

CIVIL DIVISION - LAW

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

Plaintiffs )

v. )

PENNSYLVANIA POWER & LIGHT )  
COMPANY, n/k/a PP&L, INC., )

Defendant )

NO. 99-09799

CIVIL ACTION

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH  
SUBPOENA**

FILED  
NOV 20 2000  
CHESTER COUNTY, PA

The matter now before the court is the Motion of Spectrum Energy Services Corporation ("Spectrum") to quash a Subpoena, and/or for a protective order, with respect to the discovery contemplated by a Subpoena duces tecum directed to Spectrum.

Plaintiffs, Commercial Utilities Consultants and Public Utility Service Corporation, commenced an action by the filing of a Complaint against Pennsylvania Power & Light Company (now, by corporate reorganization, known as PPL Electric Utilities Corporation) ("PPL"). Plaintiffs' Complaint is detailed beyond what is even ordinarily seen in a fact pleading state like Pennsylvania; Plaintiffs' single count Complaint runs thirteen (13) pages and thirty-nine (39) lengthy paragraphs. Despite its length and level of detail, the Complaint nowhere even mentions an enterprise called Utilities Management Consultants, Inc. ("UMC").

Recently, Plaintiffs caused to be issued a Subpoena to Attend and Testify, relating to a deposition scheduled for November 17, 2000, purportedly compelling the attendance and testimony of Daniel J. Persa, President, Spectrum Energy Services Corporation ("Spectrum"), a PPL affiliate. A copy of the Subpoena with its attachments is annexed hereto, marked

EXHIBIT "A", and is incorporated herein by this reference. The Subpoena also contains a duces tecum clause requiring Persa to bring with him, "documents" defined in the broadest conceivable sense (a definition which goes on for 14 lines of small type). The 13 categories of "documents" (so defined) which the witness is then supposedly compelled to bring with him are likewise hopelessly vague and broad (for example, "all 'documents' . . . which relate or refer to (UMC)"). Additionally, Spectrum, the object of the Subpoena, is a non-party. Therefore, the circumstances before the Court is a Subpoena directed to one non-party (Spectrum) commanding it to testify and produce, with respect to another non-party (UMC), documents described in the vaguest, broadest and most comprehensive manner imaginable.

Because the Subpoena seeks testimony and document production which is both irrelevant and unduly vague and burdensome, Spectrum has filed a Motion to Quash the Subpoena, or for other relief in the nature of a protective order. This Memorandum is offered in support of that Motion.

The Pennsylvania Rules of Civil Procedure governing the permissible scope of discovery, and the remedies for improper discovery, are familiar. Rule 4003.1 limits discovery to matters which are, "relevant to the subject matter involved in the pending action." Rule 4011 prohibits discovery which would cause unreasonable annoyance, oppression or burden, or is beyond the permissible scope of discovery, or which would require the making of an unreasonable investigation. Rule 4012 implements Rule 4011 by authorizing the court to make an order to protect a party or person from unreasonable annoyance, oppression, burden or expense.

Accordingly, for the proposed discovery in this case to be allowable, it must meet two standards -- the discovery sought must be relevant to the subject matter involved in the case, and it must not be unreasonably burdensome or oppressive to Spectrum. Plaintiffs' Subpoena duces tecum fails on both branches.

First, "relevance" means that the evidence proposed to be discovered tends to prove or disprove a fact in issue. Turney Media Fuel, Inc. v. Toll Brothers, Inc., 725 A.2d 836 (Pa. Super. 1999). Stated alternatively, evidence is "relevant" if it tends to establish facts in issue, or advances the inquiry, resulting in evidence having probative value. Burrell Construction & Supply Co. v. Straub, 440 Pa. Super. 596, 656 A.2d 529 (1995). As noted above, Plaintiffs' Complaint is extraordinarily detailed, beyond the scope ordinarily encountered in a Pennsylvania Complaint. Even in its level of detail, though, the Complaint fails to disclose a hint of how the vast document production sought by the Subpoena would tend to prove or disprove a fact at issue in the case. Plaintiffs' Subpoena therefore fails to meet the threshold relevance test.

