BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

THE VICTORY CONDOMINIUM ASSOCIATION, Complainant v. PECO ENERGY COMPANY Respondent.	Docket No. C-2011-2268126

THE VICTORY CONDOMINIUM ASSOCIATION'S RESPONSE BRIEF TO PECO ENERGY COMPANY'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This dispute arises from PECO's unilateral decision to charge Victory a contract minimum demand on an account that had no contract. Now PECO seeks to further capitalize on its unfair treatment of a customer by refusing to refund the $145,683.55 in overcharges and by shirking its responsibility to its customer. The Commission should not permit a utility to treat its customers with such disregard.

By failing to assist its customer in determining the most advantageous rate upon actual notice of service conditions, and by imposing this contract minimum demand without creating a contract or providing its customer as to any information regarding the terms of the customer's contract, PECO Energy Company violated its tariff and deprived The Victory Condominium Association of the ability to make an informed decision about service. Now PECO seeks to further capitalize on its dereliction of duties by refusing to issue a refund to its customer. The Commission should not permit such unfair treatment of a customer where the evidence clearly leads to four conclusions: 1) that there was no contract between PECO and Victory; 2) that PECO had knowledge of Victory's service

condition in August 2008; 3) that despite that knowledge, PECO removed a rider from Victory's account without notification to Victory and failed to provide Victory with any information to provide the customer with meaningful information (or any information at all) to make a decision about its service; and 4) that Victory could not have had knowledge of its claim any earlier than October 2008 when it first failed to meet its PECO-imposed contract minimums. Since Victory has met its burden of proof using undisputed facts, PECO's motion for summary judgment should be denied, and Victory's motion for summary judgment should be granted.

II. FACTS

Background

The Victory Condominium Association ("Complainant" or "Victory") is a customer of PECO Energy Company ("PECO"). A true and correct copy of the Amended Complaint is attached to the Motion as Exhibit A. A true and correct copy of the Answer with New Matter is attached to the Motion as Exhibit B. *See* Exhibits A and B, ¶¶ 1 and 4. Victory's current PECO Account Number is 34455-61001. Exhibits A and B, ¶ 5. Service was provided to Victory under Rate HT with a contract minimum of 560 kW and a contract maximum of 1400 kW during non-summer months (October through May) of each year from June 2008. Exhibits A and B, ¶6. In 2008, service was provided to the prior account owner under Rate HT with a contract minimum of 560 kW and a contract maximum of 1400 kW during non-summer months (October through May) of each year from June 2008, as well as under PECO's Night Service Rider and Construction Rider. Exhibit B, ¶6. The service was imposed upon the prior owner by PECO. The Construction Rider removes contract minimums while a property is under a

construction or expansion period or is receiving service during a receding load period after the expiration of the initial contract term while a customer is in the process of dissolution. A true and correct copy of PECO's Construction Rider is attached to the Motion as Exhibit C.

PECO Selects A Contract Minimum Demand for Victory on an Account with No Contract, Without Informing the Customer of the Service Rates and With Actual Knowledge of the Service Conditions

1. In 2008, Victory requested a name change on the PECO account for purposes of transferring ownership of the account to itself. A true and correct copy of the Interrogatories (Set II) and Response (Set II) are attached hereto as Exhibits D-1 and D-2. Exhibits D-1 and D-2, ¶¶2.a, 2.b. Although Victory was managed by a property manager (Wentworth Group), the property manager did not advise Victory on energy related issues and did not review utility contracts. A true and correct copy of the Interrogatories (Set I) and Response (Set I) are attached hereto as Exhibits E-1 and E-2. Exhibits E-1 and E-2, ¶¶ 2, 5, 6, 7, 9, 10, and 12. PECO forwarded an e-mail correspondence requesting information from Victory to effect service. A true and correct copy of PECO's response to Interrogatory No. 2, and the responsive documents, including the series of e-mails culminating with the August 19, 2008 e-mail is attached hereto as Exhibit F-1. Specifically, PECO asked Victory about the type of service it was seeking:

> Type of service: (If nothing is changing with the operation of the building, I assume the new owner will stay with the same contract limits but I need that stated in the letter.)

A true and correct copy of Victory's August 19, 2008 e-mail correspondence in response to the request is attached to the Motion as Exhibit F-2. On August 19, 2008, Victory

responded to the e-mail correspondence stating, in pertinent part, that "nothing is changing." Exhibit F-2.

