

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

John R. Starzmann	:	
	:	
Complainant	:	
	:	Docket No. C-2010-2192759
v.	:	
	:	
PECO Energy Company	:	
	:	
Respondent	:	

**MOTION OF PECO ENERGY COMPANY TO STRIKE  
EXTRA-RECORD EVIDENCE IN THE MAIN BRIEF  
OF COMPLAINANT JOHN STARZMANN**

Pursuant to 52 Pa. Code § 5.103, PECO Energy Company (“PECO”) respectfully submits the following Motion to Strike Extra-Record Evidence in the Brief filed by Complainant John Starzmann.

**BACKGROUND**

1. On or about August 11, 2010, the Complainant filed a Formal Complaint (“Complaint”) against PECO. The Complaint alleged that the Complainant had been experiencing low voltage at his residence for over 25 years and requested that various remedial measures be ordered against PECO.

2. On September 1, 2010, PECO filed its Answer and New Matter to the Complaint. PECO’s Answer and New Matter denied the allegations in the Complaint, and stated that the two low voltage situations experienced by the Complainant were the result of temporary equipment issues that were quickly repaired. PECO’s New Matter also objected to the Complainant’s claims regarding events that happened beyond the three-year statute of limitations set forth 66 Pa. C.S. § 3314.

3. On October 27, 2011, a Prehearing Order was issued which clearly instructed the Complainant that he bore the burden of proof and that he must demonstrate by a preponderance of evidence that he is entitled to the relief requested in his complaint.

4. On December 6, 2011, the evidentiary hearing in his matter was held, with Administrative Law Judge Joel Cheskis ("ALJ Cheskis") presiding. At the hearing, the Complainant testified on his own behalf, called no other witnesses to testify, and offered no exhibits into evidence. The Complainant's testimony consisted of 24 lines of direct testimony, and several pages of cross-examination testimony.

5. PECO offered the testimony of one witness, and submitted two Exhibits for admission into the record. The hearing produced a transcript which consisted of sixty-one pages.

6. At the conclusion of the hearing, ALJ Cheskis requested that the parties submit written briefs in support of their positions by January 10, 2012.

7. On or about January 2, 2012, the Complainant submitted his Brief in this matter. The Complainant's Brief consisted of 32 written pages, plus 26 Exhibit totaling an additional 93 page.

8. The Complainant's Brief has no grounding in the record. The Brief consists almost entirely of references to material that was never entered into the record in this case. As a result, much of the Complainant's Brief should be stricken and not be considered by the Commission in disposing of this case, as set forth in more detail below.

## **PECO's Motion**

9. The Commission's findings and decision in this proceeding must be based only on evidence in the record. On appeal, the court cannot affirm an adjudication where it "shall find that . . . any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence." 2 Pa. C.S. § 704.

10. Under the Commission's regulations, the record is closed at the conclusion of a hearing unless otherwise directed by the presiding officer or the Commission. After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion. See 52 Pa. Code § 5.431.

11. The Complainant's Brief contains extensive discussion of factual and technical material that does not appear in the record of this case. Since the record in the case is closed, and this material was not in the record, the Complainant's discussion of this material is improper and cannot be relied upon by the Commission in resolving the Complaint.

12. PECO moves to strike the following extra-record evidence from the Complainant's Brief:

(a) Exhibits A-J and N-Z, attached to the Brief.

- a. Exhibit A, Mr. Stazmann's Complaint, is a pleading, and pleadings are not part of the record. Under 52 Pa. Code 5.405 (b), a pleading, or any part thereof may not be considered as evidence of a fact other than that of filing thereof unless

offered and received into evidence. The Complaint was not offered into evidence.

- b. Exhibit B, PECO's 8/24/10 letter, was not entered as an Exhibit in this proceeding. The letter was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- c. Exhibit C, PECO's Answer to the Complaint, is a pleading, and therefore not part of the record, and was not separately introduced as an Exhibit.
- d. Exhibit D, Mr. Starzmann's Reply to New Matter, is a pleading, and therefore not part of the record, and was not separately introduced as an Exhibit.
- e. Exhibit E, Mr. Starzmann's personal notes, was not entered into the record as an Exhibit. The notes were not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- f. Exhibit F, an email exchange between the parties, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.

- g. Exhibit G, an email exchange between the parties, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- h. Exhibit H, purportedly a Commission performance report, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- i. Exhibit I, an Excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- j. Exhibit J, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- k. Exhibit K, a Commission publication, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.

- l. Exhibit N, ANSI Voltage Ranges, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- m. Exhibit O, pages from Allegheny Power's website, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- n. Exhibit P, a powerpoint slide related to interconnection standards, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- o. Exhibit Q, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- p. Exhibit R, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.

- q. Exhibit R, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- r. Exhibit S, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit
- s. Exhibit T, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- t. Exhibit U, an excerpt from a reference manual, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- u. Exhibit V, a product comparison chart, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.

- v. Exhibit W, product specification sheets, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- w. Exhibit X, a photograph of switchgear, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- x. Exhibit Y, a photograph of switchgear, , was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit.
- y. Exhibit Z, a photograph switchgear, an excerpt from a textbook, was not entered into the record as an Exhibit. This document was not authenticated nor sponsored, and PECO was not provided with the opportunity to examine any witnesses in connection with this Exhibit

(b) The assertions on page 6-7 of the Complainant's Brief regarding inspections, PG&E company operations, and the discussions between Mr. Starzman and a former colleague of his. None of this material appears in the record.

