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March 17, 2011

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

**Re: Andree Lombard v. PECO Energy Company**  
**Docket No. C-2011-2227675**

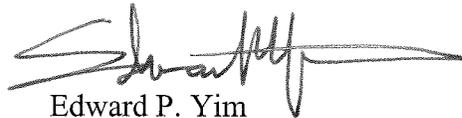
Dear Secretary Chiavetta:

Enclosed for filing on behalf of PECO is an original of its Preliminary Objection to the above-referenced Complaint. 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

Enclosure

cc: Certificate of Service

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A PROFESSIONAL CORPORATION

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANDREE LOMBARD	:	
Complainant	:	
	:	
v.	:	Docket No. C-2011-2227675
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

**NOTICE TO PLEAD**

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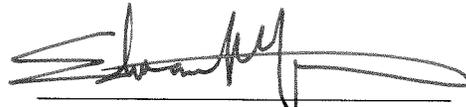
**To: *Andree Lombard***

You are hereby notified to file a written response to the attached Preliminary Objections of PECO within 10 days from the date of service of this notice. If you do not file a written response denying or correcting the enclosed Preliminary Objections within 10 days of service, the facts set forth by PECO may be deemed to be true, thereby requiring no other proof, and judgment may be entered against you. All pleadings, such as responses to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission:

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

You must also serve a copy of your response on the undersigned counsel for PECO.  
Failure to respond to Preliminary Objections could result in the dismissal of your case.

STEVENS & LEE



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Fax (610) 988-0852  
COUNSEL FOR PECO

DATE: March 17, 2011

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANDREE LOMBARD	:	
Complainant	:	
	:	
v.	:	Docket No. C-2011-2227675
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

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**PRELIMINARY OBJECTIONS OF RESPONDENT,  
PECO ENERGY COMPANY**

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Pursuant to 52 Pa Code §5.101(a), PECO hereby files the within Preliminary Objections to the Complaint filed by Complainant Andree Lombard, and requests that this Honorable Commission dismiss those portions of the Complaint that seek to contest PECO's rates.

1. On February 25, 2011, PECO Energy Company (PECO) was served with a formal complaint from Andree Lombard (Complainant).
2. The complaint checked the box marked "I want to oppose the Company's proposed rate increase". In the fact section of the complaint, Complainant indicates that "I was not aware that a rate increase already started in January 2011. I do oppose [sic] to that rate increase."
3. The complaint also alleges that his bill seems too high for his usage.
4. To the extent that Complainant seeks to contest PECO's distribution or generation rates, the complaint is legally insufficient, and Complainant's purported challenge of PECO's rates should be dismissed for the reasons set forth below.

5. Under 52 Pa. Code §5.101(a)(4), a formal complaint may be dismissed with prejudice for legal insufficiency.

6. When considering a preliminary objection seeking dismissal for legal insufficiency, the complaint must be viewed in the light most favorable to Complainant, and the facts alleged in the complaint must be assumed to be true. The complaint should be dismissed only when it appears that Complainant is not entitled to relief under any circumstances. This requirement is similar to Pennsylvania civil practice with respect to the filing of preliminary objections. *Equitable Small Transportation Interveners v. Equitable Gas Co.*, Docket No. C-00935435 (Order entered July 18, 1994).

7. In this case, the portion of the complaint involving a challenge to PECO's rates should be dismissed. Even when viewed in the light most favorable to Complainant, the complaint fails to state a claim for which relief can be granted with respect to PECO's distribution and generation rates, and therefore the Commission must deny the complaint as a matter of law.

#### **PRELIMINARY OBJECTION #1**

##### **Legal Insufficiency on Alleged Proposed Rate Increase**

8. To the extent that Complainant challenges a "proposed rate increase," that claim must be dismissed because PECO currently has no proposed rate increase pending before the Commission. Simply, there is no proposed rate increase about which to complain. Therefore, this claim must be dismissed because the subject of the claim does not exist.

## PRELIMINARY OBJECTION #2

### Legal Insufficiency of Complaint about PECO Distribution Rate

9. The complaint refers to a rate increase that took effect in January 2011. To the extent that the complaint challenges PECO's distribution rate that took effect in January 2011, the complaint is legally insufficient and should be dismissed for failing to state a claim for which relief can be granted.

10. On March 31, 2010, PECO filed a tariff proposing, among others, increases in electric and gas distribution rates in a proceeding at docket number R-2010-2161575. Several parties, representing industrial, commercial, small business and residential customers, intervened.

11. The Commission afforded PECO customers additional opportunities to express any concerns about proposed rate increases by holding public input hearings on June 28, June 29 and June 30, 2010 in three different locations in PECO's service territory. Notices of the public input hearings were posted on local newspapers as well as on PECO's and the Commission's websites. See *Pennsylvania Public Utility Commission, et al. v. PECO Energy Company*, p.5, Docket Number R-2010-2161575 (Order entered December 21, 2010).

12. On December 21, 2010, following an exhaustive review, the Commission approved PECO's settlements with all interested parties on proposed distribution rate increases. *Id.*

13. There is a strong presumption that "the preexisting Commission approved rates are just and reasonable." *Duquesne Light Company v. Pennsylvania Public Utility Commission*, 715 A.2d 540, 545 (Pa. Cmwlth. 1998).

14. To overcome the presumption that preexisting Commission approved rates are just and reasonable, a Complainant must demonstrate the existence of “recent significant changes in circumstances in the interim.” *Schellhammer v. Public Utility Commission*, 629 A.2d 189, 193 (Pa. Cmwlth. 1993).

