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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

September 30, 2011

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

RE: Back to the Fifties Diner, Inc v. PECO Energy Company
PUC Docket No. C-2011-2227751

Dear Ms. Chiavetta:

Enclosed for filing with the Commission are the following documents and copies in the matter referenced above.

--	Answer (Original)
--	Answer & New Matter (original)
___	Motion to Consolidate (original)
___	Motion for Judgment on the Pleadings (original)
___	Preliminary Objection (original)
___	Exceptions (original)
___	Reply Exceptions (original)
X	Brief (original)
___	Reply Brief (original)

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,

Tishekia Williams
Counsel for PECO Energy Company
Enc.

Cc: ALJ Angela Jones
John Hare, Esq.

BACK TO THE FIFTIES DINER, INC **Complainant**	:	
v.	:	**DOCKET NO. C-2011-2227751**
	:	
PECO ENERGY COMPANY **Respondent**	:	

MAIN BRIEF OF RESPONDENT, PECO ENERGY COMPANY

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

Prepared by Tishekia E. Williams, Esq.
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STATEMENT OF THE CASE

There are no mysteries in this case. The facts are virtually undisputed. The Complainant, Back to the Fifties Diner, Inc ("Fifties, Inc") has a single officer, Claudine Ascher who serves as President, Treasurer and Secretary of the corporation. (Tr. p 79; PECO Exhibit 7) The corporation's registered address is 800 Edison Furlong Road, Furlong PA and the tax identification number is 810625085. (Tr. p. 74-77; PECO Exhibit 7) Fifties, Inc. was billed for utility service by PECO Energy at two separate locations. (Tr. p 11) On August 1, 2003, an electric service account was initiated by an authorized agent of Fifties, Inc for service at 800 Edison Furlong Road, Furlong PA. (Tr. p.32-33; PECO Exhibit 6) The service was initiated using the name "Back to the Fifties Diner, Inc" with an address of 800 Edison Furlong Road and tax identification number 810625085. (Tr. p. 76; PECO Exhibits 5 & 6) All PECO Energy bills were mailed to "Back to the Fifties Diner, Inc" at 800 Edison Furlong Road.

Then, on August 13, 2007 a second electric service account was initiated by an authorized agent of Fifties, Inc at 1167 Dublin Pike, Perkasie PA. (Tr. p 32, 73; PECO Exhibit 3) The service was initiated using the name "Back to the Fifties Diner, Inc" with a mailing address of 800 Edison Furlong Road and tax identification number 810625085. (Tr. p 72-74; PECO Exhibit 3) PECO Energy bills were mailed to "Back to the Fifties Diner, Inc" at 800 Edison Furlong Road. (Tr. p 73) This service account was closed on September 1, 2010 with a final unpaid balance of $13,113.65. (Tr. p.73) The final bill was not paid. (Tr. p 73) The unpaid balance was transferred to the active account at 800Edison Furlong Road on September 29, 2010. (Tr. p 74)

Although the extent of the delinquency varied greatly at the two locations, Back to Fifties, Inc failed to timely pay its service bill each month for service at 1167 Dublin Pike and 800 Edison Furlong Road,. (Tr. p 93-96, PECO Exhibits 1 & 4). Despite the account delinquency, the sole officer of the corporation never contacted PECO Energy about the accounts until the unpaid balance for service at Dublin Pike transferred to 800 Edison Furlong Road. (Tr. p. 34) She did not ask PECO Energy, or her authorized agent what was needed to establish service for a corporation (Tr. at p. 34) Instead, all operations, minus check writing and waitressing, were simply left to her delegates (Tr. at p. 34-38):

When service was first initiated at the Edison Furlong Road address, a $1,321.00 deposit was assessed to the account. (Tr. p 81) Then, on February 22, 2011, a second deposit in the amount of $1,325.00 was assessed as a result of increased usage and continued delinquency at the Edison Furlong Road address. (Tr. p. 81; PECO Exhibit 4). In June 2011, Complainant was issued a 72 hour notice of termination for past due undisputed charges in the amount of $1,904.51. At that time, the total account balance was $15,709.64. (Tr. at p. 84)

On February 24, 2011, Fifties, Inc. filed a formal complaint against PECO Energy disputing the "improper transfer of separate corporate arrearages. ..." PECO suspended charges on the transferred balance in the amount of$13.113.65.

On March 17, 2011, PECO Energy filed an Answer denying that that the transfer was improper or that the arrearage belong to another corporate entity. On or about July 22, 2011, Fifties, Inc filed an amended complaint alleging that PECO improperly assessed a $1,325.00 deposit as a result of the transferred charges and that PECO wrongfully issued a termination notice on July 22, 2011 for amounts that had been paid and the newly disputed deposit. By notice dated June 29, 2011, a hearing was scheduled for August 16, 2011. The hearing convened as scheduled on August 16, 2011.

