



McNees
Wallace & Nurick LLC

100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Charis Mincavage
Direct Dial: 717.237.5437
Direct Fax: 717.260.1725
cmincavage@mwn.com

June 16, 2010

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA HAND DELIVERY

**RE: Digital 833 Chestnut, LLC v. PECO Energy Company, Philadelphia Gas Works,
and UGI Energy Services, Inc.; Docket Nos. C-2008-2076610, C-2008-2076235,
and C-2008-2076623**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") are the original and three (3) copies of the Prehearing Memorandum of Digital 833 Chestnut, LLC, in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp an extra copy of this transmittal letter and Prehearing Memorandum, and kindly return them for our filing purposes. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Charis Mincavage

Counsel to Digital 833 Chestnut, LLC

CM/sds

Enclosures

c: Administrative Law Judge Herbert Smolen (via E-mail and First-Class Mail)
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DIGITAL 833 CHESTNUT, LLC	:	
	:	
v.	:	DOCKET NOS. C-2008-2076610
	:	C-2008-2076235
PECO ENERGY COMPANY;	:	C-2008-2076623
PHILADELPHIA GAS WORKS; and	:	
UGI ENERGY SERVICES, INC.	:	

**PREHEARING CONFERENCE MEMORANDUM OF
DIGITAL 833 CHESTNUT, LLC**

As requested by Administrative Law Judge ("ALJ") Herbert Smolen in his Prehearing Conference Order on Remand, dated May 25, 2010, Digital 833 Chestnut, LLC ("Digital 833"), hereby submits this Prehearing Conference Memorandum in anticipation of the Prehearing Conference scheduled for June 23, 2010, regarding Digital 833's Complaints against PECO Energy Company ("PECO"), Philadelphia Gas Works ("PGW"), and UGI Energy Services ("UGIES") (jointly, "Respondents").

I. SERVICE LIST ENTRY

Digital 833 requests that the following attorneys be included on the official Service List:

Charis Mincavage (I.D. No. 82039)
Shelby A. Linton-Keddie (I.D. No. 206425)
McNees Wallace & Nurick LLC
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17101
Telephone: 717-232-8000
Facsimile: 717-260-1725
E-mail: cmincavage@mwn.com
skeddie@mwn.com

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II. STATEMENT OF POSITION REGARDING TRIFURCATION

To Digital 833's knowledge, an Order has not yet been issued by the Pennsylvania Public Utility Commission ("PUC" or "Commission") formally consolidating these cases into a single proceeding; however, ALJ Smolen requests Digital 833's position with respect to whether these cases should be trifurcated for hearing and decision. Digital 833 opposes trifurcation of these cases and, instead, submits that these cases should be consolidated. Digital 833's legal arguments with respect to these complaints address many of the same legal issues and regulations. Accordingly, allowing for consolidated briefing may prove more efficient and effective with respect to the legal aspects of this proceeding. Moreover, Digital 833 plans to utilize the same witnesses for each of the complaint proceedings. These witnesses are employed by Athenian Properties, LLC ("Athenian") and would need to be absent from their place of employment in order to attend hearings. Allowing for a single set of hearings would greatly assist Digital 833's witnesses in limiting the amount of time they would need to make themselves available. Moreover, Digital 833 does not believe it would bias the Respondents to consolidate these proceedings.

III. PROPOSED SCHEDULE FOR DISCOVERY

Digital 833 individually served with Set I – Interrogatories ("Set I") on May 6, 2009. None of the Respondents provided any responses to Set I prior to the initial Prehearing Conference, which was held on June 2, 2009. In approximately that same time period, the Respondents each filed *Motions to Dismiss*, which effectively denied Digital 833 the ability to obtain responses to Set I until a decision was rendered on these Motions.

On March 26, 2010, the PUC entered an Opinion and Order denying PGW's Motion to Dismiss, as well as an Opinion and Order denying PECO's Motion to Dismiss. On April 8, 2010,

the PUC entered an Opinion and Order denying UGIES's Motion to Dismiss. Although these Motions to Dismiss were denied almost three months ago, Digital 833 has not received any responses to any of the May 6, 2009, Set I - Interrogatories by any of the Respondents. Digital 833 has spoken with UGIES, which has indicated that it is planning to provide interrogatory responses to Digital 833 by approximately Monday, June 21, 2010. Similarly, Digital 833 spoke with PECO approximately two months ago, at which time it also indicated that it was attempting to provide responses, but Digital 833 has not received anything from PECO to date. Finally, Digital 833 reached out to PGW to address this issue; however, PGW did not respond to Digital 833, and, as such, Digital 833 is not aware of whether PGW is planning to respond to Set I, much less any timeframe for such response. Digital 833 submits that, considering the significant amount of time in which the Respondents have had to review and respond to Set I, responses by all Respondents should be due immediately.

