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February 8, 2012

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
P.O. Box 3265  
Harrisburg, Pennsylvania 17105-3265

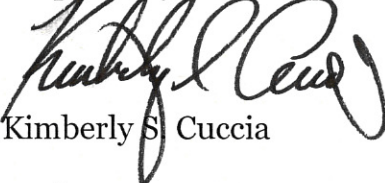
**RE: Application for Approval of Abandonment of Service by  
Columbia Gas of Pennsylvania, Inc. to One (1) Natural Gas  
Service Customer Located in Greene County, Pennsylvania;  
Docket No. A-2011-2276780**

**Joseph Lucey v. Columbia Gas of Pennsylvania, Inc.;**  
**Docket No. C-2011-2248370**

Dear Secretary Chiavetta:

Enclosed please find the Preliminary Objections of Columbia Gas of Pennsylvania, Inc. and accompanying Notice to Plead for the above-referenced proceeding. Copies will be provided as indicated on the certificate of service.

Respectfully Submitted,



Kimberly S. Cuccia

Enclosures

cc: Honorable Katrina L. Dunderdale (via e-mail and First Class Mail)  
Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a party).

### VIA FIRST CLASS MAIL

Joseph T. Lucey  
107 W. Roy Furman Highway  
Wind Ridge, PA 15380

David C. Hook, Esquire  
Law Offices of Hook and Hook  
189 W. High Street  
Post Office Box 792  
Waynesburg, PA 15370

Date: February 8, 2012

  
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Kimberly S. Cuccia

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joseph Lucey	:	
	:	
v.	:	Docket No. C-2011-2248370
	:	
Columbia Gas of Pennsylvania, Inc.	:	
	:	
Application for Approval of	:	
Abandonment of Service by Columbia	:	
Gas of Pennsylvania, Inc. to One (1)	:	Docket No. A-2011-2276780
Natural Gas Service Customer Located	:	
in Greene County, Pennsylvania	:	

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**NOTICE TO PLEAD**

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YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.101, YOU MAY ANSWER THE ENCLOSED PRELIMINARY OBJECTIONS WITHIN TEN (10) DAYS OF THE DATE OF SERVICE HEREOF. YOUR ANSWER TO THE PRELIMINARY OBJECTIONS MUST BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL FOR COLUMBIA GAS OF PENNSYLVANIA, INC.

  
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DATED: February 8, 2012

*Counsel for Columbia Gas of Pennsylvania, Inc.*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joseph Lucey	:	
	:	
v.	:	Docket No. C-2011-2248370
	:	
Columbia Gas of Pennsylvania, Inc.	:	
	:	
Application for Approval of	:	
Abandonment of Service by Columbia	:	
Gas of Pennsylvania, Inc. to One (1)	:	Docket No. A-2011-2276780
Natural Gas Service Customer Located	:	
in Greene County, Pennsylvania	:	

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**PRELIMINARY OBJECTIONS OF  
COLUMBIA GAS OF PENNSYLVANIA, INC.  
TO THE ANSWER OF JOSEPH LUCEY TO APPLICATION OF  
COLUMBIA GAS OF PENNSYLVANIA, INC.**

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**TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:**

AND NOW, Columbia Gas of Pennsylvania, Inc. (“CPA” or the “Company”), by and through its attorneys, hereby files Preliminary Objections, pursuant to the regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.101, and respectfully requests that the Commission strike portions of the above-captioned *Answer to Application of Columbia Gas of Pennsylvania, Inc.* filed by Joseph Lucey, docketed at Docket No. A-2011-2276780 (“Answer”), and reclassify remaining portions of the Answer as a protest. In support thereof, CPA states as follows:

## I. BACKGROUND

1. CPA is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. CPA is a “public utility” and “natural gas distribution company” (“NGDC”) as those terms are defined in Sections 102 and 2202 of the Public Utility Code, 66 Pa.C.S. §§ 102, 2202. CPA provides natural gas sales, transportation, and/or supplier of last resort services to approximately 414,000 retail customers in portions of 26 counties of Pennsylvania and is subject to the regulatory jurisdiction of the Commission, pursuant to certificates of public convenience.

