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August 15, 2011

*Via Electronic Filing*

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street – Filing Room (2<sup>nd</sup> Floor)  
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Second Petition for Leave to Withdraw Complaint of Complainants Guntram Weissenberger, et al, in the above-referenced matter. Copies of the Petition are being served in accordance with the attached Certificate of Service.

Should you have any questions, please feel free to contact me. Thank you for your attention to this matter.

Very truly yours,

THOMAS, LONG, NIESEN & KENNARD

By

Charles E. Thomas, III

Encl.

cc: Dennis J. Buckley, Presiding Administrative Law Judge

**Before The  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Administrative Law Judge  
Dennis J. Buckley, Presiding**

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Guntram Weissenberger, <i>et al.</i>	:	
Complainants	:	
	:	
v.	:	Docket No. C-2010-2182281
	:	
PECO Energy Company	:	
Defendant	:	

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**SECOND PETITION FOR LEAVE TO WITHDRAW COMPLAINT  
OF COMPLAINANTS GUNTRAM WEISSENBERGER, *ET AL.***

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AND NOW, comes Guntram Weissenberger, *et al.* (“Complainants”), by its attorneys, and, pursuant to 52 Pa. Code § 5.94, petitions the Pennsylvania Public Utility Commission (“Commission”) for leave to withdraw their Complaint, as amended, in the above-referenced proceeding. In support of this Second Petition for Leave to Withdraw, Complainants submit as follows:

**I. BACKGROUND**

1. This proceeding involves a formal complaint filed with the Commission on June 14, 2010 against PECO Energy Company (“PECO”). The Complaint, as subsequently amended by First Amended Complaint on July 15, 2010, seeks to determine (i) whether Complainants are “Landlord Ratepayers” under the provisions of Sections 1521-1533 of the Public Utility Code (“Code”), 66 Pa.C.S. §§ 1521-1533, for electric bills submitted by PECO to a third party, ConServe Corporation (“ConServe”), in connection with service provided by PECO to four (4)

different apartment complex properties owned by Complainants located in the Counties of Delaware, Bucks, Chester, and Montgomery (the “Properties”), at which 1,153 residential apartments are separately metered, and (ii) if so, to what extent Complainants are liable for the electric service provided by PECO which is unpaid by ConServe. Complainants generally trade and conduct business in the Commonwealth of Pennsylvania under the name, the “Westover Companies.”

2. The matter comes before the Commission pursuant to Amended Order of the Court of Common Pleas of Delaware County, dated March 26, 2010, in the matter of *Guntram Weissenberger, Gen. Partner Panonia Associates L.P. t/a Whiteland West Apartments, et al. v. Conserve Corporation, et al.*, Civil Action No. 08-6555 (the “Civil Action”), which bifurcated Counts VI (landlord ratepayer claim) and VII (breach of contract claim) and referred those counts to this Commission to the extent they raise liability issues.

3. On July 7, 2010, PECO filed a Preliminary Objection to the Complaint contending insufficient specificity of the pleading. Following the filing of Complainants’ First Amended Complaint on July 15, 2010, PECO filed a Second Preliminary Objection on August 12, 2010, again contending insufficient specificity of the pleading. On August 26, 2010, Complainants filed a Response thereto.

4. On December 10, 2010, Complainants propounded their Set I Interrogatories and Request for Production of Documents on PECO.

5. A Prehearing Conference was held in Philadelphia on February 16, 2011, with Administrative Law Judge Dennis J. Buckley presiding. Counsel for Complainants and PECO appeared and participated, and it was agreed that the proceeding should be continued until further discovery could be conducted before Complainants could proceed with their Complaint.

By Order dated February 17, 2011, Judge Buckley established a February 28, 2011 response deadline for PECO to answer the Complainants' Set I Interrogatories and continued the matter until April 19, 2011, at which time a second prehearing conference was scheduled to be held in Harrisburg.<sup>1</sup> Judge Buckley also ordered that a ruling on PECO's Preliminary Objections be held in abeyance.

6. On February 28, 2011, PECO served its responses to the Set I Interrogatories.

7. After completing their review of PECO's discovery responses, Complainants decided to forgo the further pursuit of their Amended Complaint based on the responses contained therein. Accordingly, on April 15, 2011, Complainants filed a Petition for Leave to Withdraw their Amended Complaint, with prejudice in regard to Count VI (landlord ratepayer issue),<sup>2</sup> and without prejudice with respect to Count VII (breach of contract issues). On April 18, 2011, PECO filed a Reply to the Petition to Withdraw, which, in substance, agreed with the petition insofar as it purported to withdraw liability counts with prejudice, but amounted to an objection to the petition insofar as it purported to withdraw liability counts without prejudice.

8. On June 2, 2011, a hearing was held to hear oral argument with respect to the Complainants' Petition to Withdraw and PECO's objection thereto.

