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October 5, 2011

VIA HAND DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

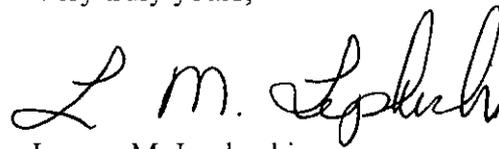
Re: E.C. Smart v. PECO Energy Company
Docket No. C-2010-2193243

E.C. Smart v. Commerce Energy, Inc.
Docket No. C-2010-2193415

Dear Secretary Chiavetta:

On behalf of Commerce Energy, I have enclosed for filing the original and nine (9) copies of the Replies to Exceptions on behalf of Commerce Energy, Inc. in the above-captioned matter. Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,



Lauren M. Lepkoski

LML/kra
Enclosure
cc: Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

E.C. SMART :
 :
 v. : Docket No. C-2010-2193415
 :
 COMMERCE ENERGY, INC. :
 :
 E.C. SMART :
 :
 v. : Docket No. C-2010-2193243
 :
 PECO ENERGY COMPANY :

REPLIES TO EXCEPTIONS
ON BEHALF OF
COMMERCE ENERGY, INC.

BUCHANAN INGERSOLL & ROONEY, P.C.

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Attorneys for Commerce Energy, Inc.

Dated: October 5, 2011

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I. INTRODUCTION

On August 10, 2010, E. C. Smart ("Complainant") filed a Formal Complaint with the Pennsylvania Public Utility Commission ("Commission") against PECO Energy Company ("PECO") at Docket No. C-2010-2193243. The Complainant also filed a Formal Complaint with the Commission against Commerce Energy Inc. ("Commerce") at Docket No. C-2010-2193415. In both Formal Complaints the Complainant alleged that: (i) she is being billed for supply charges by Commerce, an electric generation supplier ("EGS") that she did not select; (ii) there are incorrect charges on her bill; and (iii) PECO terminated her service on April 10, 2010, without proper notice.

On September 1, 2010, PECO filed an Answer and New Matter.

On October 15, 2010, Commerce filed an Answer and New Matter. Commerce also filed a Motion to Join an Indispensable Party, requesting that PECO be joined in the proceeding at Docket No. C-2010-2193415.

The Complainant failed to file a response to either the New Matter or the Motion to Join An Indispensable Party both filed by Commerce.

On May 27, 2011, Administrative Law Judge ("ALJ") Christopher P. Pell issued a *Hearing Notice for July 29, 2011, at 10:00 a.m.*

On June 1, 2011, ALJ Pell issued a Prehearing Order.

On June 14, 2011, ALJ Pell issued an Order consolidating Docket Nos.C-2010-2193243 and C-2010-2193415.

On June 13, 2011, Commerce submitted a request to allow its witness, Inger Goodman, to testify telephonically at the July 29, 2011, hearing, instead of in-person, because she is located in La Palma, California. There was no objection to Commerce's request.

On July 29, 2011, ALJ Pell granted Commerce's request to allow telephonic testimony.

On the evening of July 28, 2011, the Complainant faxed a "Motion For Summary Judgment" with an attachment to Commerce.¹

The hearing was held on July 29, 2011. The Complainant failed to appear at the hearing. At the outset of the hearing, counsel for PECO requested that the ALJ strike the complainant's Motion For Summary Judgment because it was untimely. Counsel for Commerce joined in the request.

On August 18, 2011, PECO and Commerce jointly filed a letter addressing the Complainant's Motion for Summary Judgment.

On August 23, 2011, ALJ Pell issued his Initial Decision ("ID"), dismissing the Formal Complaint with prejudice.

On September 14, 2011, the Complainant faxed to Commerce's counsel a "Sur Motion for Summary Judgment."

In accordance with the Sections 5.102(b) and 5.103(c) of the Commission Regulations, 52 Pa. Code §§ 5.102(b) and 5.103(c), Commerce submits the following Answer to the Complainant's Motion.

II. REPLY TO MOTION

The Complainant faxed a "Sur Motion for Summary Judgment" on September 14, 2011, to Commerce. Commerce is unaware if the Complainant filed the "Sur Motion for Summary Judgment" with the Commission's Secretary's Bureau. However, even if the Complainant filed the "Sur Motion for Summary Judgment" with the Commission's Secretary Bureau, the Complainant's Motion is untimely.

¹ It appears the Motion was also faxed to PECO and the ALJ.

Section 5.102(a) of the Commission's regulations, 52 Pa. Code § 5.102(a)

provides that:

After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. . . .

The Complainant filed a "Sur Motion for Summary Judgment" after the ALJ issued his I.D. This regulation clearly contemplates a party moving for summary judgment/judgment on the pleadings prior to hearing, and certainly not after an I.D. has already been issued. Therefore, the Complainant's "Sur Motion for Summary Judgment" should be denied as untimely.