2. Mr. Joseph Lucey (“Lucey”) is an adult individual residing at 107 West Roy Furman Highway, Wind Ridge, PA 15380 (“Lucey Residence”), and a customer of CPA. *Lucey v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2011-2248370 (“Formal Complaint”) at ¶1.

3. On June 24, 2011, CPA was served with the Formal Complaint filed against the Company by Lucey.

4. On July 14, 2011, CPA filed an Answer and New Matter to the Formal Complaint.

5. On December 5, 2011, CPA filed an *Application for Approval of Abandonment of Service by Columbia Gas of Pennsylvania, Inc. to One (1) Natural Gas Service Customer Located in Green County, Pennsylvania* (“Application”), Docket No. A-2011-2276780, and a motion to consolidate the Formal Complaint with the Application.

6. On January 4, 2012, Administrative Law Judge Katrina L. Dunderdale issued an order granting CPA’s motion to consolidate the Application with the Formal Complaint.

7. On January 23, 2012 Lucey filed an Answer to CPA's Application.<sup>1</sup>

8. In the Answer Lucey admits Columbia Gas Transmission, LLC ("TCO") is an interstate pipeline, denies imminent safety threats existed on TCO's line that would affect natural gas service to the Lucey Residence, and describes a discussion about a purported settlement agreement between Lucey's legal counsel and legal counsel who do not represent CPA in the two consolidated matters subject of this proceeding. (Answer, ¶4; Answer, Exhibit 2).

9. Also in the Answer, Lucey summarized an alleged settlement he reached with "representatives of NiSource," wherein Lucey references communications between legal counsel for Lucey and legal counsel who do not represent CPA in the two consolidated matters subject of this proceeding. (Answer, ¶ 14; Answer, Exhibit 2).

10. CPA herein files these Preliminary Objections to Mr. Lucey's Answer and, for the reasons explained below, requests that the Answer be stricken in part, and the portions of the Answer remaining be reclassified as a protest, pursuant to Section 5.101(a) of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.101(a), for inclusion of impertinent matter and for legal insufficiency of the pleading, respectively.

## **II. STANDARD OF REVIEW**

11. Pursuant to the Commission's Rules of Administrative Practice and Procedure, preliminary objections in response to a pleading may be filed on several grounds, including:

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<sup>1</sup> The Commission's regulations do not provide for the filing of an answer in response to an application, but rather provide that a person objecting to the approval of an application may file a protest. 52 Pa. Code § 5.51. This issue is specifically addressed in more detail herein as grounds for one of CPA's preliminary objections.

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the *inclusion of scandalous or impertinent matter*.
- (3) Insufficient specificity of a pleading.
- (4) *Legal insufficiency of a pleading*.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

52 Pa. Code § 5.101(a) (emphasis added).

12. In ruling on preliminary objections, the Presiding Officer must accept as true all well-pled allegations of material facts as well as all inferences reasonably deducible therefrom. *Stilp v. Cmwth.*, 910 A.2d 775, 781 (Pa. Cmwth. 2006) (citing *Dep't of Gen. Serv. v. Bd. of Claims*, 881 A.2d 14 (Pa. Cmwth. 2005); accord *Complaint of Nat'l Fuel Gas Distrib. Corp. and Petition for an Order to Show Cause*, Docket No. P-00072343 (December 26, 2007)). However, the Presiding Officer need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwth. 2007). For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party. *Stilp*, at 781.

### **III. PRELIMINARY OBJECTIONS**

#### **A. Preliminary Objection No. 1: Legal Insufficiency of Pleading.**

13. Columbia incorporates by reference Paragraphs 1 through 12 as if fully set forth herein.

14. Mr. Lucey's Answer purports to respond to Columbia's Application.

15. The Commission's regulations do not provide for the filing of an "answer," in response to an Application, but rather provide that a person objecting to the approval of an application may file a "protest." 52 Pa. Code § 5.51. The Formal Complaint has been consolidated with the Application, and CPA is by no means challenging Lucey's right to protest the Application. However, if the Answer is allowed to stand in form, CPA is not clear as to whether it would be required or permitted to file a reply to the Answer. Therefore, in light of the Commission's regulation which does not provide for answers to be filed in response to applications, the Answer must be stricken as it is legally insufficient. CPA recognizes Mr. Lucey's interest in this proceeding, however, and CPA would support the reclassification of Answer as a timely filed protest.

