

HALBERSTADT CURLEY
ATTORNEYS AT LAW

Via Federal Express

July 11, 2012

Secretary of the Commission
Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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JUL 11 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

RE: The Victory Condominium Association v. PECO Energy Company
Docket No. C-2011-2268126

Dear Sir/Madam:

Enclosed please find an original and ten copies of the Exceptions of the Victory Condominium Association to the Initial Decision Issued June 22, 2012 and the Order of January 20, 2012 in the above-referenced matter. Kindly file the original of record and return a filed copy to me in the envelope provided for your convenience. Also enclosed please find a CD with a PDF version of the above-mentioned document contained therein.

Thank you for your assistance in this matter. Please feel free to contact me if you have any questions or concerns.

Very truly yours,

HALBERSTADT CURLEY, LLC

By: _____

Charles V. Curley

CVC/mf

Encl.

cc: Ward Smith, Esquire (*via Regular Mail and E-Mail*)
Office of the Special Assistants (*via Federal Express*)

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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<p>THE VICTORY CONDOMINIUM ASSOCIATION, Complainant</p> <p>v.</p> <p>PECO ENERGY COMPANY Respondent.</p>	<p>JUL 11 2012</p> <p>PA PUBLIC UTILITY COMMISSION SECRETARY'S BUREAU</p> <p>Docket No. C-2011-2268126</p>
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EXCEPTIONS OF THE VICTORY CONDOMINIUM ASSOCIATION TO THE INITIAL DECISION ISSUED JUNE 22, 2012 AND THE ORDER OF JANUARY 20, 2012

Complainant, The Victory Condominium Association (“Victory”) files these exceptions to the June 22, 2012 decision issued by Administrative Law Judge Christopher Pell in the above matter, in accordance with Section 332(h) of the Public Utility Code, 66 Pa. C.S. § 332(h) and with Commission Regulation 5.533, 52 Pa. Code § 5.533.

Complainant Victory files these exceptions to the Initial Decision’s grant of PECO’s Motion for Summary Judgment, based on five central errors, as well as to the sustaining of PECO’s Preliminary Objections to a claim of unjust enrichment. Four of the exceptions to the Initial Decision relate to errors of law, while one raises genuine issues of material fact that go to the heart of this dispute. The Initial Decision erroneously concluded that the statute of limitations barred the action, where it was clear that 1) the applicable period was four years and so Victory’s filing of a formal complaint on October 13, 2011 was timely; 2) even if the applicable period was three years, the cause of action did not accrue until, at the earliest, October 22, 2008, when Victory made the first of 28 payments on overcharges; and 3) PECO deliberately concealed information from Victory by failing to send a written contract for service, much less disclose what PECO-selected Contract Minimums were applied to the account.

Victory's second and third exceptions relate to the determination that PECO had received no notice of service conditions, and no actual notice from the customer that it sought to change its rates. In doing so, the Initial Decision ignored evidence which conclusively established that PECO had enough information at hand to know that service conditions had altered for the account such that it should remove a Construction Rider (which then, for the first time, applied contract minimums to Victory's account). That action – without the customer advising of a change in service and without PECO informing the customer of the change – convincingly demonstrates that PECO had notice of conditions sufficient to trigger a duty to communicate with its customer about service.

Victory further takes exception to the determination that there were no genuine disputes of material fact, as the parties dispute when liability accrued, and what PECO knew about the change in service conditions. These facts are integral to a determination on the merit, and it is clear that the evidence is disputed. It was error to dismiss an entire action where there is a significant dispute over key evidence. Victory's fifth exception relates to the Initial Decision's conclusion that there are no genuine issues of material fact.

The sixth and final exception is based on the January 20, 2012 Order which sustained PECO's Preliminary Objection to the allegation that PECO was unjustly enriched when it received \$145,683.55 through Victory's payment of 28 months of overcharges. In light of the clear statutes and case law which provide that the Commission may refund consumers payments that are unjust or unreasonable, it was error for this allegation to be dismissed at the pleading stage.

