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October 11, 2011

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

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OCT 11 2011

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**RE: Back to the 50's 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) |
| --- | Brief (original) |
| <u>X</u> | Reply Brief (original) |

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Also enclosed is an extra copy of this letter, which I request that you date stamp and return to me in the envelope provided as proof of filing. Thank you for your time and attention on this matter.

Very truly yours,



Tishekia Williams
Counsel for PECO Energy Company
Enc.

Cc: John J. Hare, Jr.
ALJ Angela T. Jones

BACK TO THE FIFTIES DINER, INC :
Complainant :

v. :

PECO ENERGY COMPANY :
Respondent :

DOCKET NO. C-2011-2227751

**REPLY 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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Summary of the Argument

There are very little factual disputes in this case. Instead the dispute centers on the objective meaning of the facts. This case presents two issues. The first issue is whether PECO Energy properly billed the Complainant, Back to the Fifties Diner, Inc for utility service provided to 1167 Dublin Pike, Perkasio PA. The second issue is whether the additional \$1,300 security deposit was properly assessed to the Complainant's account.

The Complainant has the burden to prove that PECO is responsible and accountable for the problems in its complaint. In meeting this burden, the Complainant must demonstrate its case by the preponderance of the evidence. In meeting its burden of proof it is important to note that mere bald assertions, personal opinions or perceptions do not constitute evidence.

The record evidence in this case demonstrates that the Complainant was properly billed for based on its outward manifestation of intent to PECO Energy to form a contract for utility service. There was no invalidating mutual mistake. The Complainant states that "one can only speculate how that telephone conversation between PECO Energy and Number 2 50's played out." The Complainant goes on to argue that the "burden" should be placed on PECO Energy as the entity with "superior bargaining power." However the record contains no evidence to support this position. Moreover, the evidence is equally clear that the security deposit was assessed in compliance with PECO's Commission approved tariff. Therefore, the complaint must be dismissed.

ARGUMENT

PECO Energy notes that the Complainant's brief does not address its prior allegation of improper notice of termination. Based on this exclusion, PECO Energy believes that this allegation has been withdrawn and is no longer the subject of dispute. Therefore, the notice of termination is not addressed in this reply brief. Instead, the Complainant's brief does address two issues. The first issue whether PECO Energy improperly billed Back to the Fifties Diner, Inc for service at 1167 Dublin Pike, Perkasio PA. The second issue is whether PECO Energy improperly increased the deposit assessed to the account of Back to the Fifties Diner, Inc. PECO avers that the billing and security deposit is proper.

A. The Complainant's reliance on various facts and conclusions not supported by substantial evidence can not form the basis for a ruling in its favor.

In its brief, the Complainant relies on a number of statements and conclusions that are not supported by substantial evidence. Because the Complainant failed to put forth sufficient evidence to support these statements and conclusions, they can not be the basis for a ruling in the Complainant's favor. As the person seeking affirmative relief from the Commission the Complainant has the burden of proof. 66 Pa. C.S. §332(a). Although the Complainant erroneously argues that "we must put upon PECO Energy a heavier burden because of its superior standing..." the law is clear that the Complainant alone bears the burden of proof. While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001). To satisfy its burden of proof, the Complainant must demonstrate by a preponderance of the evidence that PECO Energy is responsible and accountable for the problem(s) in its complaint. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). It is well established law

that mere bald assertions, personal opinions or perceptions do not constitute evidence.

Pennsylvania Bureau of Corrections v. City of Pittsburgh, 516 Pa. 75, 532 A.2d 12 (1987).

1. There is no evidence that PECO Energy billed Back 2 the Fifties Diner, Inc. for service at 1167 Dublin Pike.

First and most significantly, the Complainant repeatedly asserts that “Back 2 the Fifties Diner, Inc” received and was billed for utility service at 1167 Dublin Pike, Perkasio Pennsylvania. Indeed, every page of the Complainant’s brief states or implies that “Back 2 the Fifties Diner, Inc.” received and was billed for electric service from PECO Energy Company. This allegation is the nucleus of the Complainant’s dispute and may not simply be asserted as true, no matter how frequently stated.

