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June 23, 2011

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 the Reply Exceptions of PECO Energy Company in the above-captioned matter, which were 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. Grun

Enclosures

cc: Certificate of Service  
Cheryl Walker-Davis, Director, Office of Special Assistants

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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.

Complainant filed 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, which was granted by the ALJ.

On January 14, 2011, the Commission entered an Opinion and Order declining to answer the Petition for Interlocutory Review and Answer to a Material Question and returned the matter

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<sup>2</sup> Id.

to the Office of Administrative Law Judge for further proceedings.<sup>3</sup> The evidentiary hearing in this matter was held on April 13, 2011. By Initial Decision issued on May 25, 2011, Administrative Law Judge Nguyen dismissed the Complaint. The Complainant filed Exceptions to the Initial Decision on June 14, 2011.

## **II. ARGUMENT**

The Commission should affirm the Initial Decision and sustain the dismissal of the Complaint. While the Exceptions purport to find fault with the Initial Decision's findings, Complainant provides no valid basis whatsoever for reversing or modifying the Initial Decision.

### **Reply Exception 1 – The Complainant Provided No Proof That PECO Incorrectly Calculated The Charges On Her Account.**

The burden of proof is on the proponent of a rule or order, pursuant to Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a). In this proceeding, Complainant is the proponent of a rule or order, and therefore she bears the burden of proving by a preponderance of the evidence that PECO has violated the Public Utility Code or a regulation or order of the Commission. *Selling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Complainant must show that the utility is responsible for the problem described in the complaint. *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. P.U.C. 300 (1976). Once Complainant has established a prima facie case, the burden of going forward shifts to the utility, but the ultimate burden of persuasion remains with Complainant. If the utility presents evidence of co-equal or greater weight compared with that of Complainant, the burden of proof will not have been met. *Milkie v. Pennsylvania Public Utility Commission*, 768 A.2d 1217 (Pa. Cmwlth. 2001). In reviewing the Complaint, the Commission's role is to determine whether that burden has been sustained.

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<sup>3</sup> The Complainant appealed the Commission's Order on the Material Question to Commonwealth Court, but the Appeal was quashed upon Motion of the Commission.

*Burleson v. Pennsylvania Public Utility Commission*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 443, 461 A.2d 1234 (Pa. 1983).

The record in this case reflects that the Complainant provided no evidence whatsoever to support her allegations that there were incorrect charges on her PECO account. By contrast, PECO provided extensive evidence of the Complainant's account history and the correctness of the various charges and credits on the account. PECO submitted the Complainant's detailed account histories from October 2002 through March 21, 2011. See PECO Exhibits 3, 4 and 5. These account histories contain every charge, payment, credit, and write-off on the Complainant's accounts during these time periods. PECO witness Theresa Ferrier provided supporting testimony regarding the Complainant's account history. Ms. Ferrier testified that as of March 2011 the unpaid balance on the account was \$17,119. See PECO Exhibit 3 and Transcript page 44. Ms. Ferrier also testified that PECO had previously issued significant credits to the Complainant, without which the Complainant's unpaid balance would have been much higher. PECO issued a credit to the Complainant in the amount of \$7,642.27 when the Complainant first enrolled in PECO's CAP Program. PECO issued a credit in the amount of \$2,885.76 to remove previously accrued late charges on the account. And PECO issued two additional credits in the amount of \$187.59 and \$337.88. See Tr., page 57. Ms. Ferrier testified that the unpaid balance on the Complainant's account was correct, and that the large unpaid balance had accrued due to a very poor payment history. The record reflects that the Complainant only made three payments on her account in 2003, three in 2004, one in 2005, one in 2006, two in 2007, five in 2008, and one in 2009. See PECO Exhibit 6. Ms. Ferrier also testified that PECO had provided the Complainant with five payment arrangements over the years to address the outstanding balance on the account, but that Complainant defaulted on each

of the payment arrangements. See PECO Exhibit 10. Ms. Ferrier also explained how the Complainant's sporadic payments were applied to the outstanding balance due, and confirmed that the payments were applied in accordance with PECO's tariffed payment hierarchy. See Transcript, pages 47-51 and PECO Exhibit 7. Simply put, overwhelming record evidence demonstrates that the balance due on the Complainant's account is correct, and that the Complainant's allegations about improper billing are baseless.

