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August 6, 2012

VIA UPS OVERNIGHT DELIVERY

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


Re: Mark's Tire Service, Inc. v. Pennsylvania Electric Company
Docket No. C-2012-2314041

Dear Secretary Chiavetta:

On behalf of Pennsylvania Electric Company, I have enclosed for filing an original and three (3) copies of the Preliminary Objections of Pennsylvania Electric Company to the Formal Complaint of Mark's Tire Service, Inc. in the above-captioned matter. Please note that Pennsylvania Electric Company is requesting that this matter be set for mediation.

Copies have been served on all parties as indicated in the attached certificate of service.

Very truly yours,


Brian C. Wauhop

BCW/ljs
Enclosures
cc: Certificate of Service

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

MARK'S TIRE SERVICE, INC. :
 :
 v. : **Docket No. C-2012-2314041**
 :
PENNSYLVANIA ELECTRIC COMPANY :

NOTICE TO PLEAD

TO: Mark's Tire Service, Inc.
c/o Mark B. Przybyszewski
7441 West Lake Road
Fairview, PA 16415

Pursuant to 52 Pa. Code § 5.62(b), you are hereby notified that, if you do not file a written response denying or correcting the enclosed Preliminary Objections of Pennsylvania Electric Company to the Formal Complaint of Mark's Tire Service, Inc. within **ten (10) days** from service of this Notice, the facts set forth by Pennsylvania Electric Company in the Preliminary Objections may be deemed to be true, thereby requiring no other proof. All pleadings, such as a Reply to the Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Pennsylvania Electric Company, and where applicable, the Administrative Law Judge presiding over the case.


File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Brian C. Wauhop
Buchanan Ingersoll & Rooney, PC
One South Market Square
213 Market Street, 2nd Floor
Harrisburg, PA 17101-2121

Dated: August 6, 2012



Brian C. Wauhop, Esq.

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SECRETARY'S

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MARK'S TIRE SERVICE, INC. :
:
v. : Docket No. C-2012-2314041
:
PENNSYLVANIA ELECTRIC COMPANY :

**PRELIMINARY OBJECTIONS OF PENNSYLVANIA ELECTRIC COMPANY
TO THE COMPLAINT OF MARK'S TIRE SERVICE, INC.**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, Pennsylvania Electric Company ("Penelec" or the "Company"), by and through its counsel, Brian C. Wauhop, Alan Michael Seltzer, and Buchanan Ingersoll & Rooney PC, files these Preliminary Objections pursuant to Sections 5.101(a)(1) and 5.101(a)(5) of the Pennsylvania Public Utility Commission's ("Commission") regulations, 52 Pa. Code § 5.101(a), and in support thereof avers as follows:

I. Introduction

1. In these Preliminary Objections, Penelec seeks a ruling that (i) the relief requested (i.e., money damages) in the Formal Complaint filed on June 29, 2012 by Mark's Tire Service, Inc. ("Complainant") is beyond the jurisdiction of the Commission to grant; (ii) the Complainant does not have standing to prosecute any claims regarding two vehicles allegedly damaged by a downed electric wire; and (iii) the individual who filed the Formal Complaint on behalf of the Complainant cannot continue to prosecute the Formal Complaint on the Complainant's behalf because that individual is not an attorney licensed to practice law in Pennsylvania.

2. Therefore, these Preliminary Objections should be granted dismissing the Formal Complaint; or, in the alternative, the Complainant's request for monetary damages should be stricken, unless the Complainant files an amended *Complaint that states a legally sufficient claim before the Commission within ten (10) days of the date of any order granting this Preliminary Objection*; and the Complainant be directed to certify to the Commission and Penelec the name and contact information of its legal representative within ten (10) days of the date of any order granting this Preliminary Objection.

I. Facts and Procedural History.

3. Penelec is an electric distribution company that is certificated as a public utility within the Commonwealth of Pennsylvania

4. On June 29, 2012, the Complainant filed a Formal Complaint with the Commission averring functionality problems with the telephone system, loudspeakers, intercom system, and garage door located at 7441 West Lake Road, Fairview, Pennsylvania 16415 under Account No. 10004927297 ("Service Location"), allegedly due to a downed wire near the Service Location. (Compl. ¶ 4B.)

