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September 30, 2011

Pennsylvania Public Utility Commission
Secretary of the Commission
PO Box 3265
Harrisburg, PA 17105-3265

Administrative Law Judge Angela T. Jones
Pennsylvania Public Utility Commission
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Philadelphia, PA 19107

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2301 Market Street, S23-1
PO Box 8699
Philadelphia, PA 19101-8699

Re: Back to the 50's Diner, Inc. v. Peco Energy Company
No. C-2011-2227751

To all concerned:

Please find enclosed the Main Brief of Back to the 50's Diner, Inc. in the above matter. Service has also been made by electronic mail to Hon. Angela T. Jones and to Tishekia Williams, Esq.

Very truly yours,

John J. Hare, Jr.

JJH/kg
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Back to the 50's Diner, Inc. Complainant	:	
v.	:	C-2011-2227751
PECO Energy Company Respondent	:	

MAIN BRIEF
OF
BACK TO THE 50'S DINER, INC.

John J. Hare, Jr.
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2370 York Road
Jamison, PA 18929

Counsel for:

Back to the 50's Diner, Inc.

Dated: September 30, 2011

I. INTRODUCTION

Back to the 50's Diner, Inc. (Original 50's) was incorporated June 13, 2003 and is doing business at 800 Edison-Furlong Road, Furlong, Bucks County, Pennsylvania. It had conducted business prior to that time for many years as a sole proprietorship. Until recently it has been current on its account (15143-00505) with Peco. Back 2 the 50's Diner, Inc. (Number 2 50's) was incorporated on August 9, 2007 and was doing business at 1167 Dublin Pike, Perkasie, Bucks County, Pennsylvania until it closed on August 31, 2010 due to financial troubles. It was not current on its bill with Peco (36509-35008). Peco transferred Number 2 50's bill to Original 50's in the amount of $13,113.65 on September 29, 2010. Due to the confusion of this transfer Original 50's from time to time has been notified by PECO of it being in arrears. For the most part, however, it is the transfer amount of $13,113.65 that is the subject of this case.

The facts of the case are not in dispute. The parties have stipulated that both 50's corporations are separate entities owned by one shareholder (transcript page 24, lines 18-22). After obtaining a lease on the Perkasie property on August 13, 2007, Number 2 50's took possession of the premises and prepared it for the opening of its business. On or about August 13, 2007, Monique Van Hulst, (the mother of the shareholder, Claudine Ascher), the manager of Number 2 50's contacted Peco Energy to provide electric service to the premises (transcript page 72, line 25, page 73, lines 1-2). Mrs. Van Hulst spoke by telephone to the appropriate Peco Energy employee and service was contracted. Number 2 50's did not yet have a Tax Identification Number which Peco Energy requested so the Tax Identification Number for Original 50's was given. Number 2 50's obtained its Tax Identification Number on August 28, 2011(transcript page 47, line 25, page 48, lines 1-4). At no time did Peco contact Claudine Ascher to discuss the new account for service at Number 2 50's. On direct examination the following exchange took place between Ms. Ascher and Mr. Hare (transcript page 26, lines 20-25, page 27, lines 1-9):

> Q. Ms. Ascher, at the time that the location was being developed in Perkasie, Bucks County for number two '50s, were you ever contacted by PECO regarding service?
> A. No.
> Q. How did you come to have service at that location?
> A. My mom, who is my manager/bookkeeper, took care of that,

setting everything up at number two.
Q. Do you recall signing any agreement with PECO?
A. No.
Q. *Do you recall ever being notified by PECO that there were* problems on the account?
A. No.
Q. Do you recall paying an initial deposit on behalf of number two '50s to PECO?
A. I did not realize that I was supposed to do that. I was never contacted.
Q. You were never asked to provide it?
A. I was never contacted.
Q. Were you aware that original '50s' tax ID number was given to PECO at the inception of service?
A. No, I was not.
Q. Were you ever contacted to provide a tax ID number?
A. No.

