

Lauren M. Lepkoski  
(717) 237-4841  
lauren.lepkoski@bipc.com

17 North Second Street, 15th Floor  
Harrisburg, PA 17101-1503  
T 717 237 4800  
F 717 233 0852  
www.buchananingersoll.com

April 4, 2012

**VIA E-FILING**

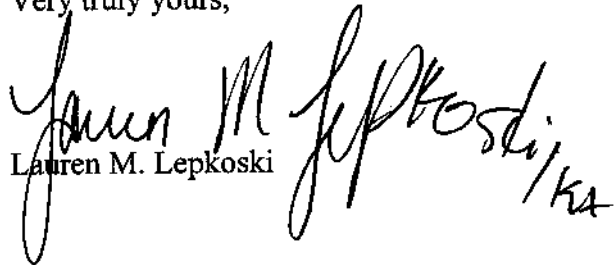
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

Re: Kathy Lyons v. Pennsylvania Electric Company  
Docket No. C-2011-2238862

Dear Secretary Chiavetta:

On behalf of Pennsylvania Electric Company, I have enclosed for filing the Exceptions on Behalf of Pennsylvania Electric Company. Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,

  
Lauren M. Lepkoski

LML/kra  
Enclosure

cc: Office of Special Assistants (Via UPS Overnight Delivery)  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**KAT LYONS**

**v.**

**PENNSYLVANIA ELECTRIC COMPANY**

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:  
: **Docket No. C-2011-2238862**  
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:

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**EXCEPTIONS  
ON BEHALF OF  
PENNSYLVANIA ELECTRIC COMPANY**

**BUCHANAN INGERSOLL & ROONEY, P.C.**

**Lauren M. Lepkoski, PA ID No. 94800  
Alan M. Seltzer, PA ID No. 27890**

**17 North Second Street, 15th Floor  
Harrisburg, PA 17101-1503  
Telephone: (717) 237-4800  
Facsimile: (717) 233-0852  
lauren.lepkoski@bipc.com  
alan.seltzer@bipc.com**

**Attorneys for Pennsylvania Electric Company**

**Dated: April 4, 2012**

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## I. INTRODUCTION

On or about April 18, 2011, Kat Lyons ("Complainant") filed a complaint with the Pennsylvania Public Utility Commission ("Commission") against Pennsylvania Electric Company ("Penelec" or the "Company") alleging incorrect charges on her electric bills for electric service provided to 254 A South Main Street Brookville, Pennsylvania 15825 ("Service Location"). Specifically, the Complainant claims that the Company's meter readers incorrectly read the meter at the Service Location.

On May 23, 2011, Penelec filed an answer to the complaint.

On August 5, 2011, Administrative Law Judge ("ALJ") John H. Corbett, Jr. issued a Prehearing Order.

On December 22, 2011 a telephonic hearing was held on the complaint.<sup>1</sup>

On March 1, 2012, ALJ Corbett issued his Initial Decision ("I.D.").

Penelec submits the following Exception to the ALJ's I.D in accordance with the Commission's Secretarial Letter dated March 15, 2012 and its regulations at 52 Pa. Code § 5.533.

## II. SUMMARY OF RELIEF

As described further below, the I.D. erred in applying *Waldron v. Philadelphia Electric Company*, 54 Pa. PUC 98 (1980) ("*Waldron*") and its progeny to the operative facts in this proceeding. According to *Waldron*, a complainant may establish a *prima facie* case by showing that: (1) the disputed bill was abnormally high when compared to prior usage patterns; and (2) his/her pattern of usage had not changed.<sup>2</sup> As the ALJ noted in the I.D., the Complainant is a new customer of the Company and does not have a clearly defined pattern of electric usage at the

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<sup>1</sup> The ALJ scheduled two telephonic hearings prior to December 22, 2011; however, both hearings were re-scheduled due to the Complainant's illness.

<sup>2</sup> See *Waldron*.

