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June 24, 2011

VIA HAND DELIVERY

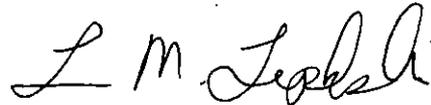
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Linda Berkery v. PECO Energy Company
Docket No. C-2010-2170223

Dear Secretary Chiavetta:

I have enclosed for filing the original and nine (9) copies of the Reply to the Exceptions of Linda Berkery on Behalf of Commerce Energy in the above-captioned matter. Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Lauren M. Lepkoski

LML/kra
Enclosure

cc: The Honorable Ky Van Nguyen
Office of Special Assistants (w/CD)
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

LINDA BERKERY

v.

PECO ENERGY COMPANY

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Docket No. C-2010-2170223

REPLIES TO THE EXCEPTIONS
OF LINDA BERKERY
ON BEHALF OF
COMMERCE ENERGY

BUCHANAN INGERSOLL & ROONEY, P.C.

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Dated: June 24, 2011

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I. INTRODUCTION

On or about April 12, 2010, Linda Berkery ("Complainant") filed a Complaint with the Pennsylvania Public Utility Commission ("Commission") against PECO Energy Company ("PECO"). The Complainant alleged the following: (i) PECO had billed the Complainant for a gas company in California; (ii) the gas company in California did not provide service to the Complainant in years and the gas company in California did not send the Complainant a bill; (iii) PECO used false gas charges to compute late charges which amounted to \$170 a month; and (iv) that because she is a Customer Assistance Program ("CAP") rate customer, she is not responsible for any late charges.¹

On May 13, 2010, PECO filed an Answer to the Complaint. On the same date, PECO filed a Motion to Join Commerce Energy Inc. ("Commerce") as an Indispensible Party.

On May 21, 2010, the Complainant filed an Answer to PECO's Motion to Join Commerce as an Indispensible Party. The Complainant stated that she severed business with Commerce two and six years ago, and that, as such, Commerce had no place in this proceeding.²

On July 16, 2010, Commerce sent a letter to the Commission stating that it did not contest PECO's Motion to Join it as an Indispensible Party.

On July 22, 2010, the Complainant filed a Motion to Strike Commerce's letter of July 16, 2010, from the record because Commerce is not a party to, and has no standing to file documents, in this case. The Complainant also stated that Commerce's letter showed that PECO had engaged in ex parte communications with Commerce.

On August 2, 2010, Commerce answered to the Complainant's Motion to Strike its letter of July 16, 2010. Commerce requested that the Commission consider nunc pro tunc its letter

¹ Formal Complaint at ¶5.

² Complainant's Answer to PECO's Motion to Join Commerce as an Indispensible Party at 1 and 3.

dated July 16, 2010 to be its answer to PECO's Motion to Join, and also stated that PECO had not violated the ex parte rules of the Public Utility Code because Commerce is not a member of the Commission, administrative law judge ("ALJ"), or employee of the Commission.

On November 19, 2010, a hearing was scheduled on the complaint.

On November 8, 2010, ALJ Ky Van Nguyen issued an Order granting PECO's Motion to Join, adding Commerce as an additional Respondent and indicating that the November 19, 2010 hearing be held as scheduled.

On November 15, 2010, the Complainant filed with the Commission a Petition for Interlocutory Review and Answer to Material Question, requesting the Commission to review the ALJ's Order granting PECO's Motion to Join Commerce as an Indispensible Party.

On November 18, 2010, the ALJ issued a stay of proceedings.

On January 14, 2011, the Commission declined to review the ALJ's Order and allowed the matter to run its course.

Evidentiary hearings were held before the ALJ on April 13, 2011. At the evidentiary hearing, the Complainant's husband, John Berkery, proceeded unrepresented. He testified on his own behalf and introduced no exhibits into the record. PECO was represented by Michael Gruin, Esquire, who presented the testimony of two witnesses and introduced 12 exhibits (PECO Exhibits 1-10, 14 and 15). Respondent Commerce was represented by Lauren M. Lepkoski, Esquire, who presented the testimony of one witness and introduced one exhibit into the record.

At the hearing, Mr. Berkery made three oral on-the-record data requests. First, Mr. Berkery requested the outstanding amount Ms. Berkery owed ACN Energy ("ACN Energy"), which Commerce purchased. Second, Mr. Berkery requested the payments Commerce received

from PECO Energy Company ("PECO"). Third, Mr. Berkery requested his usage from September 2003 to July 2008.³

On April 22, 2011, Commerce submitted a letter to the parties answering Mr. Berkery's on-the-record data requests and explaining that in obtaining the billing information for Mr. Berkery's on-the-record data requests, Commerce realized it inadvertently misstated the amount owed from July 2005 to July 2008. Commerce submitted an affidavit from Inger Goodman explaining the correct amount owed to Commerce. Attached to Ms. Goodman's affidavit, were two exhibits. Commerce Exhibit No. 2 provided the Complainant's usage and the amount billed to the Complainant for her usage from September 2003 to July 2008. Commerce Exhibit No. 3 provided the amount of payments Commerce received for the Complainant's account.

