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October, 11 2011

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Administrative Law Judge Angela T. Jones  
Pennsylvania Public Utility Commission  
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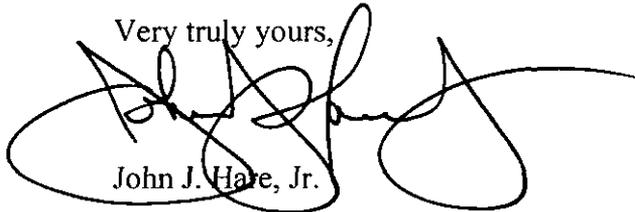
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Re: Back to the 50's Diner, Inc. v. Peco Energy Company  
C-2011-2227751

Dear Secretary, Judge Jones and Ms. Williams:

Please find enclosed Complainant's Reply Brief in the above captioned matter. Thank you.

Very truly yours,



John J. Hare, Jr.

JJH/kg  
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REPLY BRIEF OF BACK TO THE 50'S DINER, INC.

To: The Honorable Angela T. Jones  
Presiding Administrative Law Judge

In accordance with 52 Pa. Code § 5.501 and the August 25, 2011 Order of the Presiding Administrative Law Judge Back to the 50's Diner, Inc. ("Original 50's") hereby files its Post-Hearing Reply Brief in the captioned proceedings.

I. INTRODUCTION

Original 50's concedes that it bears the burden of proving that it has been improperly billed for service by Respondent, PECO Energy Company ("PECO"). It further concedes that the facts are virtually undisputed. However, the interpretation of those facts is clearly at issue and raises the defense by Original 50's that there existed a mutual mistake as to the contractual relationship being formed by PECO with Original 50's and/or Back 2 the 50's Diner, Inc. ("Number 2 50's"). The principal facts for discussion are brief:

1. Number 2 50's was incorporated on August 9, 2007;
2. On August 13, 2007, PECO service was ordered for 1167 Dublin Pike, Perkasio, PA, the place of business to be for Number 2 50's;
3. When calling by telephone to order service, the representative for Number 2 50's, when asked by the representative for PECO, gave Original 50's tax identification number;
4. Number 2 50's obtained its tax identification number on August 28, 2007;
5. PECO sent its billing statements for 1167 Dublin Pike under a separate account number, to 800 Edison-Furlong Road, the place of business for Original 50's;
6. Number 2 50's used its bank account to pay the billing statements for 1167 Dublin Pike.
7. PECO always had the ability to demand either a deposit on the initiation of service with Number 2 50's or to shut off its service when that service was not being paid for.

## II. SUMMARY OF ARGUMENT

It is not unreasonable to find that when the conversation took place on August 13, 2007 when Number 2 50's was setting up utility service with PECO by telephone there could have been confusion as to which corporation was going to be responsible for paying for that service. Back to the Fifties Diner, Inc. was incorporated on June 13, 2003 with its registered office at 169 Moyer Avenue, Dublin, PA 18917, not 800 Edison-Furlong Road, Furlong, PA 18925 as PECO claims in its Main Brief, p. 3. Back 2 the Fifties Diner, Inc. was incorporated on August 9, 2007. Please note the spelling of the second word in each name. It is admitted that Original 50's tax identification number was given to PECO to begin utility service on August 13, 2007. Number 2 50's did not have its tax identification number until August 28, 2007. It is admitted that PECO sent its billing statements to Original 50's place of business at 800 Edison-Furlong Road. However, all of Number 2 50's bills were sent to 800 Edison-Furlong Road. That is where the shareholder of both corporations ran the business of Original 50's. It was for the convenience of the shareholder to control the bookkeeping for both businesses. It was not for the purpose of deceiving PECO into not collecting a deposit prior to the inception of utility service for Number 2 50's or to avoid the payment of any proper utility charges. Was the giving of Original 50's tax identification number sufficient to outweigh the manner in which Number 2 50's conducted its business as a separate entity responsible for its liabilities? The facts show otherwise.

