BEFORE THE PENNSYLVNIA PUBLIC UTILITY COMMISSION

E.C. SMART

v.

PECO ENERGY COMPANY,
COMMERCE ENERGY, INC.
and PUC

In Re: C-2010-2193243

SUR MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF LAW

In this SUR MOTION FOR SUMMARY JUDGMENT [now, SSJ] reply, the Defendants still defy the spirit and letter of the law. First, based on the record and under several Doctrines the matter was partially disposed. *See Nunc Pro Tunc*, *Collateral Estoppel* and *Res Judicata*. In particular, the Defendants' [PUC, Commerce Energy, Inc. and PECO Energy Company] pleadings, the PUC's "*non sequitur*", complicit and expressed refusal to adhere to the record and there was/is no requirement under Pa.R.C.P. 1035.1-2 that requires "Notice". Note, Pa.R.C.P. 1035.1-2 prevails as seen, *infra*:

"Rule 1035.2. Motion.

After the relevant pleadings are closed, but within such time as not to unreasonably delay **trial** (emphasis added), any party may move for summary judgment in whole or in part as a matter of law

(1) **whenever there is no genuine issue of any material fact as to a necessary element of the cause of action** (emphasis added) or defense which could be established by additional discovery or expert report, or

Official Note

Rule 1035.2 sets forth the general principle that a motion for summary judgment is based on an evidentiary record which entitles the moving party to judgment as a matter of law. The evidentiary record may be one of two types. Under subparagraph (1), the record shows that the material facts are undisputed and, therefore, there is no issue to be submitted to a jury. An example of a motion under subparagraph (1) is a motion supported by a record containing an admission. By virtue of the admission, no issue of fact could be established by further discovery or expert report (emphasis added).".

Presumably, the present Defendants seek a remedy that is utterly beyond the "ALJ" to provide in their joint "letter" of 18 August 2011. The FCA [Formal Complaint Action] was perfected on or about 5 August 2010 [Notification of Intent to Appeal]; PUC's manifest illegal interventions were shown in the record along with its inability to be impartial as a matter of law. Therefore, no requirement for "Notice" was/is necessary. *See* MSJ [MOTION FOR SUMMARY JUDGMENT].

Whenever there is a conflict involving damages (equity, direct, consequential and punitive damages) the Administrative Court [now, AC] must abrogate 52 Pa.C.S. § 5.102(a) and (c) in favor of Pa.R.C.P. 1035.1, et seq.. The PUC admits the limitation of their "ALJ" in their Instructions for Formal Complaints [661739 Rev. July 2007, pp. 2-3]:

"NOTE: The PUC can decide that a customer was over billed and can order billing refunds. The PUC can also fine a company for not providing the level of service required by law. You may also file a formal complaint to seek a refund for an over billing or to request that the company be ordered to correct a problem with your service. **Under state law, the PUC cannot decide whether companies should pay customers' damage claims** (emphasis added). Damage claims may be sought in an appropriate civil court.".

The Defendants chose to illegally disregard the FCA and are simply paying the cost of their decisions. Even before the FCA, in the Informal Complaint the Defendants were consistently told not to disregard the Complaint, all to no avail. The latest "filing" highlights the Defendants recalcitrance, *infra*. *See* BCS[1-2] [Bureau Consumer Services Case Numbers: [1]2599000 and [2]2663968, respectively]. *See* MSJ. All statements and attachments herein are subject to 18 Pa.C.S. § 4904, re Unsworn falsification.

GROUND I

First, the entirety of the document labeled "letter" jointly endorsed by counsel for PECO Energy Company and Commerce Energy, Inc. is without merit. For the record, the Defendants' statements will be construed for their plain view conclusions and not for any apparent unnecessary delay and expense. This is a one-time gratuity.

In ¶ 1, Defendants PECO Energy Company and Commerce Energy, Inc. statement(s) at the

29 July 2011 Hearing are moot as a matter of law. Giving there statements, *sensu latissimo* the ***present*** Defendants conclusions are fatally flawed. In item 1, they claim that the MSJ was/is "untimely". This is false on its face. The governing statutes are clear about the "**trial**" not being delayed **not** a Hearing. *See* Pa.R.C.P. 1035.1, et seq.. Pa.R.E. 201(d), 607-608, 613, 801, 803(1), (2), (6), (20), (21), (25), 804(a)(2), (5), (b)(1), 806 and 1007. As that specious argument is exhausted, it consistently fails. The ALJ must note several plain view facts:

1. The sum total of the claims in the MSJ are derived from the FCA. Therefore, to argue that the MSJ is "untimely" the present Defendants must show the FCA was defective. Since there is nothing on record about such an endeavor it is moot. *See* Id..
2. Should the present Defendants decide to now cover the point, it is "untimely" since they have had significantly more than the statutory time to respond. *See* Pa.C.S. 1035.3. In fact, the present Defendants' time has expired on the FCA **and** the MSJ. The statute does provide the "adverse party" an opportunity to "open" a judgment for good cause; should the present Defendants state a bona fide issue. This is a check to balance the prejudicial and probative issues. As there are no prejudicial issues, only probative issues can be presented by the Defendants.
3. A final point here on the MSJ, SSJ and being "untimely"; the Defendants refused to make a **required responsive** pleading, *supra*. *See* Pa.R.C.P. 208.2 and 1035.1 et seq..
   Thus, the record does not contain any Plaintiff filed "untimely" document as purported by the present Defendants.

