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July 28, 2011

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

**Re: Barbara Gallagher v. PECO Energy Company**  
**Docket No. C-2010-2201568**

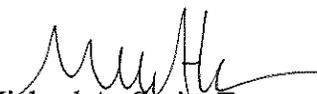
Dear Secretary Chiavetta:

Enclosed for filing please find the Reply Exceptions of PECO Energy Company in the above-captioned mater. These Reply Exceptions were filed electronically via the Commission's e-filing system. A copy of the Reply Exceptions have 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. Gruin, Esq.

Enclosure

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

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A PROFESSIONAL CORPORATION

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BARBARA GALLAGHER

Complainant

v.

PECO ENERGY COMPANY

Respondent

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Docket No. C-2010-2201568

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**REPLY EXCEPTIONS OF  
OF PECO ENERGY COMPANY**

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Pursuant to 52 Pa Code § 5.535, PECO Energy Company (“PECO”) hereby replies to the Exceptions of the Complainant Barbara Gallagher (“Complainant”). As the Complainant’s Exceptions make clear, the Complaint in this case is about the configuration of several companies’ utility service wires and the Complainant’s objection to the way in which those wires traverse the Complainant’s property. The Complaint is not about maintenance or inspection of poles and wires. The Complainant’s Exceptions are essentially a three-page restatement of her written formal complaint, with little reference to the evidentiary record and no citation to controlling legal authority. The Exceptions explain why the Complainant feels that PECO should be ordered to remove its wires from the easement on the Complainant’s property, but the Exceptions provide no basis for reversing the ALJ’s conclusions regarding the location of PECO’s wires.

The Administrative Law Judge made the following correct conclusions in the Initial Decision<sup>1</sup>, and the Complainant's Exceptions provide no basis for reversing those conclusions:

- 1) PECO has a valid easement which allows it to place electric service facilities on the Complainant's property. (Finding of Fact 2).
- 2) PECO's service wires run across the easement on Complainant's property in order to provide service to Complainant's neighbor. (Finding of Fact 4).
- 3) PECO's wires are affixed to a private pole on the Complainant's property (Passim).
- 4) The service wires of a telephone company and a cable company are also affixed to the private pole and also traverse the Complainant's property in order to serve the Complainant's neighbor (Finding of Fact 4).
- 5) The private pole was located on the property when the Complainant bought her house in 1999 (Finding of Fact 3).
- 6) PECO has offered two alternative configurations that would allow it to move its own service wires from the Complainant's property. (Finding of Fact 13). However, PECO's configurations did not address removal or relocation of the service wires of other companies.
- 7) PECO's Commission-approved tariff requires that the cost of changes or alterations to PECO's service lines for the accommodation of a customer must be borne by the customer (Finding of Fact 7).

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<sup>1</sup> As PECO stated in its Exceptions to the Initial Decision, while the ALJ correctly determined that PECO has a valid easement and should not be ordered to remove its facilities from the easement, the ALJ incorrectly determined that PECO owned the private pole on the Complainant's property and was responsible for maintaining and inspecting the pole.

- 8) There is no indication that the pole or the service lines on the Complainant's property pose a harm, risk, or danger to the Complainant (Initial Decision, at page 6).
- 9) The Pennsylvania Public Utility Commission does not have jurisdiction over the scope or validity of easements (Initial Decision, at page 5).
- 10) The Complainant must pursue a civil action in a court of general jurisdiction if to determine whether PECO's right-of-way on their property is valid and whether the PECO can use this right-of-way to serve other customers (Initial Decision at page 6).

For the reasons set forth below, the Complainant's Exceptions should be denied.

#### **BACKGROUND AND PROCEDURAL HISTORY**

PECO incorporates herein the Background and Procedural History contained in its Exceptions filed on June 19, 2011 in this matter.

#### **REPLY EXCEPTION NO. 1**

**There is insufficient evidence in the record to allow for a conclusion as to 1) the date the private pole was erected on the Complainant's property, and 2) the exact distance of the private pole from the Complainant's property line, but neither of these facts is relevant to the disposition of this case.**

Several portions of Complainant's Exceptions are devoted to a discussion of when the private pole was placed on her property, and the distance of the pole from her property line. A review of the record makes it clear that there is no evidence in the record to allow for a conclusion on either point. In any event, the date of the pole's installation and the distance of the pole from the Complainant's property have no relevance to the case, and should have no bearing on the Commission's final determination.