5. The Formal Complaint was served on Penelec on or about July 16, 2012.

6. Penelec is timely filing its Answer and New Matter contemporaneously with these Preliminary Objections.

II. Argument.

A. Preliminary Objection Regarding Jurisdiction Pursuant to 52 Pa. Code § 5.101(a)(1)

7. Paragraphs 1-6 of these Preliminary Objections are incorporated by reference as if fully set forth herein.

8. In paragraph 5 of the Formal Complaint, the Complainant makes the following demand: “Penelec needs to . . . re-imburse [sic] my company for it’s [sic] losses.”

9. As such, the Complainant has demanded money damages.

10. It is well-established under Pennsylvania law that the enforcement powers of the Commission do not include the power to award money damages. *See, e.g., Elkin v. Bell*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978); *Nagy v. Bell Tel. Co.*, 436 A.2d 701 (Pa. Super. 1981).

11. In *Feingold*, the Pennsylvania Supreme Court explained:

. . . the statutory array of PUC remedial and enforcement powers does not include the power to award damages to a private litigant for breach of contract by a public utility. Nor can we find an express grant of power from which the power to award such damages can be fairly implied. Thus, it can be concluded that the Legislature did not intend for the PUC to have such a power.

Feingold, 383 A.2d at 794.

12. A claim for damages which is not legally recoverable in the cause of action pleaded is “impertinent matter” in the sense that it is irrelevant to that cause of action, and is correctly challenged through a motion to strike the requested relief as impertinent matter. *See Third Avenue Realty Limited Partners v. Pennsylvania-American*

Water Co., Docket No. C-2010-2167286 (Initial Decision issued August 16, 2010), slip op. at 8 (citing *Hudock v. Donegal Mut. Ins. Co.*, 264 A.2d 668 (Pa.1970)).¹

13. As a result, in accordance with Pennsylvania law, this Commission does not have jurisdiction to award monetary damages, and the Complainant's request for money damages is an impertinent matter that must be stricken.

B. *Preliminary Objection Regarding Standing Pursuant to 52 Pa. Code § 5.101(a)(5)*

14. Paragraphs 1-13 of these Preliminary Objections are incorporated by reference as if fully set forth herein.

15. In order to bring a complaint before a tribunal, a complainant must first demonstrate that she/he has standing to maintain the action. *Nye v. Erie Insurance Exchange*, 470 A.2d 98, 100 (Pa. 1983). Standing requires that a party have an interest in the matter that is substantial, direct and immediate. *William Penn Parking Garage, Inc. et al. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). These criteria are defined as follows:

A 'substantial' interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A 'direct' interest requires a showing that the matter complained of caused harm to the party's interest. An 'immediate' interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or the constitutional guarantee in question.

George v. Pennsylvania PUC, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1999). The standard set by *William Penn Parking Garage* is applicable to the Commission cases. *Courier*

¹ By operation of law, the Initial Decision at Docket No. C-2010-2167286 became a Final Order of the Commission entered September 30, 2010.

Express, Inc. v. F.L. Shaffer Company, Inc., order entered August 30, 1990 at Docket No. C-892462, petition for reconsideration denied December 3, 1990.

16. In the Formal Complaint, the Complainant states that “[w]hen the line came down, 2 vehicles in the parking lot were scratched and dented from the force of the snapping aluminum braided cable.” (Compl. ¶ 4(B)(8).)

17. However, the Complainant has not alleged that it is the owner of the two allegedly damaged vehicles. Nor are there any averments in the Complaint that the Complainant has *any interest whatsoever* in the subject vehicles.

18. Because the Complainant has failed to plead any interest in the allegedly damaged vehicles, it lacks standing to prosecute any claims regarding those vehicles in this proceeding.

