

RECEIVED

FEB - 9 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

CHARLES NELSON :
Complainant :
v. : DOCKET NO. C-2012-2284248
PECO ENERGY COMPANY :
Respondent :

PRELIMINARY OBJECTION OF RESPONDENT,
PECO ENERGY COMPANY

Respondent, PECO Energy Company ("PECO Energy"), pursuant to 52 Pa. Code § 5.101(a)(4) respectfully petitions this Honorable Commission to dismiss the instant Complaint as legally insufficient.

1. On January 20, 2012, PECO Energy was served with a formal complaint filed by Charles Nelson (hereafter "Complainant"). The Complainant disputes the eventual elimination of PECO's discounted OP rate.

2. PECO Energy simultaneously filed an Answer and the instant Preliminary Objection.

3. Commission procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil procedure.²

4. In deciding preliminary objections, the Public Utility Commission must determine, based on the factual pleadings of the petitioner, if relief or recovery is possible.³

5. A complaint must be able to recover under the law to survive a preliminary objection.⁴

² *Equitable Small Transportation Interveners v. Equitable Gas Co.*, 1994 Pa.PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994)

³ 2006 Pa. PUC Lexis 111, *7.

6. All of the non-moving party's averments must be taken as true for the sake of deciding the preliminary objection.⁵

7. The court does not, however, need to accept, "unwarranted inferences from facts, argumentative allegations, or expressions of opinions."⁶

8. Section 703 of the Public Utility Code, 66 Pa.C.S.A. § 703(b) provides that the Commission may dismiss any complaint without a hearing if, in its opinion, a hearing is not necessary in the public interest.

9. A hearing is required only when there is a disputed question of fact, and is not required to resolve questions of law. *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm'n*, 817 A.2nd 593 (Pa. Commw. Ct. 2003), petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003).

10. Here, there are no genuine issues of fact and PECO Energy is entitled to judgment as a matter of law. Therefore, the complaint is legally insufficient and should be dismissed.

11. The Complainant disputes the phase out of PECO Energy's OP rate. The elimination of PECO Energy's OP rate was approved by the Commission as part of PECO's Default Service Program and Rate Mitigation Plan on June 9, 2009, docket number P-2008-2062739. The plan was previously approved by the Commission and is just, reasonable and lawful.

12. By way of background, in 1996 the Pennsylvania General Assembly enacted the Electricity Generation Customer Choice and Competition Act (Act), 66 Pa.C.S. §§2801-15. The Act allows Pennsylvanians to buy electric generation supply from licensed alternative

⁴ *Milliner v. Enck*, 709 A.2d 417, 418 (Pa. Super. Ct. 1998) ("preliminary objection should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover").

⁵ *Id.* at 7-8.

⁶ *Feingold v. McNulty*, 2009 Phila. Ct. Com. Pl LEXIS 167, *3.

suppliers by unbundling the generation portion of electric rates from the transmission and distribution portions.

13. The Act capped the generation portion of electric rates to ease the transition to competitive markets at 1996 levels. The rate cap was initially established under Section 2804 of the Act, and, after much litigation, settlements were reached in which the rate cap would expire for all PECO customers at the end of 2010.⁷

14. On September 10, 2008, PECO Energy filed its Default Service Program and Rate Mitigation Plan (DSP Petition) to establish rates, terms and conditions for the provision of default service for the period of January 1, 2011 through May 31, 2014, for those customers who do not take service from an alternative electric generation supplier (EGS) or whose contracted generation is not delivered.

15. PECO Energy's DSP plan is designed to ensure that PECO's default service customers have access to a reliable supply of generations and to help them manage the transition from capped generation rates to market-priced rates that were to occur on January 1, 2011. PECO's DSP Petition was assigned Commission Docket P-2008-2062739.

16. The phase out of the residential OP was included as part of PECO's DSP Plan.

17. After extensive discovery, hearings, and the filing of testimony and rebuttal testimony in this matter, on March 10, 2009, a Joint Petition for Settlement was filed to request approval of PECO's DSP Plan as modified by the settlement.

18. By Order entered June 2, 2009 the Commission approved the Settlement and PECO's DSP Plan, as modified by the settlement.

⁷ The Commission has already ruled that it lacks the authority to extend the expired rate caps. See *Tshundy v. PPL Electric Utilities Cor.*, Docket No. C-2009-2092230 (Order entered August 21, 2009)(citing 66 Pa.C.S. 2804(4)).