Peco Energy has a policy whereby any new business is required to post a deposit determined by Peco Energy as security for the ongoing payment of services provided to that business. A security deposit is not required for services provided to an existing customer. Peco Energy did not require a security deposit in this case. On cross examination the following exchange took place between Ms. Tarpley and Mr. Hare (transcript pages 87 and 88, and page 89, lines 1-24):

Q. Ms. Tarpley, on, I believe it's Exhibit Number One, which was the service address at Dublin Pike, are you aware of who was paying the bills as they came due?
A. No.
Q. Okay. So you don't know whether it was original '50s or number two '50s?
A. Not at all.
Q. Okay. Were you aware that there were separate corporations involved ---
A. No.
Q. --- for these service addresses?
A. No.
Q. Okay. Are customers advised at any time whether if there's a change in a tax ID number that they should contact PECO?
A. They should, I mean, for their own record keeping. But once they establish the account, I don't think there's any reason for us to call the customer to advise them. They would have to contact us to do such.
Q. Do you know whether there was any question, as a representative of PECO, when service was instituted at Dublin, and this being a new service address, was any investigation done as to whether this was a different company?
A. No. The individual who they spoke to, according to our records, referenced the Edison Furlong address, didn't want to pay a deposit and gave us the information and tax ID for the new

establishment.
Q. Was the process of the application for a new customer and an existing customer, is that routinely explained to the customer?
A. Yes. If you're totally new, yes, you have to provide a written application. You have to pay a security deposit. You have to give us the alternate information. It all depends on what sort of establishment or entity it is, yes.
Q. And how is that relayed to the customer?
A. Just when they call us.
Q. Is it a letter?
A. No. They usually call on the phone and then they have to come into the office if they're totally new.
Q. Okay. So I think you had testified that because there was an existing company, that account was reviewed to determine whether a deposit was necessary?
A. That's correct.
Q. Is there an option on PECO's part to take a deposit for an existing customer? In other words, can you say, well, we're going to charge you X amount of dollars because you have a new location?
A. Not a new location. It has to be a totally separate entity when they ask for a deposit. In this particular case, a Monica Van Hulst, she contacted us and referenced the other account and wanted to initiate service at the new establishment. Monique. I'm not sure if it's Monique.
Q. Monique, yes.
A. Monique.
Q. Well, you said that PECO reviews the history of the existing customer to determine whether a deposit might be necessary.
A. Yes.
Q. So is there the option of PECO to charge even an existing customer?
A. Oh, yeah. If it's in bad standing, yes, we would.
Q. Okay. And how is the amount of the deposit figured?
A. It looks at the history of the usage on the account.
Q. So there's no set dollar amount?
A. No. I can't say there's any set dollar amount, to my knowledge.

Number 2 50's opened for business on or about September 1, 2007 and continued until its termination on August 31, 2010. During this time it paid its operating expenses including charges from Peco Energy for provision of utility services. Number 2 50's began falling behind on its account and Peco Energy would telephone the business at its Perkasie location and speak to its employees to advise of this fact and to have Number 2 50's arrange payment plans to catch up on its account. Ultimately, Number 2 50's was unable to timely pay its operating expenses including those of Peco Energy. The business closed. Subsequent to the closure of the business, Peco Energy transferred the balance admittedly owed by

Number 2 50's to the account held by Original 50's in the amount of $13,113,65 (Peco Exhibit 4, notation 09/29/10 Transfer Bill).

Original 50's disputed the transfer of Number 2 50's account and eventually filed an informal complaint with the Pennsylvania Public Utility Commission. The parties were unable to resolve this matter between themselves and Original 50's filed a formal complaint on February 24, 2011.

A second issue arose subsequent to Original 50's filing its formal complaint. On July 22, 2011 Original 50's received a 72-Hour Shut-Off Notice for a Past Due amount of Peco charges in the amount of $1,933.92, $608.92 being the next monthly payment not yet due and $1,325.00 representing a deposit required of Original 50's for alleged "estimated average monthly usage" increase. The deposit letter had been dated February 22, 2011. A comparison of usage for the annual period ending February 23, 2011 was 78,492 kWh with usage for the annual period ending January 26, 2010 at 79,507 kWh, actually a lower amount for the later period. These figures were taken from Peco bills sent to Original 50's (Back to the 50's Exhibit C-3, pages 1, 2, and 3).

It is Peco Energy's position that because the tax identification number of Original 50's was given at the inception of service, there existed a contract between Peco Energy and Original 50's and not with Number 2 50's.