16. Accordingly, the Answer fails to conform to the Commission's regulations pursuant Section 5.101(a)(2) of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.101(a)(2).

**B. Preliminary Objection No. 2: Inclusion of Scandalous or Impertinent Matter.**

17. Columbia incorporates by reference Paragraphs 1 through 12 as if fully set forth herein.

18. In his Answer, Lucey includes the following text and accompanying Exhibit 2 outlining a purported discussion that took place with counsel not representing CPA in the two consolidated matters subject to this proceeding, and an agreement that \$25,600 would be paid to Lucey for a geothermal conversion pending one unresolved issue having to do with earth subsidence:

- (a) "Safety was raised for the first time when an Attorney by the name of James Doerfler called Mark Lucey on December 20, 2010 and threatened to bring a lawsuit

against him to permit disconnection of the line for safety reasons.”

- (b) “A proposal for a geothermal conversion was provided to Mr. Doerfler. It was thereafter agreed the conversion cost of \$25,600.00 Dollars would be paid to Mr. Lucey.”
- (c) “The only unresolved issue was Lucey’s request to delay conversion until subsidence had resolved itself being nine (9) months after the mining. There was never a response to the delay request. The last mention of it was made in a May 6, 2011. See email attached as Exhibit 1 to Jodie N. Hermann an Attorney representing NiSource.”<sup>2</sup>

(Answer, ¶4; Answer, Exhibit 2).

19. In the Answer, Lucey also includes the following text which purports that Lucey reached a settlement with NiSource representatives concerning the conversion to a geothermal heating system:

- (a) “Lucey had agreed with representatives of NiSource that Lucey would be paid the conversion costs for a geothermal heating system at a cost of \$25,600.00 Dollars. The only issue unresolved was whether Lucey could wait nine (9) months from the date of mining to install the geothermal system. This nine (9) month wait is required to permit subsidence to resolve itself as a geothermal system requires the drilling of a vertical Well which could be affected by ongoing subsidence. This is the same subsidence that which TCO claims caused leaks in line 954. The last communication regarding this settlement came from counsel for Lucey on May 6, 2011 wherein it was noted that the monetary amount was settled and the only outstanding issue was the nine (9) month delay from the time of mining. (See Exhibit 2 attached hereto)”

(Answer, ¶14; Answer, Exhibit 2).

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<sup>2</sup> Columbia notes that the exhibit referenced in paragraph 4d of the Answer is Exhibit 2 as attached to the Answer, not Exhibit 1.

20. The above-mentioned averments set forth in Paragraphs 4 and 14, and Exhibit 2 of Mr. Lucey's Answer, are not relevant or material to whether CPA properly terminated service to the Lucey Residence or to whether CPA has sufficiently met its burden of proof to abandon service to the Lucey Residence. Section 1103 of the Code, 66 Pa. C.S. § 1103(a), defines the general standard by which the Commission determines whether to grant a certificate of public convenience:

A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable.

In assessing whether public convenience and necessity will be served by any proposed abandonment, the Commission considers a number of factors: (1) the availability of supply, (2) the economics of maintaining the system, (3) the number of customers affected, (4) the availability of alternative fuels and/or suppliers, (5) the costs of converting to alternate fuels or suppliers, and (6) the allocation of such costs. *Able Company, Ltd.*, 1996 Pa. P.U.C. LEXIS 108, 23 (1996). The settlement information CPA objects to in this preliminary objection as impertinent is not relevant or material to the issues or factors before the Commission in this proceeding.

21. The averments instead describe purported settlement discussions to which CPA was not a participant. Moreover, the legal counsel referenced in the above averments do not represent CPA in this matter. Rather, it is CPA's understanding that the identified legal counsel represents TCO, an interstate pipeline company regulated by the FERC.

22. To be considered scandalous or impertinent, “the allegations must be immaterial and inappropriate to the proof of the cause of action.” *Common Cause/Pennsylvania*, 710 A.2d 108, 115 (Pa. Cmwlth. 1998).