15. In the absence of such a showing of “recent significant change in circumstances” by Complainant, the prior Commission rate determination remains conclusive under Section 316 of the Public Utility Code, 66 Pa.C.S. §316.

16. Section 316 of the Code provides that “[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be *prima facie* evidence of the facts found and shall remain conclusive upon all parties affected thereby....”

17. The instant Complaint makes no assertion whatsoever of recent significant changes in circumstances that would allow Complainant to overcome the presumption that PECO’s existing Commission-approved rates are just and reasonable.

18. The Commission approved PECO’s distribution rates on December 21, 2010, less than two months before the Complaint was filed.

19. The Commission’s approval is *prima facie* evidence of the reasonableness of such rates. 66 Pa.C.S. §316; *Duquesne Light Company*, at 545. Therefore, under Section 316 of the Public Utility Code, the Commission’s approval of PECO’s distribution rates is conclusive and binding.

20. For these reasons, Complainant’s challenge of PECO’s distribution rates must fail for legal insufficiency under 52 Pa.Code §5.101(a)(4).

### PRELIMINARY OBJECTION #3

#### Legal Insufficiency of Complaint about Generation Rates

21. The complaint mentions that Complainant is “in the process of switching [his] energy provider,” that “a rate increase already started since January 2011,” and that “I do oppose [sic] to that rate increase.” To the extent that such assertions could be possibly interpreted by the Commission as challenging Complainant’s generation rates, such claim should be dismissed for legal insufficiency because those assertions fail to state a claim for which relief can be granted.

22. In 1996, the Pennsylvania General Assembly enacted the Electricity Generation Customer Choice and Competition Act (Act), 66 Pa.C.S §§2801-15. The Act allows Pennsylvanians to buy electric generation supply from licensed alternative suppliers by unbundling the generation portion of electric rates from the transmission and distribution portions.

23. The Act also capped the generation portion of electric rates to ease the transition to competitive markets at 1996 levels. The rate cap was initially established under Section 2804 of the Act, and, after much litigation, settlements were reached in which the rate cap would expire for all PECO customers at the end of 2010. See *Application of PECO Energy Company for Approval of Its Restructuring Plan under Section 2806 of the Public Utility Code*, Docket Number R-00973953 (April 29, 1998).

24. The Commission has already ruled that it lacks the authority to extend the expired rate caps. See *Tshudy v. PPL Electric Utilities Corp.*, Docket Number C-2009-2092230 (Order entered August 21, 2009) (citing 66 Pa.C.S 2804(4)).

25. Starting January 1, 2011, PECO’s generation rates have reflected wholesale market prices at which PECO procured its generation supply for its customers who do not

choose an alternative generation supplier, known as “Default Service Program.” Those customers who choose an alternative supplier would pay the rates set by the supplier based on wholesale market prices.

26. As of the date of the complaint, Complainant receives generation supply through PECO’s Default Service Program.

27. To the extent that Complainant challenges any increase in PECO’s generation rates, the challenge must be dismissed for legal insufficiency under 52 Pa.Code §5.101(a)(4).

28. The Commission has only those duties, powers, responsibilities and jurisdiction that were expressly or by necessary implication given to it by the Legislature. *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959).

29. Wholesale market-based generation rates are a federal subject matter and are regulated only by the Federal Energy Regulatory Agency (FERC). See *Utilimax.com. Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303 (3d Cir.2004).

30. The Federal Power Act of 1935 established the Federal Power Commission (now FERC) and gave it “plenary and exclusive jurisdiction over ‘the transmission of electric energy in interstate commerce’ and ‘the sale of electric energy at wholesale in interstate commerce.’” *Utilimax.com. Inc. v. PPL Energy Plus, LLC*, 273 F.Supp.2d 573, 574 (E.D.Pa.2003); 16 U.S.C. §824(b).

31. There is no relief that the Commission may grant regarding market-based generation rates. As the Commission recognized in *Tshudy*, the Commission may not extend the rate caps, which expired in 2010. in order to prevent a generation rate increase.

32. Therefore, the claim related to the rate cap expiration or wholesale market-based generation rates must be dismissed for legal insufficiency under 52 Pa.Code §5.101(a)(4).

**REQUEST FOR RELIEF**

WHEREFORE, for all of the reasons stated herein, PECO respectfully requests that your Honorable Commission dismiss those portions of the Complaint that seek to contest PECO's generation or distribution rates, with prejudice.

Respectfully submitted,



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tishekia.williams@exeloncorp.com

Counsel for PECO Energy Company

Dated: March 17, 2011

Commonwealth of Pennsylvania

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SS

County of Philadelphia

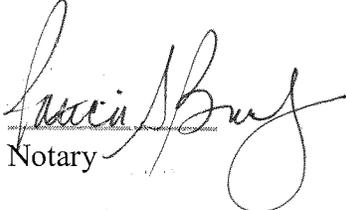
**AFFIDAVIT**

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.



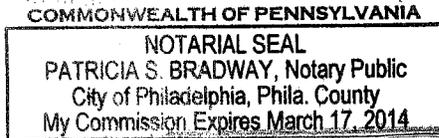
Edward P. Yim, agent of PECO Energy Company

Sworn and subscribed before me this  
17th day of March, 2011



Notary

My Commission Expires:



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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

ANDREE LOMBARD	:	
Complainant	:	
	:	
v.	:	Docket No. C-2011-2227675
	:	
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 party 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

Andree Lombard  
404 Aldan Avenue  
Aldan, PA 19018

  
Edward P. Yim

DATED: March 17, 2011