

STEVENS & LEE
LAWYERS & CONSULTANTS

17 North Second Street
16th Floor
Harrisburg, PA 17101
(717) 234-1090 Fax (717) 234-1099
www.stevenslee.com

Direct Dial: (717) 255-7365
Email: mag@stevenslee.com
Direct Fax: (610) 988-0852

April 12, 2012

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

RE: William Diedrich v. PECO Energy Company
Docket No. F-2010-2191381

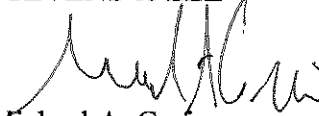
Dear Secretary Chiavetta:

Enclosed for filing on behalf of PECO is an original of its Exceptions filed in this matter. This document has been e-filed at the Pennsylvania Public Utility Commission's website. A copy has been served on the Complainant in accordance with the attached Certificate of Service.

If you have any questions, please feel free to contact me.

Best Regards,

STEVENS & LEE



Michael A. Gruin

Encl.

cc: William Diedrich w/encl. (via U.S. Mail)
The Office of Special Assistants w/encl. (Hardcopy and CD, via FedEx Overnight Delivery)

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A PROFESSIONAL CORPORATION

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WILLIAM DIEDRICH

Complainant

v.

PECO ENERGY COMPANY

Respondent

Docket No. F-2010-2191381

**EXCEPTIONS OF
OF PECO ENERGY COMPANY**

Pursuant to 52 Pa Code § 5.533, PECO Energy Company (PECO) hereby files its Exceptions to the Initial Decision (“I.D.”) of the Administrative Law Judge (“ALJ”) issued on March 23, 2012 in the above-referenced matter.

This Complaint in this matter involved allegations of incorrect charges on the Complainant’s bill. On the central issue raised in the Complaint – the correctness of charges on the Complainant’s bills - the ALJ found that PECO utilized a reasonable and appropriate method to calculate an adjustment to the Complainant’s account. But then, based on mis-readings of the evidence and an improper application of the burden of proof, the ALJ incorrectly recommends a violation against PECO for the manner in which PECO responded to the high bill complaint. The I.D. also improperly recommends a civil penalty against PECO even though, by the ALJ’s own admission, at least seven of the ten criteria for imposing a civil penalty are not present in this case. With respect to the finding of a violation and recommendation of a civil penalty against PECO, the I.D.’s key factual conclusions are not supported by substantial evidence (and in some cases are directly contradicted by the evidence), and its key legal conclusions directly conflict with well-established Commission precedent. The errors in the I.D. include:

- Concluding that PECO provided unreasonable service for taking six months to complete a high bill investigation, when the evidence indicates that the investigation was completed in approximately one month, and that a courtesy adjustment was provided to the Complainant three months later.
- The use of a “negative inference” drawn from the lack of a meter test to conclude that PECO’s meter was “defective”, in direct contradiction to the sworn testimony of a PECO supervisor that the meter was functioning properly and evidence that a meter test could not be performed.
- Concluding that the Complainant had met his burden of proof based solely on this “negative inference”, without *any* evidence regarding the accuracy of the meter.
- Concluding that PECO’s explanation for a billing adjustment was “not credible” based not on any particular aspects of witness’s testimony, but instead on an arbitrary and unsupported observation about public utility billing practices.
- Concluding that the Complainant had met his burden of proof for a high bill complaint even though the Complainant provided none of the evidence required by the *Waldron* rule.

Because the I.D. is premised on multiple erroneous findings of fact and conclusions of law, the I.D. should not be adopted by the Pennsylvania Public Utility Commission (“Commission”). For the reasons set forth more fully below, the I.D. should be rejected and the

Commission should dismiss the Complaint in its entirety with no finding of a violation against PECO.

BACKGROUND AND PROCEDURAL HISTORY

On July 30, 2010, William Diedrich (“Complainant” or “Mr. Diedrich”) filed his formal complaint against PECO. The Complaint was an appeal of a Bureau of Consumer Services informal complaint decision. On the Formal Complaint form, the Complainant marked “there are incorrect charges on my bill” in Section 4A. The Complainant went on to allege that his electric meter was broken, that it took PECO two months to read his meter, and that he did not agree with the amount of money that he was required to pay to PECO.

On August 24, 2010, PECO filed its Answer to Complainant’s formal complaint.