III. REPLIES TO EXCEPTIONS

A. Overview

To the extent that the Commission treats the Complainant's "Sur Motion for Summary Judgment" as Exceptions to the ALJ's I.D. rather than a Motion, Commerce submits the following Replies in accordance with Section 5.535 of the Commission Regulations, 52 Pa. Code § 5.535. The Complainant's Motion is unintelligible. However, Commerce has attempted to discern the Complainant's concerns and respond accordingly.

B. Reply to Ground One

Ground One of the Sur Motion for Summary Judgment concerns the PECO and Commerce August 18, 2011, letter to the ALJ stating that the Complainant's Motion for Summary Judgment (that was faxed to PECO, Commerce, and the ALJ on the eve of the hearing) was untimely.² The ALJ did not consider PECO and Commerce's August 18, 2011 letter in his I.D. Therefore, any of the Complainant's concerns regarding the August 18, 2011, letter are

² Sur Motion for Summary Judgment at 2-3.

moot. However, the ALJ correctly determined in his I.D. that the Complainant's Motion for Summary Judgment was untimely.³

Section 5.102(a) of the Commission's regulations, 52 Pa. Code § 5.102(a) provides that:

After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

The Complainant submitted her Motion For Summary Judgment the eve of an in-person hearing scheduled for July 29, 2011. In the instant proceeding, the pleadings closed on November 4, 2010 and the ALJ issued a hearing notice to the parties on May 27, 2011 (which was two months before the scheduled hearing). Therefore, the Complainant had sufficient time to file her Motion for Summary Judgment. As the ALJ noted in his I.D., "[c]learly, the Complainant submitted her Motion at such a time as to delay the scheduled hearing."⁴

Moreover, the Complainant's Motion for Summary Judgment was substantively deficient for numerous reasons. First, the Complainant failed to file the Motion for Summary Judgment with the Commission's Secretary. Second, the Complainant's Motion for Summary Judgment failed to include a Notice to Plead as required by 52 Pa. Code 5.102(a).⁵ Third, the Motion was not based on the pleadings and depositions, answer to interrogatories, admissions and supporting affidavits as required by 52 Pa. Code § 5.102(c).⁶ Fourth, 52 Pa. Code § 5.102(d)(1) provides that a motion for summary judgment may be granted "if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no

³ I.D. at 5-6.

⁴ I.D. at 6.

⁵ I.D. at 6.

⁶ I.D. at 6.

genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law." As the ALJ correctly noted:

[t]he parties' pleadings (E.C. Smart's Complaint, PECO's Answer and Commerce's Answer) reveal a disagreement between the Complainant, PECO and Commerce over material facts. The Complainant and PECO disagree over charges appearing on her electric bill and whether termination of electric service was proper. The complainant and Commerce disagree over generation supply charges appearing on her bill. Clearly, since there are genuine issues as to material facts, the complainant is not entitled to judgment as a matter of law.⁷

Therefore, the ALJ correctly denied the Complainant's Motion for Summary Judgment.

C. Reply to Ground Two

Ground Two of the Sur Motion for Summary Judgment concerns PECO's and Commerce's Motion to Dismiss the Complainant's Formal Complaint with prejudice at the July 29, 2011, hearing. The ALJ issued a Hearing Notice and Prehearing Order that provided the Complainant with notice of the date, time, and place of the hearing, clear instructions for requesting a continuance, and a warning that if she failed to appear at the hearing her case will be dismissed. Specifically, the May 27, 2011 Hearing Notice stated, "You may lose the case if you do not come to this hearing and present facts on the issues raised." The ALJ's Prehearing Order also stated:

You must be available in the hearing room when your case is called by the presiding Administrative Law Judge. You should arrive at the hearing room no later than 9:45 a.m. and wait in the hearing room until the Administrative Law Judge calls your case. **If the customer is not present and prepared to go forward with the case when it is called, the case will be dismissed by the Administrative Law Judge.**⁸

⁷ I.D. at 6.

⁸ Prehearing Order at 1.

2. A request for a change of the scheduled hearing date must state the agreement or opposition of other parties, and must be submitted in writing no later than five (5) business days prior to the hearing. 52 Pa. Code §1.15(b). Requests for changes of hearing dates must be sent to me and all parties of record... Changes are granted only in rare situations where good cause exists.⁹ (emphasis original)

The Hearing Notice and the Prehearing Order provided notice and warned the Complainant that she could lose her case if she failed to appear. Therefore, the Complainant was afforded due process. *Schneider v. Pa. P.U.C.*, 479 A.2d 10 (Pa.Cmwlth. 1984) (due process requirement is satisfied when the parties are provided notice and the opportunity to appear and be heard.) As the ALJ noted in his I.D.:

Clearly, the complainant demonstrated that she knew how to contact the OALJ office since she faxed her Motion For Summary Judgment to the office and left a voicemail for me. However, she did not, at any time, request a postponement of the scheduled hearing, nor did she make any attempt whatsoever to notify me that she did not plan to attend the hearing. Under these circumstances, it appears complainant had ample opportunity to appear and be heard in this proceeding, but voluntarily chose not to do so. Therefore, the due process rights of the complainant have been fully protected.¹⁰

Moreover, Section 332(f) of the Public Utility Code, 66 Pa.C.S.A. § 332(f) provides in relevant part:

Any party who shall fail to be represented at a scheduled conference or hearing after being duly notified thereof, shall be deemed to have waived the opportunity to participate in such conference or hearing, and shall not be permitted thereafter to reopen the disposition of any matter accomplished thereat . . .

