

**STEVENS & LEE**  
**LAWYERS & CONSULTANTS**

1818 Market Street  
29th Floor  
Philadelphia, PA 19103  
(215) 575-0100 Fax (215) 851-0214  
www.stevenslee.com

Direct Line: (215) 751-1955  
Email: epy@stevenslee.com  
Fax: (610) 988-0860

March 2, 2011

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

**Re: Marilyn Day v. PECO Energy Company**  
**Docket No. C-2010-2181515**


Dear Secretary Chiavetta:

Enclosed for filing on behalf of PECO is an original of its Reply Exceptions to the Exceptions filed in the above-referenced docket. This document has been e-filed at the Pennsylvania Public Utility Commission's website. A copy has been served on the Complainant in accordance with the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Best Regards,

STEVENS & LEE



Edward P. Yim

Encl.

cc: Certificate of Service

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A PROFESSIONAL CORPORATION

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARILYN DAY	:	
Complainant	:	
v.	:	Docket No. C-2010-2181515
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

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**REPLY EXCEPTION OF  
OF PECO ENERGY COMPANY**

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Pursuant to 52 Pa.Code §5.535, PECO Energy Company (PECO) hereby replies to the Exception of the Complainant Marilyn Day (Complainant) as follows:

**I. PROCEDURAL HISTORY**

On June 4, 2010, Complainant filed a Formal Complaint against PECO, requesting restoration of service, a reduced restoration fee, a new payment agreement, and forgiveness of late and other charges. The complaint followed a decision by the Commission's Bureau of Consumer Services (BCS) that dismissed Complainant's informal complaint. The BCS determined that the termination was proper, the balance was \$18,109.50, and Complainant was ineligible for a payment agreement because of her enrollment in the Customer Assistance Program. The case was assigned to ALJ Marlane R. Chestnut, and an initial Hearing Notice was issued on October 5, 2010, identifying the time, date and place of the hearing. The next day, ALJ Chestnut issued a Prehearing Order, which reiterated the time, date and place of the hearing and provided clear instructions on the importance of attending the hearing and the procedure for rescheduling a hearing date.

On January 6, 2011, the hearing convened as scheduled, and PECO appeared with counsel and a witness. Complainant, however, failed to appear. ALJ Chestnut noted in that Complainant had called the ALJ's office to request a continuance on the day of the hearing. Complainant's request was denied because it was untimely.

Based on Complainant's failure to appear, PECO's counsel moved for dismissal with prejudice for lack of prosecution under 52 Pa.Code §5.245. ALJ Chestnut granted the motion and issued an Initial Decision dismissing the complaint on January 6, 2011, which was served on January 31, 2011.

On February 18, 2011, Complainant filed a timely Exception to the Initial Decision.

## II. ARGUMENT

The Commission should sustain the dismissal of the complaint and adopt the Initial Decision, as it is devoid of any error. Indeed, the Exception does not allege any error in ALJ Chestnut's findings of fact or in conclusions of law. Rather, Complainant alleges only that she could not attend the hearing because she started a new job on the day of the hearing. Importantly, she does not dispute that she had notice of the correct time, date, and place of the hearing or that she knew the deadline for requesting a continuance and how to make that request. Nor does she dispute that she failed to request a continuance five days before the date of the hearing as she was instructed to do. As ALJ Chestnut noted, because Complainant had notice and the opportunity to be heard, she was afforded due process. Complainant's failure to use that process is not grounds for overturning the Initial Decision. Lastly, it would be unfair to require PECO to expend more time, money and energy for a new hearing when PECO appeared at the scheduled

hearing with counsel and a witness, ready to defend its case. Thus, the Commission should sustain the Initial Decision that dismissed the complaint with prejudice.

First, Complainant does not dispute that she had notice of the date, time and place of the hearing and that she received clear instructions for requesting a continuance through the Hearing Notice and the Prehearing Order. In addition, Complainant was warned of the dire consequence of failing to appear at the hearing. The Hearing Notice emphasized that “*You may lose the case if you do not come to this hearing and present facts on the issues raised.*” Hearing Notice, October 6, 2010, (emphasis original). In addition, the Prehearing Order stated as follows:

**You must be available in the hearing room when your case is called by the presiding Administrative Law Judge.** You should arrive at the hearing room no later than 9:45 a.m. and wait in the hearing room until the Administrative Law Judge calls your case. **If the customer is not present and prepared to go forward with the case when it is called, the case will be dismissed by the Administrative Law Judge.**

....

2. A request for a change of the scheduled hearing date must state the agreement or opposition of other parties, and must be submitted in writing no later than five (5) business days prior to the hearing. 52 Pa. Code §1.15(b). Requests for changes of hearing dates must be sent to me and all parties of record. ... Changes are granted only in rare situations where good cause exists. (emphasis original)

Prehearing Order, pp. 1-2.