PECO’s Answer averred that

- PECO attempted to contact the Complainant on four occasions between April 28, 2009 and May 8, 2009, to schedule a high bill investigation and that eventually a high bill field investigation was scheduled for May 28, 2009.
- the Complainant’s meter had a malfunctioning digital display, and
- the Complainant was rebilled for electric service from the period from October 12, 2008 to May 13, 2009 based on a daily average usage of 23.1 kWh.

A telephonic evidentiary hearing was held in this matter on March 10, 2011. The hearing had originally been scheduled as an in-person hearing, but was converted to a telephonic hearing at the request of the Complainant. ALJ Cynthia Fordham presided over the hearing. At the hearing, the Complainant’s evidence consisted solely of his own testimony, and he submitted no exhibits into the record. PECO provided the testimony of two witnesses, and offered four exhibits into evidence. The hearing generated a transcript consisting sixty-nine (69) pages.

Although the hearing was conducted before ALJ Fordham, the Initial Decision in this case was written by Administrative Law Judge Katrina L. Dunderdale, who was assigned decision-writing responsibilities for the case by a Judge Change Notice issued on March 7, 2012. The I.D. in this matter was issued on March 23, 2012. The I.D. concluded that PECO's rebilling of the Complainant's account for the period from October 2008 to May 2009 was a "reasonable and appropriate way for PECO to resolve the high bill complaint."¹ The I.D. also concluded that the Complainant did not meet the burden of proving that the late charges assessed by PECO were in error.² The I.D. did, however, conclude that the Complainant had met his burden of proving that PECO did not provide reasonable and adequate service. The I.D. held that PECO's equipment was faulty, resulting in the Complainant being overbilled; that PECO had unwittingly caused the Complainant to build up an unpaid balance, and that PECO's "untimely response" to the high bill complaint "caused an arrearage".³ The I.D. also recommended a civil penalty of \$1,000 against PECO, primarily because PECO's errors resulted in frustration to the Complainant, and because the ALJ concluded that PECO failed to act in a timely manner.⁴

As set forth in more detail below, PECO takes exception to the ALJ's recommended finding of a violation against PECO, and to the ALJ's recommendation of a civil penalty. The evidence in the record clearly does not support a finding of a violation by PECO, and absolutely does not justify the imposition of civil penalties.

¹ I.D., at p. 11

² *Id.*

³ *Id.*

⁴ I.D., at pp. 14-15

EXCEPTION NO. 1

The I.D. Misstates the Length of Time That It Took To Complete The High Bill Investigation.

The ALJ's finding of a violation against PECO hinges on her conclusion that PECO's response to the Complainant's high bill complaint was untimely. See I.D. at 11,14. The I.D. states that it took PECO six months to complete the high bill complaint investigation,⁵ and that "PECO was untimely in its response to his high bill complaint."⁶ These conclusions by the ALJ resulted in the improper finding that PECO did not provide reasonable and adequate customer service.⁷ PECO respectfully submits that the record clearly indicates that the high bill investigation was actually completed in five weeks, not six months as stated in the I.D. In concluding that the high bill investigation took six months to complete, the ALJ ostensibly looked to the date that the Complainant contacted PECO to request a high bill investigation (April 20, 2009) as the start of his dispute, and the October 26, 2009 utility report as the closing date of the dispute. This conclusion by the ALJ was clearly erroneous, because all of the evidence in the record, including the October 26 utility report itself, indicates that the high bill investigation was completed long before the issuance of the written utility report. In fact, PECO Exhibit 7 clearly indicates that the high bill investigation was completed on May 28, 2009, the results were conveyed to Mr. Diedrich at that time, and Mr. Diedrich indicated that he was satisfied. This is a critical factual error in the I.D.

The results of the high bill investigation are reflected in PECO Exhibit 7 and discussed by PECO witness Thomas Lerro. PECO Exhibit 7 explains that the Complainant's electric meter could not be tested because there was no digital display on the meter, but as a good faith

⁵ I.D., at pp. 11

⁶ I.D., at p. 11

gesture to resolve the dispute, PECO rebilled the customer for the period from October 2008 through May 2009 at an estimated consumption of 23.1 kWh per day. PECO rebilled the account without any indication that the meter was improperly registering the customer's usage, and therefore the rebilling was indeed an act of good faith toward the customer. Mr. Lerro testified that the 23.1 kWh estimate used was actually the lowest of Mr. Diedrich's kWh readings during that period.⁸ Mr. Lerro also testified that the meter itself was not defective and was sending actual consumption readings to PECO, but rather the digital display was defective, and that the meter was replaced by the field representative.⁹