For the reasons set forth below, the Initial Decision and the January 20, 2012 Order should be vacated, the Amended Complaint should be reinstated (including the allegation relating to unjust enrichment), and a full hearing on the merits should be held.

I. HISTORY OF THE PROCEEDING

On October 13, 2011, The Victory Condominium Association (“Victory” or “Complainant”) filed a formal Complaint with the Pennsylvania Public Utility Commission (“Commission”) against PECO Energy Company (“PECO” or “Respondent”). On November 16, 2011, Respondent filed an Answer denying the material allegations of the Complaint, together with Preliminary Objections to an unjust enrichment claim in the Complaint, and to certain paragraphs in the Complaint. On November 29, 2011, Victory filed an Amended Complaint with the Commission against PECO.

The Amended Complaint alleged that PECO applied a contract minimum of 560 kW to all of its bills in all of the non-summer months since June 2008, when it should have instead applied contractual limits of 200/500 kW with an off-peak maximum of 600 kW. Victory asserted that PECO's billing mistake resulted in overcharges from June 2008 to December 2010 in the amount of \$ 145,683.55, together with pre-judgment interest, and costs. On December 14, 2011, PECO filed an Answer and New Matter (December 2011 Answer) to the Amended Complaint, denying the material allegations of the Complaint. PECO also filed Preliminary Objection requesting that references to “unjust enrichment” be stricken from the Amended Complaint. On December 21, 2011, Complainant filed its Response to Preliminary Objection of PECO Energy Company. On January 20, 2012, PECO's Preliminary Objections were sustained, and the references were struck from the Amended Complaint. A hearing was scheduled for February 9, 2012 to address the issues of incorrect billing and inadequate service.

On January 30, 2012, PECO filed a Motion for Summary Judgment or Partial Summary Judgment (Motion), endorsed with a Notice to Plead. PECO also filed a Motion for Continuance of the February 9, 2012 hearing, for purposes of determination on the Motion. The hearing was continued pending determination of the Motion.

On February 21, 2012, Victory filed “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” (“Victory’s Response Brief”) together with The Victory Condominium Association's Cross Motion for Summary Judgment (“Victory’s Cross Motion”). The Cross Motion with a Notice to Plead advising PECO that it had 20 days to file a written response to complainant's Cross Motion. Despite this notice, PECO did not respond to Victory's Cross Motion.

On June 22, 2012, the Initial Decision was issued.

II. EXCEPTIONS

EXCEPTION NUMBER 1.

Victory takes exception to Conclusion of Law Number 4, page 13 of the Initial Decision, which reads, “Complaints must be filed within three years from the date that the liability arose. 66 Pa. C.S.A. § 3314.” The referenced section 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 therefore arose, except as otherwise provided in this part.” 66 Pa. C.S.A. §3314. In its discussion on this statute, the Initial Decision concludes that “this provision provides a general limitation

period of three years for any action under the Code, except as otherwise provided.” (Initial Decision, p. 9.) This conclusion is an oversimplification of the issue, as in fact, the applicable statute is four years. Even in the event that the applicable statute is three years, then Victory’s claims come within it, as Victory’s claims did not accrue until October 2008, and troublingly, PECO deliberately concealed information from Victory which would have led to an earlier discovery of the claims.

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). 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 should have been applied, rather than the three year limit.

The distinction between these competing statutes has been explained in that Section 3314 applies 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). 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 seeks a refund for a substantial overpayment, and its claim did not involve penalties or forfeitures. Accordingly, the Initial Decision erred in applying the three year statute of limitation.