(c) The assertions of pages 7-8 regarding Mr. Starzman's work history and observations regarding companies which he inspected. None of this material appears in the record.

(d) Discussion of 8/24/10 letter to PECO Regulatory Assessor on Page 8. The letter in question is not in the record, as set forth above.

(e) Discussion of 9/1/10 document from PECO on Pages 9-10. The document in question is not in the record, as set forth above.

(f) Discussion of Complainant's Answer to New Matter on Page 10. The Answer to New Matter is not in the record, as set forth above.

(g) Discussion of 9/23/10 telephone conference on Page 10. There is no reference in the record to this telephone conference.

(h) Discussion of 12/22/11 telephone call with Scott Newmann (sic) on page 10. There is no reference in the record to this telephone conference.

(i) Excerpts of 12/5/11 correspondence on Pages 10-12. This correspondence is not in the record.

(j) Excerpt of letter from the undersigned on page 12 is not in the record.

(k) Descriptions of PECO's customer service responses on page 12-13. These communications are not in the record.

(l) Discussion of communications regarding power outage on page 13. There are no references to these communications in the record.

(m) Discussion of Business cultures on page 14. There are no references to this material in the record.

(n) Discussion of PUC Customer Service Performance Report on pages 15 and 19-20. This document is not in the record, as discussed above.

(o) Excerpts from *Regulation of Voltage Quality* on pages 15-16. This document is not in the record, as discussed above.

(p) Excerpts from *Electric Power Systems Quality* on pages 16-18. This document is not in the record, as discussed above.

(q) Excerpts from "Exhibit K" on page 19. This document is not in the record, as discussed above.

(r) References to Exhibits N, O, and P on page 21. These documents are not in the record, as discussed above.

(s) Discussion of contents of Complainant's home on page 22. There is no record evidence to support this discussion.

(t) Excerpts from *Industrial Power Systems Handbook* on pages 22-23. This document is not in the record, as discussed above.

(u) Discussion of relaying and circuit protection, and symmetrical components on page 24. There is no reference to this technical discussion in the record.

(v) Excerpts from Station Protection Section of Power Plant Electrical Reference Series on pages 24-25. This document is not in the record, as discussed above.

(w) Discussion of Exhibit S on pages 25-26. This document is not in the record, as discussed above.

(x) Discussion of Complainant's inferences of PECO's systems, discussion of relays and switchgear and other equipment, and references to Exhibits U, V, W, X, Y, and Z on pages 26-28. These documents are not in the record, as discussed above.

(y) Discussion of business ethics on pages 28-29. There is record evidence to support the discussion and opinions contained in this section of the Brief.

(z) Excerpt from 8/24/10 letter on page 30. This document is not in the record, as discussed above.

13. None of the extra-record evidence listed in paragraph 12 of this Motion was entered into the record in this proceeding. The Complainant's references to evidence that is clearly not in the record is a violation of applicable law and the Commission's procedural rules.

14. The Complainant's status as a pro se litigant does not excuse his references to extra-record evidence. The hearing transcript demonstrates that the Complainant was explicitly instructed that the correspondence and pleadings he referenced would not be admitted into the record. See Tr., at 27-28.

15. Moreover, the Complainant was given time to review his documents and ensure that his testimony was complete. See Tr., at 29.

16. Where parties have attempted to introduce new evidence for the first time through their briefs, the Commission has stricken such evidence. For example, in *Joint Application of Verizon Communications, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, 2006 Pa. PUC LEXIS 22, 42 (2006), aff'd sub nom. *Popowsky v. Penn.*

*Pub. Util. Comm'n*, 937 A.2d 1040 (2007), the Commission adopted ALJ Rainey's initial decision, which struck extra-record evidence from the main brief of the Competitive Carrier Group ("CCG"). As ALJ Rainey explained, "CCG's inclusion of extra-record evidence in its brief violates the principle fundamental fairness and also violates the due process rights of other parties."

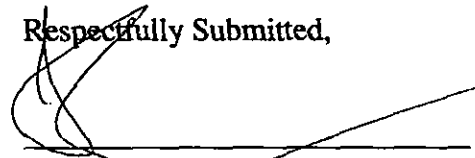
17. Similarly, in *Application of Pennsylvania-American Water*, 2001 Pa. PUC LEXIS 6, 187, adopted in relevant part, 2001 Pa. PUC LEXIS 5 (2001), ALJ Cocheres struck extra-record evidence from a party's reply brief: "Mr. Campos' recitation of the events which occurred after the September 7 hearing amounts to unsworn testimony which he wants to use to supplement the record. . . . His attempt to explain events which occurred after the September 7 hearing in his briefs deprived the other parties of their right to due process of law by virtue of failing to allow them to cross-examine his testimony."

18. Any consideration of the extra-record evidence included in the Complainant's Brief would be fundamentally unfair and would violate PECO's due process rights. PECO has not had the opportunity to cross-examine any witness with respect to the extra-record evidence included in the Complainant's Brief. PECO has also been deprived of the opportunity to present its own evidence to rebut the Complainant's extra-record evidence.

18. The Complainant had ample opportunity to present additional evidence before and during the hearing in this proceeding, but they chose not to do so. It would be unreasonable to allow the Complainant to reopen the record at this time to consider admitting evidence that could have been considered during the hearings in this proceeding or shortly thereafter.

WHEREFORE, PECO respectfully requests that the extra-record evidence included in the Complainant's Brief not be considered by the presiding officer or the Commission in this matter, and that all quotations from and references to such extra-record evidence, as set forth above in Paragraph 12 of this Motion, be stricken.

Respectfully Submitted,



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