On Page 2, ¶1 of its brief the Complainant states “[Back 2 the 50’s Diner, Inc] 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.” While it is undisputed that Back 2 the Fifties Diner, Inc was incorporated by Claudine Ascher in August 2007, the Complainant provide no evidence that Back 2 the Fifties Diner, Inc contracted, or even requested service from PECO Energy. Rather, the Complainant summarily states that “Fifties 2” received service at account number 36509-35008, although the record evidence conclusively demonstrates that Back to the Fifties Diner, Inc was the customer of record for account number 36509-35008. The Complainant goes on to state that the “Fifties 2” debt was transferred to the “Original 50’s.”

Again, the record contains no evidence that could be reasonably and objectively interpreted as a service application by Back 2 the Fifties Diner, Inc. The service was initiated using the name, address and tax identification number of Back to the Fifties Diner, Inc. After three years of service, no additional information was ever provided to PECO Energy. The evidence is clear

that PECO billed one single entity for service. That entity is “Back to the Fifties Diner, Inc.” While there is a dispute regarding whether that entity was properly billed for service, it is indubitable that “Back to the Fifties Diner, Inc” is the entity that was billed for PECO service. All statement to the contrary must be rejected.

2. PECO never admitted that “the balance owed by Number 2 50’s was transferred to the account of the Original 50’s.”

On page 4, ¶1, the Complainant states “Number 2 50’s began falling behind on its account and Peco Energy would telephone the business at its Perkasio 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. ... 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).” Again, this entire paragraph is unsupported by the record evidence. There is no evidence that suggest Back 2 the Fifties Diner, Inc. was billed for service by PECO Energy. The complainant did not provide any evidence supporting its allegation that Back 2 the Fifties Diner, Inc paid for services provided to the Perkasio location. When questioned on the issue, PECO’s witness testified that it had no knowledge of the second entity or whether it made any payments. Therefore, the statement is merely an uncorroborated allegation. Finally, there is no evidence that PECO Energy telephone the Perkasio location to arrange a payment agreement with “Number 2 Fifties.” Instead the record evidence clearly demonstrates that PECO contacted the Edison Furlong Road location, never submitted a bill to “Back 2 the Fifties Diner, Inc” and adamantly disputes that the debt is owed by “Number 2 50’s.”

On page 7, ¶3, the Complainant goes on to state “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.” To be clear, PECO Energy did not stipulate that it *was* aware that both 50’s businesses were separate entities. Instead, PECO stipulated that two separate and distinct entities exists, that Back to the Fifties Diner, Inc was established in 2003 and still exists, and that Back 2 the Fifties Diner, Inc was incorporated in 2007 but not longer exists. To be clear, PECO Energy made no representations of knowledge regarding whether Back 2 the Fifties Diner, Inc existed at the time the second service was initiated in the name Back to the Fifties Diner, Inc.

3. The Complainant failed to provide substantial evidence to support its allegation that Back to the Fifties Diner, Inc’s tax identification number was intended for temporary use.

On Page 2, ¶2 of the Complainant’s main brief, the Complainant states “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.” However, the rationale provided for providing Back to the Fifties Diner, Inc tax identification number is not supported by substantial evidence. While the evidence suggests that Back 2 the Fifties Diner, Inc did not have a tax identification number at the time it applied for service, the Complainant has not provided sufficient evidence to conclude that the tax id number provided was intended to be used temporarily. Instead, on cross examination Ms. Ascher testified that her mother probably “gave the first number she was aware of.”¹ By contrast, PECO’s witness testified that its records indicate that the applicant consciously decided to apply for service using the Original 50’s name

¹ Tr. at p. 34, line 10-13.

to take advantage of the less strenuous application process.² Whatever the reason may be, it is undisputed that PECO Energy requested the applicant's tax identification number, among other information. It is undisputed that the Complainant provided the tax identification number for Back to the Fifties Diner, Inc. among other information. Finally, it is undisputed and the Complainant never contacted PECO Energy to provide the tax identification number for the alleged "intended" applicant. Despite these facts, the Complainant implies that the "Original 50's" number was provided as a temporary measure until the correct tax identification number could be obtained. However, the Complainant has not provided substantial evidence to support its position and therefore this conclusion must be rejected.