It is clear that the Complainant does not know when the private pole was placed on her

property. All she knows is that the pole was in its current location when she bought her property in 1999. *Transcript, pages 19-20*. The Complainant's testimony also referenced some old photos of unknown origin, but the photos themselves were not authenticated, not probative and not placed into the record. Likewise, PECO also indicated that it does not know when the private pole was erected. PECO's witnesses stated that the company does not have records of when the pole was placed, because PECO does not own the pole. PECO witness Francis stated he did not know when the pole was placed, but he stated that PECO service was established at the location in 1958. *Transcript, page 45*. He reiterated that he was not certain how long the pole itself has been there. *Transcript, page 46*. So, neither the Complainant nor PECO definitively knows when the private pole was placed. The whole inquiry into the date that the pole was installed should be moot, however, because the exact date that the pole was placed is irrelevant to the disposition of this case. The record establishes that PECO has a valid easement to place service wires on the Complainant's property, and that the pole in question is a private pole to which PECO's wires are affixed (along with the service wires of two other companies). The date of placement of the pole has no bearing or relevance on the outcome of this case.

Similarly, the Complainant's Exceptions repeatedly state that the private pole is "seven feet" inside here property line. Meanwhile, the ALJ stated that the "pole planted on the Complainants' property" was "about 18 inches inside the property line". The fact is that there is no evidence in the record regarding the exact distance of the pole from the property line. Neither party presented evidence regarding the location of the Complainants' property line, or the proximity of the pole to the property line. From the photos and the design schematic entered into the evidence<sup>2</sup>, it is apparent that the pole is several feet from the Complainants' driveway,

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<sup>2</sup> PECO Exhibits 6 and 8

and a considerable distance from the street fronting the Complainants' property. No record was developed regarding the location of the Complainants' property line, so it is impossible for a conclusion to be made regarding the distance of the pole from the property line. The citations used to support the ALJ's finding of "18 inches" are transcript passages in which PECO witnesses generally discuss the tariff provisions regarding placement of PECO underground utility facilities, but the transcript and exhibits do not contain any discussion of the distance of this pole from the Complainants' property line.

Just like the date of installation, the precise distance of the pole from the property line is also irrelevant to the disposition of the case. As the ALJ concluded, neither the pole nor PECO's service wires pose a harm, risk or danger. PECO did not place the pole in question, so PECO cannot be held responsible for the location of the pole. To the extent that the Complainant is challenging the easement or PECO's right to affix its facilities to the pole, such questions are beyond the jurisdiction of the Commission as set forth below in Exception 2.

### **REPLY EXCEPTION NO. 2**

**To the extent that the Complainant seeks a ruling on the scope and validity of PECO's easement, such a ruling is beyond the power of the Commission to make.**

The Complainant's Exceptions seem to allege that the existence of PECO's service wires on her property are improper and/or in violation of PECO's easement.<sup>3</sup> To the extent that the Complainant is alleging that the presence of PECO's wires somehow does not accord with the easement, such an allegation is beyond the jurisdiction of the Commission to address. It is well-settled that the Commission has only asserted jurisdiction in cases involving the *existence*, rather than the *scope and validity*, of an easement.

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<sup>3</sup> The Exceptions allege an "abuse of a utility easement", an "infringement of personal property", and allege that PECO's service wires "should be removed".

The Commission has only those duties, powers, responsibilities and jurisdiction as 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); Western Pennsylvania Water Company, 10 Pa. Commw. 533, 311 A.2d 370 (1973). The Commission must act within, and cannot exceed, its jurisdiction. City of Pittsburgh v. Pa. P.U.C., 157 Pa. Super. 595, 43 A.2d 348 (1945). Jurisdiction may not be conferred by the parties where none exists. Roberts v. Martorano, 427 Pa. 581, 235 A.2d 602 (1967). The Pennsylvania Supreme Court has held that the Commission does not have jurisdiction to determine the scope and validity of an easement. Fairview Water Company v. Pa. P.U.C., 509 Pa. 384, 393, 502 A.2d 162, 167 (1985).

The Commission has reiterated its lack of jurisdiction over the scope and validity of an easement numerous times. In Boczar v. PPL Electric Utilities Corporation (Boczar), Docket No. C-20016332, Order entered February 10, 2003, the complainant alleged that the utility was not authorized to place its poles, transformers, and cable lines on his property. The Commission noted that the utility produced right-of-way agreements for the facilities in question and concluded that it was without jurisdiction to determine property rights concerning these easements, citing to In re: Lou Amati/Amati Service Station v. West Penn Power Company and Bell Atlantic-Pennsylvania, Inc. ("Amati") Docket No. C-00945842, Order entered October 25, 1996. In Amati, the Commission had ruled that questions involving trespass and whether or not utility facilities are located pursuant to valid easements are exclusively within the jurisdiction of the Courts of Common Pleas.