Even if the three year statute of limitation pertained to this claim, Victory’s action is not barred by the statute of limitations, if the rationale applied in *Duquesne Light Co. v. Pennsylvania Public Utility Com.*, 611 A.2d 370 (Pa. Commw. 1992) – the case relied upon in the Initial Decision – is adopted here. In *Duquesne Light Co. v. Pennsylvania Public Utility Com.*, a ratepayer filed an informal complaint alleging the existence of a billing dispute. He sought to be relieved of his obligation to make a payment as the service provider failed to timely terminate his service. The service provider asserted that his claim accrued as of July 9, 1986, as that was the initial date on which the ratepayer had requested that his service be terminated. The Public Utility Commission rejected that argument and determined that the statute of limitations actually began to run on October 28, 1986, which was the last date of the disputed billing period and it was the date that service was actually terminated. The Commonwealth Court affirmed the Public Utility’s decision that the statute of limitations began to run on the last date of the disputed billing period, as it was not possible for the ratepayer to know that he would have a billing dispute with the service provider. *Duquesne Light Co.* 611 A.2d at 373, fn.2. Accordingly, the ratepayer could not have initiated a claim at that point.

Like the ratepayer in *Duquesne*, it was inconceivable for Victory to know that it was being overcharged by PECO due to an excessive, utility imposed contract minimum until October 2008, when (for the first time since initiating its service with PECO) Victory did not meet the utility selected contract minimums and accordingly was overcharged. Like the ratepayer in *Duquesne*, Victory could not have known that it had a dispute with PECO at the start of services since PECO failed to send a contract for HT service – or even a written application – for the customer to review and sign. Victory’s cause of action, therefore, is not barred. PECO does not enforce its Contract Minimums during the months of June through September. The first bill detailing the 560kW Contract Minimum (as selected by PECO) was issued on October 7, 2008, and not paid until October 22, 2008. Since it filed its Complaint on October 13, 2011, and only seeks refunds dating back to October 2008 (the earliest possible time at which Victory could have known of a claim and the first time that Victory’s liability arose), the three year statute of limitations does not prevent the claim – whether in whole or in parts.

Moreover, 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)). “[The Plaintiff] could have no cause of action until each allegedly improperly computed payment was made and, as to each such payment, a separate and distinct cause of action would accrue. *Pennsylvania Turnpike Com.*, 375 A.2d at 892. Similarly, every time that Victory made an overpayment to PECO, a separate and distinct cause of action, including damages, accrued. The first cause of action did not – and could not – accrue until Victory’s first payment – which was not until October 22, 2008. The final cause of action accrued when Victory made its last overpayment, pursuant to the January 2011 bill. It was an error to treat these 28 distinct claims as one bundle,

and to determine that all were barred by the statute of limitations, as the law clearly provides otherwise.

“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.” *Id.* The Initial Decision improperly ignored this well settled rule in determining that Victory’s entire cause of action was barred. Genuine issues of material fact exist as to when each claim accrued, and, at the very least as to whether each of these claims fell within statute of limitations. The law and the facts clearly establish that liability could not have accrued unless and until the first bill imposing the 560kW utility selected Contract Minimum was paid; that is, no earlier than October 22, 2008. Because Victory made payment on the overcharges on a monthly basis, each payment to PECO on the overcharge gave rise to new liability cause of action. Therefore, Victory’s claims dating from October 11, 2008 and forward are not precluded.

Finally, contrary to the Initial Decision’s determination, there were multiple instances of concealment committed by PECO requiring the applicable statute of limitations to be extended under the doctrine of equitable estoppel. (Initial Decision, p. 10). “The doctrine of equitable estoppel serves to toll the statute of limitations...it provides that a defendant may not invoke the statute of limitations if through fraud or concealment he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts.” *Ely v. Pennsylvania American Water Company*, 2006 Pa. PUC LEXIS 74, *3 (Pa. PUC 2006). PECO’s omissions – including the failure to provide a written contract or application to its customer – rise to the level of unintentional deception which the law disdains. *Ely*, 2006 Pa. PUC Lexis at *3. When

removing the Construction Rider without authorization, and failing to provide a written contract for service or even a statement of the applicable Contract Minimums as selected by the utility, PECO deliberately failed to provide Victory with information necessary for an informed decision, and tolled the statute of limitations.