Despite Victory's representation that "nothing [was] changing" to the account – and even prior to Victory's request for service – PECO removed Victory from the Construction Rider while retaining service under the above referenced Rate HT and PECO's Night Rider. A true and correct copy of the Reply to New Matter is attached hereto as Exhibit G. Exhibit B (New Matter) and Exhibit G, ¶8. PECO did not provide Victory with a copy of a contract, and did not provide Victory with any information as to requirements for a contract minimum demand.

Without the Construction Rider, Victory was required to meet the PECO-imposed contract minimums to avoid overcharges. PECO did not advise Victory that it had removed the Construction Rider from the account or of the impact it would have on Victory's bills. Exhibits D-1 and D-2, ¶2.b. Moreover, PECO never provided Victory with any information as to the contractual rates or contract minimum demand applicable to its service, much less a written contract. *Id.* As evidenced by its removal of the Construction Rider despite Victory's representation that "nothing [was] changing" to its account, PECO had actual knowledge that Victory's service conditions had changed. Exhibits F-1 and F-2. Despite its actual knowledge of Victory's service conditions, PECO did not place Victory on the most advantageous rate, and did not communicate with Victory regarding its options. Exhibits D-1 and D-2, ¶2.b.

In its pleadings, PECO suggests that the August 19, 2008 e-mail correspondence was Victory's written application for service. Exhibit B, ¶9 (p.5). To the extent that PECO deemed Victory to be a customer applying for service, PECO's tariff requires that

a written application "shall contain a statement of the premises to be served, the rate under which service is desired, and such conditions or riders as are applicable to the special circumstances of the case." A true and correct copy of Tariff, § 4.3 is attached to the Motion as Exhibit H. The August 19, 2008 was devoid of certain items, including a copy of the contract between PECO and the prior account owner, the types of contract limits applied to the prior owner's account, the types of contract limits available to the new owner's account, and the rate of service desired or the conditions or riders applicable to the account. Exhibits F-1, F-2; *cf* Exhibit H. Accordingly, this written document did not satisfy the requirements of PECO's tariff. Not only did this deprive PECO's customer of its ability to make an informed decision regarding its service rates, but it also allowed PECO to use the customer's ignorance to its benefit through months of overcharges.

Victory Discovers that It Is Not Receiving the Most Advantageous Rate

In October 2008, for the first time since initiating service with PECO, Victory did not meet the utility selected contract minimums. From October 2008 through January 2011, Victory was on Rate HT, and repeatedly failed to meet the contract minimums. Ultimately, Victory realized that the most advantageous rate was not being applied by PECO, and it requested an adjustment to its account. A true and correct copy of a January 24, 2011 letter is attached to the Motion as Exhibit I. Despite this letter, PECO failed to adjust the account to the lower Contract Minimum until the next PECO bill dated Feb. 10, 2011.

PECO's Violations of Its Tariff, Unlawful Discrimination and the Resulting Damages

Based on historical data and information available to PECO at the time the Contract Limits were chosen by PECO, PECO should have applied more reasonable Contract Limits of 200/500 KW with an Off-Peak maximum of 600 KW. Pursuant to the terms of its own tariff, PECO should have disclosed the rate under which service was applied, the conditions or riders applicable to the account, and, as required by law, in light of the actual notice of the service conditions, it should have placed Victory on the most advantageous rate. Exhibits F-1, F-2 and H; *see also* 13 Pa. C.S. §1303. At the time that service was initiated no one from PECO explained the different options that were available to Victory and PECO did not send a Contract for HT Service for review and signature as required by the PECO tariff. Exhibits D-1 and D-2, ¶2.b., and Exhibits F-1, F-2. Had PECO reviewed the account history prior to establishing this account for Victory, it would have known that the average monthly demand was 280kw or one-half of the Contract Minimum. PECO did not review the account history when establishing Contract Limits for this account. As a result of the foregoing, Victory was unlawfully discriminated against by PECO and suffered substantial overcharges. PECO's billing error resulted in substantial overcharges from June 2008 to January 2011 totaling $145,683.55. Victory now seeks a refund of that overpayment.

II. STANDARD

A motion for summary judgment in a public utility proceeding will be granted "if the applicable pleadings, depositions, answers to interrogatories and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving party is entitled to a judgment as a matter of law." 52 Pa. Code § 5.102(b).

"A motion for summary judgment must be based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits." 52 Pa. Code § 5.102(c). The cross motions for summary judgment establish that there are no genuine issues of material fact and that judgment should be entered in favor of Victory.

