

STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
(717) 234-1090 Fax (717) 234-1099
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com
Direct Fax: (610) 988-0852

November 22, 2010

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

Re: Linda Berkery v. PECO Energy Company
Docket No. C-2010-2170223

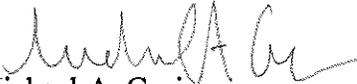
Dear Secretary Chiavetta:

Enclosed please find PECO Energy Company's Brief in Opposition to Complainant's Petition for Interlocutory Review and Answer to a Material Question, which was electronically filed today. A copy has been served in accordance with the enclosed Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,

STEVENS & LEE


Michael A. Gruin

Enclosures

cc: Honorable Ky Van Nguyen
Certificate of Service

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A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

LINDA BERKERY	:	
Complainant	:	
v.	:	Docket No. C-2010-2170223
PECO ENERGY COMPANY	:	
Respondent	:	

**PECO ENERGY COMPANY’S BRIEF IN OPPOSITION TO PETITION FOR
INTERLOCUTORY REVIEW AND ANSWER TO A MATERIAL QUESTION**

Pursuant to 52 Pa. Code § 5.302, PECO Energy Company (“PECO”) hereby files its Brief in Opposition to Complainant’s Petition for Interlocutory Review and Answer to a Material Question in the above-captioned matter.

MATERIAL QUESTION FOR REVIEW

Was it proper for the Administrative Law Judge (“ALJ”) to issue an Order joining Commerce Energy, Inc. as an indispensable party to this proceeding?

Suggested Answer: Yes. Commerce Energy, Inc. (“Commerce”) clearly satisfies each of the four criteria articulated by the Pennsylvania Supreme Court for determining indispensability, and therefore, the ALJ correctly concluded that Commerce should be joined as a party to this proceeding.

I. BACKGROUND AND PROCEDURAL HISTORY

Linda Berkery (“Complainant”) initiated this proceeding by filing a Formal Complaint against PECO on or about April 5, 2010. The Complaint alleged that PECO improperly billed the

Complainant for charges from “a gas company in California who haven’t serviced me in years.”¹

On May 13, 2010, PECO filed an Answer to the Complaint which denied that there were any incorrect charges on Complainant’s bill. PECO’s Answer also asserted that Complainant’s balance included unpaid supplier charges of \$8,649.98. PECO simultaneously filed a Motion to Join Commerce as an indispensable party to the proceeding. PECO’s Motion asserted that the unpaid supplier charges on Complainant’s account were charges from Commerce for alternative gas and electric supply provided to Complainant during the periods from June 2005 to July 2008 (for gas supply) and August 2003 to October 2004 (for electric supply). PECO’s Motion asserted that Commerce met all four of the criteria for joinder as an indispensable party as articulated by the Pennsylvania Supreme Court in *CRY, Inc. v. Mill Service, Inc.*, 536 A.2d 462, 640 A.2d 372 (1994).

On or about May 19, 2010, Complainant filed an Opposition to PECO’s Motion to Join Commerce as an Indispensable Party. On July 16, 2010, Commerce filed a letter with the Commission to advise the Commission that Commerce did not oppose PECO’s Motion to Join Commerce as an Indispensable Party. On or about July 22, 2010, Complainant filed a Motion to Strike Commerce’s letter of non-opposition. On July 30, 2010, Commerce filed an Answer to Complainant’s Motion to Strike. On or about August 2, 2010, the Complainant filed a letter in response to Commerce’s Answer to Complainant’s Motion to Strike.

By Order dated November 8, 2010, ALJ Nguyen granted PECO’s Motion to Join Commerce as an Indispensable Party and confirmed the previously scheduled hearing date of November 19, 2010 for this proceeding.

¹ See Complaint, at Paragraph 5.

Complainant filed her Petition for Interlocutory Review and Answer to Material Question on November 10, 2010, seeking Commission review of ALJ Nguyen's Order joining Commerce Energy as an Indispensable Party. The Complaint simultaneously filed a letter requesting a continuance of the November 19, 2010 hearing.

II. STANDARD OF REVIEW

The standard of review for a Petition for Interlocutory Review and Answer to a Material Question is set forth in the Commission's Regulation at 52 Pa. Code §5.302. That Regulation requires the petitioner to state "the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding." The pertinent consideration is whether interlocutory review is necessary in order to prevent substantial prejudice – that is, that the alleged error, and any prejudice flowing therefrom, could not be satisfactorily cured during the normal Commission review process. *Joint Application of Bell Atlantic Corporation and GTE Corporation*, Docket Nos. A-310200F0002, *et al.* (Order entered June 10, 1999); *Pa. PUC v. Frontier Communications of Pennsylvania Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Pa. PUC v. C.S. Water and Sewer Associates*, 74 Pa. P.U.C. 716 (1991); *Re Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

III. ARGUMENT

The Complainant's Petition should be denied because it sets forth no compelling reason why Interlocutory Review will prevent prejudice or expedite the conduct of this proceeding. To the contrary, Complainant's Petition merely re-hashes the same arguments that she made in her Answer to PECO's Motion to Join Commerce as an Indispensable Party and does not explain how she would be prejudiced by having Commerce joined as a party. Furthermore, rather than expediting the proceeding, Complainant's Petition will likely result in a delay of the proceeding, because

Complainant has requested a continuance of the evidentiary hearing in this matter pending a ruling of her Petition for Review.

The fact is that Complainant's Complaint cannot be properly adjudicated *without* the participation of Commerce, and it was entirely proper for ALJ Nguyen to join Commerce as an indispensable party for the reasons set forth in PECO's Motion.