19. Therefore, the Complainant does not have standing to bring an action against Penelec because it has not demonstrated any interest in the allegedly damaged vehicles that is substantial, direct and immediate.

C. *Preliminary Objection Regarding Legal Representation Pursuant to 52 Pa. Code § 5.101(a)(5)*

20. Paragraphs 1-19 of these Preliminary Objections are incorporated by reference as if fully set forth herein.

21. An individual by the name “Mark B. Przybyszewski” alleging to be the President of Mark’s Tire Service, Inc., filed the Formal Complaint against Penelec at the above docket on behalf of Mark’s Tire Service, Inc., which is the customer of record for the account relating to the Service Location. (Compl. ¶¶ 1, 9.)

22. Nowhere in the Formal Complaint does Mr. Przybyszewski indicate that he is licensed as an attorney in Pennsylvania. Upon information and belief, it is averred that Mr. Przybyszewski is not licensed as an attorney in Pennsylvania.

23. Representation before the Commission is governed by the Commission's regulations at 52 Pa. Code §§ 1.21-1.23. These regulations provide that "[i]n adversarial proceedings, partnerships, corporations, trusts, associations, agencies, political subdivisions and government entities shall be represented by...an attorney." 52 Pa. Code § 1.21.

24. The Complainant is a business corporation operating within the Commonwealth of Pennsylvania and is registered with the Pennsylvania Department of State as such. (*See* Compl. ¶ 1.)

25. In *Tyler Run, LLC v. Met-Ed*, Docket No. C-20043888 (January 5, 2005), the Chief Administrative Law Judge clarified that a non-attorney owner/operator of a business entity such as a corporation, limited liability company, or partnership, may file a formal complaint pleading, *without an attorney*, but thereafter must be represented by counsel.

26. Therefore, to the extent that the Complainant, Mark's Tire Service, Inc.—the customer of record that is the subject of this Formal Complaint—is a corporation, limited liability company, partnership, or similar business form, it must obtain legal representation in this matter prior to proceeding further with its Formal Complaint.

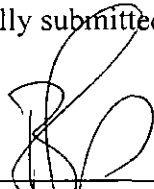
27. To the extent the Complainant is a corporation, limited liability company, partnership, or similar business form and Mr. Przybyszewski is not a licensed attorney, the Complainant must be directed to certify to the Commission and Penelec

within ten (10) days of receiving this Answer and New Matter the name and contact information of its legal representative. If the Complainant fails to do so, the Formal Complaint should be dismissed with prejudice.

IV. Conclusion

WHEREFORE, for the foregoing reasons, Penelec respectfully requests that the Commission: (1) grant these Preliminary Objections; (2) dismiss the Complaint for failure to state a claim upon which relief may be granted, or, in the alternative, strike the Complainant's request for money damages and expressly prohibit the introduction of any testimony or evidence with respect to alleged damages in this proceeding; (3) direct the Complainant to certify to the Commission and Penelec within ten (10) days of receiving this Answer and New Matter the name and contact information of its legal representative; and (4) grant the Company such other relief as may be just and reasonable under the circumstances.

Respectfully submitted,



Dated: August 6, 2012

Brian C. Wauhop
Pennsylvania I.D. # 306695
Alan Michael Seltzer
BUCHANAN INGERSOLL & ROONEY P.C.
One South Market Square
213 Market Street, 2nd Floor
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(717) 237-4975

Attorneys for
Pennsylvania Electric Company

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

MARK'S TIRE SERVICE, INC.

v.

PENNSYLVANIA ELECTRIC COMPANY

:
:
: Docket No. C-2012-2314041
:
:

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document on behalf of Pennsylvania Electric Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, addressed as follows:

Mark's Tire Service, Inc.
c/o Mark B. Przybyszewski
7441 West Lake Road
Fairview, PA 16415



Dated: August 6, 2012

Brian C. Wauhopp
Alan Michael Seltzer
BUCHANAN INGERSOLL & ROONEY P.C.
One South Market Square
213 Market Street, 2nd Floor
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Attorneys for
Pennsylvania Electric Company

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