By way of example, PECO never advised Victory what the current limits were, and the limits did not appear on Victory's bills. (Victory's Cross-Motion for Summary Judgment, ¶¶ 17-18.) PECO never explained to Victory that it was unilaterally removing the Construction Rider from Victory's account, or the effect that removal would have on the utility selected account limits. (Victory's Cross-Motion for Summary Judgment, ¶¶ 16.) Victory never received a contract for service or written application stating the utility selected contract limits. (Victory's Cross-Motion for Summary Judgment, ¶¶ 19.) Although PECO's normal standard of business is to review a customer account history prior to recommending contract limits, there is nothing of record to demonstrate that PECO engaged its customer in this type of discussion. At no point did either the PECO representative or any documents from PECO establish or explain what the utility selected Contract Minimums were. Instead of disclosing the limits *before* asking its customer whether it will be staying within the limits, PECO instead remained silent, and placed the customer on a service plan which guaranteed that the customer would be overcharged. These deliberate concealments placed PECO's customer at a severe disadvantage for making any *decisions or for discovering its harm, and allowed PECO to receive a financial windfall of \$145,683.55.* In light of the above, the doctrine of equitable estoppel should be applied to save Victory's claims dating back to October 2008, and the Amended Complaint should be reinstated with a full hearing on the merits.

EXCEPTION NUMBER 2.

Victory takes exception to Conclusion of Law Number 6, p. 14 of the Initial Decision, which provides “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. 66 Pa.C.S.A. §1303.” While Victory acknowledges that the public utility shall, after notice of service conditions, compute bills under the rate most advantageous to the customer, and takes no issue with the legal conclusion itself, it disputes the facts supporting this conclusion. The evidence clearly established that PECO did have actual notice of a change in conditions, sufficient to compel PECO to determine and supply service at the most advantageous rate. This fact was implicitly acknowledged in the Findings of Fact in the Initial Decision, and then ignored in the Conclusions of Law.

The Initial Decision noted that “prior to August 19, 2008...Service was also provided pursuant to PECO’s Night Service and Construction Riders.” (Initial Decision, p 5-6, ¶3.) The Initial Decision also noted that PECO requested information on the type of service to be provided, with an instruction that “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.” (Initial Decision, p.6, ¶5.) On August 19, 2008, in response to that inquiry, PECO was advised that “nothing is changing.” (Initial Decision, p.6, ¶6.) Despite this statement – that nothing was changing with the account – PECO unilaterally removed the account from the Construction Rider. (Initial Decision, p. 8-9, ¶6.) PECO’s unilateral decision to remove the Construction Rider (despite Victory’s representation that “nothing [was] changing” in its account) conclusively establishes that PECO had actual knowledge that Victory’s service conditions had changed.

As a result, PECO had an obligation to provide Victory with a Contract for HT Service for review and signature. Had PECO provided Victory with a contract for services, the document would have been subject to review and approval. PECO's failure to take such action – which is a serious derogation of its obligations – is even more troubling in light of the applicable tariff regarding HT Service. The only statement in PECO's tariff which allows it to impose a contract minimum on a rate HT account provides: “Additionally, during the months of October through May the billing demand **will not be less than 40% of the maximum demand specified in the contract...**” (Supplement No. 60 to Tariff No. 3)(emphasis added). If the erroneous result outlined in the Initial Decision is permitted to stand, the effect will be to allow PECO to impose a contract minimum demand on an account *which does not have a contract*. The Public Utility Code, Tariffs, and regulations are specifically designed to prevent this type of manipulation. PECO hid the ball from the customer, and reaped a sizable financial reward for its deliberate misconduct, in the amount of \$145,683.55. This abuse of unsophisticated customers should not be tolerated, where the utility clearly had knowledge of changing service conditions and took advantage of a client's ignorance. For the foregoing reasons, the Initial Decision should be vacated, and the Amended Complaint should be reinstated with a full hearing on the merits.

EXCEPTION NUMBER 3.

