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NOV 30 2010

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JAMES S. SMITH, JR
Complainant

v.

PECO ENERGY COMPANY
Respondent

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Docket No. C-2010-2209072

PRELIMINARY OBJECTIONS OF RESPONDENT, PECO ENERGY COMPANY

1. Respondent, PECO Energy Company (“PECO Energy”), pursuant to 52 Pa. Code § 5.101(a) respectfully petitions this Honorable Commission to dismiss this action as legally insufficient. Complainant’s allegations have already been adjudicated and are barred by Res Judicata. Therefore, Complainant fails to state a claim upon which relief can be granted. 52 Pa. Code § 5.101(a)(4).

2. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil procedure.¹

3. In deciding preliminary objections, the Public Utility Commission must determine, based on the factual pleadings of the petitioner, if relief or recovery is possible.²

4. A complaint must be able to recover under the law to survive a preliminary objection.³

¹ *Equitable Small Transportation Interveners v. Equitable Gas Co.*, 1994 Pa.PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994)

² 2006 Pa. PUC Lexis 111, *7.

³ *Milliner v. Enck*, 709 A.2d 417, 418 (Pa. Super. Ct. 1998) (“preliminary objection should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover”).

5. On or about, November 5, 2010, Complainant filed the instant complaint with the Public Utility Commission. In this complaint, Complaint alleged that the meter box at his prior address was faulty; that he repeated complained to PECO; and PECO failed to respond. PECO avers that this complaint is barred by the doctrine of Res Judicata.

6. On, or about July 21, 2009, Complainant filed a formal complaint against PECO Energy Company making the same allegations.

7. On August 10, 2010, PECO filed a response denying the material allegations of the complaint.

8. By hearing notice dated September 19, 2009 a hearing was scheduled for November 16, 2009. This hearing was continued at Complainant's request.

9. By hearing cancellation/reschedule notice dated November 10, 2009, the matter was rescheduled for February 9, 2010

10. Complainant failed to appear.

11. An initial decision was rendered on March 1, 2010 dismissing the complaint for failure to prosecute.

12. On March 16, 2010, Complainant filed Exceptions to the initial decision.

13. By Opinion and Order dated May 11, 2010, the Commission upheld the initial decision stating "It would be unfair to require PECO, the Party that appeared for the hearing , to be inconvenienced when the other Party did not appear and did not show that his failure to appear was unavoidable. In this instance, Mr. Smith was given a second opportunity to present his case..."

14. To succeed in a defense based on Res Judicata, a party must demonstrate that the actions have four common elements: (1) identity of the thing sued upon; (2) identity

of the cause of action; (3) identity of the parties; and (4) identity of the capacity of the parties.⁴

15. All four elements are met. The identity of the thing sued is the same in both actions. Complainant disputes the charges on her PECO bill alleging that they stem from a faulty meter box. The cause of action is also the same. In essence, Complainant alleges that PECO violated Commission regulations by providing inaccurate billing. The parties are also the same. Each case involved a suit between Complainant and PECO Energy. Finally, the parties are acting in the same capacity in each case. Complainant is a customer and PECO is a public utility.

Wherefore, PECO Energy request that Complainant's claim regarding the accuracy of her billing be dismissed.

Respectfully Submitted,



Tishekia Williams
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⁴ Stevens Painton Corp. v. First State Ins. Co., 746 A.2d 649 (Pa.Super. 2000). The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding where the parties had an opportunity to appear and assert their rights. *Id.* at 654.

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VERIFICATION

I, Tishekia Williams, hereby declare that I am an attorney representing PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.



Tishekia Williams

Date: November 30, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of PECO Energy Company's Preliminary Objections in the above matter upon all interested parties by mailing a copy thereof Certified mail, properly addressed and postage prepaid to:

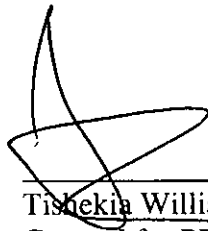
James Smith
1126 Ward Street, Apt B
Chester, PA 19013

Dated at Philadelphia, Pennsylvania, November 30, 2010

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