⁹ Prehearing Order at 2.

¹⁰ I.D. at 6.

Because the Complainant failed to appear, ALJ Pell correctly held that the Complainant waived her opportunity to participate in the hearing and the Complainant failed to bear her burden of proof.¹¹

The Complainant's failure to appear was due to her own negligence. A party has a duty to appear at an administrative hearing under Pennsylvania law: "a party's own negligence is not sufficient good cause as a matter of law for failing to appear at a . . . hearing." *Eat 'N Park Hospitality Group, Inc v. Unemployment Compensation Board of Review*, 970 A.2d 492, 494 (Pa. Cmwlth. 2008). Here, the Complainant was advised how to contact the ALJ to request a continuance. However, she failed to do so. Instead, the Complainant faxed a Motion for Summary Judgment and left a voicemail with the ALJ the evening before the hearing regarding her Motion.

The Complainant did attach to her Sur Motion for Summary Judgment a notice from the JFK Medical Center for the day of the hearing. Assuming *arguendo* that the Complainant had a doctor's appointment on the day of the hearing, nothing prevented her from requesting a continuance before the hearing. The Motion does not assert that the Complainant's failure to attend the hearing was due to the doctor's appointment nor does the Complainant request another hearing in the Sur Motion for Summary Judgment. Therefore, the Commission simply has no basis to "reopen" the case when Complainant waived her right to a hearing by negligently failing to appear.

Furthermore, it would be unfair to require Commerce and PECO to expend more time, money, and energy to defend its case at a new hearing when it already appeared at the scheduled hearing, with counsel and a witness, prepared to defend its case. ALJ Pell Correctly dismissed

¹¹ I.D. at 8.

the complaint with prejudice "due to the waste of the Commission's and respondent's time, money, and energy occasioned by complainant's failure to appear at a hearing of which she had notice . . ." ¹² Commerce has already spent a considerable amount of resource to prepare for the scheduled hearing; it should not be asked to do more.

D. Reply to Ground Three

Ground Three of the Sur Motion for Summary Judgment concerns PECO's 60 day revert process. ¹³ The Complainant misunderstands the 60 day revert process. The 60 day revert process is a part of PECO's billing process. If a customer does not pay PECO for the EGS charges then PECO will send a letter to the customer informing them they will receive a separate bill from the EGS instead of PECO continuing to send one bill with both the EDC and EGS charges. The 60 day revert process is not connected to the termination of Complainant's electric service.

E. Reply to Remedies

The remedy that the Complainant requests in her Sur Motion for Summary Judgment is that the Commission grant her Motion for Summary Judgment and her Sur Motion For Summary Judgment. ¹⁴ The Complainant does not request another hearing before the ALJ. Although the Complainant did attach to the Sur Motion for Summary Judgment a notice from the JFK Kennedy Medical Center for the day of the hearing, this notice is not material to her remedy since the Complainant is not requesting another hearing.

¹² I.D. at 9.

¹³ Sur Motion for Summary Judgment at 4-5.

¹⁴ Sur Motion for Summary Judgment at 5-6.

IV. CONCLUSION

For the reasons set forth in the Replies to the Complainant's September 14, 2011, Exceptions, Commerce respectfully requests that the Commission:

- A. Affirm ALJ Pell's Initial Decision; and
- B. Dismiss the *Formal Complaint* with prejudice.

Respectfully submitted,



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Attorneys for Commerce Energy, Inc.

Dated: October 5, 2011

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

E.C. SMART	:	
	:	
v.	:	Docket No. C-2010-2193415
	:	
COMMERCE ENERGY, INC.	:	
	:	
E.C. SMART	:	
	:	
v.	:	Docket No. C-2010-2193243
	:	
PECO ENERGY COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

VIA UPS OVERNIGHT

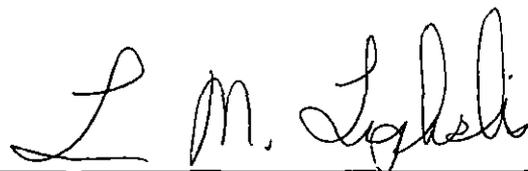
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Dated this 5th day of October, 2011.

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