## III. ARGUMENT

Counsel for PECO ("Counsel") describes the exchange between whom she refers to as an authorized agent of Original 50's and PECO on August 13, 2007. However, there has been no testimony that the agent was acting for Original 50's. Rather the answer given, pp. 33, 34 of the Transcript, was that Ms. Ascher, the shareholder for both corporations, had authorized her mother to make application for utility service:

*Q. You indicated that your mother applied for service on behalf of the corporation; is that correct?*

*A. She made the phone call at the establishment.*

*Q. For the purposes of receiving service?*

*A. Correct.*

*Q. And did she do so with your authorization?*

*A. Yes, she did.*

Even now there continues to be confusion as to which corporation was ordering service.

Counsel states also that the tax identification number of Original 50's was given at the time of initiation of service. Number 2 50's obtained its tax identification number on August 28, 2007, more than two weeks subsequent to this exchange. Mrs. Monique Van Hulst could not provide Number 2 50's tax identification number because it did not yet have one, nor was Ms. Ascher aware that one was needed. p. 34

*Q. And when your mother applied for service with your authorization, did you ever inquire to her which tax ID she used?*

*A. I didn't even know she needed a tax ID number. She did not let me know that she needed one. She just took it upon herself, I guess, to give the first number that she was aware of.*

Counsel states on page 3 of her Main Brief that PECO Energy bills were mailed to "Back to the Fifties Diner, Inc. (Original 50's) at 800 Edison-Furlong Road. However, all bills, not just PECO bills, all bills both for Original 50's and Number 2 50's, were mailed to the location at 800 Edison-Furlong Road. Ms. Ascher testified on direct examination at p. 27:

*Q. As far as the payment of bills at the Perkasio location for number two '50s, how was that handled?*

*A. My manager would ask me for checks to sign. I would sign them and she would pay them.*

*Q. For all creditors, not just PECO?*

*A. All creditors. It was separate identity, so yes.*

On my redirect at p. 47, Ms. Ascher further explains this:

*Q. --- I think it was paragraph three, that paragraph relates to the corporate office?*

*A. Correct.*

*Q. And is that your home address?*

*A. Correct. And I received number two IRS information at my home.*

*Q. Okay. So my question is, all formal notices, other than bills, per se, for the operation ---*

*A. Went to my home.*

*Q. --- went to your home?*

*A. Correct.*

And again on redirect pp 47-49

- Q. Did you have access to the Perkasio location soon after you purchased the business?*
- A. Yeah, relatively, maybe two weeks. Two, three weeks.*
- Q. Okay. Exhibit C-1, the Articles of Incorporation for number two '50s, was filed when?*
- A. C-2?*
- Q. It's at the bottom. I'm sorry. C-1.*
- A. C-1? Okay. Incorporation?*
- Q. Was filed what date?*
- A. August 9th, 2007.*
- Q. And Exhibit C-2, the tax identification number for number two '50s, what is the date that you received that tax identification number?*
- A. I'm going to say from the IRS that would be 8/28/2007.*
- Q. August the 28th?*
- A. Yes.*
- Q. So you were in the location prior to receiving the tax identification number?*
- A. Correct.*
- Q. And while you were in that location, were you receiving services from PECO?*
- A. Yes.*
- Q. For clarification, the PECO bills would go to your original '50s location?*
- A. Correct.*
- Q. Did all bills go to original '50s location?*
- A. No. Some were. Not all were mailed. Some were, you know, like ---.*
- Q. Those that were mailed?*
- A. I'm sorry? All mailed ones, yes.*
- Q. And what would you do with those?*
- A. My manager at the original separates them.*
- Q. Okay. So did you go through the bills individually?*
- A. No.*
- Q. Okay. Last question. Was it ever your intention to have all PECO bills be the responsibility of original '50s?*
- A. No. That's why I set up separate corporations for both businesses.*

It has been stipulated that Original 50's and Number 2 50's were separate entities, incorporated at separate times, with different tax identification numbers and with different PECO account numbers. Yet, PECO, because of one incidence where at the inception of service, a representative gave the only tax identification number (Original 50's) that was then available, claims that this separate entity, Original 50's is fully responsible for the delinquency of the separate entity that was using and paying for the utility services provided, even though Number 2 50's paid every one of its other creditor liabilities through its own bank account at all times. As the manager of Number 2 50's, Ms. Amy Van Hulst, testified on recross by Counsel at pp 61, 62:

- Q. First, you testified that you would go to the Furlong Road address to retrieve the bills for Back 2 the '50s?*
- A. For number two, yes.*
- Q. And that you knew how much to pay because you had reviewed the bill?*
- A. Yes.*
- Q. Are you aware that the bill for both service locations was addressed to Back to the '50s Diner, T-O?*
- A. Yes.*
- Q. And you were aware that what you're calling Back 2 the '50s two actually is Back, numeric 2, the '50s Diner?*
- A. Yes.*
- Q. And seeing that the bills were coming for a period of, I think, March 2008 until the business failed, to the same name, did you ever contact PECO to inquire?*
- A. No, because the account numbers were different.*
- Q. So even though the name of the entity was the same, because the account numbers were different, you did not contact PECO?*
- A. No.*

PECO always had an opportunity to demand a security deposit for service at this second location. Original 50's paid \$1,321.00 when it initially subscribed for PECO service in August of 2003 (Counsel's Main Brief, p. 4.) But none was demanded in August of 2007. PECO's representative, Ms. Tarpley, testified at Transcript pp. 88-89 on cross examination:

- 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.*

One would think that with this new location, total usage was going to increase if PECO believed that Original 50's would be responsible for payment of services at both locations. Original 50's usage was certainly going to be higher if, as PECO believed, Original 50's was responsible for payment for all usage. Yet no deposit, similar to the deposit charged Original 50's in August, 2003-\$1,321.00, was charged. Further, PECO's Exhibit 1 shows that Number 2 50's bills appear to go delinquent in January of 2009. They quickly go to \$2,339.44 in April, 2009; \$4,929.27 in May; \$7,061.21 in August; and \$10,640.11 in December, 2009. In one year, Number 2 50's fell behind by \$10,000.00. PECO always had a remedy to reduce or eliminate the losses that it seeks here from Original 50's. The delinquency at the time Number 2 50's account was closed was \$13,113.65. No shut-off orders were ever enforced. As Ms. Van Hulst testified on direct examination at pp. 53, 54:

- Q. *Was the electric ever shut off ---*
- A. *No.*
- Q. *--- at the Perkasio location?*
- A. *No, it wasn't.*
- Q. *Did the arrearage at number two '50s continue to rise?*
- A. *Yes, it did.*
- Q. *And at the time that number two '50s closed, do you recall what the approximate amount owed was?*
- A. *I would say it was approximately \$14,000.*

Q. And was the electric ever shut off?

A. No, it was not.

As the facts of this case are basically undisputed, the law applicable to contracts is likewise undisputed. As counsel for PECO has cited at page 7, “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 Service* 920 A.2d 906 (Pa. Commw. Ct. 2007). And later on the same page, “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. Where there is a mistake, “a court will not afford relief for a unilateral mistake”. *In re Allegheny Intern., Inc.*, 954 F.2d 167 (3d Cir. 1992). All sound statements supported by case law. But this is not a unilateral mistake. It is clear from the facts of this case and the testimony of the witnesses that Number 2 50’s intended that it was ordering utility service from PECO for its location on at 1167 Dublin Pike and not on behalf of Original 50’s, a business at a distinctly different location. It followed this belief by paying for its usage with its company checks, just as it did for all other creditors with which it dealt. It was a properly incorporated business that from the beginning of its existence operated as separate and distinct from Original 50’s. It is reasonable that the PECO representative taking the utility service order believed that Back to the 50’s and Back 2 the 50’s were one and the same. Unfortunately, neither party explained or questioned the mistake because neither knew of the mistake at that time. 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*. No contract in the sense that Original 50’s would be held liable for the delinquency of Number 2 50’s. Both parties operated thereafter as if there were a contract, PECO provided service to Number 2 50’s location and Number 2 50’s paid for that service but eventually defaulted.

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). PECO should have been clearer or better yet should have forwarded a written agreement as to the terms of the contract that it believed it had. Original 50’s was never aware that PECO was holding it liable for the service provided to Number 2 50’s until the delinquent balance was transferred to it over three years later. 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).