Even if the discovery sought were barely relevant, the requested discovery still is oppressively vague and burdensome. The scope of discovery in Pennsylvania admittedly is extensive. It is not, however, limitless. It still remains the law of Pennsylvania that, " 'fishing expeditions' are not to be countenanced under the guise of discovery . . . ." Estate of Thompson, 416 Pa. 249, 261, 206 A.2d 21, 28 (1965). The question whether a discovery request is too broad or too burdensome is a matter for the trial court, and the trial court has broad discretion to deal with discovery issues. Blouch v. Clifford R. Zinn & Son, Inc., 350 Pa. Super. 327, 504 A.2d 862 (1986). The discovery requested in this case is of the same oppressively broad and burdensome character as was the discovery sought in Estate of Townsend, 430 Pa. 318, 241 A.2d 534 (1968), where the Supreme Court affirmed the trial court's refusal to permit discovery phrased by the moving party as, "all memoranda, correspondence and writings relating to (the subject matter, there, a decedent's will) and/or other dealings (the respondent) with (the decedent)." Similarly, see also, Potter Bank & Trust Co. v. Gage, 41 Erie 159 (1958) (a discovery request that calls for production of "all files", rather than specific files is not justifiable).

Plaintiffs' Subpoena demands production of any and all manner of "documents" which fit any description on a 14 line definition of the term "document." The Subpoena then goes on to demand in the broadest imaginable sense production of any documents which "relate or refer" to UMC. Literal compliance would require Spectrum to search every one of its files for any and all manner of "documents" which even tangentially "relate or refer" to UMC. That is precisely the kind of excessively broad, burdensome and vexatious discovery request which Rules 4011 and 4012 were intended to protect deponents against.

As the Supreme Court observed in Stahl v. First Pennsylvania Banking & Trust Co., 411 Pa. 121, 126, 191 A.2d 386, 389 (1963), "a recitation of the above-mentioned facts and contentions makes it clear that this is nothing but a very expensive, onerous and harassing fishing expedition for a school of mythical fish. . . ." Moreover, this extremely burdensome and costly expedition is not to be paid for by the fishermen . . . ; it is to be paid for by the present owners of the lake. It is very difficult to believe that any such fishing expedition which is so obviously unrealistic, unreasonable, oppressive and unjust could ever have been intended . . . ."

An Order should therefore be entered quashing the Subpoena or, in the alternative, entering an Order protecting Spectrum from unreasonable oppression, burden or expense.

GROSS, MCGINLEY, LABARRE & EATON, LLP

DATE: 11/21/2005

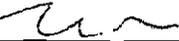
BY:   
MALCOLM J. GROSS, ESQUIRE  
Attorney for Movant, Spectrum Energy Services  
Corporation  
33 South 7<sup>th</sup> Street, P.O. Box 4060  
Allentown, PA 18105-4060  
Phone: (610) 820-5450  
Direct No.: (610) 871-1312  
Fax: (610) 820-6006  
I.D. # 08137

Exhibit A

# SUBPOENA TO ATTEND AND TESTIFY

COMMERCIAL UTILITY CONSULTANS and  
PUBLIC UTILITY SERVICE CORPORATION

Civil Action No. 99-09799

vs

PENNSYLVANIA POWER & LIGHT COMPANY

To DANIEL J. PERSA, PRESIDENT  
SPECTRUM ENERGY SERVICES CORPORATION

NAME(S) OF WITNESS(ES)

TWO NORTH NINTH STREET

ALLENTOWN, PA 18101

1. You are ordered by the court to come to Official Court Reporter of Chester County

(SPECIFY COURTROOM OR OTHER PLACE)

20 North Church Street at West Chester Pennsylvania

on November 17, 2000 at 9:30 o'clock, A. M., to testify on behalf

of Plaintiffs in the above case, and to remain until excused.

2. And bring with you the following: See attached.

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5, of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

Ethan N. Halberstadt/Atty. ID#57544 / Tel: 610.354.9700

Requested by: 475 Allendale Road, Suite 200, King of Prussia, PA 19406

(STATE ATTORNEY'S NAME, ADDRESS, TELEPHONE NUMBER AND IDENTIFICATION NUMBER)

Date October 26, 2000

BY THE COURT

Seal of the Court

By: Alicia Bell Royer  
Prothonotary

This form of subpoena shall be used whenever a subpoena is issuable, under Rule 234.1, including hearings in connection with depositions and before arbitrators, masters, commissioners, etc.

To require the production of documents or things in addition to testimony, complete paragraph 2.

**SUBPOENA**  
**COMMONWEALTH OF PENNSYLVANIA**  
In the Court of Common Pleas of Chester County

*Return of Service:*

On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, I \_\_\_\_\_ served \_\_\_\_\_  
(NAME OF PERSON SERVED)

with the foregoing subpoena by: (Describe method of service)

\_\_\_\_\_

\_\_\_\_\_

I verify that the statements in this return of service are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

Date: \_\_\_\_\_

\_\_\_\_\_  
(SIGNATURE)

Documents to be produced

The term "document" includes the plural and means, without limitation, the original and each copy of each and any writing, evidence of indebtedness, report, memorandum, letter, correspondence, telegram, note, minutes, contract, agreement, inter-office communication, bulletin, circular, procedure, pamphlet, photograph, study, notice, summary, invoice, diagram, plan, drawing, specification, diary, record or note of telephone conversation, chart, schedule, entry, print, representation, record, report or any tangible item or thing of written, readable, graphic, audible, or visual material, of any kind or character, whether handwritten, typed, xeroxed, photostated, printed, duplicated, reproduced, recorded, photographed, copied, microfilmed, micro-carded, or transcribed by any means, and any electronic, mechanical or electrical records or representations stored in any computer storage device, tape, disc, bubble memory (cassette or recording), including without limitation, each interim as well as final draft and each revision, each amendment, and each modification, which is in the possession or subject to the control of you or your present or former agents, employees or representatives, consultants or sub-consultants including any related corporations or business entities.

1. All documents, as defined above, which relate or refer to Utilities Management Consultants, Inc. (hereinafter "UMC").

2. All documents, as defined above, which relate or refer to UMC's joint venture agreement (hereinafter the "Joint Venture Agreement") with Spectrum Energy Services Corp. and/or PP&L Spectrum (hereinafter collectively "Spectrum").

3. All documents, as defined above, which identify the customers of the joint venture between UMC and Spectrum.

4. All documents, as defined above, which relate or refer to any marketing support or customer account information provided by the Pennsylvania Power & Light Company (hereinafter "PPL") to UMC, Spectrum, and/or the Joint Venture.

5. All contracts that the Joint Venture (or any of the joint venturers) entered into with customers in conjunction with the Joint Venture Agreement.

6. All documents, as defined above, which identify the individuals within PPL who agreed to assist in the marketing of the joint venture between UMC and Spectrum.

7. All documents, as defined above, which relate or refer to the marketing efforts of the Joint Venture, including all lists of customers obtained from PPL, all promotional materials, and similar documents.

8. All documents, as defined above, which relate or refer to an agreement by UMC not to provide rate consulting within the PPL franchise territory in consideration for entering into the Joint Venture Agreement.

9. All documents, as defined above, which relate or refer to revenue projections for the Joint Venture.

10. All documents, as defined above, which relate or refer to the reasons that Spectrum terminated the Joint Venture Agreement.

11. All documents, as defined above, which relate or refer to the reasons that Spectrum entered into the Joint Venture Agreement with UMC.

12. All documents, as defined above, which relate or refer to communications with Oliver Kasper regarding UMC, Commercial Utility Consultants, Public Utility Service Corporation, or rate consultants in general.

13. All documents, as defined above, which relate or refer to how Spectrum learned of UMC and the circumstances which led Spectrum and UMC to enter into a Joint Venture Agreement.

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

NO: -99-09799

Plaintiffs )

v. )

PENNSYLVANIA POWER & LIGHT )  
COMPANY n/k/a PP&L, INC., )

Defendant )

*[Handwritten signature]*  
FILED  
NOV 28 PM 12:32  
Chester County PA

CERTIFICATE OF SERVICE

MALCOLM J. GROSS, ESQUIRE, hereby certifies that he served a true and correct copy of the MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH SUBPOENA, upon the following persons listed below, by first class U.S. mail, postage prepaid, on November 27, 2000

EHTAN N. HALBERTSTAT, ESQUIRE  
POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.  
475 ALLENDALE ROAD, SUITE 200  
KING OF PRUSSIA, PA 19406

GROSS, McGINLEY, LaBARRE & EATON, LLP

BY: *[Signature]*  
MALCOLM J. GROSS, ESQUIRE  
Attorney for Spectrum Energy Services Corporation  
33 South 7th Street  
PO Box 4060  
Allentown, PA 18105-4060  
I.D. #08137

Dated: 11/27/2000

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

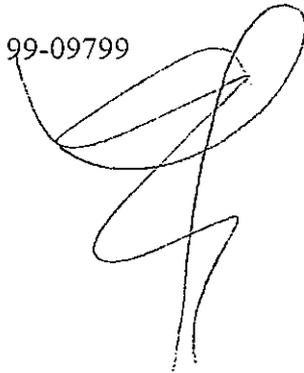
Plaintiffs )

v. )

PENNSYLVANIA POWER & LIGHT )  
COMPANY n/k/a PP&L, INC., )

Defendant )

NO: 99-09799



ORDER

AND NOW this \_\_\_\_\_ day of \_\_\_\_\_, 2000, upon  
consideration of Spectrum Energy Services Corporation's Motion to Quash Subpoena or for other  
Protective Relief, and any response thereto,

IT IS HEREBY ORDERED that the subpoena served by the Plaintiff upon Spectrum Energy  
Services Corporation is quashed.

BY THE COURT:

\_\_\_\_\_  
J.

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

CIVIL DIVISION - LAW

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

Plaintiffs )

V. )

PENNSYLVANIA POWER & LIGHT )  
COMPANY, n/k/a PP&L, INC., )

Defendant )

NO. 99-09799

CIVIL ACTION

FILED  
NOV 29 PM 12:32  
CLERK OF COURT  
CHESTER COUNTY, PA

**MOTION OF SPECTRUM ENERGY SERVICES CORPORATION TO  
QUASH SUBPOENA OR FOR OTHER PROTECTIVE RELIEF**

Movant, Spectrum Energy Services Corporation, by its attorneys, Gross, McGinley, LaBarre & Eaton, LLP, hereby respectfully moves your Honorable Court to quash the Subpoena issued by Plaintiffs, or in the alternative to enter an appropriate protective order with respect to the discovery sought by the Subpoena on the grounds that:

A. The discovery sought by the Subpoena violates Pennsylvania Rule of Civil Procedure 4003.1 as it is not relevant to a matter at issue in the case; and

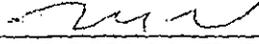
B. Even if the discovery sought were found to be relevant, it violates Pennsylvania Rule of Civil Procedure 4011 as the requested discovery is excessively vague, broad, burdensome, vexatious and oppressive.

In further support of this Motion, Movant incorporates herein by reference its supporting Memorandum of Law being filed concurrently herewith.

WHEREFORE, Spectrum Energy Services Corporation, prays your Honorable Court to enter an Order quashing the Subpoena or, in the alternative, entering an appropriate order protecting the Movant against unreasonable annoyance, burden, vexation and oppression.

GROSS, MCGINLEY, LABARRE & EATON, LLP

DATE: 11/2/2000

BY:   
MALCOLM J. GROSS, ESQUIRE  
Attorney for Movant, Spectrum Energy Services  
Corporation  
33 South 7<sup>th</sup> Street, P.O. Box 4060  
Allentown, PA 18105-4060  
Phone: (610) 820-5450  
Direct No.: (610) 871-1312  
Fax: (610) 820-6006  
I.D. # 08137

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA  
CIVIL DIVISION

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

NO: 99-09799

Plaintiffs )

v. )

PENNSYLVANIA POWER & LIGHT )  
COMPANY n/k/a PP&L, INC., )

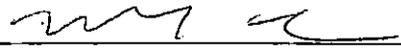
Defendant )

CERTIFICATION OF COUNSEL

I, MALCOLM J. GROSS, ESQUIRE, hereby certify that I have conferred with opposing counsel on at least four (4) different occasions, the latest being November 14, 2000, in a good faith attempt to resolve the disputed Subpoena. All attempts have been made telephonically, and have been unsuccessful

FILED  
00 NOV 28 PM 1:32  
SPECTRUM ENERGY SERVICES CORPORATION

GROSS, McGINLEY, LaBARRE & EATON, LLP

BY: 

MALCOLM J. GROSS, ESQUIRE  
Attorney for Spectrum Energy Services Corporation  
33 South 7th Street  
PO Box 4060  
Allentown, PA 18105-4060  
I.D. #08137

Dated: 11/22/00

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

NO: 99-09799

Plaintiffs )

v. )

PENNSYLVANIA POWER & LIGHT )  
COMPANY n/k/a PP&L, INC., )

Defendant )

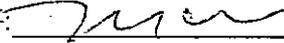
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00 NOV 28 PM 12:32  
PROthonotary  
Chester County, Pa