4. There is no evidence to support the Complainant's claims that PECO Energy is in a superior bargaining position.

On page 5, ¶3, the Complainant summarily asserts that PECO Energy is in a "superior bargaining position" and therefore has a heightened duty. Whether a party has a superior bargaining position over another is an objective question of fact that must be supported by evidence. However, the record is entirely lacking of any evidence to support the Complainant's allegation. Indeed, no evidence was proffered, no questions were asked, and no exhibits submitted to demonstrate that PECO Energy is in a superior bargaining position to Back to the Fifties Diner, Inc. Therefore, it is unclear to the undersigned how the Complainant reached this conclusion.

Whether a party has a superior bargaining position can be determined by a number of factors, including but not limited to, which party has access to relevant information and whether the parties are acting of their own volition. The Complainant alleges that PECO Energy controlled the relationship and dictated all the terms of the agreement. The Complainant argues

² Tr. at p. 89, line 20-24.

that because PECO always had the power to terminate the service, it has somehow waived its right to receive payment for the services rendered. This argument misses the mark for a number of reasons. Just as PECO Energy always had the power to terminate the service, so too did the Complainant. The Complainant was fully aware that it was unable to meet its financial obligations long before PECO Energy became aware. At all times it had the ability to call and discontinue the service prior to amassing a \$13,000.00 bill. Instead, the Complainant took affirmative steps to prevent the service termination by requesting extensions and payment agreements knowing that it was unable to meet the obligations. The Complainant now argues that PECO Energy should have simply terminated the service. PECO avers that this argument is disingenuous, under the circumstances.

Additionally, all customers receive service in accordance with PECO's Commission approved tariff. PECO Energy's tariff is not simply imposed by the Company. Instead it's approved by the Commission upon petition of the Company. The process involves input and opposition from various stakeholders including consumer advocates and small business advocates to name a few. Once approved, the tariff is binding on the customers, Commission and Company. Once approved, PECO Energy is required to comply with its tariff (in addition to the Public Utility Code and Commission regulations) which governs virtually all aspects of service including the rates charged, payment terms, payment priority, billing cycle, voltage delivered, installation, metering, termination, late fees, security deposits, etc, etc, etc. Moreover, because PECO Energy provides an essential service, it is not at liberty to decline service to customers otherwise qualified to receive service under the law. Importantly, there is no law that dictates that a customer may only receive service at one location, or that a customer may not place service in its name for the benefit of another customer, whether residential or commercial.

In this case, the Complainant was the guardian of the relevant information. There were no public records that tied “Back 2 the Fifties Diner, Inc” to the 1167 Dublin Pike address. The Complainant had all the information necessary to prevent this situation, while PECO had none. Yet, without any evidence the Complainant summarily asserts that PECO Energy was in a “superior bargaining position.” The record evidence does not support this position.

Finally, on page 8, ¶1, the Complainant claims that “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.” Again, this statement is conjecture unsupported by the record evidence. First, PECO Energy testified that the Complainant was advised of the application requirements. Second, PECO Energy specifically requested the tax identification number; therefore the Complainant’s employees had actual knowledge that the tax identification was required. Because the “new” tax identification number was not provided despite PECO’s request for the applicant’s tax identification number, it can not be concluded that the employees would have provided the tax identification number upon request. In fact, they did not.

The Complainant’s brief is replete with mischaracterizations, conclusions lacking substantial evidence, and in some cases statements devoid of any supporting evidence. The Complainant can not meet its burden with statements of its subjective intentions and mere bald assertions. Therefore, the statement and conclusions discussed above must be rejected.