9. By Order dated July 8, 2011 ("July 8 Order"), Judge Buckley denied in part and granted in part the Petition to Withdraw and sustained PECO's Second Preliminary Objection. Specifically, the Order granted the withdrawal of those parts of the Amended Complaint with prejudice (*i.e.*, Count VI) but denied the withdrawal of those parts of the Amended Complaint

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<sup>1</sup> On April 19, 2011, the Commission's offices in Harrisburg were closed due to a water main break and loss of water pressure in the Capitol complex. As a result, the second prehearing conference for that day was cancelled. Judge Buckley issued an Order on April 20, 2011 continuing and rescheduling the hearing.

<sup>2</sup> Complainants conceded that they were "Landlord Ratepayers" under the provisions of Sections 1521-1533 of the Public Utility Code and acknowledged they were the parties responsible for payment for electric service provided by PECO to the Properties even though service was billed to ConServe.

without prejudice (*i.e.*, Count VII). The Order also directed Complainants to file a Second Amended Complaint within thirty days (*i.e.*, by August 8, 2011) which specifically stated:

which tariff or rates PECO should have applied to the Complainants, any relevant information or discussion regarding the periodicity of PECO billing, how PECO's billing and notifications violated a specific tariff, rule or rate filed with, approved by, or established by the Commission, and, most importantly, which acts by PECO constitute a violation of the Pennsylvania Public Utility Code and/or regulations of the Commission and, specifically, which provision(s) of the Pennsylvania Public Utility Code and/or the regulations of the Commission have allegedly been violated by PECO.<sup>3</sup>

10. On August 5, 2011, a Praecipe was filed by Complainants' civil counsel in the Civil Action to discontinue and voluntarily terminate Count VII of the underlying civil complaint.

11. By Order dated August 8, 2011, Judge Buckley extended the filing date for the Second Amended Complaint by an additional seven days.

## II. PETITION TO WITHDRAW

12. Section 5.94(a) of the Commission's Rules and Regulations, 52 Pa. Code § 5.94(a), permits a party to withdraw its complaint in a contested proceeding as follows:

### § 5.94. Withdrawal of pleadings in a contested proceeding.

(a) Except as provided in subsection (b), a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. The petition must set forth the reasons for the withdrawal. A party may object to the petition within 20 days of service. After considering the petition, an objection thereto and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted.

13. Having discontinued and voluntarily terminated Count VII of the underlying complaint in the Civil Action, Complainants submit that there are no provisions of the Code or the Commission's regulations or of PECO's Electric Service Tariff that have been violated by

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<sup>3</sup> July 8 Order at 10-11.

PECO in connection with the instant complaint proceeding. Accordingly, there is no longer a need to pursue before this Commission the remaining issues raised by the Amended Complaint or those issues outlined by Judge Buckley in his July 8 Order. Rather than prolong litigation through the filing of an unjustified Second Amended Complaint, Complainants instead seek to withdraw their Amended Complaint in all respects *with prejudice*.

14. Complainants specifically agree that the withdrawal of their Amended Complaint is *with prejudice* as to any liability claims or allegations that PECO provided unreasonable electric utility service by:

- a) Improperly altering the account status for each Property at ConServe's request to provide for Complainants as the responsible parties for purposes of billings for the master-metered electrical services at the Properties, for all relevant accounts, without notice to or the consent of Complainants;
- b) Applying improper Tariff rates and overcharging Complainants for electric utility services to the Properties since September 25, 2003;
- c) Violating its Tariff for failure to bill Complainants or notify Complainants of the accrued arrearages;
- d) Violating its Tariff for failure to bill the subject accounts at sufficient intervals and charging late fees in violation of the Tariff; and
- e) Violating its Tariff by failing to follow PECO's internal process and procedure of having a PECO account representative handle Complainants' large commercial accounts.

15. Moreover, Complainants agree to withdraw their Amended Complaint *with prejudice* as to any liability claims or allegations concerning:

- a) Which tariff or rates PECO should have applied to Complainants;
- b) The periodicity of PECO's billing;
- c) How PECO's billing and notifications violated a specific tariff, rule or rate filed with, approved by, or established by the Commission; and
- d) Acts by PECO that may have constituted a violation of the Code or the Commission's regulations.

16. Complainants aver that the withdrawal of the Amended Complaint is justified and is in the public interest for the foregoing reasons.

WHEREFORE, for the reasons set forth above, Complainants Guntram Weissenberger, *et al.*, respectfully request that the Pennsylvania Public Utility Commission grant their Second Petition for Leave to Withdraw Complaint *with prejudice* in the above-referenced proceeding.

Respectfully submitted,

By 

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*Attorneys for  
Complainants Guntram Weissenberger, et al.*

DATE: August 15, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 15<sup>th</sup> day of August, 2011, served a true and correct copy of the foregoing Petition for Leave to Withdraw Complaint in the above-captioned proceeding, upon the persons and in the manner set forth below:

**EMAIL AND FIRST CLASS MAIL, POSTAGE PREPAID**

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