It is Original 50's position that it and Number 2 50's were separate incorporated entities that conducted separate business, ordered and paid for separate goods and services from its own banking accounts and filed separate federal and state income tax returns and never intended that both corporations be considered by one and the same by any creditor.

II. STATEMENT OF THE QUESTIONS

Whether there existed between Original 50's and Peco Energy an enforceable contract, a binding mutual understanding or so called "meeting of the minds" or was there a mutual mistake, a misconception about a basic assumption upon which the parties based their bargain.

Whether the annual kWh usage by Original 50's had increased over the previous annual kWh period as alleged in the Peco Notice dated February 22, 2011 to an extent that would justify Peco charging another deposit of $1,320.00.

III. SUMMARY OF THE ARGUMENT

Peco Energy Company argues that the determinant issue in this case is not whether one corporation is responsible for the debts of the other corporation but rather which corporation applied for service with Peco Energy Company. Although I believe that the determinant issue is quite simple, it is not so simple to state that if a representative of one corporation gives Peco Energy Company the tax identification number of the other corporation the case is closed and the other corporation is liable for the service provided to the first. This ignores the long and well-reported history of contract law. There must be a meeting of the minds in order for there to be a contract. Where was the utility service to be provided? Did Number 2 50's have their tax identification when utility service was ordered? Was it reasonable for Peco to explain to the representative of Number 2 50's the significance that Peco put on the tax identification number? Who actually paid for the utility service provided to Number 2 50's? Is it reasonable for a contracting party who is in an unfairly superior bargaining position to know that the terms of its agreement must be clear to the party with the inferior bargaining position?

Original 50's did not intend to be the liable party for the utility service ordered, provided to and paid for by Number 2 50's. The worst case scenario even as stated by Peco Energy is that had Number 2 50's been recognized as the responsible party, it would have had to have made a deposit for its entitlement to the utility service. How much was that deposit? Although Peco was not able to define what that deposit would be there was testimony that deposits for Original 50's were in the $1300.00 range. Peco always has a remedy for a customer that is delinquent in its account-the shut off notice. However, the facts show that at no time did Peco shut off service to the Number 2 50's location but rather allowed the delinquency to amount to in excess of $13,000.00. I would argue that a $1,300.00 deposit would have been Peco's only recovery in such an instance. It is therefore

patently unfair for Peco to hold Original 50's liable for Number 2 50's delinquency when Peco always had the power to limit its damages.

IV. ARGUMENT

As stated, the facts of this case are not in dispute. The issue is a simple one: Was there an enforceable contract between Original 50's and Peco Energy. Original 50's argues that there was no such contract. Rather the contract that Peco Energy had was with Number 2 50's, the intention of that business all along. Admittedly, the acting manager of Number 2 50's in response to a request from Peco Energy at the time of ordering utility service at the new location, gave the tax identification number of Original 50's. At that time there was no tax identification number for Number 2 50's. That number was obtained on August 28, 2011.

Peco Energy argues that had it known that Number 2 50's would be the responsible party on the account it would have required a security deposit. When questioned about the amount of the security deposit the Peco representative was unable to define the amount of the deposit that would have been required. There was no written agreement between Peco Energy and either 50's business. Service was being provided on the promise of the parties, one to provide service and the other to pay for it. Number 2 50's operated from that very moment of agreement with Peco Energy with the understanding that it was responsible for the services provided to its location. It followed that understanding by paying for those services charged against its own bank account just as it did for every other service or goods provider with which it did business. Peco Energy accepted those payments without question. Peco Energy was aware that both 50's businesses were separate entities as stipulated by the parties at the initial hearing before the Pennsylvania Public Utility Commission on August 16, 2011. At no time did Peco Energy contact either business to inquire or to state with which business it expected payment for services provided to the Perkasie location, the location of Number 2 50's. The employees of Number 2 50's were unaware that once its tax identification number was obtained that it should have or could have provided that number to Peco Energy to ensure or confirm that Number 2 50's was the

responsible party. Had Peco Energy explained to those employees what its expectation was at the time of the inception of service, Number 2 50's would have responded with its new tax identification number and if necessary paid a security deposit.