CERTIFICATE OF SERVICE

MALCOLM J. GROSS, ESQUIRE, hereby certifies that he served a true and correct copy of the MOTION OF SPECTRUM ENERGY SERVICES CORPORATION TO QUASH SUBPOENA OR FOR OTHER PROTECTIVE RELIEF, upon the following persons listed below, by first class U.S. mail, postage prepaid, on November 27, 2000

EHTAN N. HALBERTSTAT, ESQUIRE  
POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.  
475 ALLENDALE ROAD, SUITE 200  
KING OF PRUSSIA, PA 19406

GROSS, McGINLEY, LaBARRE & EATON, LLP

BY:   
MALCOLM J. GROSS, ESQUIRE  
Attorney for Spectrum Energy Services  
Corporation  
33 South 7th Street  
PO Box 4060  
Allentown, PA 18105-4060  
I.D. #08137

Dated: 11/27/00

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

NO. 99-09799

Plaintiffs )

v. )

PENNSYLVANIA POWER & LIGHT )  
COMPANY n/k/a PP&L, INC., )

Defendant )

FILED  
00 NOV 28 PM 12:33  
PROTHONOTARY  
CHESTER CO. PA

**PRAECIPE FOR DETERMINATION**

To the Prothonotary:

Kindly submit the following matter to Judge Katherine B. L. Platt  
(insert the name of the assigned judge)

for Determination: Motion for Spectrum Energy Services Corporation to Quash Subpoena or for  
(insert specifically the title of petition/motion/preliminary objections, etc. to be submitted)  
other Protective Relief.

(date of filing/service): November 27, 2000

Oral Argument is requested.

Malcolm J. Gross  
Attorney's Name Malcolm J. Gross, Esquire  
Address 33 South 7<sup>th</sup> Street, 4<sup>th</sup> Floor, PO Box 4060  
Allentown, PA 18105-4060  
ID No: 08137  
Telephone No: (610) 820-5450

COMMERCIAL UTILITY CONSULTANTS  
and PUBLIC UTILITY SERVICE  
CORPORATION

Plaintiffs/Counterclaim Defendants,

v.

PENNSYLVANIA POWER & LIGHT  
COMPANY,

Defendant/Counterclaimant.

IN THE COURT OF COMMON PLEAS OF  
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

JURY TRIAL DEMANDED

NO. 99-09799

(Consolidated Cases)

**STIPULATION AND ORDER AMENDING  
ADMINISTRATIVE CONFERENCE ORDER**

**Background**

1. On July 13, 2000, an administrative conference was held in this action and an Administrative Conference Order was issued dated July 17, 2000.
2. The discovery deadline set forth in the Administrative Conference Order is November 30, 2000.
3. The parties are attempting to amicably resolve numerous discovery disputes, the resolution of which will impact the scope of the depositions which have not yet been completed.
4. There are numerous depositions which remain to be completed, including the deposition of non-party witnesses (some of whom have indicated that they will be filing for appropriate protective orders). Due to scheduling conflicts, many of these depositions cannot be completed prior to November 30, 2000.
5. The deadlines set forth in the Court's Administrative Conference Order have not been previously amended or extended.
6. The parties agree that the deadlines previously established in this case should be extended for 60 days in order to allow the parties to complete discovery and to resolve the outstanding discovery issues.

OFFICE OF THE  
PROthonotary  
CHESTER CO., PA.

NO DEC -4 PM 2:58

FILED

Stipulation

AND NOW, the parties, by and through their respective counsel, stipulate and agree that all of the deadlines set forth in the Court's Administrative Conference Order of July 17, 2000 shall remain the same except as amended below:

3. Discovery:

\_\_\_\_\_ complete, unless further specially allowed by Court;

xxx to be completed as follows:

a. All fact discovery shall be completed on or before January 30, 2001. Any interrogatories or document request shall be served so that responses are due on or before that date and depositions shall be scheduled so as to be conducted on or before that date;

b. Plaintiff shall provide the substance of the facts and opinions to which each expert identified pursuant to the Court's Administrative Conference Order is expected to testify and a summary of the grounds for each such opinion on or before February 14, 2001. (Alternatively, Plaintiffs may provide the expert report of any such expert on or before the date specified);

c. Defendant shall provide the substance of the facts and opinions to which each expert identified pursuant to the Court's Administrative Conference Order is expected to testify and a summary of the grounds for each such opinion on or before February 27, 2001. (Alternatively, Defendant may provide the expert report of any such expert on or before the date specified);

f. The parties shall conduct any depositions of the experts identified pursuant to the Court's Administrative Conference Order on or before March 13, 2001;

g. All case and issue dispositive motions and an opening brief and affidavits, if any, in support of the motion(s), shall be served and filed by March 20, 2001. Opposing briefs shall be served and filed by April 17, 2001. Reply briefs shall be served and filed by May 1, 2001.