Victory takes exception to Conclusion of Law Number 7, p. 14 of the Initial Decision, which provides “[t]he responsibility is upon utility customers to provide the utility company with actual notice of a change in service conditions before the utility must determine and supply service at the most advantageous rate. *City of Pittsburgh v. Duquesne Light Co.* 54 Pa. PUC 460 (1980); *Springfield Township v. Pennsylvania Pub. Util. Comm'n*, 676 A.2d 304 (1996) and *Mauro v. Duquesne Light Co.*, 69 Pa. PUC (1989).” As in Exception Number 2, Victory does

not take exception with the statement of law, but rather, the assumptions that are omitted in the conclusion. The conclusion is based on a strict application of the definition “actual notice” and the erroneous assumption that PECO did not have facts within its knowledge to determine that *service conditions had changed*.

As detailed in Exception Number 2, PECO’s unilateral decision to remove the Construction Rider (despite Victory’s representation that “nothing [was] changing” in its account) conclusively establishes that PECO had facts within its knowledge that Victory’s service conditions had changed, such that it had a duty to inquire as to the statute of the account. The utility’s position that it had knowledge sufficient to alter the terms of service in a manner favorable to it but not for the customer is untenable, and unsupported by law. In *City of Pittsburgh v. Duquesne Light Company*, 54 Pa.PUC 460, 463 (1980) the court defined notice to include that which is

given to a party directly, and also such notice as a party is presumed to have received personally because facts within its knowledge were sufficient to place upon the party the duty to inquire about the fact or condition in question. The former is to express actual notice -- e.g. written or oral notice -- and the latter is implied actual notice.

In numerous cases, the Commission has deemed a utility to have ‘actual notice’ of a change in service conditions when it has facts within its knowledge sufficient to trigger a duty of inquiry. *Gardiner v. Philadelphia Gas Works*, 2012 Pa. PUC LEXIS 520, 6-8 (Pa. PUC 2012) (citing *City of Pittsburgh v. Duquesne Light Company*, 54 Pa.PUC 460, 463 (1980)). The evidence clearly established, and the law clearly supports a finding, that PECO had actual implied notice of the change in service conditions such that it had an obligation to work with its customer. In light of this substantial error, the Amended Complaint should be reinstated with a full hearing on the merits.

EXCEPTION NUMBER 4.

Victory takes exception to Conclusion of Law Number 8, that there are no genuine issues of material fact. (Initial Decision, p. 14, ¶8). To the contrary, the record clearly established that there was a dispute over at least two material facts sufficient to at least require a hearing. Primarily, there is clearly a dispute as to when liability accrued – in the summer of 2008 or October 2008. These disputed dates are at the foundation of the conflict, as PECO claims that the statute of limitation bars the action. Next, there is a question of what PECO knew about Victory's account, and when PECO knew the information. The record clearly suggests that PECO knew that Victory's service conditions were changing, and elected to ignore this fact for its benefit. A full hearing is integral to a determination on the merits of this dispute, in light of these disputes of fact.

By way of example, in PECO'S Motion for Summary Judgment, it erroneously asserted that there was no dispute over the date on which liability accrued, as the parties agreed that liability accrued during summer 2008. (PECO's Motion for Summary Judgment, p. 14). In reality, however, Victory's Response Brief to PECO's Motion for Summary Judgment presented evidence that liability did not accrue until October 2008. (Victory's Response Brief to PECO's Motion for Summary Judgment p. 13, 15. *See also* Victory's Cross-Motion for Summary Judgment, ¶32-33.) It was only at that time that Victory was overcharged due to the excessive, utility imposed contract minimum, causing it to substantially overpay. *Id.* Accordingly, there was an error in concluding that there were no genuine issues of material fact, and failed to take Victory's conflicting evidence into consideration on this substantial and material point.