Although not a controlling factor, "the concept of unconscionability ... has been extended by the common law courts to various provisions in commercial distributing ... Courts have also recognized a broadly applicable common law public policy against agreements involving an unconscionable disparity in bargaining positions." *Schlessman v. Henson 413 NE2d 1252 (1980).* Original 50's is not arguing that the general agreement of Peco Energy to provide service contained unconscionable provisions. Rather, a contracting party who is in an unfairly superior bargaining position must know that the terms of its agreement must be clear to the party with the inferior bargaining position. Peco Energy dictates its terms and the customer must comply in order to receive services. Peco Energy should have been more clear or better yet should have forwarded a written agreement as to the terms of the contract that it believed it had.

The assent necessary in order to form a...contract is operative only to the extent that it is outwardly, objectively manifested *Restatement Second, Contracts §18 Comment (a).* Assent is usually given by means of an offer and an acceptance. Invalidating causes-mistake, misapprehension, fraud, duress and undue influence, for example-can all, to the extent that they vitiate a party's assent to a bargain, have an effect on the agreement...(T)here are occasionally instances where there appears to be a manifestation of assent initially, but, following appropriate interpretation or construction, it becomes clear that the parties' apparent assent did not in fact indicate assent at all. In such a case, there is no contract. *Williston on Contracts, Fourth Edition by Richard Lord, Volume 1 §3:4 pp. 283, 284, 285.* There is no question that Peco Energy provided services for which it was entitled to be compensated. The question is to whom did it provide those services. When the manager of Number 2 50's spoke on the telephone with Peco Energy at the inception of service, it was clear that Peco was to provide service to the Perkasie location, the place of business of Number 2 50's. Peco Energy's sole argument for the transfer to Original 50's of the unpaid charges at the time of the closing of Number 2 50's is that at that inception of services the

manager gave Original 50's tax identification number when requested to give a tax identification number. In its answer to the Form Complaint, Peco states that "Each service account was initiated by, and at the request of an authorized agent of Back to the Fifties Diner using the tax identification number belonging to Back to the Fifties Diner, Inc. As the requestor and beneficiary of the service, Back to the Fifties Diner, Inc. is liable for the unpaid bill." Peco has acknowledged by stipulation that Original 50's (Back to the 50's Diner, Inc.) and Number 2 50's (Back 2 the 50's Diner, Inc.) were separate and distinct entities. Perhaps had Peco reduced its contract to writing, given the similarity of names and the fact that Number 2 50's had not yet obtained its tax identification number, the worst case situation would have been the requirement of a security deposit from Number 2 50's, as is Peco's policy. However, there was no follow up to ensure that the service being provided to a new and separate location was for the benefit of a new and separate entity.

There must be a meeting of minds in order to constitute a contract. This doctrine is very familiar and has been recognized many times in our Courts." *(Rich v. Pifer*, 100 Pa. Superior Ct. 483, 487.) In all the months that followed the telephone call that set up utility service on or about August 13, 2007, there was never a time that Original 50's "mind" and the "mind" of Peco Energy met in complete harmony. The formation of a contract is like two bridge spans moving from opposite sides to a junction midstream. Unless and until the spans meet perfectly there is no bridge. *(Rich v. Pifer*, 100 Pa. Superior Ct. 483, 487.)

Nothing is better settled than that in order to constitute a contract there must be an offer on one side and an unconditional acceptance on the other. So long as any condition is not acceded to by both parties to the contract, the dealings are mere negotiations and may be terminated at any time by either party while they are pending. There must be a meeting of minds in order to constitute a contract. This doctrine is very familiar and has been recognized many times in our Courts. In *Swing v. Walker*, 27 Pa. Super. 366, we said at page 372, quoting from *Joseph v. Richardson*, 2 Pa. Super. 208: "To constitute a contract the acceptance of the offer must be absolute and identical with the terms of the offer. If one offers another to do a definite thing, and that other person accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat

or it is in effect a counter proposal." We then stated "To bind the parties, an acceptance must be in exact conformity with the proposal. A qualified acceptance does not constitute a contract." This was re-affirmed in *Coastwise L. & S. Co. v. Stitzinger*, 81 Pa. Super. 554, where we went even further and decided that "as the letters show plaintiff did not accept the terms, there was nothing to submit to the jury on the subject: *Clements v. Bolster*, 6 Pa. Super. 411; *Swing v. Walker*, 27 Pa. Super. 366-372; *Brentwood Realty Co. v. Moses*, 73 Pa. Super. 307; *Ehrenstrom v. Hess*, 262 Pa. 104, 105 A. 44."