The Hearing Notice and the Prehearing Order provided notice and plainly warned Complainant that she could lose her case if she failed to appear. Therefore, Complainant was afforded due process. *Schneider v. Pennsylvania Public Utility Commission*, 479 A.2d 10 (Pa. Cmwlth. 1984) (holding that due process is met when parties have notice and opportunity to be heard).

The issue of a party who, despite notice, fails to appear at a hearing is governed by 66 Pa.C.S. §332(f), which provides, in part, as follows: “Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat...” Because Complainant failed to appear, ALJ Chestnut held that Complainant was deemed to have waived the opportunity to participate in the hearing. 66 Pa.C.S. §332(f). Since Complainant provided no evidence at the hearing to support the complaint under 66 Pa.C.S. §332(a) (providing that proponent of a rule or order bears the burden of proof), it was proper for ALJ Chestnut to grant PECO’s motion to dismiss.

Second, Complainant’s failure to appear was owing to her own negligence. A party has a duty to appear at an administrative hearing under Pennsylvania law: “a party’s own negligence is not sufficient ‘good cause’ as a matter of law for failing to appear at a Referee’s hearing.” *Eat’N Park Hospitality Group, Inc. v. Unemployment Compensation Board of Review*, 970 A.2d 492, 494 (Pa. Cmwlth. 2008).

Here, it is a simple case in which Complainant failed to appear through her negligence. Complainant, who knew how to request a continuance and avoid this result, has no legal remedy available for failing to secure a continuance. *Eat’N Park Hospitality Group Inc.* Assuming *arguendo* that Complainant started a new job on the day of the hearing, nothing prevented her from requesting a continuance merely five days before the hearing, nor alerting her new employer--when she accepted the job--of the hearing so that she could participate therein. The Exception does not assert that Complainant gave the employer notice of the hearing or that the employer prohibited her participation therein.

The Commission simply has no basis to “reopen” the case when Complainant waived her right to a hearing by negligently failing to appear. 66 Pa.C.S. §332(f).

Lastly, it would be unfair to require PECO to expend more time, money and energy to defend its case at a new hearing when it already appeared at the scheduled hearing, with counsel and a witness, prepared to defend its case. ALJ Chestnut correctly dismissed the complaint with prejudice “[d]ue to the waste of the Commission’s and respondent’s time, money, and energy occasioned by complainant’s failure to appear...” Initial Decision, p. 7. PECO has already spent a considerable amount of resource to prepare for the scheduled hearing; it should not be asked to do more.

### III. CONCLUSION

As the Exception finds no error with the Initial Decision and merely describes an avoidable personal circumstance for which no legal remedy is available, the Commission should adopt ALJ Chestnut’s Initial Decision dismissing the complaint with prejudice.

Respectfully submitted,



Edward P. Yim (I.D. No. 205612)  
Dana Pirone Carosella (I.D. No. 57221)  
Stevens & Lee  
1818 Market St. 29<sup>th</sup> Floor  
Philadelphia, PA 19103  
Telephone: 215-575-0100  
Facsimile: 610-988-0852  
epy@stevenslee.com  
dpc@stevenslee.com

Michael Gruin (I.D. No. 78625)  
Stevens & Lee  
17 North 2<sup>nd</sup> Street, 16<sup>th</sup> Floor  
Harrisburg, PA 17101  
Telephone: 717-234-1090

Facsimile: 717-234-1099  
mag@stevenslee.com

Tishekia Williams  
PECO Energy Company  
2301 Market Street, S23-1  
PO Box 8699  
Philadelphia, PA 19101-8699  
(215) 841-6841  
Fax: 215.568.3389  
tishekia.williams@exeloncorp.com

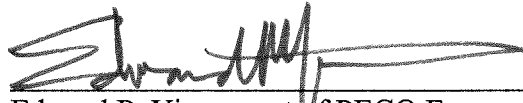
Counsel for PECO Energy Company

Dated: March 2, 2011

Commonwealth of Pennsylvania :  
: SS  
County of Philadelphia :

**AFFIDAVIT**

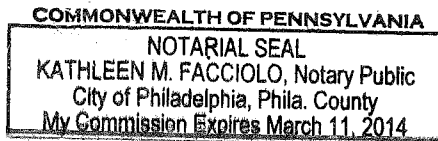
I, Edward P. Yim, being duly sworn according to law, depose and say I am agent of PECO Energy Company and have been authorized to make this affidavit on its behalf and that the facts above set forth are true and correct to the best of my knowledge, information and belief, and PECO Energy Company expects to be able to prove the same at any hearing hereof.

  
\_\_\_\_\_  
Edward P. Yim, agent of PECO Energy Company

Sworn and subscribed before me this  
2nd day of March, 2011

  
Notary

My Commission Expires:



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**


MARILYN DAY	:	
Complainant	:	
v.	:	Docket No. C-2010-2181515
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing Answer and New Matter upon the parties listed below, in accordance with the requirements of 52 Pa.Code §1.54 (relating to service by a party).

VIA First Class U.S. Mail

Marilyn Day  
44 Norwood House Road  
Downingtown, PA 19335

  
Edward P. Yim

DATED: March 2, 2011