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August 19, 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 Ms. Chiavetta:

Enclosed for filing with the Commission is a copy of PECO Energy Company's Reply to the Second Petition for Leave to Withdraw Complaint in the above referenced matter. I have enclosed a Certificate of Service showing that a copy of filing was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

Cc: Service List
Administrative Law Judge Dennis J. Buckley

In the Second Petition³, the Complainants expand their request to withdraw their complaint, with prejudice, to include certain matters specified in Count II of their First Amended Complaint. PECO is heartened by this development. However, it appears that the Second Petition continues to fall short of seeking complete closure on liability issues, in that it does not appear to seek prejudicial closure of numerous liability issues that were pled in the First Amended Complaint, or of liability issues that could have been pled, but were not pled. PECO therefore requests that the Commission enter an order that the Complaint in this matter is dismissed, with prejudice, with respect to:

- (1) The landlord-ratepayer issue specified in Count I of the First Amended Complaint;
- (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 this docket.⁴

In support thereof, PECO states as follows:

- 1. The Commission should dismiss with prejudice the landlord ratepayer issues discussed in Count I**

³ The First Petition to Withdraw Complaint was filed on April 15, 2011. In the First Petition to Withdraw, the Complainants requested permission to withdraw Count 1 with prejudice, but to withdraw Count 2 without prejudice. That request was denied by Order of Administrative Law Judge Buckley on July 8, 2011.

⁴ PECO requested this same relief in its April 18, 2011 Reply to the First Petition to Withdraw. PECO provides specific recommended ordering paragraphs in its conclusion to this reply.

The First Petition requested permission to withdraw with prejudice the landlord ratepayer issues discussed in Count I of the First Amended Complaint, and that request was granted by Administrative Law Judge Buckley's July 7, 2011 Order. (Ordering Paragraph 1.) PECO anticipates that this dispute may be the subject of further litigation in the civil courts, and therefore requests that this ruling be reiterated in the order to be issued in response to the Second Petition. Having the Commission's full ruling in a single document will reduce the possibility of confusion in future litigation. PECO provides suggested ordering language in its conclusion to this reply.

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

The First Petition requested permission to withdraw Count II without prejudice, a request that was denied by Administrative Law Judge Buckley's July 7, 2011 Order. The Second Petition requests permission to withdraw an extensive list of articulated arguments (but without generally requesting to withdraw Count II):

In particular, the Second Petition requests (§ 15) permission to withdraw with prejudice the following four issues⁵:

- 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

⁵ The issues specified in paragraph 15 of the Second Petition appear to be based on, and to track, the ordering paragraphs of Administrative Law Judge Buckley's July 7, 2011 and August 8, 2011 Orders.

d) Acts by PECO that may have constituted a violation of the Code or the Commission's regulations.

The Second Petition also requests (§ 14) permission to withdraw with prejudice the following five issues⁶:

. . . . 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.

PECO agrees that Complainants should be allowed to withdraw with prejudice the nine arguments specified above.

However, the First Amended Complaint contains at least four additional liability claims that are not addressed in the Second Petition. Those claims are:

§ 75 (b): 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: (b) All late delinquencies, including late fees, are

⁶ The issues specified in paragraph 14 of the Second Petition appear to be based on, and to track, some of the arguments set forth in Count I and some of the arguments set forth in Count II of the First Amended Complaint.

attributable solely to the failure of ConServe to remit payment to PECO pursuant to their bi-lateral agreement; and,

¶ 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.

WHEREFORE, the *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.*

The Second Petition does not request permission to withdraw these claims (either with or without prejudice), and does not explain why these claims are excluded from the Complainants' request to withdraw with prejudice. Regardless of the reason – and it may have been mere inadvertence – the path for dealing with these claims is clear. The Complainants have had ample opportunity to plead and proceed with these claims. They should not be allowed to withdraw the other claims with prejudice, but leave these claims intact – especially since the Second Petition gave absolutely no rationale as to why these claims should survive.

Given that the Complainants have had every opportunity to expand on these claims in an amended complaint before the Commission, but have failed to do so, PECO respectfully suggests that these additional claims should be dismissed, with prejudice, for failure to prosecute. If Complainants are allowed to keep these claims “alive” for future litigation, then we will again face the circularity of litigation against which the ALJ inveighed in both his July 7 and August 8, 2011 Orders.

PECO also notes that, in ¶ 13 of the Second Petition, Complainants aver that the supporting rationale for their request to withdraw, with prejudice, is because they withdrew the parallel claims that were pending in civil court:

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 3 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*.

Administrative Law Judge Buckley's August 8, 2011 Order (p. 4) already analyzes this civil court activity and states that the withdrawal of the civil complaint makes it even more imperative that the Complainants fully articulate their claims before the Commission:

Indeed, if the *praecipe* filed with the Court of Common Pleas is seen as the discontinuation of Count VII in that forum, then it makes it all the more likely that the claim will be pursued in this forum at some point because there has been absolutely no showing that the underlying controversy with respect to PECO's unpaid charges has been addressed in any way.