It would appear from the testimony and the facts of this case that Peco offered and one of the 50's corporations accepted the provision of utility service to the location at 1167 Dublin Pike, Perkasie, PA, the location of Number 2 50's. However, the intention of Number 2 50's was that it was the responsible party for that service. There was nothing in the telephone conversation that alerted the manager that there was any misunderstanding as to whom would be responsible for the service at the Perkasie location. As the contracting party who is in a superior bargaining position it should have ensured that the terms of its agreement must be clear to the party with the inferior bargaining position.

It is interesting to note that the issue in one of the most classic cases in contract law bears a striking similarity to this case. *Raffles v. Wichelhaus, 184 WL 5985 (1864), 159 Eng Rep 375.* In this case the plaintiff and defendant agreed to the sale of cotton to arrive on the ship Peerless. Unknown to the parties, there were two ships Peerless, both of which sailed from the appointed port, one in October and one in December. The defendant averred that he intended the October Peerless; the plaintiff that he intended the December Peerless. In holding that the defendant was not liable for his refusal to accept the cotton tendered by the plaintiff upon the arrival of the December Peerless, the court accepted the argument that "there was no consensus ad idem, and therefore no binding contract." What appeared to be a manifestation of mutual assent in fact did not indicate assent to the bargain. The Restatement Second adopts this view, as do the overwhelming majority of American jurisdictions. *Restatement Second, Contracts §20. Northland Capital Corp. v. Silver 735 F.2d 1421 (D.C. Cir. 1984).* The testimony in this case is clear, the shareholder for Original 50's averred that she intended the Number 2 50's to be responsible for the utility services that it used at its

Perkasie location; Peco Energy that it intended Original 50's to be responsible for the utility services that Number 2 50's used at its Perkasie location, even though acknowledging that the corporations were separate and distinct. The only fact that triggered this averment by Peco was that they had the tax identification number of Original 50's obtained in the telephone call with the manager and not the number of Number 2 50's which was not yet obtained. When both parties independently make a clear, bona fide mutual mistake as to a basic assumption of a contract there can be no contract.

The undisputed facts have shown that Number 2 50's was a separately incorporated, entity that conducted separate business, ordered and paid for separate goods and services from its own banking accounts and filed separate federal and state income tax returns and never intended that both corporations be considered by one and the same by any creditor. The acceptance of an offer, to be effective, must be unequivocal *(Jaxtheimer v. Sharpsville Borough,* 238 Pa. 42, 57; *United Agencies v. Slotsky et al.*, 121 Pa. Super. Ct. 1, 8; Restatement of Contracts, section 58; 1 Williston on Contracts, section 72), and it must be transmitted to the offeror: *Morganstern Elec. Co. v. Coraopolis*, 326 Pa. 154, 157. Had Peco investigated why service was being initiated at Number 2 50's, the Perkasie location, while in its "mind" believing that Original 50's operating at the Furlong location was taking responsibility for the cost of that service, it would have had to communicate with Original 50's what its belief was. In fact, the acceptance of an offer was never transmitted by Original 50's back to Peco. It was never aware of an offer being directed to it and not to Number 2 50's. It is not unreasonable to require that a business with the size and power of Peco be held to a standard that would ensure, if there possibly is some ambiguity in a contract transaction, it would clarify whom the parties to the contract transaction are. Peco, as the provider of utility services, transacting day in and day out, is certainly in a better position to identify a potential problem, and to not be so informal that it would be entitled to rely on a mere telephone call with one entity to hold another entity liable when the first entity defaults on its account. One would think that Peco has seen this situation before.

Regarding the question as to whether the annual kWh usage by Original 50's had increased over the previous annual kWh period as alleged in the Peco Notice dated February 22, 2011 (Original 50's Exhibit C-3, page 1) to an extent that would justify Peco charging

another deposit of $1,320.00, I refer to Original 50's Exhibit C-3, pages 2 and 3. These represent Peco billing statements sent to Original 50's for the monthly periods ending 01/26/10 and 02/23/11. Each bill contains a Total Annual kWh Usage. The one for 01/26/10 shows annual usage as 79,507 and the one for 02/23/11 shows 78,492. The Notice requiring the new deposit dated 02/22/11 states that "Due to an increase in your recent average monthly usage, an additional deposit of $1,325.00 is required...If you do not pay the deposit when billed, your utility service may be shut-off." This, of course, shows the superior bargaining position of Peco and the issues faced by Original 50's, the party with the inferior bargaining position. Simply stated Original 50's disputes the rationale for the imposition of another deposit requirement for its utility usage at its Furlong location.