5. The Complainant's depiction of PECO's security deposit policies are mischaracterizations of the record evidence.

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.

On page 3, ¶1, the Complainant states that PECO's policy is to require a deposit for any new business, but security deposits are not required for service to existing customers. The Complainant also states that PECO Energy did not require a security deposit in this case. These statements mischaracterize the testimony and evidence. First, PECO did not state that its policy dictates that any new business is required to post a deposit. Second, PECO Energy did not state that existing customers are exempt from security deposit requirements. Finally, the evidence

shows that PECO Energy did require a security deposit from Back to the Fifties Diner, Inc at both addresses. Therefore, all three statements are contrary to the record evidence.³

On page 7, ¶3, the Complainant states “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.” Again, this statement mischaracterizes PECO’s testimony. First, PECO Energy clearly testified that a new business entity would be required to complete an application in person at PECO Energy offices as well as submit a deposit. PECO Energy also testified that the amount of the deposit is based on the individual customer’s usage. Therefore, the Complainant’s restatement of PECO’s position is incomplete and inaccurate based on the record. To be clear, PECO’s testimony regarding initial deposit requests for new commercial customers was based on its position that the Complainant should not be permitted to claim a certain corporate identity when it suits its financial interest. The Complainant avoided the commercial new service application process and initial deposit requirement by asserting itself as Back to the Fifties Diner, Inc. Now, three years and \$13,000 later, the Complainant seeks to avoid financial responsibility for the bill by asserting itself to be Back 2 the Fifties Diner, Inc. PECO Energy avers that this position is inequitable.

B. The Complainant’s outward and objective actions demonstrate a manifestation of assent resulting in a binding contract between PECO Energy Company and Back to the Fifties Diner, Inc.

When viewed objectively, the facts of this case demonstrate that the Complainant acted to create a binding contract between PECO Energy and Back to the Fifties Diner, Inc. In describing the concept of “mutual manifestation of assent” the Complainant states that “the formation of a

³ The excerpt from the transcript provided in page 4 of the Complainant’s brief contradicts all three statements.

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.” When the Complainant contacted PECO Energy and provided the name, address and tax identification number for Back to the Fifties Diner, Inc in support of its application for service at 1167 Dublin Pike, and PECO Energy provided the service per the Complainant’s request, the “spans met.” That is because ascertaining the intent of the parties to a contract requires one to examine the party’s outward and objective manifestations of assent, as opposed to their undisclosed and subjective intentions. *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). 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). The Complainant also argues that no contract exists due a mutual mistake between the parties. Blacks Law Dictionary defines a mutual mistake as “a mistake in which each party misunderstands the other's intent.” The intention of the party’s requires an objective evaluation of the facts. By contrast, a unilateral mistake is defined as a mistake by only one party to a contract. 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); *Lanci v. Metropolitan Ins. Co.*, 388 Pa. Super. 1, 564 A.2d 972 (1989).

The Complainant is unable to refer to any facts in the record that support a finding that its outward manifestations to PECO Energy can be objectively interpreted as creating a contract between Back 2 the Fifties Diner, Inc. and PECO Energy. Instead, the Complainant argues that Back 2 the Fifties Diner, Inc was incorporated and operating a business at 1167 Dublin Pike. The Complainant argues that the two diners operated separate and distinct from each other. Based on these statements, the Complainant asks this Commission to conclude that Back 2 to the

Fifties Diner, Inc is the party that contracted for the service. However, this argument ignores that fact that prior to this instant litigation, Back 2 the Fifties Diner, Inc failed to provide any identifying information to PECO Energy. Instead, PECO records indicate that the decision was made to apply for additional service at a new establishment for Back to the Fifties Diner, Inc. Back to the Fifties Diner, Inc requested and was provided service at 1167 Dublin Pike. If this is a mistake, the mistake was unilaterally on the part of the Complainant.