Moreover, there clearly was a dispute of fact as to whether PECO had actual (or implied actual) notice of the change in conditions as of August 19, 2008, and whether PECO therefore

had an obligation to render a Contract for HT Service to Victory for review and signature. PECO framed the issue by asserting there was no genuine issue of material fact as to whether Victory requested assistance. (PECO's Motion for Summary Judgment, p. 19.) The real question to be addressed – and another genuine issue of material fact – is whether PECO's unilateral decision to remove the Construction Rider from the account without a request from Victory (and without informing Victory of the change) demonstrated PECO's actual knowledge (or implied actual knowledge) that service conditions had changed on the account such that PECO was obligated to apply the most advantageous rate. (Victory's Cross-Motion for Summary Judgment, ¶¶13, 16; Victory's Response Brief to Motion for Summary Judgment 4, 7-13.) If the answer is not conclusively in favor of Victory, then, at the very least, there is an issue of fact as to what information PECO had in its possession as of August 19, 2008. In light of these significant factual disputes, which go to the heart of this dispute, it is apparent that a full hearing on the merits is required.

EXCEPTION NUMBER 5.

For the reasons more fully set forth in Exceptions Number 1-4 and adopted as though set forth in full herein, Victory takes exception to Conclusion of Law Number 9, "PECO is entitled to judgment as a matter of law in this case."

EXCEPTION NUMBER 6.

Victory further takes exception to Conclusion of Law No. 4 of the January 20, 2012 Order, which stated that "The Commission does not have the jurisdiction to hear tort-based claims such as 'unjust enrichment.' *County of Erie v. Verizon North, Inc.* C-20032036 (Opinion and Order entered April 1, 2005.)" This decision, which did not become final and appealable

until the Initial Decision was issued, was at odds with established case law holding that the Commission has jurisdiction to determine a claim such as “unjust enrichment.”

Pursuant to *County of Erie v. Verizon North, Inc.*, 879 A.2d 357 (Pa. Cmwlth. 2005), the Commission has jurisdiction over Victory’s claims, including the averments relating to unjust enrichment, contained in Paragraph 13 of the Amended Complaint. In that case, the County of Erie (“Erie”) claimed that Verizon had incorrectly billed, collected, and remitted 911 contributions as to all lines providing “local telephone service.” Erie sought both legal and equitable relief via claims for an accounting, injunction, breach of fiduciary duty, **unjust enrichment**, and conversion. The Commonwealth Court determined that Erie’s claims should be decided pursuant to the doctrine of primary jurisdiction, whereby the parties preliminarily resort to the agency that administers the scheme for the resolution of disputes. The Commonwealth Court further decided that the proper course was for the trial court to transfer the matter to the Pennsylvania Public Utility Commission due to its special experience and expertise in complex areas and its authority to order appropriate remedies. *Id.* at 363-364.

In reaching its decision, the Commonwealth Court explained that “[i]n determining whether the doctrine of primary jurisdiction applies, courts must look beyond the form of action to the *essence* of the underlying claims. *Id.* at 364 (citing *T.W. Phillips Gas & Oil Co. v. Peoples Natural Gas Co.*, 492 A.2d 776, 779 (Pa. Cmwlth. 1985). The Court further discussed the case of *Morrow v. Bell Telephone*, 479 A.2d 548 (1984), stating:

[T]he Superior Court, after carefully scrutinizing the nature of the claims, found that the action, which was couched in terms of equity, was actually a challenge to rates and services and, accordingly, determined that jurisdiction was vested in the PUC. *Id.* at 551. There, a customer brought an action in equity seeking class action certification and challenging Bell's rate and service practices, and another action seeking individual damages for tortious and/or contractual wrongs. The Court stated that ‘when a utility's failure to maintain reasonable and adequate service is alleged, regardless of the form of the pleading in which the allegations are couched, it is for the PUC, initially, to determine

whether the service provided by the utility has fallen short of the statutory standard required of it.’ *Id.* at 550-551 (quoting *DiSanto v. Dauphin Consol. Water Supply Co.*, 291 Pa. Super. 440, 436 A.2d 197, 199 (Pa. Super. 1981)). The Morrow Court found that the equity action was a challenge to Bell's rate and service practices, which is an area peculiarly and exclusively within the jurisdiction and expertise of the PUC. *Id.* at 551.