On the issue of the gas supplier charges on the Complainant's account, the Complainant has likewise provided no evidence that would allow for a conclusion that the supplier charges on the account are or were improper. By contrast, Commerce provided evidence and testimony to confirm that the Complainant incurred charges of \$5,503.30 from Commerce for gas service between September 18, 2003 and July 18, 2008 (N.T. 83-90; Commerce Exhibit 2). The Complainant provided no evidence to rebut Commerce's calculation of the gas supplier charges that appear on her PECO account, and therefore there is no basis to conclude that the Commerce charges are incorrect or improper.

The Complainant's Exceptions make several references to the CAP arrears on her account, and argues that 66 Pa.C.S.A. 1405 (c) is irrelevant to the disposition of this case. To the contrary, 66 Pa.C.S.A. 1405 (c) is clearly relevant to this case to the extent that the Complainant seeks a payment arrangement on the unpaid balance on her account. According to Ms. Ferrier's testimony and PECO Exhibit 9, the Complainant has been continuously enrolled in PECO's CAP Program since July 2006, with the exception of the period from July 31, 2008 to February 9, 2009. See PECO Exhibit 9. Because of the Complainant's extremely poor payment history during this period, a considerable amount of the unpaid balance on the account relates to unpaid CAP arrears. Therefore, under 66 Pa.C.S.A. 1405 (c), the Complainant is not eligible for a

Commission-ordered payment arrangement for the portion of the balance that relates to CAP arrears.

**Reply Exception 2 – The Lack Of An Executed Contract Between The Complainant And Commerce Does Not Relieve The Complainant From Responsibility For The Unpaid Supplier Charges On Her Account**

Both PECO and Commerce provided evidence and testimony confirming that the Complainant received electric supply from A.C.N./Commerce from 9/18/2003 through 11/17/2004, and gas supply from Commerce from 7/20/2005 through 7/19/2008. See Tr., pg 16-17, and PECO Exhibit 1. In fact, Mr. Berkery explicitly stipulated that Complainant received gas and electric supply from Commerce for the periods referenced above. See Tr., pg, 33. The fact that the Complainant received electric and gas supply service from Commerce is clearly not in doubt. Complainant is fully responsible for the Commerce supply charges that were billed by PECO, and the lack of an original signed contract between the Complainant and PECO does not relieve the Complainant of her responsibility for those supply charges.

**III. CONCLUSION**

The Complainant has not provided any proof to support her claims, and a review of the procedural history of this case makes it clear that the Complainant's strategy is to drag out the resolution of the case with meritless appeals as long as possible in order to avoid a final disposition of the complaint. Nothing in the Complainant's Exceptions warrant a reversal of the ALJ's decision. The Exceptions, raising either irrelevant points or repeating positions that ALJ Nguyen soundly rejected based on the evidence, are without any merit. The substantial record evidence show that Complainant failed to establish a prima facie case at the hearing. The Complainant would have failed to meet her burden of persuasion even if she had established a

prima facie case, given the clear evidence by PECO that all charges on the account are accurate and that her arrearages accumulated because she failed to pay the billed charges and defaulted on payment arrangements. The Commission should affirm the Initial Decision in its entirety and sustain the dismissal of the Complaint.

Respectfully submitted,



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Dated: June 23, 2011

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

LINDA BERKERY

Complainant

v.

PECO ENERGY COMPANY

Respondent

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Docket C-2010-2170223

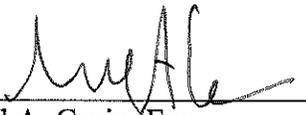
CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2011, a copy of the foregoing Reply Exceptions has been served upon the persons listed below in accordance with the requirements of 52 Pa. Code Sections 1.54 and 1.55.

Linda Berkery  
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Lauren Lepkoski, Esq. (via electronic mail)  
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DATE: June 23, 2011

  
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Michael A. Gruin, Esq.