Commerce noted in its April 22, 2011, letter that *after the adjournment* of the evidentiary hearing, Mr. Berkery requested a copy of the agreement the Complainant signed with ACN Energy. Commerce sent the Complainant a courtesy copy of the standard contract that was sent to customers who signed up for service with ACN Energy. Commerce informed the ALJ that the agreement between the Complainant and Commerce was made in 2003, approximately eight years ago and Commerce is only required to keep documents for four years.⁴

On April 27, 2011, Mr. Berkery filed an objection to Commerce's answer because Commerce did not forward to him a copy of the agreement between Ms. Berkery and ACN Energy.

On May 3, 2011, counsel for Commerce sent a letter to the ALJ explaining that the answer dated April 22, 2011 fully answered Mr. Berkery's on-the-record data requests and that

³ H.T. at 90 and 91.

⁴ 52 Pa. Code § 56.202.

the request for the agreement between Complainant and ACN Energy was made after the adjournment of the evidentiary hearing and was therefore outside the record.

On May 5, 2011, Mr. Berkery filed his comments regarding Commerce's May 3, 2011 letter.

On May 25, 2011, the ALJ issued his Initial Decision. In the ALJ's ID, he: (i) admitted the affidavit and exhibits of Commerce's witness Inger Goodman into the record and (ii) agreed with Commerce that Mr. Berkery's request for the agreement the Complainant and Commerce entered into was not part of the record and was beyond the four-year-record-keeping period.

Specifically, the ALJ stated:

I agree with the explanation and I consider it part of Commerce's answer to the requests. The witness's answer (April 22, 2011) to the on-the-record data requests and this explanation (May 3, 2011) will be marked as Commerce Exhibit 2 and will be admitted into the record.

Because I agreed with Commerce's counsel that the request for the agreement between Ms. Berkery and ACN Energy was made off the record and beyond the four-year record-keeping period, I will not discuss Mr. Berkery's comments.⁵

On June 12, 2011, the Complainant submitted Exceptions to the ALJ's ID.

Commerce submits the following Replies to Complainant's Exceptions.⁶

⁵ ID at 3 and 4.

⁶ Commerce does not address each of the Complainant's Exceptions; however, that does not mean that Commerce agrees with the Complainant's Exceptions that it did not respond to. Instead, Commerce believes that PECO is the appropriate party to respond to those Exceptions.

II. REPLIES TO EXCEPTIONS⁷

- A. **REPLY TO THE COMPLAINANTS' EXCEPTIONS NO. 2 and 4:**
The ALJ was correct in concluding that: (i) the Complainant signed up her electricity with ACN Energy between September 18, 2003 and November 17, 2004; (ii) the Complainant signed up for gas with ACN Energy between September 18, 2003 and July 20, 2005; and (iii) the Complainant became Commerce's customer for gas between July 20, 2005 and July 18, 2008.

1. **Electric Service**

The Complainant argues that ALJ incorrectly concluded that she signed up for electric service with ACN Energy from September 18, 2003 through November 17, 2004, because PECO and Commerce could not produce any executed contract between the Complainant and ACN Energy.⁸

PECO's witness Carol Riley testified that Ms. Berkery was a customer of ACN Energy from September 18, 2003 through November 17, 2004. Specifically, Ms. Riley testified on cross-examination:

Michael Gruin: Can you give us a brief overview of their supplier history while they were PECO customers?

Carol Riley: Sure. They signed up for their electric with ACN Energy and they began service with them on 9/18/2003. And their service stopped with them on 11/17 of 2004. And that's when they began with PECO Energy again as ---.

Michael Gruin: Let me stop you right there. That was for electric supply only?

Carol Riley: That was for electric supply only.⁹

⁷ The Complainant has not numbered their Exceptions. Commerce's Reply to Exceptions therefore refers to the Complainant's paragraph numbers in their May 25, 2011 filing.

⁸ Complainant's Exceptions at 2, para. 2 and 3, para. 4.

⁹ H.T. at 14-15.

Ms. Riley also sponsored PECO's Exhibit No. 1 which shows the Complainant's supplier history. PECO's Exhibit No. 1 indicates that: (i) Ms. Berkery was a customer of ACN Energy from September 18, 2003 through November 17, 2004 and (ii) on November 17, 2004, PECO began providing the Complainant electricity.

