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April 18, 2011

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

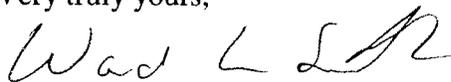
Re: **Guntram Weissenberger, et al. v. PECO Energy Company**
PUC Docket No. C-2010-2182281

Dear Secretary Chiavetta:

Enclosed please find PECO Energy Company's Reply to the Petition of Guntram Weissenberger, et al. for Leave to Withdraw Complaint.

Please let me know if you have any questions.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

WLS/zyr

Enc.

cc: Administrative Law Judge Dennis Buckley (via email)
: Service List (via email and first class mail)

- (2) The breach of contract and subsidiary issues set forth in Count II of the First Amended Complaint; and
- (3) Any and all other liability theories that were pled or could have been pled in the First Amended Complaint.

In support thereof, PECO states as follows:

1. The Commission’s Order should dismiss with prejudice the landlord ratepayer issue specified in the Petition

PECO’s first request mirrors the specific language of the Petition with respect to the landlord ratepayer issue. The Petition itself notes that Complainants have (§ 7) “conceded the landlord ratepayer issue,” with the specific admission that (§ 6) “the Westover Companies are, in fact, the parties responsible for payment for electric service provide[d] by PECO to the Properties” and that “the Complainants hereby concede that they are ‘Landlord Ratepayers’ under the provisions of Sections 1521-33 of the Public Utility Code.” Moreover, the Complainants have requested that their withdrawal be with prejudice. *See* § 8 and conclusion.

PECO supports this request and agrees that the Commission should allow withdrawal with prejudice to the landlord ratepayer issue, and requests that the Commission’s Order so specify.²

² PECO has provided proposed ordering language for each of its requests in its Conclusion and Proposed Ordering Paragraphs.

2. The Commission's Order should dismiss with prejudice the breach of contract and subsidiary issues set forth in Count II of the First Amended Complaint

PECO's second request is that the Commission's Order should dismiss with prejudice the breach of contract and subsidiary issues set forth in Count II of the First Amended Complaint.

Count II of the First Amended Complaint is comprised of five numbered paragraphs. For convenience, those paragraphs are reproduced in whole here:

**COUNT – II.
BREACH OF CONTRACT**

73. Complainants hereby incorporate by reference the averments contained in paragraphs one (1) through seventy-two (72) above as though fully set forth herein.

74. This Claim is in the alternative to the claim for Declaratory Judgment, solely to the extent that this Court determines that the Complainants are "Landlord Ratepayers." The Complainants do not waive any issue and reserve all claims by asserting this claim for breach of contract in the alternative.

75. Upon belief, the claims against the Complainants for electric services at the Properties are in error and do not accurately reflect the proper amounts due and owing PECO when:

- a) PECO applied the improper tariffs overcharging the Complainants for electric utility services; and,
- b) All late delinquencies, including late fees, are attributable solely to the failure of ConServe to remit payment to PECO pursuant to their bi-lateral agreement; and,
- c) PECO violated its tariffs by failing to bill the Complainants and notify Complainants of the accrued arrearages; and,

d) PECO violated its tariffs when it failed to bill the accounts at insufficient Intervals.

76. PECO did not equitably allocate payments from Conserve between the Properties owned by Complainants and unrelated third-party properties thereby artificially increasing the burden of the Complainants.

77. PECO, as a result of its conduct is equitably estopped from claiming that Complainants owe accrued billings to PECO incurred by and through Conserve.

PECO notes that these breach of contract are some of the precise claims that the Court of Common Pleas sent to the Commission for resolution. In the Court of Common Pleas, PECO originally requested that liability issues in this matter, *including the breach of contract claims*, be referred to the Commission. PECO's Preliminary Objections in the civil complaint (which were attached to the Complaint and First Amended Complaint in this proceeding as Exhibit B) stated in relevant part (§ 31) that:

31. The issues involving whether PECO Energy violated contractual duties under multiple PECO tariffs since 2003 and/or provided unreasonable service to Plaintiffs (Counts VII and VIII) are quite clearly matters within the expertise of the PUC, the regulatory body established by the Legislature. Indeed, the PUC should address and resolve such issues if the concerns of uniform policy and consistency in the provision of electrical service under such tariffs that underlie the Public Utility Code are to be met. See also *Communications Team, Inc. v. Bell Tel. Co.*, 20 Phila. 285, 1990 Phila. Cty. Rptr. LEXIS 10, *13-14 (Pa. C.P.), *aff'd*, 580 A.2d 1169 (Pa. Super. 1990) (allegations related to tariffs "is one area peculiarly within the expertise of the PUC and outside the jurisdiction of the courts") (citing *Bell Tel. Co. v. Uni-Lite, Inc.*, 439 A.2d 763 (Pa. Super. 1982)).

Based in part upon this request, the Court ordered³ that:

All liability issues raised in the Complaint's Counts, VI, VII and VIII are bifurcated from damages and shall be referred to and resolved by the Pennsylvania Public Utility Commission (PUC).

³ The Court's orders of January 26, 2010 and March 26, 2010 containing this language were attached to the Complaint and First Amended Complaint as Exhibits C and D.

The breach of contract issues contained in the civil complaint⁴ were found in Count VII or the civil complaint, and were repeated verbatim in Count II of the First Amended Complaint before the PUC. That is, PECO argued that the breach of contract liability issues should be referred to the PUC for resolution, the court so ordered, and the Complainants pled them. PECO therefore requests that the Commission's Order should specifically state that these potential liability causes of action, as set forth in the First Amended Complaint, are dismissed with prejudice.

Moreover, the breach of contract claims are the precise paragraphs of the First Amended Complaint to which PECO's outstanding Second Preliminary Objection Claiming Insufficient Specificity of Pleading apply. It is now nearly a year since the Court of Common Pleas referred this matter to the Commission for resolution of, *inter alia*, complainants' breach of contract claims against PECO. Most of that time has been taken up with PECO's attempts to obtain a pleading that specifically states the basis for such a claim – albeit such specificity has not been provided by Complainants. PECO therefore requests that the dismissal of this count should be with prejudice not only to the matters actually pled in Count II, but also should be with prejudice to all matters that could have been pled in Count II.

The Petition is not altogether clear as to the breadth the Complainants intend with respect to their request for a withdrawal with prejudice, but for the reasons stated above PECO believes that its requested clarification on this scope is not controversial. PECO

⁴ The civil complaint was attached to the Complaint and First Amended Complaint as Exhibit A.

does note, however, that the Petition has one discussion that generates confusion on this issue, thus especially warranting the Commission providing detailed language on the scope of the withdrawal with prejudice.

The lack of clarity that PECO perceives in the Petition is in the discussion of continued action in the Delaware County Court of Common Pleas. The Petition states (§ 7) in relevant part that:

The remaining issues of the dispute concern the appropriate level of damages and are premised on a breach of contract claim, which are issues that should be referred back to the Delaware County Court of Common Pleas for resolution. It is well established that the Commission lacks the authority to award damages. [Citations omitted.] '[The Commission's] remedial and enforcement powers do [not] include the authority to award damages for a breach of contract by a public utility.'

PECO agrees that the Commission does not have the power to award damages, including damages for a breach of contract by a public utility. In some circumstances, however, the Commission does have the authority to determine whether a public utility has breached a contract – especially where, as here, a party requested that the breach of contract issues be referred to the Commission, a court ordered Complainants to present all liability issues to the Commission for resolution, the Complainants posed a separate count in their Complaint requesting a determination of whether such a breach occurred, and where the contract that has purportedly been breached is then specified to include multiple claimed violations of the utility's tariff. *See* Paragraph 75 of the First Amended Complaint, set forth in full above.