7. Anticipated Trial Listing Date: TRIAL READY LISTING DEFERRED TO MARCH, 2001.

\_\_\_\_\_ matter to be scheduled for arbitration.

xxx Jury; \_\_\_\_\_ Non-Jury Trial

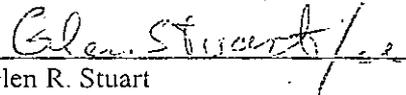
5 day(s) – anticipated length of trial.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By:   
Ethan N. Halberstadt  
Attorneys for Plaintiffs

Dated: 11-27-00

MORGAN LEWIS & BOCKIUS, LLP

By:   
Glen R. Stuart  
Bryant D. Lim  
Attorneys for Defendant

Dated: 11-27-00

**ORDER**

AND NOW, this 28<sup>th</sup> day of November, 2000, upon consideration of the parties' Stipulation, it is hereby ORDERED that said Stipulation is approved as an Order of Court and that the Court's Administrative Conference Order is amended as set forth in the above Stipulation.

BY THE COURT:

  
Katherine B. L. Platt, J.

FILED  
DEC 14 PM 3:12  
CLERK OF COURT  
HESTER CO.

*Commercial Utility  
Consultants, et al.*

Plaintiff(s)

: IN THE COURT OF COMMON PLEAS  
: CHESTER COUNTY, PENNSYLVANIA

VS.

: NO. 99-09799

*Pennsylvania Power  
& Light Company*

Defendant(s)

: CIVIL ACTION-LAW/EQUITY

**TRIAL READY LISTING DATE**

AND NOW, this 6 day of December, 2000, it is hereby  
ordered that the date upon which this case shall be placed upon the list of trial ready cases  
is hereby 3/2/01

BY THE COURT:

*Per Curiam*  
\_\_\_\_\_ J.

FILED  
00 DEC -6 PM 3:50  
OFFICE OF THE  
PROTODIARY  
CHESTER CO. PA.

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMERCIAL UTILITY CONSULTANT )  
and PUBLIC UTILITY SERVICE )  
CORPORATION, )

NO: 99-09799

Plaintiffs )

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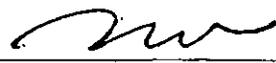
FILED  
00 DEC 12 PM 2:23  
CLERK OF COURT  
CHESTER COUNTY

PRAECIPE FOR APPEARANCE

TO THE CLERK OF SAID COURT:

Kindly enter my appearance for Spectrum Energy Services Corporation, Movant in the Motion to Quash Subpoena or for Other Protective Relief, filed in the above-captioned case on or about November 28, 2000.

GROSS, McGINLEY, LaBARRE & EATON, LLP

BY: 

MALCOLM J. GROSS, ESQUIRE  
Attorney for Spectrum Energy Services Corporation  
33 South 7th Street, PO Box 4060  
Allentown, PA 18105-4060  
Phone: (610) 820-5450 / Direct # (610) 871-1312  
Fax: (610) 820-6006  
I.D. #08137

Dated: 12/6/2008

CERTIFICATE OF SERVICE

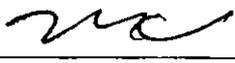
MALCOLM J. GROSS, ESQUIRE, hereby certifies that he served a true and correct copy of the PRAECIPE FOR APPEARANCE, upon the following persons listed below, by first class U.S. mail, postage prepaid, on December 6, 2000:

ETHAN N. HALBERSTAT, ESQUIRE  
POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.  
475 ALLENDALE ROAD  
SUITE 200  
KING OF PRUSSIA, PA 19406

BRYAN A SNAPP, ESQUIRE  
OFFICE OF GENERAL COUNSEL  
PPL ELECTRIC UTILITIES CORPORATION  
TWO NORTH NINTH STREET  
ALLENTOWN PA 18101-1179

FILED  
09 DEC 12 PM 2:23  
CLERK OF COURT  
JUDICIAL DISTRICT OF JERSEY  
ALLENTOWN, PA

GROSS, McGINLEY, LaBARRE & EATON, LLP

BY: 

MALCOLM J. GROSS, ESQUIRE  
Attorney for Spectrum Energy Services  
Corporation  
33 South 7th Street, PO Box 4060  
Allentown, PA 18105-4060  
Phone: (610) 820-5450 / Direct # (610) 871-1312  
Fax: (610) 820-6006  
I.D. #08137

COMMERCIAL UTILITY CONSULTANTS  
and PUBLIC UTILITY SERVICE  
CORPORATION  
Plaintiffs/Counterclaim Defendants,

v.