Similarly, Victory’s claims, including the averments of Paragraph 13 of the Amended Complaint, directly challenge PECO’s rate and service practices, and seek remedies which the Commission is authorized to provide.

Moreover, it is beyond cavil that the Commission has the authority to determine whether payment received by the 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 the existing and effective tariff of such public utility.” 66 Pa. C.S. §1312(a). If the Commission makes such a determination, then it is authorized to issue a refund of the excess amount paid, together with interest at the legal rate from the date of the excess payment. *Id.*; *Pettko v. Pa. Am. Water Co.*, 39 A.3d 473, 483 (Pa. Commw. 2012). In light of the clear statements of law, and the fact that PECO received excess payments totaling \$145,683.55, the allegations in the Amended Complaint related to PECO’s unjust enrichment should have been permitted to stand.

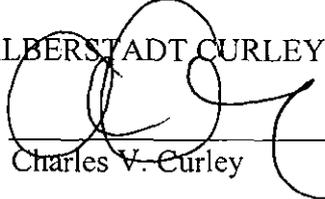
In light of the Commission’s extensive statutory responsibility for ensuring the adequacy, efficiency, safety and reasonableness of public utility services, *see* Pa.C.S. § 1501 (2012), its expertise to analyze PECO’s practices and billings, as well as its authority to order appropriate remedies, *see* Pa. C.S. §1312 (2012), the Commission has primary jurisdiction over Victory’s claims, including the averments of Paragraph 13 relating to unjust enrichment. Accordingly, it was error to sustain the Preliminary Objections to the Amended Complaint, and the Order should be reversed.

V. CONCLUSION

In light of the foregoing, Complainant The Victory Condominium Association seeks an Order vacating the Initial Decision, reinstating the Amended Complaint (including paragraph 13, relating to unjust enrichment), and directing a full hearing on the merits of this dispute.

Respectfully submitted,

HALBERSTADT CURLEY LLC

By: 

Charles V. Curley

Date: 7/11/12

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

I hereby certify that a true and correct copy of the foregoing Exceptions of the Victory Condominium Association to the Initial Decision Issued June 22, 2012 and the Order of January 20, 2012 was sent via first class U.S. mail and email addressed as follows:

Ward Smith, Esquire
PECO Energy Company
2301 Market Street, S-23
Philadelphia, PA 19103

The filing also was sent via first class mail to the following:

Honorable Christopher P. Pell, Administrative Law Judge
Pennsylvania Public Utility Commission
801 Market Street, Suite 4063
Philadelphia, PA 19107

HALBERSTADT CURLEY LLC

By: _____

Charles V. Curley

Attorneys for Complainant

Date: 7/11/12

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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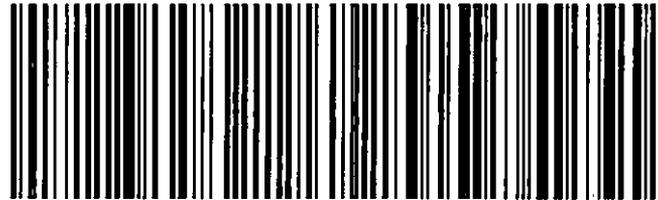
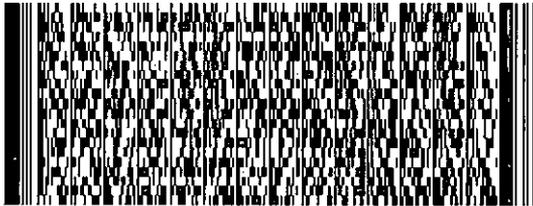
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PRIORITY OVERNIGHT

TRK# 7937 7741 8054
0201

17120
PA-US
MDT

ZN MDTA



515G1/E052/AA44

After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

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