Service Location.<sup>3</sup> When the Complainant failed to meet her burden of proof that she was overbilled for the electric usage at the Service Location, the burden of going forward should not have been shifted to the Company. Inasmuch as the unequivocal record evidence shows that: (i) the Complainant is a new customer who has no prior usage at the Service Location against which to evaluate the alleged high bills; (ii) the Company meter at the Service Location was operating properly, accurately and in accordance with the Commission's standards for watt-hour electric meters at all times relevant to this proceeding; and (iii) all electric bills provided by the Company to the Complainant were calculated in accordance with the Company's Commission-approved retail electric tariff, it is clear that the I.D. has incorrectly applied *Waldron* and should be reversed.

### III. EXCEPTIONS

**EXCEPTION:** The I.D. erred in applying *Waldron* to conclude that the Complainant's January 14, 2011, electric bill at the Service Location was excessive by 7%.

#### A. **Factual Overview**

The Complainant began receiving electric service at the Service Location on December 14, 2010.<sup>4</sup> The Complainant lives alone at the Service Location.<sup>5</sup> On January 25, 2011, after receiving her first electric bill at the Service Location, the Complainant contacted the Company's Customer Service Department to dispute her electric bill of \$84.07 for the period from December 14, 2010 to January 14, 2011.<sup>6</sup> During the January 25, 2011 contact, the Complainant advised

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<sup>3</sup> I.D. at 7.

<sup>4</sup> NT at 46.

<sup>5</sup> NT at 11-16.

<sup>6</sup> Penelec Exh. 7.

the Company representative that she was using a space heater at the Service Location during the time relevant to the disputed electric service bill(s).<sup>7</sup>

The Complainant's basic claim is that electric bills issued by the Company for electricity provided to the Service Location for January, February, and March 2011 ("Disputed Billing Period") were excessively high and that later bills for April, May, June, July, and August 2011 electric bills were much lower.<sup>8</sup>

The Company removed the electric meter at the Service Location on August 23, 2011 and tested it on August 30, 2011. The test confirmed that the electric meter at the Service Location during the Disputed Billing Period was operating 99.43% accurate on full load, 98.74% accurate on light load, and had a weighted average of 99.29% accuracy, all within the Commission's regulations for watt-hour meter accuracy.<sup>9</sup>

The I.D. concluded that: (i) the Complainant had the potential to use 637 kWh during a 31-day period at the Service Location; (ii) because the Complainant's January 14, 2011 electric bill was for 686 kWh for a 31-day period, it exceeded the Company's potential for consumption by 49 kWh or 7%; and (iii) the Company should be required to adjust the Complainant's electric bill by 7% and issue her the necessary credit.<sup>10</sup> For the reasons specified below, the Company takes exception to these findings and conclusion, and requests that the I.D. be reversed and modified accordingly.

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<sup>7</sup> *Id.*

<sup>8</sup> NT at 16-17. However, as stated further below, because the Complainant has not been a customer long enough to have accumulated any billing/usage history with the Company at the Service Location, her claims that bills are "higher" or "lower" *are not* with reference to any specific baseline level of usage.

<sup>9</sup> NT at 34-36; Penelec Exh. 4.

<sup>10</sup> I.D. at 8.

## B. Legal Standard

Under Section 332(a) of the Public Utility Code ("Code"), 66 Pa.C.S. § 332(a), the proponent of a rule or order has the burden of proof in a Commission proceeding, except as otherwise provided in Code Section 315. 66 Pa.C.S. § 315. "Burden of proof" imports the duty of finally establishing the existence of a certain fact or set of facts by evidence which preponderates to a legally required extent.<sup>11</sup> The term "preponderance of the evidence" means one party must present evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party.<sup>12</sup> Accordingly, one must review the record in this case to determine whether the Complainant has satisfied her burden of proof. If the review indicates the burden has been satisfied, one must then determine whether the respondent has submitted evidence of co-equal value or weight to refute Complainant's evidence. If this has occurred, the burden of proof cannot be satisfied, unless the party bearing the burden of proof presents additional evidence.<sup>13</sup>

Furthermore, substantial evidence in the record must support the decision of the Commission.<sup>14</sup> The term "substantial evidence" means such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.<sup>15</sup> The Commission has held that a complainant, to establish a sufficient case against a utility and satisfy the burden

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<sup>11</sup> *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

<sup>12</sup> *Id.*

<sup>13</sup> *Morrissey v. Pa. Dept. of Highways*, 225 A.2d 895 (Pa. 1967); *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982).

