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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE VICTORY CONDOMINIUM ASSOCIATION	:	
	:	
Complainant	:	DOCKET NO. C-2011-2268126
v.	:	
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

**PRELIMINARY OBJECTION OF PECO ENERGY COMPANY
TO STRIKE NON-JURISDICTIONAL CLAIMS
AND
TO STRIKE IMPERTINENT MATTER**

Respondent, PECO Energy Company (“PECO Energy”), pursuant to 52 Pa. Code § 5.101(a)(1) and (2) respectfully submits this preliminary and requests that Commission strike certain specified non-jurisdictional claims and specified impertinent matter. In support thereof, PECO states as follows:

**A. “Unjust Enrichment” Is Not A PUC-Jurisdictional Claim,
And It Should Therefore Be Stricken**

1. The Commission’s rules and regulations, 52 Pa. Code § 5.101(a)(1), provide that a party may file a preliminary objection alleging lack of Commission jurisdiction.

2. Among other claims, the Complaint contains the following request (Paragraph 17):

17. *PECO will be unjustly enriched* if it is permitted to retain the financial benefit of the excessive and unreasonable rates and charges it imposed by knowingly applying an incorrect rate when it knew or should have known that Rate HT was the most advantageous rate. At all relevant times PECO was aware or should have been aware that Rate GS was causing Complainant to pay excessive utility charges but withheld this information from Complainant. It will be unjust and unreasonable if PECO is permitted to reap the financial benefit of its unlawful discrimination and negligence.

3. The Commission does not have jurisdiction to adjudicate unjust enrichment claims. *See, County of Erie v. Verizon North, Inc.* 2005 WL 6502718 (Pa.P.U.C 2005). As the Commission stated in *County of Erie*:

Furthermore, the Commission has no jurisdiction to adjudicate claims styled as common law tort causes of action or as a request for an accounting arising out of equity. This means that *the Commission has no jurisdiction to hear the claims* set forth in the complaint the County filed with the Commission, namely, the request for an accounting and an injunction and the claims *based on* breach of fiduciary duty, *unjust enrichment* and conversion

4. PECO therefore respectfully requests that Paragraph 17 of the Complaint be stricken for stating a non-jurisdictional claim, and that the Commission issue an order stating that Complainants may not pursue a claim before the Commission based upon the legal theory of “unjust enrichment.”

B. Certain Portions of The Complaint Constitute Impertinent Matter And Therefore Should Be Stricken

5. The Commission’s rules and regulations, 52 Pa. Code § 5.101(a)(2), provide that a party may file a preliminary objection alleging the “inclusion of scandalous or impertinent matter.”

6. The Commission’s regulations do not define the term “impertinent,” but in a recent case, *James Coppedge v. PECO Energy Company*, Docket No. F-2009-2135893 (Initial Decision, March 9, 2010), Administrative Law Judge Louis Cocheres found it useful to adopt the Black’s Law Dictionary definition, stating as follows:

There are no definitions of “scandalous” or “impertinent” in the Commission’s regulations. However, I find that Black’s Law Dictionary provides sufficient guidance. It defines the words, “impertinent” and “scandal” as follows:

Impertinent. That which does not belong to a pleading, interrogatory, or other proceeding; out of place; superfluous; irrelevant. A term applied to matter not necessary to constitute the cause of action or ground of defense. Such matter may be ordered stricken from the pleading. Fed.R.Civil P. 12(f). See also **Immaterial averment; Surplusage.**

[Definition of “Scandal” removed.]

Black’s Law Dictionary 679 and 1206 (rev. 5th ed. 1979) (Emphasis in the original.)

7. The Complaint contains extensive matter that, in all senses, is “out of place; superfluous; irrelevant.” Specifically, while Paragraphs 1-8 of the Complaint set forth a claim based on the allegation that PECO should have, but did not, assist Complainant in choosing correct contract minimums while on Rate HT, Paragraphs 9-18 then move to an entirely new and unrelated set of concepts, arguing that Complainant was financially harmed by being on Rate GS for years, and that PECO did not properly assist Complainant in choosing between Rate GS and Rate HT. Paragraphs 9-18 are “out of place; superfluous; irrelevant” for the following reasons:

a. Complainant has never been on Rate GS. The entire discussion of paragraphs 9-18 is predicated on the assumption that Complainant was on Rate GS for years, and should not have been.