Despite its knowledge of Victory's service conditions, PECO failed to provide Victory with the information necessary for the customer to form an informed decision (much less a written contract or application outlining the terms of service), and then took advantage of that ignorance. The PUC's "sole power is to see that in the matter of rates, service and facilities, [the utilities'] treatment of the public is fair." *Bell Tel. Co. v. Driscoll*, 343 Pa. 109, 118 (Pa. 1941). When the utility deliberately fails to provide clear information as to the applicable rates and the customer's options, it can hardly be said the treatment of its customers is "fair." An examination of the facts clearly establishes that PECO avoided its obligations to provide any information its unsophisticated customer that would allow them to make an informed decision.

III. ARGUMENT

A. Victory Does Not Claim Eligibility For the Construction Rider, and PECO's Removal of the Rider Constituted Actual Notice that Victory's Service Conditions Had Altered

PECO's lengthy argument explaining why Victory is not eligible for the PECO Construction Rider is a red herring. Victory has not claimed that it is eligible for the Construction Rider (which alleviates the need to meet contract minimums while a customer is on the rider). Rather, the Construction Rider only has been raised to establish PECO's actual knowledge that Victory's service conditions had changed, such that the utility was required to compute the bills under the most advantageous rate. Under 66 Pa.

C.S. § 1303, "...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." After a utility has actual notice of service conditions, it has an obligation to ensure that the customer receives the most advantageous rate. *See Springfield Twp. v. Pennsylvania Pub. Util. Comm'n,* 676 A.2d 304, 1996 Pa. Commw. LEXIS 200 (Pa. Commw. 1996). The facts clearly establish that PECO knew that Victory's service conditions had changed, and that PECO failed to communicate with the customer to determine the appropriate rate or even to advise the customer as to what rate applied.

Because Victory had advised PECO that "nothing is changing" with respect to the electric account, it naturally follows that PECO would not have disturbed the Construction Rider absent actual notice that Victory's service conditions had changed. Instead, PECO unilaterally removed the Construction Rider from Victory's account, despite the fact that Victory informed PECO that "nothing is changing." Accordingly, there can be no dispute that the utility had actual knowledge that Victory's service conditions had altered, and that the utility's obligations to communicate with its customer under § 1303 were triggered.

B. Since the Utility Had Actual Knowledge That the Customer's Requirements Had Changed, PECO Had an Obligation to Engage Victory in A Dialogue to Determine Its Needs, Or at Least Provide it With a Copy of the Contract Advising The Customer of The Applicable Rates.

Because PECO had actual notice that Victory's service conditions had changed, it had an obligation to assist the customer in determining whether it was being billed at the most advantageous rate. Not only did it fail to perform this duty, but also it neglected to

even provide the customer with any information – whether a contract or an application – specifying the applicable rates. Moreover, to the extent that it claims that Victory's August 19, 2008 e-mail correspondence constituted an "application" for service, PECO again abandoned its responsibility to its customer, because the "application" failed to meet the requirements of its tariff. *See* Exhibit H. For these reasons, the PECO's Motion for Summary Judgment should be denied, and Victory's Cross-Motion for Summary Judgment should be granted.

PECO deliberately mischaracterizes the communication between itself and Victory by omitting specific information. For instance, PECO posits that it communicated the different rate options available to Victory when initiating service, and offers the August 19, 2008 e-mail correspondence in support as a written application for service. Exhibits A and B, ¶9. A brief review of the communication reveals that PECO fell woefully short in explaining or identifying the rates:

> Type of service: (If nothing is changing with the operation of the building, I assume the new owner will stay with the same contract limits but I need that stated in the letter.)
> nothing is changing

Exhibit F-2 (underlined portion is Victory's response). In arguing that this communication constitutes an application for service, PECO ignores the explicit terms of its tariff which outline requirements for a service application. Specifically, the application must identify 1) the premises to be served, 2) the rate under which service is desired, and 3) the applicable conditions or riders. Exhibit H. The proffered written "application" is devoid of any reference to the rate of service desired, any conditions or riders applicable, the applicable contract limits, or even the options available to the customer. Exhibits F-1, F-2. By engaging the customer to sign it up for service, PECO

had a duty to provide information regarding the options, or at least to identify the previous owner's contract terms. PECO accordingly failed to meet the barest of obligations in creating a contract for service with its customer.