<sup>14</sup> *See, e.g.*, Section 704 of the Administrative Agency Law, 2 Pa.C.S. § 704; *Yellow Cab Company v. Pa. Pub. Util. Comm'n*, 524 A.2d 1069 (Pa. Cmwlth. 1987).

<sup>15</sup> *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 166 A.2d 96 (Pa. Super. 1961); *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

of proof, must show the utility is responsible or accountable for the problem described in the complaint.<sup>16</sup>

In certain unique circumstances, however, the Commission has fashioned a non-substantive evidentiary rule that modifies the burden of persuasion imposed on parties in a "high bill" complaint case without upsetting the ultimate burden of proof imposed on a complainant under the Code. In *Waldron*, the Commission outlined the general dynamics for the burden of proof in a case that raises a high bill dispute. In order to determine whether a complainant has established a *prima facie* case where there are claims of unusually high bills, this Commission has declared that certain factors must be considered. While the accuracy of the meter is an important factor in resolving a billing dispute, it is not the sole criterion.<sup>17</sup> A complainant may establish a *prima facie* case by showing that: (1) the disputed bill was abnormally high when compared to prior usage patterns; and (2) his/her pattern of usage had not changed.<sup>18</sup> In looking at these criteria, one may consider the billing history of the account, any change in the number of occupants residing in the household, the potential for energy utilization, and any other relevant facts or circumstances that come to light during the proceeding.<sup>19</sup> In this way, a complainant may prove entitlement to relief by wholly circumstantial evidence, rather than direct evidence of some utility misfeasance.<sup>20</sup>

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<sup>16</sup> *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. P.U.C. 300 (1976).

<sup>17</sup> *Id.* at 100.

<sup>18</sup> *Id.*

<sup>19</sup> *Replogle v. Pennsylvania Electric Company*, 54 Pa. P.U.C. 528 (1980); *Bennett v. The Peoples Natural Gas Company, LLC*, Docket No. C-2009-2122979 (Order entered October 13, 2010); *Thomas v. PECO Energy Company*, Docket No. C-2010-2187197 (Order entered November 15, 2011).

<sup>20</sup> *Milkie v Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

**C. The I.D. erred in applying *Waldron***

In fashioning the relief in this proceeding, the I.D. erroneously applied *Waldron* and thereafter inappropriately concluded that the Complainant met her burden of proof that the January 2011 electric bill for the Service Location was excessive by 7%.<sup>21</sup>

According to *Waldron*, a complainant may establish a *prima facie* case by showing that: (1) the disputed bill was abnormally high when compared to prior usage patterns; and (2) his/her pattern of usage had not changed.<sup>22</sup> In the instant case, *Waldron* could not be -- and should not have been -- applied because the Complainant was a new customer who did not have a clearly defined pattern of electric usage at the Service Location.<sup>23</sup> Under these circumstances, neither of the two critical initial *Waldron* triggers could be satisfied by the Complainant. However, the I.D. ignored this fundamental failure by the Complainant and nevertheless analyzed the evidence and the parties' burden of persuasion through the *Waldron* prism.

The Complainant began receiving electric service at the Service Location on December 14, 2010.<sup>24</sup> The first electric bill she received at the Service Location was for electric service from December 14, 2010 to January 14, 2011. The Complainant testified that her January, February, and March 2011 electric bills were *excessive* and that her electric bills in April, March, May, June, July, and August were much *lower*.<sup>25</sup> However, references to bills being "excessive" or "lower" are comparative terms that only have meaning in relation to some accepted and acknowledged amount of prior electric usage. Here, because of the lack of any prior billing/usage history at this Service Location, the Complainant could not as a matter of fact demonstrate that any electric service bills rendered during the Disputed Billing Period were

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<sup>21</sup> I.D. at 8.

<sup>22</sup> See *Waldron*.

<sup>23</sup> I.D. at 7.

<sup>24</sup> NT at 46.