b. The Complainants actual dispute, as set forth in Paragraphs 1-8 – and as confirmed by PECO in extensive discussions with Complainant – has nothing to do with choosing between Rate GS and Rate HT. It has to do with whether the customer was on the correct contract minimum. That issue is not discussed at all in any portion of Paragraphs 9-18.

c. Paragraphs 9-18 are simply a cut-and-paste from prior complaints filed by the law firm of Halberstadt & Curley. While there is nothing inherently wrong with cutting-and-pasting from prior complaints, in this case the materials that were cut-and-pasted came from a case in which the facts are very different from the instant Complaint. PECO believes that the instant Complaint may have been cut-and-pasted from the Complaint in *Collins Family Market v. PECO*, Docket No. C-2009-02131738 or similar cases. (A copy of the *Collins Family Market* complaint is attached and marked Exhibit A for reference.) Those cases involved allegations that PECO had failed to properly assist a customer in moving from Rate GS to Rate HT, and the language that has been imported to the instant Complaint is that same language. But that “choice between Rate GS and Rate HT” language has nothing to do with the “contract minimum” issues in this case.

8. Because Paragraphs 9-18 of the Complaint were originally written for another case, to address a different factual issue, they add nothing to the instant Complaint – they are out of place, superfluous, and irrelevant. Those paragraphs do not discuss the actual dispute between the parties, they provide no information as to the actual claim being made by the Complainant, and it is thus virtually impossible to provide a meaningful factual answer to those paragraphs of the Complaint. PECO is therefore meaningfully prejudiced by allowing this impertinent matter to remain in the Complaint, since the matter will progress without PECO first knowing what actual claims are being made against it.¹ In addition, allowing this language to remain will cause

¹ Although PECO knows the general factual allegations through Paragraphs 1-8, it is not clear from the face of the Complaint precisely what claims are being made against PECO, and whether those claims are within the Commission’s jurisdiction. For example, as set forth in the first section of this Preliminary Objection, Paragraph 17 purports to set forth the non-jurisdictional claim of “unjust enrichment.” Because paragraphs 9-18 only discussion of a fact pattern not

substantial confusion if Complainants attempt, at some later time, to conform the facts set forth in Paragraphs 1-8 and the completely different facts and legal theories set forth in Paragraphs 9-18.

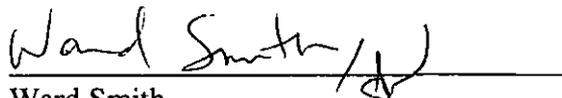
9. Complainant is a sophisticated commercial enterprise represented by an experienced law firm that has had multiple representations before the Commission. Moreover, according to Complainant, approximately \$150,000 is at issue in this matter. Complainants therefore should be required, at a minimum, to set forth a complaint that cohesively presents their actual dispute from beginning to end. Given those factors, there is no justification for Complainants filing a Complaint that is a cut-and-paste from factually unrelated complaints involving other customers.

10. PECO therefore respectfully requests that Paragraphs 9-18 of the Complaint be stricken as impertinent.

implicated by the Complainants actual dispute, PECO cannot properly evaluate whether the other claims suffer similar defects. Complainants will inevitably “reveal” their true claims at some later time in this litigation. This later revelation will prejudice PECO’s ability to prepare for this litigation.

WHEREFORE, PECO Energy Company respectfully requests that this Honorable Commission issue an Order (a) striking Paragraph 17 and stating that Complainants may not pursue a claim before the Commission based upon the legal theory of “unjust enrichment.,” and (b) striking Paragraphs 9-18 as impertinent.

Respectfully Submitted,

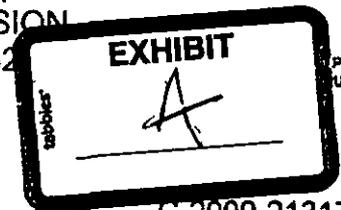
A handwritten signature in black ink that reads "Ward Smith" followed by a stylized flourish. The signature is written over a solid horizontal line.

Ward Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19103
(215) 841-6863
ward.smith@exeloncorp.com
Tishekia Williams
215-841-6841
tishekia.williams@exeloncorp.com



2009-907

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265



DATE SERVED: September 22, 2009

C-2009-2131728

*Due - 10/12
Target - 10/9*

PECO ENERGY COMPANY
C/O WARD L SMITH
ASSOCIATE GENERAL COUNSEL
PO BOX 8699
PHILADELPHIA PA 19101-8699

Dear Mr. Smith:

A complaint has been filed against you before the Pennsylvania Public Utility Commission by Collins Family Market LLC d/b/a Shop-Rite Food Corp. To defend yourself against the claims stated in the following pages, you must act within twenty (20) days by filing in writing with the Commission, either personally or through your attorney, your defenses or objections to the claims stated against you. Or, you may satisfy the complaint by settling the matter with the Complainant and submitting proof of settlement to the Commission within twenty (20) days.