In Pennsylvania, an indispensable party is one whose rights are so directly connected with and affected by the litigation that he must be a party of record to protect such rights, and his absence renders any order or court decree null and void for want of jurisdiction. *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 346 A.2d 788 (1975). The Pennsylvania Supreme Court has established that the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party. *CRY, Inc. v. Mill Service, Inc.* 536 A.2d 462, 640 A.2d 372 (1994). In order to make the analysis of whether a party is indispensable, one must refer to the nature of the claim and the relief sought. *Id.*

The Supreme Court's test for determining indispensability involves "at least" the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the claim?
4. Can justice be afforded without violating the due process rights of absent parties?

First, Commerce clearly has a right or interest related to the Complainant's claim.

Both PECO and Commerce have acknowledged that Commerce provided gas supply service to the Complainant until 2008, and provided electric supply service to the Complainant until

2005.² Billings for this electric and gas supply service comprise a large portion of Complainant's outstanding balance, and the Complaint in this matter specifically references "10,000 in bogus gas charges from a gas company in California".³ As the ALJ correctly noted in his Order, Commerce is the owner of the unpaid balance owed by the Complainant, and as such has a right and interest in the Complainant's claim.

With respect to the second consideration of the indispensability test, the nature of Commerce's interest in this proceeding is Commerce's rights related to Complainant's unpaid balance due for services provided by Commerce. Commerce's interests include confirmation that payment is owed by the Complainant for services provided by Commerce, a possible obligation to refund payments received from Complainant, and/or the ability to compromise charges in dispute. Furthermore, Complainant has alleged violations of the Commission's rules, and therefore the Complaint could give rise to Commission enforcement action against Commerce.

With respect to the third consideration of the test for indispensability, Commerce's rights and interests are essential to the merits of the issue. It is clear that the Complaint in this case relates to charges for gas and electric supply services provided by Commerce. PECO is merely a billing agent for Commerce and cannot answer for Commerce with respect to periods when Commerce was Complainant's electric and gas supplier. The relief sought by Complainant (i.e. removal of charges for electric and gas supply service) necessarily involves Commerce, and therefore Commerce's interests are essential to the merits of the case.

² See PECO's Motion to Join Indispensable Party, at p. 2, and Commerce Energy's July 16, 2010 letter to the Commission indicating its non-opposition to being joined as an indispensable party.

³ See Complaint, at Paragraph 5.

Fourth, Commerce's due process rights would certainly be violated if it was not joined as a party to the proceeding. As set forth above, Commerce has a clear interest in the relief being sought by the Complainant, and Commerce has acknowledged that it consents to being a party to the case in order to protect its rights. In order to afford Commerce due process, Commerce must be joined as a party to allow Commerce to provide evidence and testimony regarding the services supplied and the Complainant's responsibility for the charges for such services. A full examination of the Complaint and the Complainant's responsibility for the disputed charges cannot be conducted unless Commerce Energy, as the supplier of the electric and gas supply services, is made a party to the proceeding. Other considerations weigh in favor of joining Commerce as an indispensable party to this litigation. Commerce is the party in the best position to supply information and documentation regarding the gas and electric supply provided to the Complainant. Joining Commerce as a party will aid discovery in this matter, and generally expedite the ultimate resolution of this matter.

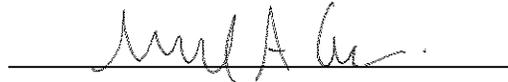
IV CONCLUSION

It is clear from the pleadings in this case that the Complaint relates to charges to the Complainant for electric and gas supply services provided by Commerce. As such, it is entirely appropriate for Commerce to be joined as an indispensable party, as ALJ Nguyen correctly concluded. The Complainant's Petition does not meet the requirements for Commission Interlocutory Review and Answer to a Material Question, and therefore should be denied. The Complainant cannot demonstrate that she will be prejudiced in any way by the joinder of Commerce, and the Complainant cannot demonstrate that a Commission ruling on the Material Question will expedite the conduct of the proceeding. Commerce clearly meets the Pennsylvania Supreme Court's test for indispensability, and Commerce itself has acknowledged that it should be

joined in the proceeding. The Complainant's Petition should be denied, and Commerce should be permitted to participate in this proceeding as an indispensable party as ordered by ALJ Nguyen.

WHEREFORE, for the foregoing reasons, PECO respectfully requests that the Commission Answer to the Material Question in the affirmative, as set forth above, and deny the Complainant's Petition for Interlocutory Review and Answer to a Material Question.

Respectfully Submitted,



Date: November 22, 2010

Michael A. Gruin
Stevens & Lee
Attorney I.D. #78625
17 North Second Street, 16th Floor
Harrisburg, PA 17101
Tel: (717) 255-7365 Fax (610)988-0852
mag@stevenslee.com

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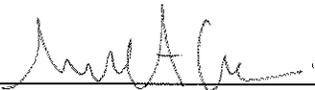
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2010, a copy of the foregoing Brief has been served upon the persons listed below via First Class U.S. Mail in accordance with the requirements of 52 Pa. Code Sections 1.54 and 1.55.

Linda Berkery
2115 Fairwold Lane
Fort Washington, PA 19034

John Povilaitis, Esq.
Ryan, Russell, Ogden & Seltzer
800 North Third Street
Suite 101
Harrisburg, PA 17102-2025

DATE: November 22, 2010



Michael A. Gruin, Esq.