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August 21, 2012

VIA E-FILE

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

Re: Edward D. Martino d/b/a County Line Market v. Pennsylvania Electric Company
Docket No. C-2012-2316843

Dear Secretary Chiavetta:

On behalf of Pennsylvania Electric Company, I have attached for electronic filing the Preliminary Objections of Pennsylvania Electric Company to the Formal Complaint of Edward D. Martino d/b/a County Line Market in the above-captioned matter.

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

Very truly yours,



Patrick R. Malone

PRM/kra
Enclosure
cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

EDWARD D. MARTINO	:	
d/b/a COUNTY LINE MARKET	:	
	:	
v.	:	Docket No. C-2012-2316843
	:	
PENNSYLVANIA ELECTRIC COMPANY	:	

NOTICE TO PLEAD

TO: Edward D. Martino d/b/a County Line Market
8810 Big Valley Pike
Mill Creek, PA 17060

Pursuant to 52 Pa. Code § 5.101(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 Edward D. Martino d/b/a County Line Market within **ten (10) days** from service of this Notice, the facts set forth by Pennsylvania Electric Company in the Answer 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:

Patrick Malone
Alan Michael Seltzer
Buchanan Ingersoll & Rooney, PC
One Oxford Centre
301 Grant Street, 16th Floor
Pittsburgh, PA 15219-1410

Dated: August 21, 2012



Patrick Malone, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

EDWARD D. MARTINO	:	
d/b/a COUNTY LINE MARKET	:	
	:	
v.	:	Docket No. C-2012-2316843
	:	
PENNSYLVANIA ELECTRIC COMPANY	:	

**PENNSYLVANIA ELECTRIC COMPANY’S PRELIMINARY OBJECTIONS
TO THE COMPLAINT OF EDWARD MARTINO**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, Pennsylvania Electric Company (“Penelec” or the “Company”), by and through its counsel Patrick R. Malone, Alan Michael Seltzer, and Buchanan Ingersoll & Rooney PC, files these Preliminary Objections, pursuant to 52 Pa. Code §5.101(a), and in support thereof, avers as follows:

I. Introduction

1. In a Formal Complaint filed with the Pennsylvania Public Utility Commission and served on the Company on August 1, 2012 (“Formal Complaint”), Edward D. Martino (“Complainant”) alleges that (i) he never contracted with Liberty Power Holdings, LLC (“Liberty”) as his Electric Generation Supplier (“EGS”) in July 2011, and (ii) the rates charged by Liberty for electric energy are in excess of those charged by Penelec. Accordingly, the Complainant requests reimbursement of the difference in electric rates charged by Liberty and Penelec for the electric energy consumed at his residence from July 2011 through April 2012. Formal Cmplt., ¶ 4(B). The Formal Complaint must be dismissed for two primary reasons: (i) the Formal Complaint is legally insufficient under 52 Pa Code § 5.101(a)(4) because it neither

pleads nor shows that the Company violated its tariffs, or any statute, regulation or order of the Commission and (ii) the Complainant failed to join Liberty as an indispensable/necessary party under 52 Pa Code § 5.101(a)(5).

II. Background

2. The Company is an electric distribution company providing retail electric service to customers within the Commonwealth of Pennsylvania.

3. Liberty is an EGS licensed by the Commission under License No. A-110175 and is thus subject to the jurisdiction of this Commission. Liberty has a business address of 1901 W. Cypress Creek Road, Suite 600, Ft. Lauderdale FL 33309.

4. In July 2011, the Complainant entered into a contract with Liberty for the supply of electric energy to his residence at 8810 Big Valley Pike, Mill Creek, Pennsylvania 17060 ("Service Location").

5. Liberty informed the Company of the Complainant's decision to purchase electricity from Liberty in July 2011, and the Company in turn sent the Complainant a letter dated July 25, 2011 which in part stated "[w]e have been notified that you have selected [Liberty] as your electric generation supplier for the Pennsylvania Electric Choice Program." See Ex. A.

6. The July 25, 2011 letter also requested that the Complainant contact the Company within ten days of the receipt of the letter if he chose not to use Liberty as his EGS. *Id.*

7. The Complainant never responded to the Company's July 25, 2011 letter and therefore the Company reasonably believed that the Complainant intended to use Liberty as his EGS for the provision of electric energy to the Service Location.

8. The Complainant called the Company's customer service department on March 19, 2012 regarding his bill for electricity and related services provided to the Service Location from January 27, 2012 to February 29, 2012. During this call, the Company representative reviewed the account with the Complainant and explained that Liberty was his EGS.

9. During this call, the Complainant also stated that he did not know "how Liberty got on his bill." This is the first time the Complainant advised the Company that he did not want Liberty as his EGS. The Company representative advised the Complainant that he could not have been a Liberty customer without having first provided his customer number to Liberty.

10. The Complainant again contacted the Company on March 19, 2012 seeking Liberty's kilowatt-hour charges. The Company representative advised the Complainant at that time that Liberty had been his EGS since August 31, 2011. At that time, Complainant requested that Liberty be dropped as his EGS. When the Complainant requested that Liberty be dropped as his EGS, the Company representative issued a notification for "end of supply contract" in compliance with the applicable Commission regulations and accordingly dropped Liberty as the Complainant's EGS. See, March 19, 2012 Letter attached hereto as Exhibit ____.

11. In addition to disputing whether he contracted with Liberty Power to act as his EGS, the Complainant is also (i) challenging the rate charged by Liberty of .098 cents per kilowatt hour and (ii) requesting reimbursement for the difference between the price per kilowatt hour charged by Penelec and Liberty for electric energy consumed at the Service Location between July 2011 and May 2012. Cmplt., ¶4(B).

III. Argument

A. Applicable Legal Standards

12. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code § 5.101. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

13. The grounds for preliminary objections are limited to those set forth in 52 Pa Code § 5.101(a) as follows:

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

(3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

14. The Commission's procedure regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

15. A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v.*

Pa. Dept. of Environmental Resources, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.*, 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

B. The Formal Complaint should be dismissed because Penelec operated at all times relevant to this matter in accordance with its Commission-approved Electric Generation Supplier Coordination Tariff, its Electric Service Tariff and has not violated any provision of the Public Utility Code, Commission order, etc.

16. At all times relevant to the Formal Complaint, including the Complainant's enrollment with Liberty in July 2011 and thereafter, the Company acted in accordance with the Company's Commission-approved Electric Generation Supplier Coordination Tariff ("EGS Tariff").

17. Section 5.3 of the Company's EGS Tariff is titled "Switching Among EGS (or between EGS and the Company providing Default Service) and Initial Section of an EGS."

18. Pursuant to Section 5.3.1 of the Company's EGS Tariff:

(c) The Company *will send the Customer a letter to confirm and verify the customer's EGS selection. If the Customer does not contact the Company within ten (10) days of the date on the confirmation letter, then the Company will process the selection.* The selection will be effective as of the next scheduled Meter Read Date and the EGS will become the EGS of record for delivery provided that: (1) the Company has received at least fifteen (15) days prior notice from the EGS and all Customer information provided to the Company is accurate and complete; (2) the 10-day waiting period has expired; and (3) the Customer has not contacted the Company to dispute the EGS selection. The confirmation letter shall include notice to residential and small commercial Customers that effective January 1, 2011, the Customer's service may be terminated for failure to pay for generation service provided by an EGS and billed by the EDC.

If, during the 10-day waiting period, the Customer cancels the new EGS selection, the Company will notify the rejected EGS of the cancellation electronically. In the event the Customer cancels the EGS selection after the

10- day waiting period, the Customer will be required to remain with the selected EGS for a minimum of one billing cycle.

See, EGS Tariff, § 5.3.1(c) (emphasis added).

19. Rule 24 of the Company's Electric Service Tariff ("ES Tariff"), titled "Transfer of Electric Generation Supplier," states in part:

The Company shall process the request to initiate, terminate or change a Customer's EGS ("Request") in accordance with this Rule 24.

* * *

After the Company has received notification from the EGS of the Customer's Request, the Company shall send the Customer a confirmation letter noting the proposed change of EGS. This letter shall include the notice of a ten (10) day waiting period in which the Request may be canceled by the Customer before the change of the EGS takes place. The notice shall include the date service with the new EGS will commence. The ten (10) day waiting period shall start on the day the confirmation letter is mailed.

* * *

If the Customer does not contact the Company within the ten (10) day notification period, the Company shall make the change of EGS at the beginning of the next billing period following the ten (10) day waiting period, provided that the Request was received by the Company from the EGS at least sixteen (16) days prior to the next scheduled meter reading date. If the Request was not received from the EGS at least sixteen (16) days prior to the next scheduled meter reading date, the Company shall change the EGS at the beginning of the following billing period. If the Customer notifies the Company of an error after the ten (10) day waiting period specified in the confirmation letter, the Customer will remain with the selected EGS for at least one (1) billing period.

See, ES Tariff, Rule 24.

20. As discussed above, Liberty informed the Company in July 2011 that the Complainant chose Liberty as his EGS. The Company then sent a letter to Complainant on July 25, 2011 informing the Complainant that he had chosen Liberty as his EGS.

21. In accordance with Section 5.3.1(c) of its EGS Tariff and Rule 24 of its ES Tariff the Company requested that the Complainant inform the Company within 10-days if he elected not to choose Liberty as his EGS. The Complainant never responded to this request.

22. The Complainant next contacted the Company's customer service department on March 19, 2012 regarding his bill for electricity and related services provided to the Service Location from January 27, 2012 to February 29, 2012. During this call, the Company representative reviewed the account with the Complainant and explained that Liberty was his EGS.

23. During this call, the Complainant also stated that he did not know "how Liberty got on his bill." This is the first time the Complainant advised the Company that he did not want Liberty as his EGS. The Company representative advised the Complainant that he could not have been a Liberty customer without having first provided his customer number to Liberty.

24. The Complainant again contacted the Company on March 19, 2012 seeking Liberty's kilowatt-hour charges. The Company representative advised the Complainant at that time that Liberty had been his EGS since August 31, 2011. When the Complainant requested that Liberty be dropped as his EGS, the Company representative issued a notification for "end of supply contract" in compliance with the applicable Commission regulations and the Company's EGS and ES Tariffs.

25. Further Rule 24 of the ES Tariff reads:

Under no circumstances shall the Company be liable or otherwise responsible to an EGS, Customer, person or entity acting on the Customer's behalf for any damages, claims, penalties or obligations (i) contained in any contract or other arrangement between Customer and an EGS or (ii) for its reasonable implementation of this Rule including, without limitation, its reasonable reliance upon any notification and/or representations made to it.

See, ES Tariff, Rule 24.

26. A public utility is required to adhere to its duly-filed and Commission-approved tariff. Such tariff has the force and effect of law in Pennsylvania and is legally binding

upon the utility, its customers and the public. See 66 Pa.C.S. § 1303; *DiSanto v. Dauphin Consolidated Water Supply Company*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pa. Public Utility Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981).

27. Because at all times relevant to the Formal Complaint the Company acted in accordance with its Commission-approved tariffs, the Formal Complaint is legally insufficient under 52 Pa Code § 5.101(a)(4) because it neither pleads nor shows that the Company violated its tariffs, or any statute, regulation or order of the Commission. Accordingly, the Formal Complaint must be dismissed.

C. The Formal Complaint Must Be Dismissed because of the Complainant's Failure to Join Liberty as an Indispensable/Necessary Party

28. Alternatively, the Formal Complaint must be dismissed pursuant to 52 Pa Code § 5.101(a)(5) because the Complainant failed to join a necessary and indispensable party.

29. Because Liberty has had such a clear and prominent role in this case, it should have been named by the Complainant as an additional respondent or separately joined as an indispensable/necessary party.

30. In Pennsylvania, “an indispensable party is one whose rights are so directly connected with and affected by litigation that he must be a party of record to protect such rights, and his absence renders any order or decree of court null and void for want of jurisdiction.” *Columbia Gas Transmission Corp. v. Diamond Fuel Co.*, 464 Pa. 377, 379 (Pa. 1975); *City of Philadelphia, et al. v. Commonwealth of Pennsylvania, et al.*, 575 Pa. 542 (Pa. 2003); *Barren v. Dubas*, 295 Pa. Super. 443, 445 (Pa. Super Ct. 1982). Failure to join an indispensable party goes absolutely to the court’s jurisdiction and, if not raised by the parties,

should be raised *sua sponte*. *Posel v. Redevelopment Authority of Philadelphia*, 72 Pa. Commw. 115, 121 (Pa. Commw. Ct. 1983).

31. The Pennsylvania Supreme Court has established that “the basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party... In order to make the analysis, however, one must refer to the nature of the claim and the relief sought.” *Cry, Inc. v. Mill Service, Inc.*, 536 Pa. 462, 486-69 (Pa. 1994). Adopting the criteria articulated in *Mechanicsburg Area School District v. Kline*, 494 Pa. 476, 481 (Pa. 1981) the court’s test for determining indispensability involved “at least” the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

32. In regards to the first factor, Liberty has a right or interest to the claim. The Complainant not only has directly challenged the amount of Liberty’s electric rates, but has also alleged that his contract with Liberty was a “scam.” Formal Cmplt. ¶4(B).

33. With respect to the second consideration of the test, Liberty has at stake the possible obligation to refund payments received and/or to compromise charges in dispute.

34. With respect to the third consideration of the test, Liberty’s interest is essential to the merits of the case because much of the Formal Complaint focuses on Liberty’s electric supply charges between July 2011 and April 2012. Penelec cannot answer for Liberty, a separate and distinct company. The relief sought by the Complainant necessarily involves Liberty.

35. Pursuant to Rule 12, Meter Reading and Rendering of Bills, of the Company's ES Tariff, the Company issued consolidated bills. Rule 12(b)(8) states:

A Delivery Service Customer that has contracted with an EGS shall receive Consolidated Billing from the Company unless the Customer requests bills only for Delivery Service Charges.

See, ES Tariff, Rule 12(b)(8).

36. The electric bills issued by the Company to Complainant, in compliance with Rule 12(b)(8) of the ES Tariff included EGS charges and delivery service charges. As a mere billing agent for Liberty, Penelec has no authority to adjust Liberty's rates.

37. In regards to the fourth consideration, not joining Liberty, when its actions and policies are so central to the Formal Complaint, would violate its due process rights. Liberty was supplying electricity to the Complainant at the Service Location during the time period in dispute, and the Complainant has directly challenged Liberty's status as his EGS and Liberty's energy rates. The Complainant's allegations go directly to Liberty's rates and supply practices, and any adjudication concerning Liberty's business practices without its presence would violate its due process rights.

38. As such, the Formal Complaint must be dismissed due to the Complainant's failure to join Liberty as a necessary and indispensable party.

WHEREFORE, for the foregoing reasons, Pennsylvania Electric Company respectfully requests that the Commission grant its Preliminary Objections, and dismiss the Formal Complaint, and grant to the Company such other relief as is just and reasonable under the circumstances.

Respectfully submitted,

Dated: August 21 2012



Patrick Malone
Alan Michael Seltzer
BUCHANAN INGERSOLL & ROONEY PC
One Oxford Centre
301 Grant Street, 16th Floor
Pittsburgh, PA 15219-1410
(412) 562-1314

Attorneys for
Pennsylvania Electric Company

EXHIBIT A



Penelec
PO Box 16001
Reading, PA 19612-6001
1-888-478-2300 (Toll-Free)
www.firstenergycorp.com/contactus

Date: July 25, 2011
Customer Number: 080650800001302923
Load Profile: GSCM
Rate:
General Secondary 3 Phase Service - PN

EDWARD D MARTINO
PO BOX 43
BLUE BALL PA 17508 -0043

Service Address:

8810 BIG VALLEY PK
MILL CREEK PA 17060

Dear EDWARD D MARTINO,

We have been notified that you have selected the following company as your electric generation supplier for the Pennsylvania Electric Choice program:
LIBERTY POWER HOLDINGS LLC
1901 WEST CYPRESS CREEK RD SUITE 600
FORT LAUDERDALE FL 33309

Our records indicate that you have chosen to receive one bill from Penelec for your electric service that will reflect both Penelec's and your electric generation supplier's charges.

You do not need to take any action if this information is correct. If this information is incorrect, or, if you would like to cancel this request to change electric generation suppliers, please contact us within 10 days of the date of this letter.

August 28, 2011.

Unless we hear from you, your new electric generation supplier will begin providing your electricity on your first scheduled meter-reading date after

Subject to the terms of your supplier agreement, residential customers may return to Penelec's tariff rates at any time.

Residential and small commercial customers who fail to pay for generation service provided by an electric generation supplier and billed by Penelec, may have their service terminated in accordance with the Pennsylvania Public Utility Code and PA PUC rules, regulations, and orders.

Please call our Retail Choice Center toll-free at 1-888-478-2300 with questions. The center is open 8:00 a.m. until 6:00 p.m., Monday through Friday.

Penelec

EXHIBIT B



Penelec
PO Box 16001
Reading, PA 19012-6001
1-888-478-2300 (Toll-Free)
www.firstenergy.com/customer

Date: **March 19, 2012**
Customer Number: **08006508000901302923**
Load Profile: **GSCM**
Rate:
General Secondary 3 Phase Service - 1W

EDWARD D MARTINO
PO BOX 43
BLUE BALL PA 17508 -0043

Service Address:

**8010 BIG VALLEY PK
MILL CREEK PA 17060**

Dear **EDWARD D MARTINO,**

As you requested, Penelec has discontinued your generation service from your electric generation supplier in the Pennsylvania Electric Choice program:

Liberty Power Holdings

AKRON OH 44333

Penelec will provide your electricity under the appropriate default service rider in its retail tariff beginning on your first scheduled meter-reading date after **April 30, 2012.**

If you decide to select a new electric generation supplier, please contact your chosen supplier. You will need to provide your new supplier with your 20-digit customer number above. Your supplier will notify Penelec of your selection, and you will receive a letter from Penelec confirming your choice.

Under our tariffs, Penelec can switch you to your new supplier if you select that supplier at least 15 days prior to your next scheduled meter read date. If Penelec has not been notified by a supplier prior to the 15 days, you will return to Penelec's default service rates for that billing month.

If you have any questions, please call our Retail Choice Center toll-free at 1-888-478-2300. The center is open 8:00 a.m. until 8:00 p.m., Monday through Friday.

Penelec

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

EDWARD D. MARTINO	:	
d/b/a COUNTY LINE MARKET	:	
	:	
v.	:	Docket No. C-2012-2316843
	:	
PENNSYLVANIA ELECTRIC COMPANY	:	

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 First Class U.S. Mail

Edward D. Martino d/b/a County Line Market
8810 Big Valley Pike
Mill Creek, PA 17060

Dated this 21st day of August, 2012.



Patrick Malone, Esq.