A contract still may be reformed when a material, mutual mistake is made, even though one of the parties denies that a mistake was made. *Kreiger v. Rizzo*, 105 Pa. Super. 429 (1932). PECO was in a much better position to correct the mistake in that from the beginning and as time went on, payments were made by Number 2 50’s. Again, separate location, separate company making payments. In addition, as Number 2 50’s fell behind, PECO could have addressed its concerns with Original 50’s in writing to alert Original 50’s as to the problem at Number 2 50’s. As the entity in the business of supplying what the consumer was buying, PECO knew or should have known that it had an opportunity to correct the mistake. It further failed to mitigate the damages to which it seeks from Original 50’s by exercising its right to shut off the supply to Number 2 50’s knowing that arrearages were accruing for a full year. For PECO to allow the delinquency to accrue to over \$13,000.00 and then seek payment from Original 50’s is unconscionable.

Complainant refers to its discussion in its Main Brief with regard to the assessment of PECO’s additional security deposit. Complainant is not challenging the authority of PECO to have a commercial customer post a deposit at any time if the Company determines that the customer is no longer creditworthy or that a deposit may be measured by a formula relating to the customer’s use. However, where PECO provided in its own billing statements to Original 50’s showing that usage from one year to the next actually decreased, it seems unjustified that during a period of time when Original 50’s was challenging the transfer of Number 2 50’s balance to it, another deposit is all of a sudden necessary. Even more

questionable, if PECO is relying on increased usage as a factor to charge a deposit, how would it justify not requiring a deposit at the inception of service to Number 2 50's location. PECO claims that Number 2 50's ordered the service with Original 50's to be the responsible party. If so, service at Number 2 50's coupled with service at Original 50's certainly created a higher usage on bills that PECO claimed were attributed to Original 50's. PECO had the means to secure itself with at least a deposit and chose not to require one. Again, more questionable is that PECO allowed the delinquency of Number 2 50's to escalate to over \$13,000.00 never exercising its obvious remedy a shut off order.

#### IV. CONCLUSION

1. Back to the 50's Diner, Inc. and Back 2 the 50's Diner, Inc. were separate corporations operating at separate locations paying its creditors with separate bank accounts and filing separate income tax returns;
2. Number 2 50's as it was preparing its location for business in August of 2003 did give PECO, during its telephone application for utility service, the tax identification number of Original 50's as it had not yet applied for its own number;
3. Every other fact of business operation by Original 50's and Number 2 50's, including the payment of PECO invoices, clearly supported the separate entity status of each, other than one shareholder being the owner of both corporations;
4. PECO never shut off service to the Number 2 50's location even though the payment delinquency was allowed to grow to over \$13,000.00, a remedy that would have drastically reduced the potential loss of revenue to PECO.
5. PECO never required a deposit of Number 2 50's, or for that matter Original 50's at the time of the inception of service at the Dublin Pike location alleging that Original 50's was its responsible party, when it clearly was obvious that usage was going to increase, a cause claimed by PECO that would in fact require a deposit. Again, PECO had a remedy that also would have reduced the potential loss of revenue.

The facts support Complainant's position that Number 2 50's not Original 50's was the separate entity operating at the Dublin Pike location and the responsible party for its own

utility charges. The tax identification number was only one manner of identification as to whom PECO had contracted for utility service. It could have asked for Articles of Incorporation. It could have asked for a copy of the lease for the Dublin Pike location. It could have asked to speak with the shareholder owner to confirm such an important issue. It could have sent a written contract for review of agreed terms. . It did none of these things. It just gave PECO a convenient opportunity to hold Original 50's responsible for charges that it did not incur.

Complainant requests that this Commission find 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.

Respectfully submitted

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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:

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Pennsylvania Public Utility Commission  
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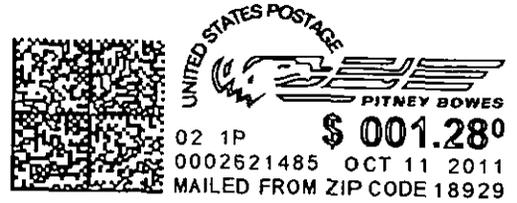
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Dated: October 11, 2011

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