ARGUMENT

As a preliminary matter, subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. *Hughes v. PA State Police*, 152 Pa. Commw. 409, 619 A.2d 390 (1992), *alloc. den.*, oh A.2d 390 (1993). The Commission possesses only the authority the state legislature has specifically granted to it in the Public Utility Code. 66 Pa. C.S. §101 et seq. Its jurisdiction arises from the express language of the enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977). Although there will likely be ample discussion of contract and corporate law in the Complainant and Respondent's briefs, the pertinent question, which is whether the Complainant was improperly charged for services by PECO Energy Company, falls squarely within the Commissions jurisdiction.

Section 701 of the Public Utility Code (Code), 66 Pa. C.S. §70 1, provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission. A person seeking affirmative relief from the Commission has the burden of proof. 66 Pa. C.S. §332(a). Accordingly, Complainant must demonstrate by a preponderance of the evidence that PECO has violated its tariff, the Public Utility Code or Commission regulations. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950); *Feinstein v. Philadelphia Suburban Water Company*, 50 PA PUC 300 (1976). Here, Fifties, Inc is the Complainant and bears the burden of proving that it has been improperly billed for service by Respondent, PECO Energy Company. PECO avers that the Complainant, Fifties, Inc was properly billed for the services it requested at 1167 Dublin Pike and 800 Edison Furlong Road. As Fifties, Inc. is responsible for the unpaid charges incurred at

1167 Dublin Pike, PECO Energy is permitted to transfer the unpaid balance to the company's active account at 800 Edison Furlong Road. The Complainant can cite no authority that prohibits the transfer of an unpaid balance from a closed account to an active account for the same customer and rate class.

A. Back to the 50's Diner, Inc was properly billed for service provided to 1167 Dublin Pike, Perkasie PA and is responsible for the $13,113.65 unpaid balance and associated late fees.

In simple terms, a contract is formed were there is an offer, acceptance and consideration. Specifically, a contract is created where there is mutual assent to the terms of a contract by the parties with the capacity to contract. *Firetree, Ltd. v. Department of General Services*, 920 A.2d 906 (Pa. Commw. Ct. 2007). It is generally true that no contract exist unless all the parties involved intend to enter into one. That is, mutual manifestation of intent to be bound is an essential element of a contract. *Philmar MidAtlantic, Inc. v. York Street Associates II*, 389 Pa. Super. 297, 566 A.2d 1253 (1989L

However, in ascertaining the intent of the parties to a contract, it is their outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions, that matter. *Long v. Brown,* 399 Pa. Super. 312, 582 A.2d 359 (1990); *Ingrassia Const. Co., Inc. v. Walsh*, 337 Pa. Super. 58, 486A.2d 478 (1984). Therefore, actual meeting of the minds is not necessary to form a contract. Id. It does not matter if a party believes a contract does not exist if the party's manifested intent reasonably suggested the contrary. *Ingrassia,* 337 Pa. Super. 58, 486 A.2d 478 (1984). Moreover, as a general rule, a court will not afford relief for a unilateral mistake. *In re Allegheny Intern., Inc.*, 954 F. 2d 167 (3d Cir. 1992); Land v. Metropolitan Ins. Co., 388 Pa. Super. 1, 564 A.2d 972 (1989). Contracting parties are bound by their agreements, without regard to whether the terms thereof were fully understood. *Simeone v. Simeone*, 525 Pa.

392, 581 A.2d 162 (1990).

In the instant case Fifties, Inc contacted PECO Energy on or about August 13, 2007 to request electric service at 1167 Dublin Pike, Perkasie PA. At that time, PECO Energy was provided with an applicant name of "Back to the Fifties Diner, Inc.," service address of 1167 Dublin Pike and mailing address of 800 Edison Furlong Road. Additionally, PECO Energy was provided tax identification number 810625085. Effective immediately, PECO Energy provided the service as requested for three years until the service was discontinued by customer request with an unpaid balance of $13,113.65. During this three year period, the Complainant made no attempt to "correct" the application information, despite receiving monthly bills in the name 'Back to the Fifties Diner, Inc."

From this simple and undisputed set of facts, the Complainant asks the Commission to determine that a separate entity called "Back 2 the Fifties Diner, Inc" with a mailing address of 115 Fairview Avenue, Perkasie PA 1 8944 and tax identification of 260759565 is responsible for the billing. Although, Complainant admits that it did not provide PECO Energy with any information for "Back 2 the Fifties," Complainant argues that this entity is responsible for the billing. In support of its position Complainant states that it was their intention to make "Back 2 the Fifties" liable for the bill and it was unaware that it should have provided the appropriate name, address, and tax identification number to PECO Energy. To the contrary, PECO avers that the Complainant's actions evince a clear intent to make a service application for Back to the Fifties Diner, Inc. To the extent that the Complainant mistakenly provided all the wrong identifying information to PECO Energy, that unilateral mistake does not absolve the Complainant of financial responsible for the unpaid bill.

Insofar as "Back to the Fifties Diner, mc" is responsible for the service provided to 1167 Dublin Pike, Commission regulations do not prohibit PECO Energy from transferring the unpaid debt to the customer's active account.