IF YOU FAIL TO RESPOND WITHIN TWENTY (20) DAYS, THE CASE MAY GO FORWARD IN YOUR ABSENCE AND A JUDGEMENT MAY BE ENTERED AGAINST YOU BY THE COMMISSION WITHOUT FURTHER NOTICE.

CUSTOMER OF A UTILITY

A payment schedule may be prescribed or a termination of utility services may be authorized. You may lose money or property or other rights important to you.

COMPANY/UTILITY

An Administrative Law Judge may revoke or suspend any certificate or permit held by you, or impose a fine, or any other appropriate penalty or remedy authorized by the Public Utility Code. You may lose money or property or other rights important to you.

Detailed instructions on how to proceed are contained in the attached pages. You are advised to read them carefully.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

COPY

COLLINS FAMILY MARKET LLC, Complainant	Docket No. C-2009-2131728
v. PECO ENERGY COMPANY Respondent	

COMPLAINT

1. Complainant is Collins Family Market LLC ("Complainant"), a limited liability corporation organized under the laws of the Commonwealth of Pennsylvania with a registered office d/b/a Shop-Rite Food Corp., 1568 Chester Pike, Eddystone, PA 19022.
2. The name and address of Complainant's attorney is:

Charles V. Curley
HALBERSTADT CURLEY LLC
1100 E. Hector Street, Suite 425
Conshohocken, PA 19428
3. Respondent is PECO Energy Company ("PECO"), a public utility authorized to do business in the Commonwealth of Pennsylvania with a principal place of business at 2301 Market Street, Philadelphia, Pennsylvania 19103.
4. At all times relevant hereto, Complainant was a commercial customer receiving electric service from PECO at its property at 1568 Chester Pike, Eddystone, Pennsylvania 19022 (the "Property").
5. Complainant's PECO Account Number is 92889-01707.

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6. Complainant's account with PECO was started on or about January 18, 2005 under PECO's General Service Rate ("Rate GS"). At the time that service was initiated no one from PECO explained the different rates that were available to Complainant and PECO, without any input from Complainant, placed Complainant on Rate GS.

7. PECO has a policy and practice of discussing rate options with a customer prior to the customer initiating service. Contrary to PECO's policy and practice, and contrary to the manner in which other, similarly situated PECO commercial customers are treated, PECO failed to discuss the rate options that were available to Complainant.

8. At all relevant times Complainant owned and maintained a 13.2 KV high tension substation, which is required in order to qualify for PECO's rate HT. Since it owned and maintained its own substation, Complainant was analogous to a customer that could purchase its electricity at a "wholesale" rate, as the Complainant purchased electricity at a high tension voltage.

9. PECO's High Tension Rate, or "Rate HT," is analogous to PECO's wholesale electricity rate since the customer is responsible for its own transforming and switching. In addition, with a high tension substation, the metering is done on the primary side and the customer is required to pay for transformer losses.

10. At all relevant times PECO was aware that Rate HT was designed for customers served at 13 kV or higher voltage and that Complainant was a customer receiving such service.

11. PECO's Rate GS is analogous to PECO's "retail" electric rate as it is available for customers receiving secondary voltage under 600 volts. General Service rate customers are not required to own or maintain their own primary transformers and/or switch gear. In addition,

General Service customers do not experience primary transformer losses that High Tension customers experience.

12. In October 2006, Complainant was informed by PECO through account manager Peter Kirilin that savings could be achieved by correcting a sub-standard Power Factor at this location. The foregoing placed PECO on notice of Complainant's service conditions and the fact that Rate HT would be the most advantageous rate available to the Complainant.

13. Despite being placed on notice of Complainant's service conditions, PECO failed to take any action to place Complainant on PECO's Rate HT, which was the most advantageous rate. At no time did PECO ever advise the Complainant that Rate HT was the most advantageous rate until Complainant advised PECO that it had been placed on the wrong rate and requested PECO to confirm same.

14. The analysis performed by PECO verified that rate HT was almost \$60,000.00 less per year than billing under rate GS.