Furthermore, Mr. Berkery explicitly stipulated that ACN Energy provided the Complainant electricity from September 18, 2003 through November 17, 2004.¹⁰

In the instant proceeding, Mr. Berkery did not contest the fact that the Complainant took electric service from ACN Energy. It was only after the adjournment of the evidentiary hearing that Mr. Berkery requested a copy of the agreement that the Complainant signed with ACN Energy for *gas service*. Moreover, the Complainant does not have any arrearages under her electric account. The Complainant only has arrearages under her gas account which will be explained in further detail below. Relative to electric service, Exception No. 2 is completely irrelevant as the Complainant has admitted being served by ACN Energy and there is no contested arrearage amount for electric service.

2. Gas Service

The Complainant argues that: (i) the ALJ incorrectly concluded that she signed up for gas service with ACN Energy from September 18, 2003 through July 20, 2004; and (ii) the ALJ incorrectly concluded that the Complainant became a customer of Commerce from July 20, 2005 to July 28, 2008, because PECO and Commerce could not produce any executed contract between the Complainant and ACN Energy/Commerce.¹¹

¹⁰ See H.T. at 7-8 and 33.

¹¹ Complainant's Exceptions at 2, para. 2 and 3, para.4.

At the evidentiary hearing Commerce 's witness Inger Goodman testified that the Complainant signed up with ACN Energy on September 18, 2003, through its friends and family program. Specifically, Ms. Goodman testified on cross-examination that:

Ms. Lepkoski: Can you explain a little bit how Commerce Energy obtained Ms. Berkery as a customer?

Ms. Goodman: Sure. On September 18, 2003, Ms. Berkery signed up for gas commodity service through ACN Energy and through the friends and family program. And then in February 2005, Commerce Energy purchased all assets of ACN Energy, and as a result of that transaction, ACN's licenses and all customers were transitioned to Commerce Energy.

Ms. Lepkoski: Okay. And what time period was Ms. Berkery a customer of ACN Energy for gas commodity service?

Ms. Goodman: She was a customer of ACN Energy from September 2003 through July of 2005.

Ms. Lepkoski: And during what time period was Ms. Berkery a customer of Commerce Energy for gas commodity?

Ms. Goodman: From July 20th, 2005, Commerce Energy began providing Ms. Berkery with natural gas service due to its acquisition of ACN. Commerce Energy served Ms. Berkery until July 18, 2008, and then on July 18, 2008, Ms. Berkery switched to PECO for her natural gas service.

Ms. Lepkoski: Can you explain why Commerce Energy started serving Ms. Berkery for gas on July 25th, 2005 when Commerce took over ACN Energy on February 9th, 2005?

Ms. Goodman: Sure. Although the acquisition took place on February 9, 2005, there were certain steps that Commerce Energy had to take and that had to be taken in order to switch the customers from ACN to Commerce. Those steps included obtaining approval from the PUC and updates to our license and then also going through system testing and approval with PECO Energy. All this caused

ACN Energy customers to be officially switched to Commerce around June or July of 2005.¹²

PECO's witness Ms. Riley also testified that Commerce served the Complainant.

Specifically, Ms. Riley testified that:

Ms. Riley: Then for gas, they started with Commerce Energy on 7/20/2005 and went through 7/18 of 2008. And then they came back to PECO Energy on 7/18 for gas as well.¹³

Ms. Riley also sponsored PECO's Exhibit No. 1 which shows the Complainant's supplier history. PECO's Exhibit No. 1 indicates that: (i) the Complainant was a customer of ACN Energy for gas service from September 18, 2003 through July 20, 2005; (ii) the Complainant was a customer of Commerce from July 20, 2005 through July 18, 2008; and (iii) on July 18, 2008, the Complainant returned to PECO for gas service.

Moreover, Mr. Berkery explicitly stated that: (i) the Complainant was a customer of ACN Energy for gas service from September 18, 2003 through July 20, 2005 and (ii) the Complainant was a customer of Commerce from July 20, 2005 through July 18, 2008.¹⁴

In the instant proceeding, Mr. Berkery did not contest the fact that the Complainant received gas service from ACN/Commerce. In fact, throughout the pleadings that the Complainant has filed in the instant proceeding, the Complainant acknowledges taking service from ACN Energy/Commerce and explicitly stipulated on the record that he received gas service

¹² H. T. at 69-70.

¹³ H.T. at 14.

¹⁴ See H.T. at 7 and 33.

from ACN Energy/Commerce.¹⁵ It was only after the adjournment of the evidentiary hearing that Mr. Berkery requested a copy of the agreement that the Complainant signed with ACN Energy for gas service. For the Complainant to now argue that the validity of her bills for service with Commerce relies solely on the executed service agreement is disingenuous.