Exhibit 7 indicates that the result of the investigation and the rebilling remedy were conveyed orally to the Complainant by PECO employee Tim Fisher on the same date of his field visit – May 28, 2009 – and that the Complainant (referred to as “Bill” on the report) **“understood and [was] satisfied”**. The Complainant indicated his satisfaction to the PECO field representative who completed the field investigation, and therefore, there was no requirement for PECO to issue a written utility report at that time. See, 52 Pa. Code. § 56.151. The investigation by PECO employee Tim Fisher, his oral transmittal of the results and remedy to the Complainant, and the Complainant's acknowledgment of satisfaction on May 28, 2009 marked the end of the high bill investigation five weeks after it was initiated, not six months as stated by the ALJ.

PECO Exhibit 7 also indicates that another PECO employee issued a further oral utility report to the Complainant on June 22, 2009, to again explain the results of the investigation and the rebilling remedy. Mr. Lerro testified that this employee was David Voigtsberger, and that

⁷ See, Conclusion of Law No. 4 and Ordering Paragraph No. 2.

⁸ See Tr., at pp. 25

⁹ See Tr., at pp. 23-25

Mr. Voigstberger contacted the Complainant to inform him that the rebilling was being processed and that a payment arrangement was available to the Complainant.¹⁰

PECO Exhibit 1 demonstrates that the rebilling was effectuated in PECO's system on August 29, 2009, as confirmed by the ALJ on page 11 of the I.D. As explained by PECO witness Tarpley¹¹ and by PECO Exhibit 5, PECO recalculated the Complainant's bill for the period from October 2008 through May 2009 using an estimated daily consumption of 23.1 kWh. This resulted in the Complainant's charges for this period being reduced from \$1,379.15 to \$762.22, as confirmed by the I.D. in Findings of Fact 12 and 13.

At some point following the rebill, Mr. Diedrich disputed the amount of the rebill. The rebilling was explained to Mr. Diedrich orally on multiple occasions, and ultimately via a written utility report issued on October 26, 2009, which is part of the record as PECO Exhibit 5. The October 26, 2009 utility report served to close that billing dispute. The October 26, 2009 utility report states the PECO Customer Relations Representative who prepared the report had spoken with Mr. Diedrich on "many occasions" about his high bill dispute. The October 26, 2009 utility report also indicates that the rebilling had already been effectuated at the time the Customer Relations Representative initially spoke to the Complainant. Just because Mr. Diedrich did not agree with the high bill investigation conclusions does not mean that the investigation was not completed by PECO in a timely manner. Indeed, it is clear from the transcript that Mr. Diedrich still does not agree with the results of the investigation, but that does not mean that the investigation has not been concluded.

High bill investigations and account billing disputes can take an extended period of time to resolve for a variety of reasons – sometimes due to the actions of the customer, and

¹⁰ See Tr., at p. 33

sometimes due to the actions of the utility. In order to determine whether utility has acted in violation of the Public Utility Code, however, there must be sufficient evidence to establish that the utility acted unreasonably in the conduct of the investigation or the handling of the dispute. Such evidence is not present in this case. As set forth above, PECO initiated and completed its high bill investigation in a timely manner, and then had many discussions with the Complainant to attempt to resolve his subsequent billing dispute informally. Based on the clear evidence in the record, PECO respectfully submits that the Commission should reject the I.D.'s finding that its high bill investigation was not performed in a timely manner, and reverse the I.D.'s conclusion that PECO did not provide reasonable and adequate service to the Complainant.

EXCEPTION NO. 2

The I.D.'s Reliance on a "Negative Inference" As The Basis For Factual Findings of A Defective Meter and Overbilling Is Improper

The ALJ in this case concluded that the

"Complainant met his burden of proof in this proceeding. PECO's equipment was faulty, resulting in Complainant being overcharged for electric service from October 2008 to May 2009."¹²

According to the ALJ, the "evidence proves Complainant's meter was defective" and "Respondent's statements that the meter was not defective and it elected to rebill Complainant for business reasons – are lacking in credibility."¹³ However, the Complainant put forward no evidence, actual or circumstantial, that the meter was defective or billing improper. The sole basis for the ALJ's finding that PECO's meter was defective is a "negative inference to drawn

¹¹ See Tr. 42-45

¹² I.D., at p. 11. See also Conclusion of Law 3 and Ordering Paragraph 2.