To counter these indisputable facts, PECO relies heavily on easily distinguishable cases. In *Springfield Twp. v. Pennsylvania Public Utility Commission*, 676 A.2d 304 (Pa. Commw. 1996), the court declined to award a refund for overcharges, noting that prior to the customer's request for a rate change, the customer had never notified the utility of its ownership or interest in the street lights or requested assistance in selecting the more favorable rate. In contrast, Victory notified PECO that it was taking over ownership of the property in 2008. Moreover, PECO had actual knowledge that Victory's service conditions had altered, and yet it failed to engage Victory in a discussion on the types of available rate service. PECO did not ask Victory which rate it should be placed on, explain the options, or identify the rates it was imposing. Rather, whole of the message regarding rates was: "if nothing is changing with the operation of the building, I assume the new owner will stay with the same contract limits..." Exhibit F-2. Unlike the customer in *Springfield*, the applicant Victory actually gave notice to the utility of the change in ownership and the utility knew that the customer's needs had changed.

City of Pittsburgh v. Duquesne Light Company, 1980 Pa PUC Lexis 37, 54 Pa. PUC 460 (Pa. PUC 1980) is equally distinguishable. In *City of Pittsburgh*, the customer sought a refund of an overcharge due to an incorrect rate classification, the PUC found that prior to the customer selecting its electric rate, the utility and the customer agreed that the rate was appropriate. The utility representative made an estimate of the

customer's demand, and the customer and the utility agreed that this rate was appropriate. The parties then executed a contract. Subsequently, the estimated loads were not realized. The city ultimately contacted the utility and was switched to the more advantageous rate. On appeal of the administrative judge's determination, the commissioners reversed the decision, rejecting the idea that the utility had an affirmative obligation to monitor its customer's utility billings.

Victory is not asking the PUC to hold otherwise; it does not seek to impose an obligation that the utility is required to monitor its customer's usage. Rather, it only seeks to hold PECO to its current legal obligations, in that when a customer is entering into a contract, the customer be informed of its options and the applicable rates. Unlike the parties in *City of Pittsburgh*, Victory and PECO did not consult on the appropriate rate was or the estimated demand. There was no discussion or exchange of ideas. Most troublesome is the fact that PECO effectively deceived its customer by omitting the information necessary to allow the customer to make an informed decision.

The Commission's disapproval of such an omission can be seen in *Fishel v. Full Service Computing Corp.*, 2008 Pa. PUC Lexis 65 (Pa. PUC 2008). In *Fishel*, the complainant alleged that the phone company placed her on the incorrect plan despite actual notice of her needs, and that she incurred excessive charges as a result. The Complainant testified that she was provided erroneous information by a carrier which caused her to switch providers to respondent's company. When she realized that the respondent had misrepresented the terms of the contract causing her to incur an overall higher bill, she ceased paying her bills, and her service was terminated. The administrative law judge ruled in favor of the complainant, and the utility filed

exceptions. The commission concluded that the utility's failure to provide the customer with full information on the terms and conditions of the service and the failure to put the customer on the most advantageous rate following notice of the service conditions was a violation of 66 Pa. C.S. § 1303.

Similar to the complainant in *Fishel*, in August 2008, PECO had notice that Victory's status was changing, including that it was taking ownership of a certain property, and construction at that property was ending. Rather than engage Victory in a discussion over its requirements or provide it with information on the terms and conditions of service, PECO simply removed the Construction Rider, and provided Victory with no information on the terms and conditions of service under 66 Pa. C.S. §1303. As it had actual knowledge of Victory's service conditions, PECO should have communicated with Victory to explain the customer's options for service. 66 Pa. C.S. § 1303.

Whether the Commission examines PECO's inactions by viewing Victory as an existing customer of which PECO had knowledge of its service conditions or as an applicant, one conclusion is necessary: PECO failed to satisfy its obligations to its customer. PECO had the chance to engage its customer in a dialogue to determine the most advantageous rate once it knew of the customer's service conditions. PECO further had the opportunity to disclose the service rates in the written application. PECO elected not do so in either instance, and instead took advantage of the customer's ignorance, resulting in overcharges totaling $145,683.55. Accordingly, there is no issue of material fact in dispute, and PECO's motion for summary judgment should be denied, and

Victory's cross motion granted due to the violation of PECO's tariff and unlawful discrimination.

C. PECO's Motion for Summary Judgment Should Be Denied, as the Statute of Limitations Does Not Bar this Action Where it Was Timely Filed, the Claims Could Not Have Been Discovered Earlier, and Victory Only Seeks Recovery of Claims Which Accrued During the Statute of Limitations

The Motion for Summary Judgment should be denied, as none of Victory's claims are time-barred. Importantly, the statute of limitations applicable to proceedings seeking refunds for overpayment is four years. 66 Pa. C.S. § 1312; *LP Water and Sewer Company v. Pennsylvania Public Utility Commission,* 722 A.2d 733, 738 (Pa. Commw. 1998). Since Victory filed its Complaint on October 13, 2011, and only seeks refunds dating back to October 2008, the statute of limitations does not bar the action. Moreover, even if a three year limitations period applied, Victory's claims survive for two reasons. First, since Victory had no way to know of the existence of a claim until October 2008, the discovery rule tolls the statute of limitations. Second, Victory's claims accrued against PECO each time it was overcharged. Since Victory was invoiced on a monthly basis, the claims dating back to October 2008 survive, even under PECO's restrictive reading of the statutes. Accordingly, PECO's Motion for Summary Judgment should be denied.