<sup>25</sup> NT at 16-17.

excessively high compared to prior usage. Instead, the ALJ was left to simply consider the Complainant's subjective assessment that bills were high or low, an approach that is insufficient to justify the application of *Waldron* and its unique realignment of evidentiary burdens and related adjustments.

Absent the erroneous application of *Waldron*, this case would have been analyzed and decided based on the uncontroverted evidence that the electric meter serving the Service Location satisfied the Commission's accuracy standards for electric watt-hour meters<sup>26</sup> and that the bills rendered to the Complainant for electric service at the Service Location were calculated in accordance with the Company's Commission-approved retail electric tariff.

Because the meter at the Service Location during the Disputed Billing Period fully satisfied the Commission's standards for watt-hour meter accuracy and the Complainant could not provide any evidence that any bills issued during the Disputed Billing Period were excessive *based on prior usage*, the I.D. should not have shifted the burden of going forward to the Company under *Waldron*.

Even if *Waldron* was to be applied in this situation, the totality of the evidence (the Customer Billing Analysis and the testimony of Company witness Carol Erb regarding the space heater usage) submitted by the Company indicates that the Complainant's electric bills at the Service Location were correct as rendered. As the Company's witness Ms. Erb testified, the use of a portable heater in the month of January could explain the 7% difference from what the

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<sup>26</sup> The test confirmed that the electric meter at the Service Location during the Disputed Billing Period was operating 99.43% accurate on full load, 98.74% accurate on light load, and had a weighted average of 99.29% accuracy, all within the Commission's regulations for watt-hour meter accuracy. NT at 34-36. See 52 Pa.Code § 57.20.

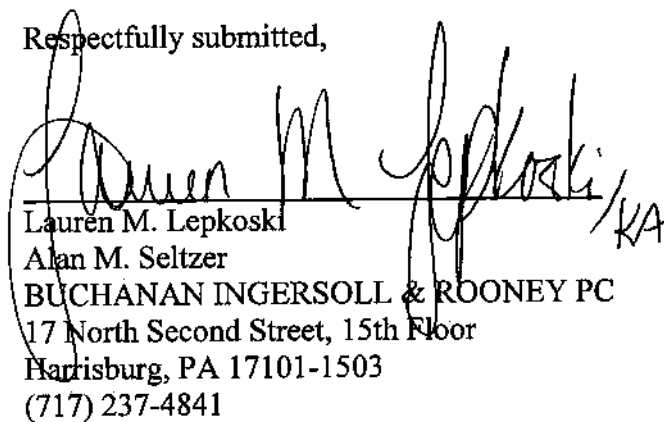
Customer Billing Analysis calculated to what the Complainant's actual usage was in the month of January.<sup>27</sup>

**IV. CONCLUSION**

For the reasons set forth above, Pennsylvania Electric Company respectfully requests that the Commission:

- a. Reverse and/or modify the Initial Decision consistent with these Exception; and
- b. Dismiss the Formal Complaint with prejudice.

Respectfully submitted,



Lauren M. Lepkoski  
Alan M. Seltzer  
BUCHANAN INGERSOLL & ROONEY PC  
17 North Second Street, 15th Floor  
Harrisburg, PA 17101-1503  
(717) 237-4841

Attorneys for  
Pennsylvania Electric Company

Dated: April 4, 2012

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<sup>27</sup> NT at 60.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KATHY LYONS

v.

PENNSYLVANIA ELECTRIC COMPANY

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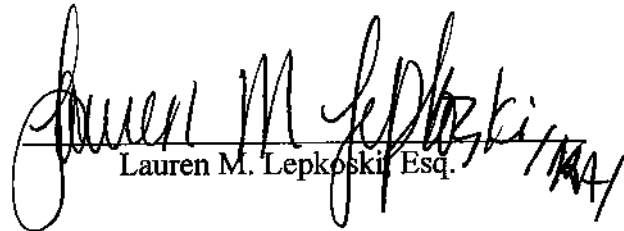
**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

**Via UPS Overnight Delivery**

Kathy Lyons  
254A South Main Street  
Brookville, PA 15825

Dated this 4th day of April, 2012.

  
Lauren M. Lepkoski, Esq.