B. The $2,645.00 security deposit assessed to Complainant's account number 15143-00500 was properly assessed based on Complainant's highest month's usage in the preceding twelve months in accordance with PECO Energy's Commission approved tariff rule 5.3 and 5.4

The Complainant was properly assessed a security deposit in accordance with PECO Energy's Commission approved tariff. In relevant part, PECO's tariff provides:

> 5.3 GUARANTEE OF PAYMENTS. The Company may charge a security deposit before it will render service to an applicant or before the Company will continue to render service to a customer for whom the Company provides Consolidated EDC Billing or Separate EDC Billing. The Company may charge deposits to applicants and customers if they have bad credit, lack creditworthiness or as otherwise permitted by Commission statutes, rules, regulations, and as required by Federal Bankruptcy Law. The applicant or customer may be required to provide a cash deposit, letter of credit, surety bond, or other guarantee, satisfactory to the Company. The Company will hold the deposit as security for the payment of final bills and in compliance with the Company's Rules and Regulations. **In addition, the Company may require industrial and commercial customers for which it may provide Consolidated EDC Billing or Separate EDC Billing to post a deposit at any time if the Company determines that the customer is no longer creditworthy or has bad credit or as otherwise permitted by Commission statutes, rules, regulations and as required by Federal Bankruptcy Law**. The Company retains the right to charge customers additional deposits based upon continued bad credit or lack of creditworthiness and increased usage. **[Emphasis Added]**
>
> 5.4 AMOUNT OF DEPOSIT. ... For industrial and commercial accounts, the amount of the deposit shall be the Company's projection of the sum of the Company charges in the customer's two highest monthly bills in the 12 months following the deposit.

PECO's Commission approved tariff is prima fade reasonable and has the full force and effect of law. 66 Pa.C.S. § 316; Kossman v. PA PUC, 694 A.2d 1147 (Pa Cmwlt 1997); Brockway Glass Co. V. PA. PUC, 437 A.2d 1067 (Pa. Cmwlt 1981).

The Complainant disputes that additional deposit requested in February 2011. The additional $1,325 deposit increased the deposit request to $2,645. As indicated on PECO Exhibit 4, the Complainant's two highest bills for service at 800 Edison Furlong was rendered on July 23, 2010 in the amount of $1,329.59 and August 23, 2010 in the amount of $1,316.43 ($2,646.02). Complainant's prior use is a clear indication of its future use. Therefore, PECO's request for a $2,645 deposit is in compliance with its tariff.

C. Complainant failed to meet its burden to prove that PECO improperly issued a notice of termination for disputed charges during the pendency of the complaint.

The 72-hour notice of termination issued on June 22, 2011 for then undisputed past due charges of $1,904.51 was proper. Although it is well-settled law that the provisions of 52 Pa.Code. Chp. 56 and 66 Pa.C.S.Chp.14 do not apply to commercial customers; the Commission may use the regulations as guidance. Pursuant to 66 Pa. C.S. §.1406(a)(1), a public utility may notify a customer of a proposed termination for nonpayment of undisputed delinquent account.

On February 24, 2011, Fifties, Inc. filed a formal complaint against PECO Energy disputing the "improper transfer of separate corporate arrearages. ..." The complaint did not dispute the security deposit. At that time PECO suspended all collection activity on the transferred balance in the amount of $13,113.65.

On June 22, 2011, the Complainant was issued a 72 hour notice of termination for past due undisputed charges in the amount of $1,904.51. At that time, the total account balance was $15109.64. Approximately one month later, on or about July 22. 2011. Fifties Diner, Inc filed an amended complaint alleging that PECO improperly assessed a $1,325.00 deposit as a result of the transferred charges and that PECO wrongfully issued a termination notice on July 22, 2011 for amounts that had been paid and the newly disputed deposit. Inasmuch as the dispute was filed after the termination notice was issued, the notice was proper.

Conclusion

Based on the forgoing statements, PECO Energy requests that the complaint of Back to the Fifties Diner, Inc be dismissed as the Complainant has failed to demonstrate that PECO Energy violated the Public Utility Code, Commission regulations or its tariff.

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Dated: September 30, 2011

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

BACK TO THE FIFTIES DINER, INC	:	
Complainant	:	
v.	:	**DOCKET NO. C-2011-2227751**
	:	
PECO ENERGY COMPANY	:	
Respondent		

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 (Federal Express only)
Secretary of the Commission
PO Box 3265
Harrisburg, PA 17105-3265

Administrative Law Judge Angela T. Jones (via electronic mail and U.S. Mail)
Pennsylvania Public Utility Commission
810 Market Street, 4th Floor, Suite 4063
Philadelphia, PA 19107

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John J. Hare, Jr. (via electronic mail and U.S. Mail)
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2370 York Road
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Dated: September 30, 2011

Tishekia E. Williams, Esq.
Counsel for PECO Energy Company
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