Despite Defendant's protestations, the applicable statute of limitations is four years. Under 66 Pa. C.S. § 1312, the statute of limitations in refund proceedings is explicitly four years:

> If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or

> unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment.

66 Pa. C.S. § 1312 (emphasis added). Since Victory seeks a refund and/or credit for its overpayments dating back to October 2008, the four year statute of limitation clearly applies. In contrast, 66 Pa. C.S. § 3314(a) applies to proceedings related to penalties or forfeitures: "No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise provided in this part."

The distinction between these competing statutes has been explained in that Section 3314 apples to penalties and forfeitures (such as when there is a dispute over a customer's failures to make payment) and Section 1312 applies to requests for refunds. *LP Water and Sewer Company,* 722 A.2d at 738; *see also Duquesne Light Company v. Pennsylvania Public Utility Commission*, 611 A.2d 370 (Pa. Commw. 1992) (applicable statute of limitations was three years where utility sought to impose penalties on customer). Victory urges the panel to adopt the reasoning stated in *LP Water and Sewer Company v. Pennsylvania Public Utility Commission*, and to reject the application of 66 Pa. C.S. § 3314(a) "because [it] states that 'no action for recovery of any *penalties or forfeitures*...shall be maintained unless brought within three years from the date in which the liability therefore arose." 722 A.2d at 738. As in *LP Water*, [t]his is not a case for

penalties or forfeitures but concerns a refund." *Id.* Victory is seeking a refund for overpayment, and the claim does not involve penalties or forfeitures. Accordingly, the four year statute of limitation applies.

Even assuming that the three year statute of limitations controls, the action is not time-barred. First, there was no way for Victory – an unsophisticated customer – to have knowledge of a cause of action against the utility. The discovery rule tolls the running of a statute of limitations where the injured party, despite the exercise of due diligence, is unable to determine the existence of a cause of action. *Pocono International Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 85, 468 A.2d 468, 471 (1983). From August 2008 until October 2008, PECO billed Victory at Rate HT, subject to contract minimums that were imposed upon the prior building owner by PECO without advising Victory of the existence of a contract or the contract minimums. Until Victory ceased meeting the contract minimum, there was no way for it to know that it was on the less advantageous rate – despite the exercise of due diligence as PECO failed to disclose any information on the applicable rates to Victory. It was not until October 2008, when Victory's usage dropped, and it failed to meet the contract minimums, that Victory could discover that a claim existed against PECO. Accordingly, the discovery rule tolled the statute of limitations and none of Victory's claims are time-barred.

In addition, it is well settled law that "a statute of limitations does not begin to run until the accrual of a cause of action." *Pennsylvania Turnpike Com. v. Atlantic Richfield Co.,* 375 A.2d 890, 892 (Pa. Commw. 1977) (citing *Bush v. Stowell*, 71 Pa. 208 (1872). "Where the repeated and measurable invasion of a plaintiff's rights occurs both outside the statutory period and also within it, the fact that some of the injury and damage

occurred outside the statutory period does not affect the plaintiff's right to recover for the separate invasion of its rights which occurred within the period." *Pennsylvania Turnpike Com.,* 375 A.2d at 892. Here, Victory's cause of action arose on a monthly basis – each time that it was overcharged by PECO. Accordingly, Victory's claims dating back to October 2008 are saved, and the motion for summary judgment should be denied.

IV. CONCLUSION

In light of the foregoing, Complainant The Victory Condominium Association seeks an Order granting Summary Judgment in its favor and against PECO Energy Service, and denying PECO's Motion for Summary Judgment, together with an Order directing PECO to refund and/or credit Complainant the difference between the charges which were imposed under the 560 KW Contract Minimum and the charges which should have been imposed under a 200 KW Contract Minimum from June 2008 to January 2011, totaling $145,683.55 together with pre-judgment interest, and costs.

Respectfully submitted,

HALBERSTADT CURLEY LLC

By: Charles Curley
Charles V. Curley

Date: 2/21/2012