Given that the Administrative Law Judge has already held that the civil court withdrawal actually increases the need to proceed at the Commission, Complainants should not be allowed to use the civil court withdrawal as a basis for keeping alive claims without pursuing those claims the Commission. Therefore, all claims that were mentioned in the First Amended Complaint should be dismissed with prejudice for lack

of prosecution, whether or not Complainants specifically identify them as claims that they seek to withdraw with prejudice.⁷

In its conclusion to this reply, PECO provides suggested ordering paragraphs to implement this recommendation.

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

This case was referred to the Commission by the Delaware County Court of Common Pleas for a determination of liability. In that Order, the Court ordered⁸ 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.

⁷ The only reason that Complainants could have for objecting to such a position is that they in fact wish to keep such claims alive for future litigation.

⁸ 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.

As noted above, Complainants have had ample opportunity to articulate each and every liability issue, but have repeatedly failed to do so – despite several orders from the Administrative Law Judge directing them to do so. 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 Commission; 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 specifically state that any and all liability theories could have been pled in this docket, but which were not pled, are dismissed with prejudice for failure to prosecute.

Conclusion and Proposed Ordering Paragraphs

For the reasons set forth above, PECO requests that the Commission dismiss all claims in this case with prejudice, utilizing the following recommended ordering paragraphs:

1. That the April 15, 2011 Petition of the Complainants, Guntram Weissenberger (in his individual capacity,⁹ trading as Whiteland West Apartments,¹⁰ trading as Rose Tree Crossing,¹¹ trading as Valley Forge Executive Suites,¹² and in his role as General Partner for Panonia Associates, L.P.¹³ or any other of the Complainants); Panonia Associates,

⁹ See First Amended Complaint, ¶ 10.

¹⁰ See First Amended Complaint, Attachment A, Caption

¹¹ See First Amended Complaint, ¶ 12, First Amended Complaint, Attachment A, Caption.

¹² See First Amended Complaint, Attachment A, Caption.

¹³ See First Amended Complaint, ¶ 8.

LP¹⁴; and 27 Summit Trace Apartments, LP¹⁵ (the Westover Companies¹⁶) to withdraw those parts of their July 15, 2010 Amended Complaint with prejudice is granted.

2. That the August 15, 2011 Second Petition of the Complainants, Guntram Weissenberger (in his individual capacity, trading as Whiteland West Apartments, trading as Rose Tree Crossing, trading as Valley Forge Executive Suites, and in his role as General Partner for Panonia Associates, L.P. or any other of the Complainants); Panonia Associates, LP; and 27 Summit Trace Apartments, LP (the Westover Companies) to withdraw those parts of their July 15, 2010 Amended Complaint with prejudice is granted, and the following claims are specifically withdrawn with prejudice at the request of Complainants:

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.

¹⁴ See First Amended Complaint, ¶ 8.

¹⁵ See First Amended Complaint ¶ 13.

¹⁶ See First Amended Complaint ¶ 15.

All claims related to:

- 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.

3. That the following claims, which were originally stated in the First Amended Complaint of the Complainants, Guntram Weissenberger (in his individual capacity, trading as Whiteland West Apartments, trading as Rose Tree Crossing, trading as Valley Forge Executive Suites, and in his role as General Partner for Panonia Associates, L.P. or any other of the Complainants); Panonia Associates, LP; and 27 Summit Trace Apartments, LP (the Westover Companies), are dismissed with prejudice for failure to prosecute:

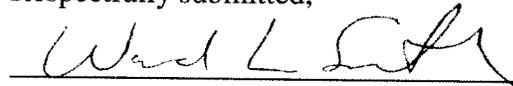
- a) The claim set forth in Paragraph 75(b) of the First Amended Complaint alleging that PECO's claims against the Complainants for electric services at the Properties are in error and do not accurately reflect the proper amounts due and owing PECO when: (b) All late delinquencies, including late fees, are attributable solely to the failure of ConServe to remit payment to PECO pursuant to their bi-lateral agreement; and,
- b) The claim set forth in Paragraph 76 of the First Amended Complaint alleging that 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.
- c) The claim set forth in Paragraph 77 of the First Amended Complaint alleging that PECO, as a result of its conduct is equitably estopped from claiming that Complainants owe accrued billings to PECO incurred by and through Conserve.

d) The claim set forth in the prayer for relief of the First Amended requesting that: “the *Complainants respectfully request . . . that the liability issues in this case be determined by the PUC.*”

4. That any and all liability theories that were pled, *or which could have been pled*, by Complainants Guntram Weissenberger (in his individual capacity, trading as Whiteland West Apartments, trading as Rose Tree Crossing, trading as Valley Forge Executive Suites, and in his role as General Partner for Panonia Associates, L.P. or any other of the Complainants); Panonia Associates, LP; and 27 Summit Trace Apartments, LP (the Westover Companies) with respect to PECO service to the Whiteland West Apartments¹⁷, the Valley Forge Suites¹⁸, Rose Tree Crossing II¹⁹, or Summit Trace Apartments²⁰, are dismissed with prejudice for failure to prosecute.

5. That the docket on this matter is marked closed.

Respectfully submitted,



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August 19, 2011

¹⁷ See First Amended Complaint, ¶ 9.
¹⁸ See First Amended Complaint, ¶ 11.
¹⁹ See First Amended Complaint, ¶ 13.
²⁰ See First Amended Complaint, ¶ 14.