V. CONCLUSION

The decision on the liability of Original 50's for the acknowledged delinquency of Number 2 50's to Peco Energy must rest on contract law. It cannot be decided solely on one side or the other's factual presentation. As stated the facts are not in dispute. We must put upon Peco Energy a heavier burden because of its superior standing in contracting with its customer for utility services. It sets the terms and conditions as to how it will supply the source of energy and how it will require a deposit, or not, and how it will be paid for that provision of services. It owes a duty to that customer that it will explain fully and clearly who that customer is (admittedly the names of the corporations are strikingly similar-Back to the Fifties Diner, Inc. and Back 2 the 50's Diner, Inc.-but that is marketing not intentional deceit); where the services are to be provided; and whom will be responsible for payment for those services.

One can only speculate how that telephone conversation between the Number 2 50's representative and Peco Customer Service representative played out. Throw in the similar names of the companies, the unfamiliarity of the Number 2 50's representative as to the importance that Peco would put on the tax identification number, even reasonably aware that Number 2 50's could have been a "new" customer, and the dispute has arisen. But if there are mistakes being made by both parties, there cannot be an enforceable contract with Original 50's because it is not even aware that Peco believes that Peco is negotiating a

contract with Original 50's. We must look at place of service, payment for service, the protections that Peco had available to it in the event of a delinquency, and allowing the delinquency to run up to what would be an unconscionable amount for Number 2 50's, a company in financial distress, and even an unconscionable amount for Original 50's, a small company able to pay its expected bills. But for Peco requiring a deposit at the inception of service for Number 2 50's this case does not exist. Penalize the party that has control over the transaction.

As such, Original 50's requests that this Commission finds that no contract existed between Peco Energy Company and Back to the 50's Diner, Inc. because of the lack of the "meeting of the minds" necessary to bind one party to the other and that Peco Energy was in a far better position to ensure that the appropriate party, Back 2 the 50's Diner, Inc. was the responsible party for utility services provided. Further, Original 50's requests that this Commission finds the additional deposit required by Peco Energy for increased usage by Original 50's is not warranted as Peco Energy's own documents show no reasonable basis for such a deposit as the usage actually decreased during this period of time.

VI. PROPOSED ORDERING PARAGRAPHS

THEREFORE IT IS ORDERED:

1. That the arrearages transferred to the Complainant by Respondent from the delinquent account of Back "2" the 50's Diner, Inc. are hereby reversed;
2. That Respondent shall provide continued utility service to the Complainant for so long as Complainant remains current on its service charges;
3. That Respondent shall withdraw its February 22, 2011 deposit demand of Complainant as it is not warranted under the facts as presented to this Commission.

Respectfully submitted

John J. Hare, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing upon the following parties to this proceeding by electronic mail and first class mail:

Pennsylvania Public Utility Commission (first class mail only)
Secretary of the Commission
PO Box 3265
Harrisburg, PA 17105-3265

Administrative Law Judge Angela T. Jones
Pennsylvania Public Utility Commission
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Philadelphia, PA 19107

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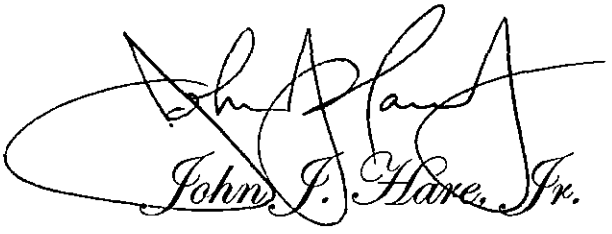
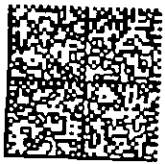


John J. Hare, Jr.
Counsel for Complainant
Back to the 50's Diner, Inc.

Dated: September 30, 2011



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Pennsylvania Public Utility Commission
Secretary of the Commission
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