¹³ I.D., at p. 9

from PECO's failure to test the meter and produce the test results at the hearing."¹⁴ In other words, even though it is well settled that the Complainant has the burden of proving the elements of his or her Complaint, this I.D. concludes that the Complainant's burden is met if the Respondent does not produce evidence to refute bald allegations – even where the Complainant has put forward no evidence to make a prima facie showing. PECO's Exhibit 7 explains that the meter *could not* be tested by the field representative because the digital display was not visible. The ALJ concluded that the Complainant had met his burden of proof that he was being overbilled by a malfunctioning meter by drawing a negative inference from the lack of a test that could not be performed. PECO witness Lerro testified that testified that the meter itself was not defective and was sending actual consumption readings to PECO, but that the digital display was defective, and was therefore replaced. *See* Tr., pp. 25-26.

In order to establish a prima facie case in a high bill dispute, the Complainant must demonstrate that:

- 1) The disputed bill was abnormally high when compared to prior usage patterns, and
- 2) The ratepayer's pattern of usage has not changed.¹⁵

In these cases, the Complainant has the burden of proving by a preponderance of the evidence that: (1) the number of occupants in the household has not changed, (2) the potential for energy use was low and (3) the Complainant's billing history showed no previous abnormalities.

Replogle v. Pennsylvania Electric Company, 54 Pa. P.U.C. 528 (1980). If the utility fails to rebut this evidence in support of the Complainant's prima facie case, the Complainant will prevail.

¹⁴ I.D. at p.10

In this case, the Complainant did not satisfy any of the criteria for establishing a prima facie case of a high bill. The Complainant did not demonstrate any marked increase in his bills for any specific period, or explain any changes in usage patterns. In fact, the Complainant did not even articulate the specific billing periods that he was disputing, so it is impossible to make a comparison to other billing periods and conclude that any high billing occurred. The fact is that the Complainant's account activity statement (PECO Exhibit 1) showed that his consumption patterns remained fairly consistent between 2008 and 2010, and there is no period which reflects an abnormally high usage. The ALJ's reliance on the lack of a meter test alone as the basis for concluding that the Complainant was overbilled conflicts with the Commission's established standards for resolving high bill complaints. The Complainant was required to provide some evidence to establish a prima facie case under the Waldron Rule, and in this case it is clear he failed in that regard.

It also should be noted that in Replogle, *supra*, the Commission stated that although the results of a meter test are important, standing alone, they may be insufficient to rebut a Complainant's prima facie case. In other words, a meter test alone is not the sole determinant of whether high billing occurred. But the ALJ in this case held that the *lack* of a meter test by a utility was determinative of a high bill. This rationale is not supported by any Commission precedent, and is contrary to both the well-established Waldron test for high bill cases and the Commission's finding in Replogle that a meter test is not the sole determinant for resolving a high billing case.

The ALJ's dismissal of PECO's explanation for its rebilling as not credible is also improper. The ALJ's basis for this finding of lack of credibility is not that PECO's witness had a

¹⁵ Waldron v. Philadelphia Electric Company, 54 Pa. P.U.C. 98 (1980)

propensity for lying, or that PECO's explanation was contradicted by some other evidence in the record, or that PECO's witness displayed uncertainty while testifying. Instead, the ALJ's sole reason for doubting PECO's reasons for conducting a rebill for the Complainant was that "there is no reason why a public utility would elect or choose to charge for lower consumption than was recorded unless the public utility knows the recorded consumption was incorrect."¹⁶

Respectfully, this anecdotal observation about utility behavior is not a valid basis for doubting the credibility of PECO's witnesses. It is common knowledge that utility companies issue credits and adjustments to customer accounts on a regular basis in order to resolve customer disputes, and such adjustments are made even if such adjustments may not be warranted.

As a practical matter, the ALJ's finding that the Complainant's meter was malfunctioning and that the Complainant was overbilled is moot, because the ALJ went on to conclude that PECO's rebilling remedy was a reasonable response to the problem. But the I.D.'s flawed application of basic burden of proof principles and credibility determinations call into question the validity of the factual and legal conclusions in the rest of the decision.