Moreover, as noted in the PUC's March 26 Order, the PUC found that "without further development of the record, [the Commission] is not in a position to determine if Digital 833 may have a colorable claim over whether [PGW] provided reasonable service or whether [PGW] otherwise violated the Public Utility Code, the Commission's Regulations, or a Commission Order." *See Digital 833 Chestnut, LLC v. Philadelphia Gas Works*, Docket No. C-2008-2076235, Opinion and Order (Mar. 26, 2010), p. 4.¹ In addition, the Commission indicated that "as a result of remand, we expect to have a fully developed factual record. That record will allow [the Commission] to determine the following: (1) what information was available to the

¹ The PUC's March 26 Order regarding PECO uses substantially similar language. *See Digital 833 Chestnut, LLC v. PECO Energy Company*, Docket No. C-2008-2076610, Opinion and Order (Mar. 26, 2010), p. 4. Similarly, the PUC's April 8 Order regarding UGIES notes that, as "the proceeding now stands, there is no record discussing what, if any, duties were owed to whom, and if such duties did exist, when they arose." *See Digital 833 v. UGI Energy Services, Inc.*, Docket No. C-2008-2076623, Opinion and Order (Apr. 8, 2010), p. 7.

Parties; (2) when it was available; (3) what knowledge the Parties had concerning the billing arrangement; and (4) when the Parties knew or should have known about any violations of the agreement." *Id.* at 5.

In this instance, Digital 833 cannot even begin to develop a factual record without the responses to its Set I - Interrogatories. Moreover, Digital 833 may have further interrogatory requests depending upon the answers received from the Respondents. The longer that PGW, PECO, and UGIES take in providing responses to Set I, the more delay that is created in terms of Digital 833 attempting to fully develop the factual record.

Accordingly, Digital 833 respectfully requests that PGW, PECO, and UGIES be required to provide responses to Digital 833's May 6, 2009, Set I - Interrogatories as soon as possible, but absolutely no later than June 30, 2010, as these responses are already unreasonably and inappropriately overdue.

Assuming that Digital 833 receives the responses to its May 6, 2009, Set I - Interrogatories as soon as possible but no later than June 30, 2010, Digital 833 is amenable to adhering to the Commission's rules and regulations for any future discovery. In order to expedite the discovery process, however, Digital 833 requests that service via electronic mail with a hard copy to follow by First Class Mail of any discovery requests, responses, objections, and responses to objections, shall constitute sufficient service to satisfy any "in hand" dates. In addition, Digital 833 requests that any discovery-related documents served after noon on Friday should be considered to have been served on the following Monday for purposes of calculating any response deadlines.

IV. PROPOSED ORDERS WITH RESPECT TO DISCOVERY

As noted in Section III, *supra*, Digital 833's only request at this time is that PGW, PECO, and UGIES be required to respond to Digital 833's Set I - Interrogatories as soon as possible but no later than June 30, 2010. Considering that the Respondents were served with these interrogatories over one year ago and were aware of the PUC's denial of their Motions to Dismiss almost three months ago, the fact that Digital 833 has not yet received any responses to Set I is unreasonable, inappropriate, and a barrier to Digital 833 being able to fully litigate these complaints.

V. PROPOSED SCHEDULE

Digital 833 is amenable to working with the Respondents and the ALJ in an effort to develop a schedule that is mutually agreeable to all parties. As noted in Sections III and IV, *supra*, however, Digital 833's ability to develop the factual record for this proceeding is dependent upon its receipt and review of the Respondents' responses to Set I of Digital 833's Interrogatories. Moreover, Digital 833 is unable to determine at this time the depth and breadth of any follow-up discovery. Accordingly, Digital 833 submits that a schedule cannot be fully determined until a timeframe has been set for responses to Set I.

Assuming a schedule can be achieved once the status of discovery is resolved, Digital 833 believes that written testimony, followed by evidentiary hearings, and then written briefs would be the most appropriate manner by which to litigate this proceeding. Digital 833 further requests that service via electronic mail with a hard copy to follow by First Class Mail of any testimony, briefs, or other pleadings shall constitute sufficient service to satisfy any "in hand" dates. In addition, Digital 833 requests that any testimony, briefs, or other pleadings served after

noon on Friday should be considered to have been served on the following Monday for purposes of calculating any response deadlines.

VI. PROPOSED WITNESSES

Digital 833 anticipates sponsoring the testimony of Ms. Maureen Roth, Ms. Jackie Buhn, and Mr. Kyle Hombeck, all of whom are with Athenian. Their address and phone numbers are: 833 Chestnut Street, Suite 909, Philadelphia, PA 19107, 215-531-8203. These three witnesses manage the business operations of Digital 833, have knowledge of Digital 833's relationships with the Respondents, and will provide testimony regarding the issues listed in Sections VII and VIII, *infra*.

Digital 833 also reserves the right to modify or supplement this witness list during the course of the proceeding, including upon receipt of responses to Set I of Digital 833's Interrogatories, as these responses may result in the need for additional witnesses. In the event that Digital 833 decides to modify or supplement its witness list, Digital 833 will inform the ALJ and the Respondents of any changes as soon as possible.