PENNSYLVANIA POWER & LIGHT  
COMPANY,  
Defendant/Counterclaimant.

IN THE COURT OF COMMON PLEAS OF  
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

JURY TRIAL DEMANDED  
NO. 99-09799  
(Consolidated Cases)

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 200\_\_, it is hereby  
ORDERED that the Motion of Spectrum Energy Services Corporation to Quash Subpoena or for  
Other Protective Relief is DENIED.

BY THE COURT:

\_\_\_\_\_  
J.

**POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.**

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
475 Allendale Road - Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

Attorneys for Plaintiff

FILED  
00 DEC 18 PM 2:48  
OFFICE OF THE  
PROTHONOTARY  
CHESTER CO. PA.

COMMERCIAL UTILITY CONSULTANTS and PUBLIC UTILITY SERVICE CORPORATION Plaintiffs/Counterclaim Defendants,	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
v.	CIVIL ACTION — LAW
PENNSYLVANIA POWER & LIGHT COMPANY, Defendant/Counterclaimant.	JURY TRIAL DEMANDED NO. 99-09799 (Consolidated Cases)

**PLAINTIFFS' RESPONSE TO MOTION OF SPECTRUM ENERGY SERVICES  
CORPORATION TO QUASH SUBPOENA OR FOR OTHER PROTECTIVE RELIEF**

Respondents, Commercial Utility Consultants and Public Utility Service Corporation, by and through its attorneys, hereby respond to the Motion of Spectrum Energy Services Corporation to Quash Subpoena or for Other Protective Relief as follows:

A. Denied as a conclusion of law to which no response is required. By way of further answer, the information sought by the subpoena served by plaintiffs is directly relevant to the issues in this case; and

B. Denied as a conclusion of law to which no response is required. The subpoena is tailored to obtain information directly relevant to plaintiffs' claims.

In further opposition to Spectrum's Motion, plaintiffs will be filing a Memorandum of Law in opposition thereto.

WHEREFORE, plaintiffs Commercial Utility Consultants and Public Utility Service Corporation request this Court to deny Spectrum Energy Services Corporation's Motion to Quash the Subpoena, and award such other relief as the Court deems appropriate.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By:



Ethan N. Halberstadt  
Attorneys for Plaintiffs,  
Commercial Utility Consultants and  
Public Utility Service Corporation

Dated: December 15, 2000

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
475 Allendale Road - Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

FILED  
00 DEC 18 PM 2:48  
OFFICE OF THE  
PROTHONOTARY  
CHESTER CO. PA.

Attorneys for Plaintiff

COMMERCIAL UTILITY CONSULTANTS and PUBLIC UTILITY SERVICE CORPORATION Plaintiffs/Counterclaim Defendants,	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
v.	CIVIL ACTION — LAW
PENNSYLVANIA POWER & LIGHT COMPANY, Defendant/Counterclaimant.	JURY TRIAL DEMANDED NO. 99-09799 (Consolidated Cases)

CERTIFICATE OF SERVICE

I, Ethan N. Halberstadt, hereby certify that on this date a true and correct copy of the foregoing Plaintiffs' Response to Motion of Spectrum Energy Services Corporation to Quash Subpoena or for Other Protective Relief was served upon all counsel of record via first-class mail, postage prepaid, addressed as follows:

Malcolm J. Gross, Esquire  
Gross, McGinley, LaBarre & Eaton, LLP  
33 South Seventh Street  
P.O. Box 4060  
Allentown, PA 18105-4060

Glen R. Stuart, Esquire  
Bryant D. Lim, Esquire  
Morgan Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921

COUNSEL FOR SPECTRUM ENERGY SERVICES  
CORPORATION

COUNSEL FOR PENNSYLVANIA POWER & LIGHT  
COMPANY

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: 

Ethan N. Halberstadt  
Attorneys for Plaintiffs,  
Commercial Utility Consultants and  
Public Utility Service Corporation

Dated: December 15, 2000

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

FILED

01 JAN 10 PM 2:26

OFFICE OF THE  
PROTHONOTARY  
CHESTER CO., PA.  
Attorneys for Plaintiffs

COMMERCIAL UTILITY CONSULTANTS  
and PUBLIC UTILITY SERVICE  
CORPORATION

Plaintiffs/Counterclaim Defendants,

v.