In Messina v. Bell Atlantic-Pennsylvania ("Messina"), Docket No. C-00968225, Order entered September 23, 1998, the Commission carefully observed the limits of its jurisdiction, as recognized in Amati, and determined that it could only adjudicate cases involving the existence,

rather than the scope and validity, of an easement. A similar determination was made by the Commission in Robert S.J. Nigro v. PPL Electric Utilities Corporation (“Nigro”), Docket No. C-00003242, Order entered October 26, 2004, wherein the utility in question was unable to produce a written instrument purporting to grant a right-of-way across complainant’s property.<sup>4</sup>

In Stavnicky v. PPL Electric Utilities Corporation, PA P.U.C. Docket No. C-20043368, Final Order Entered July 13, 2005, the Commission again concluded that “subject matter jurisdiction in right-of-way disputes extends only to cases wherein there is no written documentation of an easement....The Commission is without subject matter jurisdiction to rule upon the validity or scope of that easement, as such jurisdiction is exclusively within the Courts of Common Pleas.”<sup>5</sup> In that case, the Commission dismissed Mr. Stavnicky’s Complaint for lack of subject matter jurisdiction because PPL presented written documentation of its easements, and the issues raised by Mr. Stavnicky related to the scope and validity of those easements.<sup>6</sup>

The Commission reiterated its lack of jurisdiction over matters related to the scope and validity of an easement in the case of Tomb v. Pennsylvania Electric Co., Docket No. C-2008-2036378 (Opinion and Order entered December 8, 2008.) (“This Commission is not the proper forum to resolve a controversy which will determine property rights, that is a matter for a court of general jurisdiction.”) *See also* Anne E. Perrige v. Metropolitan Edison Co., Docket No. C-00004110 (July 11, 2003) (holding that, in a dispute regarding the location of a right-of-way, the Commission had no jurisdiction to interpret the meaning of the written right-of-way) and Fiorillo v. PECO Energy Co., Docket No. C-00971088 (September 15, 1999) where the Commission stated that real property issues such as trespass and whether or not utility facilities are located

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<sup>4</sup>The utility in Nigro had claimed an easement by prescription, and the Commission concluded that it was without jurisdiction to determine prescriptive easements.

<sup>5</sup> ALJ Melillo’s Initial Decision in the Stavnicky case provides an excellent analysis of the scope of the Commission’s jurisdiction, or lack thereof, in cases involving easements and rights of way.

pursuant to valid easements or rights-of-way are within the exclusive jurisdiction of the Courts of Common Pleas of the Commonwealth).

In the present case, PECO submitted a valid easement which grants it the “full, free and uninterrupted right, liberty and privilege to place, renew, relocate, operate, and maintain....such facilities as shall be necessary to supply the grantor and the other owners, tenants and occupiers of said premise, **and those adjacent thereto**, with electricity, gas and telephone service...” (Emphasis added). *See PECO Exhibit 1.* PECO’s witness Stark provided the chain of title which confirms that the easement applies to and binds the Complainant’s property. *See Transcript pages 27-33 and PECO Exhibit 2.* PECO has therefore established that it has a valid easement to place electric service facilities on the Complainant’s property, and it is beyond the Commission’s jurisdiction to make a finding on the scope or validity of that easement, or whether the location of PECO’s facilities within the easement is proper.

### **REPLY EXCEPTION NO. 3**

**The ALJ correctly concluded that PECO’s service wires do not pose a harm, risk, or danger.**

The Complainant’s Exceptions contain several newly minted allegations of safety concerns about PECO’s service wires. These allegations are improper and unsupported by any record evidence. These allegations represent an attempt by the Complainant to insert new issues into the case after the close of the record. The written Complaint in this case makes no allegations regarding the safety of the private pole or PECO’s wires. The words “safety”, “maintenance” or “inspection” do not appear anywhere in the Complaint document. Likewise, at the hearing, the Complainant did not make any reference to concerns over safety, maintenance

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<sup>6</sup> Stavnicky, Initial Decision at p. 17

or inspection. Rather, the Complainant was concerned solely with aesthetics and moving PECO's service location to a different location.

Contrary to the Complainant's Exceptions, PECO certainly did not "acknowledge" or "recognize" any risk or danger from the private pole or its service wires. No such acknowledgement or recognition appears anywhere in the record. Based on the evidence and testimony that was in the record, the ALJ correctly concluded that "From the testimony above, there is no indication that the pole or the service lines posed a harm, risk, or danger to the Complainant. There are no allegations that the pole displayed any signs of insect infestation or lightning strikes, or that the service lines were in use for a number of years and had sagged, or that the lines' insulation had worn off."<sup>7</sup> The Complainant's Exceptions provide no basis -- legally or factually -- the reverse the ALJ's finding on this point.