VII. STATEMENTS REGARDING EVIDENCE AND ISSUES FOR PECO AND PGW

As noted previously, Digital 833 intends to present three witnesses to discuss the relationship between Digital 833, PECO, PGW, and Celeren Corporation ("Celeren"). These witnesses will focus on discussions that Digital 833 had with both PECO and PGW regarding Digital 833's relationship with Celeren. In addition, Digital 833 has served Set I – Interrogatories on PECO and PGW in an attempt to gain further information, such as billing information, notifications, and other written documents regarding: (1) what information was available to PECO and PGW regarding the relationship between Celeren and Digital 833; (2) when PECO and PGW received this information; (3) what knowledge PECO and PGW had

regarding the billing information between Digital 833, Celeren, PGW, and PECO, including PECO's and PGW's billing standards for customers using an agent; and (4) what PECO and PGW knew about any violations, including any lack of notification, regarding violations of the arrangement.

At this time, Digital 833 is unable to provide specific evidence regarding the aforementioned statements, as Digital 833 is still awaiting responses to its Set I – Interrogatories. Digital 833 believes that once Set I responses are provided, Digital 833 will be better able to determine the written evidence (*e.g.*, billing notices, contracts, and correspondence) regarding the aforementioned knowledge, as well as determine whether depositions of specific employees of PGW and PECO are necessary to glean additional information regarding this knowledge. To that end, Digital 833's Set I – Interrogatories focus on the following issues.

- (a) whether, and to what extent, PECO or PGW were aware of the nature of the relationship between Digital 833 and Celeren;
- (b) whether PECO or PGW was responsible for treating Celeren as an EGS, NGS, broker, or marketer providing service on PECO's or PGW's systems;
- (c) whether PECO or PGW failed to provide Digital 833 with proper notice of delinquent accounts to allow for a reasonable opportunity to address and mitigate the impact of Celeren's default;
- (d) whether PECO or PGW was precluded from seeking recovery from Digital 833 of charges that Celeren failed to remit to PECO or PGW by reason of Celeren's status as an EGS, NGS, broker or marketer; and
- (e) whether Digital 833 is due a bill credit from PECO or PGW due to the aforementioned breaches of duty.

Digital 833 believes that once the Respondents agree to fully engage in the discovery process, Digital 833 will be better positioned to determine the evidence available in support of its complaints.

VIII. STATEMENTS REGARDING EVIDENCE AND ISSUES FOR UGIES

As noted previously, Digital 833 intends to present three witnesses to discuss the relationship between Digital 833, UGIES, and Celeren. These witnesses will focus on discussions that Digital 833 had with UGIES regarding Digital 833's relationship with Celeren. In addition, Digital 833 has served Set I – Interrogatories on UGIES in an attempt to gain further information, such as billing information, notifications, and other documents regarding: (1) whether UGIES had a duty to notify Digital 833 that its account was delinquent when Celeren failed to pay; (2) did UGIES know Celeren was a third party payor; and (3) whether Digital 833 obligated to make this fact known to UGIES.

At this time, Digital 833 is unable to provide specific evidence regarding the aforementioned statements, as Digital 833 is still awaiting responses to its Set I – Interrogatories. Digital 833 believes that once Set I responses are provided, Digital 833 will be better able to determine the written evidence (*e.g.*, billing notices, contracts, and correspondence) regarding the aforementioned knowledge, as well as determine whether depositions of specific employees of UGIES are necessary to glean additional information regarding this knowledge. To that end, Digital 833's Set I – Interrogatories focus on the following issues.

- (a) whether, and to what extent, UGIES was aware of the nature of the relationship between Digital 833 and Celeren;
- (b) whether UGIES failed to provide Digital 833 with proper notice of delinquent accounts to allow for a reasonable opportunity to address and mitigate the impact of Celeren's default;
- (c) whether UGIES was precluded from seeking recovery from Digital 833 of charges that Celeren failed to remit to UGIES by reason of Celeren's relationship with Digital 833; and
- (d) whether Digital 833 is due a bill credit from UGIES due to the aforementioned - breaches of duty.

Digital 833 believes that once UGIES agrees to fully engage in the discovery process, Digital 833 will be better positioned to determine the evidence available for submission to support its complaint.

IX. CONCLUSION

Digital 833 looks forward to working with the ALJ and the Respondents in an effort to address both the procedural and substantive issues at hand. In addition, Digital 833 is willing to confer with the Respondents in order to determine whether all or some of these issues can be resolved.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Charis Mincavage (I.D. No. 82039)
Shelby A. Linton-Keddie (I.D. No. 206425)
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300
E-mail: cmincavage@mwn.com
skeddie@mwn.com

Dated: June 16, 2010

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST-CLASS MAIL

Ward L. Smith, Esq.
PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
ward.smith@exeloncorp.com

Laureto A. Farinas, Esq.
Philadelphia Gas Works
800 West Montgomery Avenue
Philadelphia, PA 19122
laureto.farinas@pgworks.com

Frank H. Markle, Esq.
Melanie Tambolas, Esq.
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
marklef@ugicorp.com
tambolasm@ugicorp.com


Charis Mincavage

Dated this 16th day of June 2010, in Harrisburg, Pennsylvania.

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