15. Pursuant to Section 1303 of the Public Utility Code any public utility having more than one rate applicable to service rendered to a patron shall, after notice of service conditions, compute bills under the rate most advantageous to the patron.

16. Despite having express knowledge of Complainant's service conditions, PECO never advised Complainant that it should switch to Rate HT or placed Complainant on Rate HT.

17. Complainant has requested PECO for remuneration for its failure to place Complainant on the most advantageous rate, but PECO has failed to justly compensate Complainant for failing to adhere to its policy and practice of informing Complainant of its rate options and for failing to place Complainant on the most advantageous rate.

18. PECO has unjustly and unreasonably refused to credit or offer just remuneration to Complainant for the overcharges it paid under Rate GS from the time that PECO was placed on notice of Complainant's service conditions.

19. As a result of the foregoing, Complainant was unlawfully discriminated against by PECO.

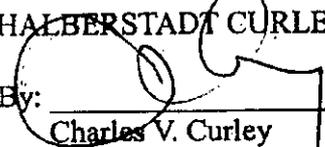
20. PECO will be unjustly enriched if it is permitted to retain the financial benefit of the excessive and unreasonable rates and charges it imposed by knowingly applying Rate GS on Complainant's account when it knew or should have known that Rate HT was the most advantageous rate. At all relevant times PECO was aware or should have been aware that Rate GS was causing Complainant to pay excessive utility charges but withheld this information from Complainant. It will be unjust and unreasonable if PECO is permitted to reap the financial benefit of its unlawful discrimination and negligence.

21. For the above reasons, Complainant requests that the Commission enter an Order directing PECO to refund and/or credit Complainant the difference between the rates and charges which were imposed under Rate GS and the rates and charges which should have been imposed under Rate HT from the date that PECO was put on notice of Complainant's service conditions or such other period as the Commission deems appropriate. Complainant also seeks pre-judgment interest, costs, and such other relief as the Commission deems appropriate.

WHEREFORE, Complainant requests that respondent PECO Energy Company be required to answer the above allegations and that, upon final hearing the Commission will make such Order as may be required.

Date: 9/4/09

HALBERSTADT CURLEY LLC

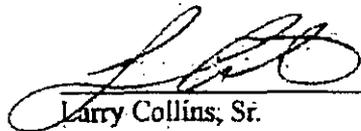
By: 

Charles V. Curley

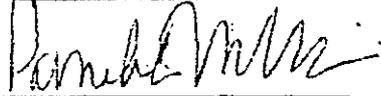
AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA
SS
COUNTY OF DELAWARE

Larry Collins Sr., owner and operator of Collins Family Market LLC and authorized agent for Collins Family Market, deposes and says that he is authorized to and does make this affidavit for the Complainant; and that the facts set forth in the foregoing Complaint are true and correct to the best of his present knowledge, information and belief and that he expects the Complainant to be able to prove the same at any hearing hereof.


Larry Collins, Sr.

Sworn to and subscribed
before me this 17th day of
September 2009.



COMMONWEALTH OF PENNSYLVANIA
Notary Seal
Pamela A. McGillant, Notary Public
Westtown Twp., Chester County
My Commission Expires Jan. 23, 2011.
Member, Pennsylvania Association of Notaries

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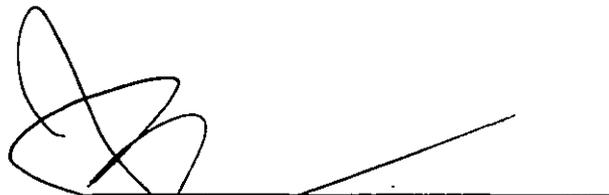
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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

THE VICTORY CONDOMINIUM ASSOCIATION	:	
	:	
Complainant	:	DOCKET NO. C-2011-2268126
v.	:	
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

VERIFICATION

I, Ward Smith, hereby declare that I am an attorney representing PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.


Tishkia Williams

Date: November 16, 2011

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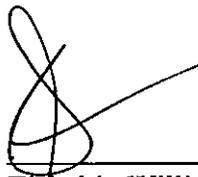
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of PECO Energy Company's Preliminary Objections in the above matter upon all interested parties by overnight delivery (Federal Express), properly addressed and postage prepaid to:

Charles V. Curley
Halberstadt Curley LLC
1100 E. Hector Street, Suite 425
Conshohocken, PA 19428

Dated at Philadelphia, Pennsylvania, November 16, 2011.

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Counsel for PECO Energy Company
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