#### **REPLY EXCEPTION NO. 4**

##### **Pursuant to PECO's tariff, the Complainant must pay for the cost of relocating PECO's service wires**

PECO agrees that there are alternative configurations that could be put in place to serve both the Gallaghers and their neighbors. The record reflects that PECO spent considerable time and effort to try to develop alternative configurations that would satisfy all of the parties involved, and that PECO did in fact propose two alternate configurations to alleviate the Complainant's aesthetic concerns. PECO witness Brown testified about the amount of time he spent inspecting the Complainant's property and evaluating alternative service configurations over the course of 4 separate visits to the property. *Transcript, page 60*. He described the two alternative designs that were created. The first design involved installing a service pole on the opposite side of the Complainant's driveway. This design was reflected in PECO Exhibit 6.

PECO witness Brown testified that this first alternative configuration would be difficult because of the existence of underground gas line and trees in the pathway of the proposed service line. Mr. Brown also testified that PECO would need to obtain an easement from the neighboring property owner in order to place facilities in that location, and that PECO had not obtained such an easement. Transcript, pages 56-57. This proposed reconfiguration would require a crew of four men working two days to install two poles and a new line to serve the neighbor's property. The crew would also need to relocate the Gallagher's service to other side of their house.

*Transcript, page 58.*

The second design proposed by PECO was described by witness Brown on pages 61-63 of the transcript. The second alternative involved taking the first leg of service over the Donald's property underground, so that the private pole would not be utilized. Mr. Brown indicated that the second design would likely be more expensive than the first.

Based on PECO's analysis, either of the two alternatives would be potentially feasible options to reconfigure service to the Gallaghers' neighbors. Both alternatives, however, are less practical than the existing configuration, and both would entail costs, as testified to by Mr. Brown. *See Pages 57 and 62 of Transcript.* Furthermore, the alternative designs would not address the service wires of the cable company and telephone company which also run over the Complainant's property. PECO has no control whatsoever over those lines, and would not have the authority or ability to remove such wires. Nevertheless, if the Complainant insists on a relocation of PECO's wires, PECO's Commission-approved tariff would clearly require the Gallaghers to pay for the cost of the reconfiguration, since the reconfiguration would be performed solely to accommodate the Gallaghers. Rule 6.2 of PECO's current distribution

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<sup>7</sup> I.D., at p. 6

Tariff<sup>8</sup> states that “Changes related to a service-supply line or meter owned by the Company, for the accommodation of the customer, shall be at the expense of the customer.” The Complainants have strenuously objected to paying any portion of the cost associated with the line relocation that they have requested, and instead are requesting that PECO be ordered to construct an alternative configuration without receiving any contribution from the Gallaghers.

An Order requiring PECO to relocate its service lines without receiving any contribution from the Gallaghers would be directly contrary to PECO’s tariff and would be an unreasonable and unprecedented extension of the Commission’s authority over a utility’s management of its service facilities. While the Commission obviously has the authority to ensure that public utilities services and facilities are maintained in a way to ensure adequate, efficient, safe and reasonable, service, the Commission has previously recognized that “the Commission's regulatory authority does not extend to acting as a super-manager mandating how a public utility must configure its distribution system.” The Fez Banquet Center/John Thomas v. Duquesne Light Company, PA PUC Docket No. C-20028464 (Order entered December 9, 2003). Because PECO’s service lines are installed pursuant to a valid easement, and because the service lines do not pose a harm, risk or danger to anyone, there is no legal basis to require PECO to relocate its service lines.

## **CONCLUSION**

The relief that the Complainant seeks with her Complaint and restates in her Exceptions (a relocation of PECO’s service lines without contribution from the Complainant) would be contrary to PECO’s easement, PECO’s tariff, and the limitations on the Commission’s

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<sup>8</sup> Tariff Electric Pa.PUC No. 4, First revised page 14, PECO Exhibit 5

authority. As such, the Complainant's Exceptions should be denied by the Commission. PECO reiterates that it is willing to work with the Gallaghers and their neighbors to design an alternative service configuration that will satisfy the concerns of all parties, and remains committed to providing safe and reliable service to all a parties in accordance with its tariffs, the Public Utility Code, and the Commission's regulations. PECO respectfully submits that the Commission should dismiss the Complaint in its entirety with no finding of a violation against PECO.

Respectfully submitted,



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Dated: July 28, 2011

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

BARBARA GALLAGHER

Complainant

v.

PECO ENERGY COMPANY

Respondent

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Docket No. C-2010-2201568

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing Reply Exceptions 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

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Barbara Gallagher  
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Michael Gruin

DATED: July 28, 2011