GROUND II

The most flagrant fallacy is the Defendants' claim in item 2, *supra*. The Defendants' claim that after more than two years of refusing, absconding and illegal conduct they were "ready to address the Complaintant's concerns at the hearing.". If that were true the Defendants would been timely in their filings rather than submitting "letters" in lieu of required responsive

pleadings. Lastly, the argument that the present Defendants "made a Motion to Dismiss the Complaintant's Formal Complaint with prejudice for failure to prosecute" presumes an absent timely filing **and** that the present Defendants have clean hands. The record shows the insurmountable truth; all Plaintiff submissions are timely, perfected **and** only the present Defendants [and PUC] have despoiled their mandates, duties and responsibilities. *See* 66 Pa.C.S. §§ 3301(a)-(b), 3302, 3303(a), 3304-3309 and 3313-3315. *See* Pa.R.A.P. 105(a). *See Fruit of the Poisonous Tree Doctrine.*

GROUND III

In ¶ 2, p. 1, the present Defendants staunchly claim although without merit that they "are not intending to file a substantive response to the Complaintant's Motion for Summary Judgment given the fact that the Complaintant's Motion for Summary Judgment is deficient for numerous reasons"; despite the governing Statutes and Rules, *supra*. The substance of the "letter" rests solely on the limited application, jurisdiction and effect of Titles 52 and 66; however, the said Titles explicitly state and require subrogation to courts of competent jurisdiction, *inter alia*, damages and crimes shown in the Formal Complaint process. Indeed, Title 66 mandates the ALJ to report illegal conduct to state and federal authorities. *See* 66 Pa.C.S. §§ 308.2(a), 309-315(a)-(d), 316, 3301(a)-(b), 3302, 3303(a), 3304-3309 and 3313-3315.

The ALJ must note that the present Defendants either refused with Notice to "appear" on record like the PUC; refused to address the undisputed record as in the present Defendants or absconded records to illegally intervene against the **60 day revert** process in violation of various statutes, *supra*. *See* Pa.R.E. 201(d), 607-608, 613, 801, 803(1), (2), (6), (20), (21), (25), 804(a)(2), (5), (b)(1), 806 and 1007.

In the remainder of ¶ 2 on page 1 and 2, the present Defendants deny the plain view record of their "admissions" in BCS[1-2] that they violated the **60 day revert process** various times; that they had Notice; they illegally terminated service without Notice and that the current line of

conduct will have dire results for them.

REMEDIES

1. Pursuant to 52 Pa.C.S. § 5.102(a), (c), (d)(1) and (3), the ALJ shall Order the MSJ and SSJ in favor of the Plaintiff; there being no good cause to continue in the absence of a "**genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report** (emphasis added)" and its Authority section:

"Authority
The provisions of this § 5.102 amended under the Public Utility Code, 66 Pa.C.S. §§ 309—311, 315, 331—335, 501, 504—506, 701—703, 1101—1103, 1301 and 1501.".

2. Since writing their "letter" and making the Motion to Dismiss with prejudice by the present Defendants (including the absent PUC) constitutes replies other than submissions; the ALJ shall ORDER the present Defendants pay a bond sufficient to indemnify the Plaintiff against the material harm in permitting the present Defendants an option to have time to produce that does not exist in the record **after** the present Defendants pre-qualify it in a pleading at the risk of a contempt charge from the ALJ, *sua sponte* for causing *undue delay and expenses* to the Plaintiff.

   The ORDER shall expressly state that any joint or several submission by the present Defendants (including the PUC) that fail to materially undo the Plaintiff points of record, **in particular** their admissions of record shall aggravate, enhance and raise the charge and penalty phases of any subsequent criminal charges by the ALJ.

   The ORDER does not in any way constitute a mitigation of the claims against the absent PUC. Instead, it provides an expeditious method prior to the sequestration, remand or removal of this matter to a competent court to serve the entire record not the remedial remnant of this forum.

3. Lastly, the ALJ shall ORDER that this phase of the pre-trial (competent court) action be

shared with state and federal authorities after its *legal* FINDINGS and/or OPINIONS. *See* 66 Pa.C.S. §§ 308.2(a), 309-315(a)-(d), 316, 3301(a)-(b), 3302, 3303(a), 3304-3309 and 3313-3315.

CONCLUSION

Based on the cited admissions, evidence and grounds, the Plaintiff moves the ALJ to immediately GRANT this SSJ and its attachments.

E.C. SMART, Plaintiff

Date: 12 September 2011

EXHIBIT A

JOHN F. KENNEDY MEDICAL CENTER

PR# 171722
E.C. SmaRT

Date of Service 7-29-11
Service Location SWMC
City Department

To Whom it May Concern:
This will certify that the person named above reported for:

✓ lab studies — radiology studies — ✓ sick
✓ other studies — physical examination

from 9:30 AM to 1:00 PM Released for work on 7-30-11

Signature Dr. C. Norris

[ ] (MD) [ ] RN [ ] PA [ ] TECH [ ] (CLERK) (please check)

Date 7-29-11

243515

Form #201

3001 WALNUT STREET, PHILADELPHIA, PENNSYLVANIA 19104, 215/386-3556

CERTIFICATE OF SERVICE

Pursuant to Pa.R.C.P. 440, et seq., I certify that a true and correct copy of this SSJ and attachments have been sent by certified mail, fax or hand delivery to the below listed Defendants or their counsel of record today.

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E.C. SMART, Plaintiff

Date: 12 September 2011