Two theories have been advanced to explain the circumstances leading to billing of Back to the Fifties Diner, Inc. PECO's proffered explanation is that the Complainant consciously sought to avoid the new service application process and opted to established a second service. The Complainant's proffered reason is that the Complainant was unable to meet the requirements for a new service application because it lacked the required tax identification number at the time. Although Complainant's rationale is disputed, it is noted that under both theories the Complainant is responsible and accountable for Back to the Fifties Diner, Inc being billed for service at 1167 Dublin Pike. Under both theories, the Complainant contacted PECO Energy and requested service using information exclusively under its control, on its own volition, for the purpose of securing service immediately.

Despite the fact that Back 2 the Fifties Diner, Inc has a separate mailing address, the Complainant provided PECO Energy with the mailing address for Back to the Fifties Diner, Inc. Even when PECO mailed monthly bills directly to "Back to the Fifties Diner, Inc" at its address for three years, neither the manager nor owner ever contacted PECO to correct what is now alleged to be a mistake.

Despite the fact that Back 2 the Fifties Diner, Inc. has a separate tax identification number, which was available to it a few short weeks after the service was initiated, the

Complainant never contacted PECO Energy to provide that information. The Complainant that PECO Energy requested the information as a condition of service. The Complainant also admits to providing the tax identification number of Back to the Fifties Diner, Inc. Nonetheless, the Complainant merely argues that it didn't know a tax identification number was required, while making no attempt to find out.

Despite the fact that the manager admittedly knew that the bills were all rendered in same exact name and to the same exact mailing address, neither the manager nor the owner ever contacted PECO Energy to ascertain its responsibilities. It simply argues that because of PECO Energy's "size a superior bargaining power" the onus should be on PECO Energy to somehow figure out the customers true intentions because clearly it can not rely on its word. PECO avers that this position is neither reasonable nor practical under the circumstances. PECO Energy provides applicants with an explanation of the requirements for establishing new service. Providing reasonable service does not require PECO Energy to protect customers from themselves and their own mistakes. The Complainant is responsible for the operations of its own business.

Request for Relief

Based on the substantial record evidence and forgoing statements, PECO Energy requests that the complaint of Back to the Fifties Diner, Inc be dismissed in its entirety. The Complainant's outward manifestations to PECO Energy clearly demonstrate intent to form a *contract for utility services between PECO Energy Company and Back to the Fifties Diner, Inc.* Moreover, the security deposit was properly assessed to the Complainant's account based on increased usage as outlined in PECO's Commission approved tariff.

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, Tishekia Williams, hereby certify that I have this day served a copy of PECO Energy Company's Reply Brief in the above matter upon all interested parties by mailing a copy, properly addressed and postage prepaid to:

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Pennsylvania Public Utility Commission
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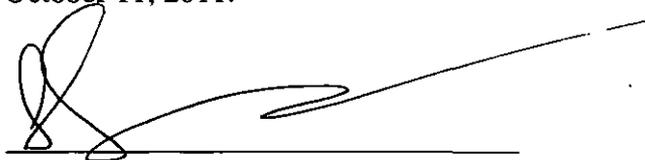
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Dated at Philadelphia, Pennsylvania, October 11, 2011.



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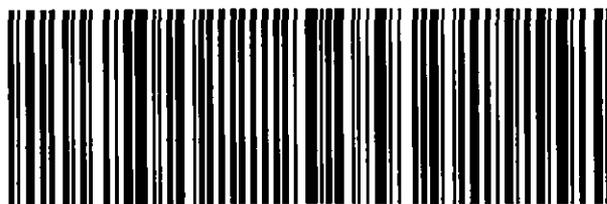
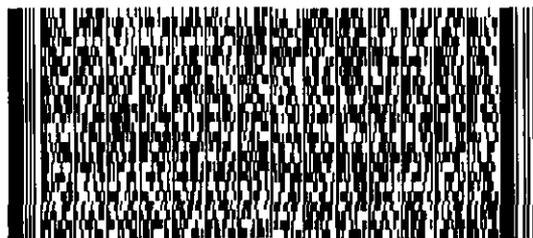
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