The confusion that PECO perceives in the Petition comes from the statement in the Petition (§ 7) that the *breach of contract damage issues* should be “referred back to the Delaware County Court of Common Pleas for resolution.” Given that the Petition requests that the Commission dismiss the First Amended Complaint with prejudice, and the Petition itself therefore requests that the Commission find, with prejudice, that PECO did not breach a contract with Complainants,⁵ what is there left to litigate? If PECO did not breach a contract, *and therefore has no liability*, what is the damage issue that remains to be referred to the Delaware County Court of Common Pleas?⁶

In order to provide clarity on this issue, to meet the court’s order that this issue be resolved by the PUC, and to cover all of the issues that were pled (or could have been pled in a more specific pleading), PECO requests that the Commission’s order specifically state that the dismissal with prejudice requested by the Petition is granted *with specific application to the breach of contract issues that were pled or could have been pled in Count II of the First Amended Complaint.*

⁵ The Petition does not indicate that Complainants wish for the breach of contract or related claims to be “carved out” and dismissed *without* prejudice. However, PECO would object to any such request, if made.

⁶ In the Petition (§ 9), Complainants state that: “The Complainants have notified PECO of their intention to withdraw the Complaint and the reasons for doing so, but PECO has not yet informed the Complainants whether it has any objection to the Petition.” In fact, counsel for Complainants originally contacted PECO to suggest a stipulation of withdrawal, and stated that the Westover Companies intended to continue to litigate “damage” issues at the Delaware County Court of Common Pleas. At that time, PECO raised the questions posed in this portion of its reply – in particular, what issues do the Complainants still believe would be litigable at the Court of Common Pleas – and stated that it would need to see a draft stipulation in order to know whether it would agree to such a stipulation. Regulatory counsel for Complainants agreed to confer with civil litigation counsel for Complainants and draft a proposed stipulation. That stipulation was not provided; the Petition came instead. In sum, Complainants fully knew PECO’s concerns on this issue and agreed to provide a stipulation designed to address them. The idea that Complainants were waiting for some response from PECO is not correct.

3. The Commission's Order should dismiss with prejudice any and all liability theories which were pled or could have been pled in the First Amended Complaint

As noted previously in this reply, when the court ordered this case referred to the PUC for determination of liability, it ordered that Complainants pose all liability issue to the PUC, stating that:

All liability issues raised in the Complaint's Counts, VI, VII and VIII are bifurcated from damages and shall be referred to and resolved by the Pennsylvania Public Utility Commission (PUC.)

For their part, the Complainants provided a catch-all request in the First Amended Complaint in which they broadly posed a request for Commission determination of "all liability issues." The "Wherefore" language found at page 22 of the First Amended Complaint states that:

[T]he Complainants respectfully request that, pursuant to both of the Orders of the Court of Common Pleas of Delaware County, the first entered on January 26, 2010 (Exhibit "C") and the second on March 26, 2010 (Exhibit "D") that the liability issues in this case be determined by the PUC.

PECO will not repeat in detail all of the arguments set forth in Section 2 of this reply, but the arguments apply here with equal force. PECO requested that all liability issues be referred to the PUC; the Court so ordered; the Complainants so pled; and the vague aspects of the liability claims are subject to an outstanding preliminary objection seeking a more specific pleading. Given those factors, PECO requests that Commission grant the Petition by specifically stating that the withdrawal of the complaint is with prejudice to any and all liability theories that were or could have been pled therein.

Conclusion and Proposed Ordering Paragraphs

For the reasons set forth above, PECO requests that the Commission grant the Complainants' Petition to Withdraw by issuing the following ordering paragraphs:

1. The Petition for Leave to Withdraw Complaint filed by Complainants on Friday, April 15, 2011, is hereby granted, with prejudice.
 - a. The claim set forth in Count I of the First Amended Complaint that Complainants are not landlord ratepayers under the provisions of Sections 1521-33 of the Public Utility Code is hereby dismissed with prejudice. Complainants have conceded that they are, and are found to be, "landlord ratepayers" for the Properties under the provisions of Sections 1521-33 of the Public Utility Code.
 - b. The request set forth in Count II of the First Amended Complaint that PECO breached a contract with Complainants is hereby dismissed with prejudice. This dismissal with prejudice includes all breach of contract claims and related or subsidiary claims that PECO violated its tariff, which were pled or which could have been pled in the First Amended Complaint.
 - c. Any and all liability theories that were pled, or which could have been pled, in a complaint before this Commission are hereby dismissed with prejudice.
2. The docket on this matter is marked closed.

Respectfully submitted,



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