Furthermore, the contract the Complainant signed with ACN Energy was approximately seven years ago (September 2003). According to Section 56.202 of the Public Utility Code, 66 Pa. C.S. 56.202, a utility is required to maintain written records for four years. The ALJ was correct in determining that the request for the service agreement was made off the record and was beyond the four-year record-keeping period.¹⁶ Therefore, the Complainant's Exception Nos. 2 and 4 should be denied.

B. REPLY TO THE COMPLAINANT'S EXCEPTION NO. 3: The ALJ correctly included the dates when PECO began servicing the Complainant electric and gas service.

The Complainant argues that "the ALJ needed to include dates wherein the Respondent, PECO, began to provide 'gas and electric services' since as stated above, there was also another provider before PECO."¹⁷

The ALJ included the date when the Complainant became the Respondent's electric customer in his Findings of Fact No.2. Specifically, the ALJ stated, " She has become the Respondent's electric customer since November 17, 2004."¹⁸

¹⁵ Formal Complaint ¶5 and Complainant's Answer to PECO's Motion to Join Commerce as an Indispensible Party at 1 and 3.

¹⁶ ID at 4.

¹⁷ Complainant's Exceptions at 3, para. 3.

¹⁸ ID at 4, Finding of Fact No. 2.

The ALJ also included the date when the Complainant became the Respondent's gas customer in his Findings of Fact No. 3. Specifically, the ALJ stated, " She has become the Respondent's gas customer since July 18, 2008."¹⁹

Since the ALJ addressed the dates when PECO began servicing the Complainant electric and gas service in his ID, the Complainant's exception should be denied.

**C. REPLY TO THE COMPLAINANTS' EXCEPTION NOS. 6 and 7:
The ALJ was correct in concluding that the Complainant owes
Commerce Energy Inc. \$5,503.30 for gas service from September
18, 2003 through July 18, 2008.**

At the evidentiary hearing, Mr. Berkery initiated three on-the-record data requests. First, Mr. Berkery requested the outstanding amount Ms. Berkery owed ACN Energy, which Commerce purchased. Second, Mr. Berkery requested the payments Commerce received from PECO. Third, Mr. Berkery requested his usage from September 2003 to July 2008.²⁰

On April 22, 2011, Commerce submitted a letter to the ALJ and the parties explaining that in obtaining the billing information for Mr. Berkery, Commerce realized it inadvertently misstated the amount the Complainant owed Commerce.²¹ Attached to the April 22, 2011, letter was Ms. Goodman's affidavit and two Exhibits. Exhibit No. 2 showed the Complainant's usage and the amount billed from September 18, 2003 through July 18, 2008, and Exhibit No. 3 showed the amount of payments Commerce received from September 18, 2003 through July 18, 2008. Ms. Goodman explained in her affidavit that: (i) the total amount billed for gas supplier charges from September 2003 to July 2008 was \$6,605.87; (ii) the Complainant made a total

¹⁹ ID at 4, Finding of Fact No. 3.

²⁰ H.T. at 75-76.

²¹ At the evidentiary hearing, Ms. Goodman testified that the Complainant owed Commerce \$4,775.27.

payment of \$1102.57 for gas supplier charges; and (iii) taking the Complainant's payments into account, the net total amount currently owed to Commerce is \$5,503.30.

In the ID, the ALJ explained that he agreed that Commerce's affidavit of Inger Goodman and the two exhibits that accompanied Ms. Goodman's affidavit were a part of Commerce's answer to Mr. Berkery's on-the-record data requests and were admitted into the record.²²

The ALJ relied on the testimony of Inger Goodman and those exhibits to determine that Mr. Berkery owes Commerce \$5,503.30. Furthermore, the ALJ took into consideration Mr. Berkery's testimony that the Complainant was a customer of Commerce and that he could not remember how much the Complainant owed Commerce.²³

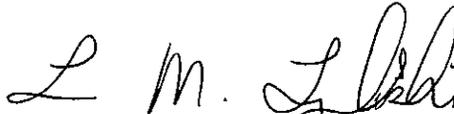
²² ID at 4.

²³ ID at 6.

III. CONCLUSION

For the reasons set forth in the above Replies to the Complainant's Exceptions, Commerce Energy Inc. respectfully requests that the Commission deny the Complainant's Exceptions.

Respectfully submitted,



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Attorneys for
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Dated: June 24, 2011

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

LINDA BERKERY :
 :
 v. : Docket No. C-2010-2170223
 :
 PECO ENERGY COMPANY :

CERTIFICATE OF SERVICE

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

Via Electronic and First-Class U.S. Mail

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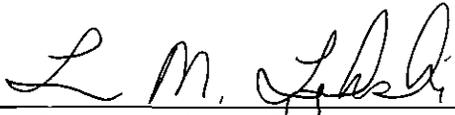
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Dated this 24th day of June, 2011.



Lauren Lepkoski, Esq.

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