EXCEPTION NO. 3

The Arrearage on the Complainant's Account Was Not Caused By PECO

The I.D. incorrectly concludes that the arrearage on the Complainant's account was somehow caused by PECO. *See*, I.D. at 11,14. The I.D. bases this conclusion on a finding that "PECO told the Complainant not to make a payment in July 2009 until he received a Utility Report, which PECO then did not issue until October 2009." This finding was erroneous and not supported by the evidence. The Complainant claims that he always sent a payment in to PECO, but this is contradicted by PECO's Exhibit 1 (the Complainant's account activity

¹⁶ I.D. at pp. 9-10

statement), which shows that Mr. Diedrich did not make any payments between August and October 2009. Mr. Diedrich claims that he made payments despite being told by a PECO representative not to send in any payments. Tr. p. 8. This explanation has no independent corroboration and is simply not credible. The evidence reflects that the Complainant's account balance accrued because 1) he continued to pay only \$301 per month on his PECO bill, even while acknowledging that he was no longer on budget billing and that his usage was more than \$301 per month¹⁷, and 2) he did not make any payment on his account between August and October 2009.¹⁸

EXCEPTION NO. 4

No Civil Penalty Is Warranted Under The Circumstances Of This Case.

As set forth above, the ALJ's finding of unreasonable service hinges on the conclusion that PECO acted in an untimely fashion in response to the Complainant's high bill inquiry. Exception 1, above, demonstrates that the underlying conclusion of untimeliness is itself flawed and based on a misreading of the evidence in the case, and should be rejected.

Even if the Commission concludes that the facts of this case warrant a finding of unreasonable service against PECO, the imposition of a civil penalty cannot be justified. By the ALJ's own admission, 7 of the 10 criteria for imposing a civil penalty are not met in this case.

With respect to the ten criteria, the ALJ concluded that:

- PECO's conduct was not serious (I.D. at p. 13)
- PECO responded appropriately once it recognized the problem (I.D. at 14)
- The situation was isolated to one Complainant, (I.D. at 14)

¹⁷ See Peco Exhibit 1 and Tr., pp. 14-18

¹⁸ Peco Exhibit 1

- PECO has a satisfactory compliance record, (I.D. at 14)
- PECO cooperated during the course of the proceeding (I.D. at 14)
- There is no record of any prior violations for untimely responses to high billing inquiries (I.D. at 14-15)
- There are no other factors which warrant the imposition of a civil penalty. (I.D. at 15)

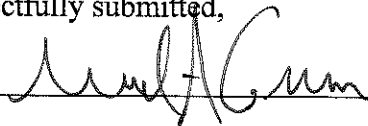
Furthermore, the ALJ's conclusions with respect to the three criteria relied upon to recommend a civil penalty are not warranted. The ALJ finds that the consequences of PECO's actions were of a serious nature, because they resulted in overcharging the Complainant and causing the Complainant to amass an arrearage on his account. Respectfully, these conclusions are incorrect and not supported by the record. As set forth above, there is no evidence in the record that PECO overcharged the Complainant, and the reliance on the "negative inference" is not proper. And in any event, PECO re-billed the Complainant's account as a courtesy, so that if there was "overcharging" such overcharging was corrected well before the filing of this Complaint.

The ALJ also justifies the civil penalty by finding that PECO's actions were intentional rather than negligent, because PECO did not explain the "delay in correcting the error". But again, as set for the above, this finding is predicated on the false assumption that PECO's bill investigation took six months to complete, when in fact it was completed in five weeks and the results were explained to the Complainant multiple times over the next several months. Because the finding of "intentional conduct" is based on this incorrect understanding of the length of the investigation, it should be rejected by the Commission.

CONCLUSION

When properly viewed, the evidence in this case cannot support a finding that the Complainant met his burden of proving a violation by PECO. PECO investigated the Complainant's high bill concerns, and upon completion of that investigation five weeks later made a significant adjustment to the Complainant's account balance as a courtesy to the Complainant. PECO conveyed the results of its investigation to the Complainant on multiple occasions. While the Complainant may not be satisfied with the results of the investigation or the amount of the credit, this alone is on sufficient grounds for finding that PECO committed a violation, and it certainly does not warrant the imposition of a civil penalty against PECO. PECO respectfully submits that the Commission should dismiss the Complaint in its entirety with no finding of a violation against PECO.

Respectfully submitted,



Michael Gruin (I.D. No. 78625)
Stevens & Lee
17 North 2nd Street, 16th Floor
Harrisburg, PA 17101
Telephone: 717-234-1090
Facsimile: 717-234-1099
mag@stevenslee.com

Dated: April 12, 2012