19. The Commission has only those duties, powers, responsibilities and jurisdiction that were expressly or by necessary implication given to it by the Legislature. *Rogoff v. The Buncher Company*, 395 Pa. 477, 151 A.2d 83 (1959).

20. As the Commission recognized in *Tshundy v. PPL Electric Utilities Corp.*, Docket No. C-2009-2092230 (Order entered August 21, 2009), the Commission may not extend the rate caps, which expired in 2010, in order to prevent a generation rate increase.

21. Additionally, the Competition Act provides that default service rates must be based on prevailing market prices, not promotional discounts or subsidies; offering reduced rates for winter heating customers would require other default service customers to subsidize the Rate OP customers to cover the difference, and therefore would violate the Public Utility Code.

22. Commission precedent is clear and unambiguous on this issue. In *Dunham v. PPL Electric Utilities Corporation*, Docket No. C-2010-2155056, the Commission stated:

In *Diehl v. PPL Electric Utilities Corporation*, Docket No. C-2009-2149261 (Order entered April 1, 2011) (*Diehl*), we discussed the circumstances surrounding PPL's phase out of the RTS rate schedule:

In 2004, at Docket No. R-00049255, PPL filed a distribution rate case with the Commission. The Commission's decision in that case on rate allocation among customer classes was appealed to the Commonwealth Court. As part of its review, the Commonwealth Court interpreted the Competition Act as requiring that rates for transmission, distribution and generation each be set separately, based on the cost of serving each separate class of customers. 66 Pa. C.S. § 2804(3). The Court ruled that subsidized rates (*e.g.*, the RTS rate) which do not cover their costs of service must be transitioned to cost-based rates. *See, Lloyd v. Pennsylvania Public Utility Commission, et al.*, 904 A.2d 1010 (Pa. Cmwlth. 2006). Thus, the RTS rate as it existed in the 1980s, at the time the Complainant constructed his home, could no longer continue to be offered.

1. *Diehl* at 4-5.

Dunham Opinion and Order, entered July 1, 2011, at 4.

23. Similar conclusions were reached in several complaints before the Commission. See also, *Kupchinskis v. PECO Energy Company*, Docket No. C-2011-2253896; *Herting v PPL Electric Utilities Corporation*, Docket No. C-2010-2153688, Commission Final Order entered October 6, 2011; *Brickner v PPL Electric Utilities Corporation*, Docket No. C-2009-2105583, Commission Opinion and Order entered May 21, 2010; *Laudenslager v. Duquesne Light Company*, Docket No. C-2010-2156300, Commission Final Order entered June 29, 2011; *Sowatskey v Duquesne Light Company*, Docket No. C-2009-2144804, Commission Final Order entered January 11, 2011.

24. As the instant case involves the same legal question, the outcome should be the same. The complaint should be dismissed as legally insufficient under 52 Pa.Code §5.101(a)(4).

REQUEST FOR RELIEF

WHEREFORE, for all of the reasons stated herein, PECO respectfully requests that your Honorable Commission dismiss the instant complaint with prejudice.

Respectfully submitted,



Tishkia Williams
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-6841
Fax: 215.568.3389
tishkia.williams@exeloncorp.com


**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CHARLES NELSON	:	
Complainant	:	
v.	:	DOCKET NO. C-2012-2284248
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

VERIFICATION

I, Tishekia Williams, hereby declare that I am counsel for 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.

Date: February 9, 2012



Tishekia Williams

RECEIVED

FEB - 9 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

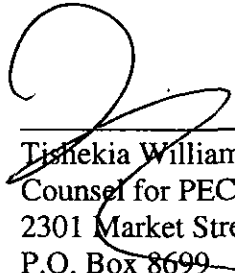
CHARLES NELSON	:	
Complainant	:	
v.	:	DOCKET NO. C-2012-2284248
	:	
PECO ENERGY COMPANY	:	
Respondent	:	

CERTIFICATE OF SERVICE

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

Charles Nelson
721 Featherbed Lane
Garnet Valley, PA 19060

Dated at Philadelphia, Pennsylvania, February 9, 2012



Tishekia Williams
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-6841
Fax: 215.568.3389
tishekia.williams@exeloncorp.com

RECEIVED

FEB - 9 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU