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January 4, 2013

VIA ELECTRONIC FILING

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

Re: Kelly Dawn Nicholson v. Pennsylvania Electric Company
Docket No. C-2012-2324204

Dear Secretary Chiavetta:

Enclosed please find the Motion for Summary Judgment in the above-referenced matter. This document has been served on the Complainant as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Tori L. Giesler

dln
Enclosures

c: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

KELLY DAWN NICHOLSON

v.

PENNSYLVANIA ELECTRIC COMPANY

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Docket No. C-2012-2324204

NOTICE TO PLEAD

To: Kelly Dawn Nicholson

Pursuant to 52 Pa. Code § 5.63, you are hereby notified that if you do not file a reply to the enclosed Motion for Summary Judgment of Pennsylvania Electric Company within ten (10) days from service of this notice, the facts set forth by Pennsylvania Electric Company in the Motion for Summary Judgment may be deemed to be admitted, thereby requiring no other proof. All pleadings, such as a reply to the Motion for Summary Judgment, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served on the undersigned counsel for Pennsylvania Electric Company.

Dated: January 4, 2013



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

KELLY DAWN NICHOLSON

v.

PENNSYLVANIA ELECTRIC COMPANY

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Docket No. C-2012-2324204

**MOTION FOR SUMMARY JUDGMENT OF
PENNSYLVANIA ELECTRIC COMPANY**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, Pennsylvania Electric Company ("Penelec" or the "Company"), by and through its counsel, Tori L. Giesler, hereby files this Motion for Summary Judgment ("Motion") in the above-referenced matter pursuant to Section 5.102 of the Pennsylvania Public Utility Commission's ("Commission") regulations, 52 Pa. Code § 5.102, and states as follows:

I. Introduction

1. In this Motion, Penelec requests the dismissal of a Formal Complaint filed by Kelly Dawn Nicholson ("Complainant"), as the pleadings in this proceeding reveal that the Company is entitled to judgment as a matter of law because the Formal Complaint fails to demonstrate that the Company has violated any provisions within the Pennsylvania Public Utility Code, the Commission's regulations or its Commission-approved tariff. Rather, the disputes raised in the Formal Complaint are predicated upon the Company's adherence to its Commission-approved tariff, as well as the Company's compliance with applicable laws requiring and governing the implementation of its default service rate. Because the pleadings, as well as the attached Affidavit of Raymond Valdes, an Advisor to the Rates and Regulatory

Affairs Department ("Valdes Affidavit"),¹ demonstrate there is no genuine issue of fact, the Formal Complaint should be dismissed with prejudice.

II. Procedural Background

2. On or about August 19, 2012, the Complainant filed a Formal Complaint with the Commission at the above-referenced docket, raising allegations relating solely to an increase in monthly charges, despite only a nominal increase in consumption as compared to previous similar consumption periods that were billed at a lower rate, which she attributes to the implementation of the Company's new default service rates on January 1, 2011. Formal Complaint, ¶ 4(B).

3. The Formal Complaint was served on the Company on September 14, 2012.

4. On October 3, 2012, the Company timely filed an Answer and New Matter, which was endorsed with a Notice to Plead. In its New Matter, the Company explained that the increase in the Complainant's monthly charges, despite only a nominal increase in monthly usage, was attributable to the Company's provision of its new default service rate on January 1, 2011, the implementation of which was required by various Commission directives relating to the required implementation of default service rates industry-wide for electric distribution companies ("EDCs"), such as Penelec. The Company concluded in its pleading that for the aforementioned reasons, the Complainant's Formal Complaint should be dismissed for legal insufficiency. Answer and New Matter, ¶¶ 1 through 20.

5. The Complainant failed to respond to the Company's New Matter within the prescribed responsive timeframe provided for in Section 5.61(a) of the Commission's regulations, 52 Pa. Code § 5.61(a).

¹ The Affidavit is attached hereto and expressly incorporated herein.

6. On October 5, 2012, the Interim Order Setting Resolution Conference Between Parties was issued in this proceeding. The Company has attempted to discuss and resolve the outstanding issues with the Complainant, but these efforts have been unsuccessful.

III. Factual Background

7. The Company is an EDC that is certificated as a public utility and provides electric service to customers within the Commonwealth of Pennsylvania.

8. The Company provides electric service to the Complainant at 51 Valley View Drive, Hidden Valley, Pennsylvania 15502 ("Service Location") under Account No. 100066611979 ("Account"). Valdes Affidavit, ¶ 4

9. The Complainant is currently receiving residential retail electric service from the Company, subject to the provisions of Rate Schedule RS as contained in the Company's Commission-approved retail electric tariff.² Valdes Affidavit, ¶ 5.

10. At all times relevant to the Formal Complaint, the Complainant has been utilizing the Company's default service at the Service Location. Valdes Affidavit, ¶ 6.

11. On November 26, 2010, the Company issued bill messages to residential customers advising that, as of January 1, 2011, generation rate caps would expire and the Company's new default service rates would go into effect. The bill message provided that, among other things, the average residential customer³ could anticipate a 16.6% increase on the first billing statement reflecting the new default service rates. Valdes Affidavit, ¶ 7.

² Pennsylvania Electric Company, Electric Service Tariff, Electric Pa. P.U.C. No. 80, Effective: September 1, 2012.

³ In order to provide customers with an approximate estimated increase that could be applicable to all standard residential customers, Penelec computed the percentage based upon the "average residential customer." An average Rate Schedule RS customer is considered to be a customer who consumes approximately 750 kWh per month. To the extent a customer's usage differs from 750 kWh per month, the projected anticipated increase will likewise differ.

12. On December 29, 2010, the Company issued the Complainant a billing statement totaling \$530.32, which was based upon the Complainant's usage of 5,176 kilowatt-hours occurring during the period spanning November 25, 2010 through December 28, 2010. This billing statement included charges contained in Rate Schedule RS and applicable riders, which is provided for by the Company's Commission-approved retail electric tariff. Specifically, the December 29, 2010 billing statement was calculated using the following charges pursuant to Rate Schedule RS and the applicable riders: (i) the Distribution Customer Charge; (ii) the Distribution kilowatt-hour Charge; (iii) the Consumer Education Charge ("CEC"); (iv) the Generation Charge; (v) the Transmission Charge; (vi) the Smart Meter Charge ("SMT-C"); and (vii) the State Tax Surcharge. Valdes Affidavit, ¶ 8.

13. On January 27, 2011, the Company issued the Complainant an electric service billing statement totaling \$485.83, which was based upon the Complainant's usage of 419 kilowatts-hours during the period spanning December 29, 2010 through December 31, 2010, and 3,640 kilowatt-hours during the period spanning January 1, 2011 through January 26, 2011. This billing statement included charges outlined in Rate Schedule RS and applicable riders, which is provided for by the Company's Commission-approved retail electric tariff. Specifically, the January 27, 2011 billing statement was calculated using the following charges pursuant to Rate Schedule RS and the applicable riders: (i) the Distribution Customer Charge; (ii) the Distribution kilowatt-hour Charge; (iii) the CEC; (iv) the Solar Requirements Charge ("SPVRC"); (v) the Default Service Support Charge ("DSS"); (vi) the Non-Utility Generation Charge ("NUG-C"); (vii) a partial Generation Charge; (viii) a partial Transmission Charge; (ix) the Price to Compare Default Service Charge ("PTC"); (x) the SMT-C; and (xi) the State Tax Surcharge. Valdes Affidavit, ¶ 9.

14. The January 27, 2011 billing statement was a prorated bill that included 419 kilowatt-hours in December 2010 priced at rates effective in December 2010, and 3,640 kilowatt-hours in January 2011 priced at rates effective in January 2011. Valdes Affidavit, ¶ 10.

IV. Summary Judgment Motion Requirements

15. The Commission's Rules of Administrative Practice and Procedure permit parties to file preliminary motions. 52 Pa. Code §§ 5.101-103. The Commission's regulation at 52 Pa. Code § 5.102(a) permits any party to move for summary judgment after the pleadings are closed, but within such time as not to delay a hearing. A motion for summary judgment must be based on the pleadings, depositions, answers to interrogatories, admission and supporting affidavits. 52 Pa. Code § 5.102(c). The presiding officer will grant a motion for summary judgment if the pleadings, depositions, answers to interrogatories, admissions and affidavits show that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. 52 Pa. Code § 5.102(d)(1). The Commission's preliminary motion practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, Docket No. C-00935435 (Order entered July 18, 1994).

16. When deciding whether a motion for summary judgment should be granted, the court must examine the record in the light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *See Sanchez v. Philadelphia Housing Authority*, 611 A.2d 346 (Pa. Cmwlth. 1992); *see also South River Power Partners, L.P. v. West Penn Power Company*, Docket No. C-00935287 (Order entered November 6, 1996).

V. Argument

A. The Company's default service rates from January 1, 2011 through May 31, 2012 were approved by the Commission.

21. In 1996, the Pennsylvania General Assembly enacted the Electricity Generation Customer Choice and Competition Act ("Competition Act")⁴ which was intended to create a market promulgating competition among the transactions involving the sale and purchase of retail electric generation service, thus controlling the price of electric generation and eliminating the occurrence of natural monopolies. The Competition Act required the Company, as well as other EDCs, to unbundle its rate structure for electric service into various functional components, including distribution, transmission, and generation. By unbundling the generation portion of electric service rates from the transmission and distribution portion, the Competition Act enabled customers to purchase generation supply service from a licensed alternative supplier at market-based prices instead of generation prices regulated by the Commission.

22. To accomplish the various goals set forth by the Competition Act, and to mitigate any costs incurred by an EDC that previously entered into long-term power purchasing agreements to satisfy the Federal requirements relating to the purchase of wholesale generation, the Competition Act provided a transitional period that would: (i) allow EDCs to recoup the costs associated with entering into long-term power purchasing agreements, which would not normally be recoverable in a competitive market; and (ii) ease the anticipated financial upset experienced by consumers during the conversion from the then-current regulated bundled rate structure to a more competitively-priced unbundled rate structure, which would be based upon and fluctuate with retail market levels.⁵

⁴ 66 Pa.C.S. § 2801, *et seq.*

⁵ *Id.*

23. Moreover, Section 2806 (relating to Implementation, pilot programs and performance-based rates) of the Competition Act required all EDCs submit, for Commission approval, a restructuring plan outlining the EDCs proposed rate design, policy and procedures relating to: (i) unbundled rates for the functional components of electric service; (ii) a transition cost recovery mechanism that would recover certain EDC costs associated with long-term power purchasing agreements which would not normally be recoverable in a competitive market; (iii) a universal service and energy conservation cost-recovery mechanism; (iv) direct access of consumers to licensed electric generation suppliers (“EGS”); and (v) the impact of the implementation of the restructuring plan on an EDC’s employees. As a part of the requirements contained in the Competition Act, the Company was also required to submit revised tariff and rate schedules with its restructuring plan submitted to the Commission for approval.

24. On June 2, 1997, the Company filed its Restructuring Plan, pursuant to directives contained in the January 24, 1997 Commission Order requiring the submission of such plan. On October 20, 1998, the Commission issued a Final Order approving the Company’s Restructuring Plan. *Application of Pennsylvania Electric Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al.*, Docket No. R-00974009 (Final Order entered October 20, 1998).

25. Pursuant to the Commission’s Rulemaking Order at Docket No. L-00040169 and 52 Pa. Code §§ 69.1810 and 54.187(c), on February 20, 2009, the Company filed with the Commission its Joint Petition for approval of its Default Service Program (“DSP Joint Petition”). In the DSP Joint Petition, the Company proposed rates, terms and conditions for its provision of default service for the period of January 1, 2011 through May 31, 2013, for those customers who chose to take generation service from the Company as opposed to exercising their right to shop

with an EGS. *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of their Default Service Programs*, Docket No. P-2009-2093053, *et al.* (Final Order entered November 6, 2009).

26. A resolution was reached in this proceeding and the Company filed a Joint Petition for Settlement on August 12, 2009. In the Joint Petition for Settlement, the parties agreed that: “[F]or the residential class, the Companies will use Price to Compare Default Rate Riders (“PTC_{Default}”), which will replace the Generation and TSC Rates in the existing residential rate schedules.”⁶ Further, the Joint Petition for Settlement provided that: “[T]he residential charge will change quarterly to reflect (a) changes in the underlying weighted average cost of default supply to the residential class, (b) taxes, and (c) a quarterly reconciliation rate component (“E Factor”) pursuant to the Price to Compare Default Service Reconciliation provision of the Price to Compare Default Service Rate Rider.” *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of their Default Service Programs*, Docket No. P-2009-2093053, *et al.* (Final Order entered November 6, 2009).

27. On November 6, 2009, the Commission adopted the Recommended Decision of Administrative Law Judge Wayne L. Weismandel issued on September 2, 2009, and approved

⁶ The TSC is a charge for Transmission Service previously outlined in Rider D of prior tariff supplements filed with and approved by the Commission. Transmission Service is defined as “[A]ll PJM approved charges incurred by the Company as a load serving entity that relate to the provision of transmission or ancillary services to Full Service Customers, plus any direct, indirect, administrative or transactional costs related to the management of such PJM charges. Currently such charges include: Day Ahead and Balancing Transmission Congestion Charges, Regulation and reconciliation for Regulation Charges, Spinning Reserve and reconciliation for Spinning Reserves, Day Ahead and Balancing Operating Reserves Charges, FTR Auction Charges and Credits, Auction Revenue Rights Credits, PJM Scheduling and Reconciliation for System Control and Dispatch Service Charges, Transmission Owner Scheduling System Control and Dispatch Service Charges and Reconciliation, Reactive Supply and Voltage Control from Generation Sources Service Charges, Black Start Service Charges, Network Integration Transmission Service Charges, Firm Point-to-Point Transmission Service Charges, Non-Firm Point-to-Point Transmission Service Charges, PJM/MISO Seams Elimination Cost Assignment Charges, Intra-PJM Seams Elimination Cost Assignment Charges, Expansion Cost Recovery, Transmission Enhancement Charges, Mid-Atlantic Area Council (MAAC), Transmission Risk Management, and any other such future charges.” Pennsylvania Electric Company, Retail Electric Tariff, Electric Pa. P.U.C. No. 79, Original Page 26, Effective: January 11, 2007.

the Joint Petition for Settlement. In the November 6, 2009 Final Order, the Commission further provided that the Company's proposed tariff revisions set forth in Exhibit M of the Joint Petition for Settlement would become effective on January 1, 2011. *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of their Default Service Programs*, Docket No. P-2009-2093053, *et al.* (Final Order entered November 6, 2009).

28. As of January 1, 2011, the Complainant began receiving retail electric generation service through the Company's Default Service Program, which reflected wholesale-market generation prices, and was subject to the provisions of Rate Schedule RS and the applicable riders, provided for in the Company's Commission-approved retail electric tariff.⁷ Valdes Affidavit, ¶ 18.

29. Under the Company's Commission-approved unbundled rate structure, the Company's retail tariff Rate Schedules, such as Rate Schedule RS, apply to customers taking delivery service from the Company. Rate Schedule RS is available to residential customers using the Company's standard, single phase service through a single meter including not more than 2,000 watts of non-residential connected load served through the same meter.⁸ Valdes Affidavit, ¶ 19.

30. As of January 1, 2011, Rate Schedule RS contained the following general monthly charges that are applicable to delivery service customers like the Complainant, who chose to utilize the Company's default service in lieu of obtaining generation from an EGS: (i)

⁷ Pennsylvania Electric Retail Tariff, Electric Pa. P.U.C. No. 80, Revised Page 185, Effective: January 1, 2011.

⁸ Pennsylvania Electric Company, Retail Electric Tariff, Electric Pa. P.U.C. No. 80, Eleventh Revised Page 72, Effective: September 1, 2012.

Distribution Charge; (ii) CEC; (iii) SPVRC; (iv) DSS; (v) NUG-C; (vi) PTC;⁹ and (vii) SMT-C, as well as the Universal Service Charge and Energy Efficiency and Conservation Charge which are included in the Distribution kilowatt-hour charge on residential customer bills.¹⁰ Valdes Affidavit, ¶ 20.

31. A public utility is required to adhere to its 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. 66 Pa.C.S. § 1303; *DiSanto v. Dauphin County Water Supply Co.*, 436 A.2d 197 (Pa. Super. 1981); *Brockway Glass Co. v. Pa. Pub. Util. Comm'n*, 437 A.2d 1067 (Pa. Cmwlth. 1981). In construing Code Section 1303, 66 Pa.C.S. § 1303 (Adherence to tariffs), the Commonwealth Court of Pennsylvania has stated that "[t]here can be no lawful rate *except* the last tariff published as provided by law.... Further, it is well established that in the absence of an exception by the Commission, a public utility may not charge any rate for services other than that lawfully tariffed. . . ." *Bell Telephone Co. v. Pa. Pub. Util. Comm'n*, 417 A.2d 827 (Pa. Cmwlth. 1980), citing *Duquesne Light Co. v. Pa. Pub. Util. Comm'n*, 611 A.2d 370 (Pa. Cmwlth. 1992); *Leiper v. Baltimore and Phila. R.R. Co.*, 105 A. 551 (Pa. 1918); *Byer v. Peoples*

⁹ The PTC is a monthly charge consisting of the sum of all generation and transmission related charges, including, among other things, the Company's recovery of costs associated with the procurement and delivery of wholesale electric generation to customers who do not choose to receive retail market generation from an alternative electric generation supplier. The PTC Charge is contained in Rider N of the Company's current Commission-approved tariff and is the same for all non-shopping residential customers regardless of the rate schedule under which they take delivery service from the Company. For all customers receiving default service under the provision of Rate Schedule RS provided for in the Company's current Commission-approved tariff, the PTC Charge is adjusted quarterly in accordance with Rider N and the Company's Default Supply Plan, which was approved by the Commission on November 6, 2009. *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of their Default Service Programs*, Docket No. P-2009-2093053, *et al.* (Final Order entered November 6, 2009); Pennsylvania Electric Retail Tariff, Electric Pa. P.U.C. No. 80, Revised Page 185, Effective: January 1, 2011.

¹⁰ The Competition Act and subsequent Commission orders permitted the Company to develop various individual rate recovery mechanisms to recover costs associated with charges such as NUG-C, CEC, SMT-C, DSS, Universal Service Charge, Energy Efficiency and Conservation Charge, and the SPVRC (herein collectively referred to as "Miscellaneous Charges"). The Commission has specifically approved the Miscellaneous Charges, which are contained in the Company's current Commission-approved retail electric tariff.

Natural Gas Co., 380 A.2d 383 (Pa. Super. 1977); *Blythe Township Municipal Authority v. Pa. Pub. Util. Comm'n*, 185 A.2d 628 (Pa. Super. 1962).

32. The Complainant raises allegations relating solely to an increase in charges, despite only a nominal increase in consumption as compared to previous similar consumption that was billed at a lower rate, which she attributes to the implementation of the Company's new default service rates on January 1, 2011. Formal Complaint, ¶ 4(B).

33. The Complainant raises no allegations contending that Penelec has improperly calculated the consumption registered by the Complainant's electric service meter, or that Penelec has otherwise violated any applicable laws relating to the Company's provision of electric service to the Service Location. Formal Complaint, ¶ 4(B). The Complainant is specifically disputing the rates for which the Company has billed her for its provision of default generation electric service to the Service Location. Formal Complaint, ¶ 4(B).

34. The Public Utility Code requires that "...any person...may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or any regulation or order of the Commission." 66 Pa.C.S. § 701.

35. In this case, the Complainant is disputing charges which have been mandated by statute, the Commission's regulations and orders, the Company's previously approved Joint Petition and its Commission-approved tariff, and not acts done or omitted to be done by the Company in violation of the Pennsylvania Public Utility Code, the Commission's regulations, or its Commission-approved tariff. The Formal Complaint thus represents a meritless allegation against Commission-approved rates, which cannot be refunded. *See C & D Technologies, Inc., et al. v. Pa. Power & Light Co.*, Docket No. C-00992119, *et al.* (Pa. PUC 2004).

36. In accordance with Section 5.102(d)(1) of the Commission's regulations, 52 Pa. Code § 5.102(d)(1), there are no genuine issues of material fact in the above-captioned proceeding, and Penelec is entitled to a judgment as matter of law.

B. A hearing is unnecessary

37. The purpose of a hearing is to create a record so that any issues of material fact may be fully heard and decided upon. A hearing is necessary only when the issues involved are not questions of law, policy or discretion. *Dee-Dee Cab, Inc. v. Pa. Pub. Util. Comm's*, 817 A.2d 593 (Pa. Cmwlth. 2003) (petition for allowance of appeal denied, 836 A.2d 123 (Pa. 2003)). Under section 703(b) of the Code, the Commission is provided with the ability to dismiss a case without a hearing if, in the Commission's opinion, a hearing would not serve public interest. 66 P.S. § 703(b). In *Carlock v. The United Tel. Co. of Pa.*, Docket No F-00163617 (Final Order entered July 14, 1993), the Commission expressed preference for Administrative Law Judges to not grant motions without first allowing a *pro se* complainant the opportunity to present their case orally at hearing, so that a sufficient record could be created to decide on issues of fact.

38. Here the Complainant clearly states that her usage remains consistent over time, however her billing amounts have increased. Further, the Complainant references the January 1, 2011 default service rates as the explanation for the increase in billing amounts. The Complainant has not alleged in her Formal Complaint that the Company's provision of electric service -- including billings, meter readings or any other facet of service associated with electric distribution service provided by the Company -- has been inaccurate or otherwise in violation of applicable laws governing the services provided by an EDC; rather, the Complainant is disputing the increase in billings, despite only experiencing a nominal increase in usage as compared over time. The Complainant merely presents her discontent with the implementation of the

Company's new default service rates. She has alleged nothing new countering the implementation of these default service rates. Formal Complaint, ¶¶ 4(B) and (5).

39. The Commission has clearly established the policies and principles relating to an EDC's requirement to comply with provisions of the Competition Act and subsequent regulations promulgated to meet the requirements of the Competition Act. As such, there is no genuine issue of fact, and a hearing would serve no useful purpose in establishing a record that may somehow alter the inevitable outcome of the Complainant's protest against the Company's implementation of its January 1, 2011 default service rates; the Company is entitled to relief in this proceeding as a matter of law.

VI. Conclusion

WHEREFORE, Pennsylvania Electric Company respectfully requests that this Motion for Summary Judgment be granted and the Commission grant the Company such other relief as is just and reasonable under the circumstances.

Respectfully submitted,



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Dated: January 4, 2013

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

KELLY DAWN NICHOLSON

v.

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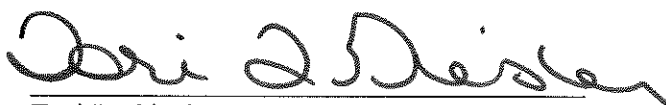
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Motion for Summary Judgment of Pennsylvania Electric Company to the Formal Complaint of Kelly Dawn Nicholson upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 5.61 (relating to service by a participant).

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

Kelly Dawn Nicholson
51 Valley View Drive
P.O. Box 4377
Hidden Valley, PA 15502

Dated: January 4, 2013



Tori L. Giesler
PENNSYLVANIA ELECTRIC COMPANY
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