23. The above-referenced averments describe an alleged settlement agreement, which is irrelevant to the two causes of action pending in this matter--CPA’s ability to terminate regulated natural gas service and CPA’s ability to meet its burden for a service abandonment. Moreover, the averments are impermissible pursuant to the Commission’s regulations because they describe an offer to compromise:

Offers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege.

52 Pa. Code § 5.231(d). The Commission has previously found that “settlement negotiations are privileged, confidential and inadmissible into evidence...” *Pa. PUC v. Pennsylvania Electric Co.*, Docket Nos. R-80051197, C-80072106 (Order entered December 4, 1980). Specifically, the Commission stated:

The rule of evidence which excludes unaccepted settlement offers is well established and is based upon two considerations: (1) the recognition that the relevance of unaccepted proposals of settlement is limited at best; and (2) public policy favors excluding such evidence in order to foster settlements. See *Redevelopment Authority of the City of Philadelphia v Pennsylvania Electric Co.* (1979) 48 Pa. Cmwlth 68, 409 A2d 122; The Federal Rules of Evidence, Rule 408; "*McCormick on Evidence*," 2nd ed, § 274; "*Wigmore on Evidence*," Chadbourn edition, § 1061. In the instant case, we need not delve into case law in order to determine the existence or nonexistence of a privilege in administrative proceedings, for we find one clearly recognized in 1 Pa Code § 35.115. That provision, placed as it is within prehearing conference procedures, indicates that the privilege reasonably extends to any unaccepted proposals of settlement or to any discussions regarding settlement, as well as a wide variety of other matters which would expedite the proceeding. Consequently, the scope of the privileged subject matter is to be interpreted broadly. Accordingly we find

that settlement negotiations are privileged, confidential and inadmissible into evidence, and that the second question is answered in the affirmative.

*Id.*

24. It is also the general rule in civil litigation that offers of settlement are not admissible. *See Commonwealth v. Terry*, 418 A.2d 673, 674 (Pa. Super. 1980). The Superior Court noted that, “[t]he reasons for the rule are clear.... The law favors out of court compromise rather than litigation. To permit the introduction at trial of a defendant’s offer to settle would severely inhibit defendants from attempting to settle *potential* litigation.” *Id.* at 674 (emphasis added).

25. The above-mentioned averments set forth in Paragraphs 4 and 14, and Exhibit 2 of the Answer are impertinent and immaterial to the two causes of action pending in this proceeding; and, therefore, are grounds for preliminary objections pursuant Section 5.101(a)(2) of the Commission’s Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.101(a)(2).

#### **IV. CONCLUSION**

26. The Answer includes confidential settlement negotiations that are (1) immaterial to the causes of action presently at issue in this proceeding, (2) inadmissible offers to compromise, and (3) discussions to which CPA was not privy.

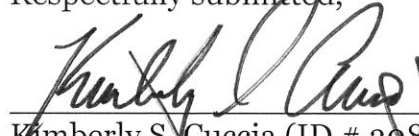
27. Inclusion of such impertinent matter is grounds for the granting of Columbia’s preliminary objections.

28. Lucey’s Answer is legally insufficient because it fails to conform to the Commission’s regulations which do not provide for the filing of an answer as a response to an application.

29. Based on the foregoing, the Answer should be reclassified as a “protest” and the portions discussing settlement as identified in these Preliminary Objections stricken.

WHEREFORE, Columbia Gas of Pennsylvania, Inc. respectfully requests that paragraphs 4 and 14, and Exhibit 2 of the Answer of be stricken, and that the remaining portions of the Answer be reclassified as a protest.

Respectfully submitted,



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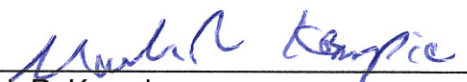
DATED: February 8, 2012

*Columbia Gas of Pennsylvania, Inc.*

## VERIFICATION

I, Mark R. Kempic, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information, and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: 2/8/12

  
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Mark R. Kempic  
Director, Rates & Regulatory Policy  
Columbia Gas of Pennsylvania, Inc.