PENNSYLVANIA POWER & LIGHT  
COMPANY,

Defendant/Counterclaimant.

IN THE COURT OF COMMON PLEAS OF  
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

JURY TRIAL DEMANDED

NO. 99-09799

(Consolidated Cases)

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO  
SPECTRUM ENERGY SERVICES' MOTION TO QUASH**

**I. Facts**

This action involves claims by plaintiffs Commercial Utility Consultants ("CUC") and Public Utility Service Corporation ("PUSC") that a regulated public utility, the Pennsylvania Power & Light Company ("PPL"), tortiously interfered with their contractual relations with their customers. CUC and PUSC are utility consulting firms that save their clients money by reviewing the rates, tariffs, and riders that apply to their customer's utility billings, and making recommendations with respect to utility savings that may be realized by the customer. Plaintiffs split these utility savings with their customers in accordance with their contracts. While these recommendations save plaintiffs' customers a great deal of money in utility savings, these savings translate into losses for the utility, PPL.

Plaintiffs contend that one of the reasons that PPL tortiously interfered with their customer

relations was because their consulting work in the PPL franchise territory proved so costly to PPL. From a financial standpoint, PPL had every incentive to disrupt plaintiffs' contractual relations and harm their ability to provide consulting services in the PPL territory. Plaintiffs' Complaint sets forth in detail various methods by which PPL undertook to interfere with plaintiffs' contractual relations. This runs the gamut from advising customers on ways in which to terminate plaintiffs' contracts, offering unauthorized benefits to customers in an effort to induce the customers to withdraw from favorable rates recommended by plaintiffs and withholding benefits from plaintiffs' customers.

Unbeknownst to plaintiffs at the time the Complaint was filed, however, PPL had taken steps in an effort to "displace" plaintiffs as consultants in the PPL franchise territory. At the end of October, 2000, plaintiffs became aware of a Complaint filed by Utilities Management Consultants, Inc. ("UMC"), a competitor of plaintiffs, against PPL and one of PPL's unregulated subsidiaries, Spectrum Energy Services Corporation ("Spectrum"). A true and correct copy of the Complaint is attached hereto as Exhibit "A". The Complaint alleges that UMC was solicited by the defendants to pursue an energy tax savings program for PPL franchise customers. This program involved something known as "sales tax audits." Commercial utility customers must pay taxes on their utility purchases, except under certain circumstances, as when the electricity they purchase is used for the manufacture of goods for resale. Under such circumstances, the customer is entitled to an "exemption" on the tax charged on its utility purchases. The savings to the customer does *not* come out of the utility's pocket, but rather out of the pocket of the Commonwealth of Pennsylvania. Plaintiffs offer these "sales tax audits" as part of the consulting services they provide. The Complaint alleges that UMC entered into a Joint Venture Agreement with Spectrum to provide such sales tax audit services. Although not set forth in detail in the Complaint, it appears that the contract

the Joint Venture intended to use with its customers was very similar, if not identical, to the contracts used by plaintiffs with their customers. (See Exhibit "A," Document No. P014309). Plaintiffs do not contend that there was anything inappropriate about a business relationship between two unregulated entities such as UMC and Spectrum. The problem is that the verified Complaint alleges that PPL, a regulated public utility and monopoly, agreed to utilize its resources to market the energy savings services to all of its potential customers. The promised marketing consisted of using PPL employees and direct mailing to PPL franchise territory. In return for this agreement, UMC agreed not to perform any rate consulting services within PPL's franchise territory. (Complaint, ¶¶9, 11, Exhibit "A").

Plaintiffs believe that, with this arrangement, PPL hoped to eliminate the types of financial losses that were caused by the services provided by plaintiffs. By effectively funneling business to the UMC/Spectrum Joint Venture, and by providing the Joint Venture with inside information regarding PPL customer accounts and utility usage, plaintiffs would be placed in an untenable competitive situation. Armed with this inside information regarding PPL's franchised customers, the Joint Venture would be able to target those customers who it already knew were in need of sales tax audit services. Perhaps better yet for PPL, UMC agreed that it would not provide the type of rate consulting services that takes money out of the pocket of PPL.

Plaintiffs' view of this arrangement is bolstered by the marketing material attached to the Complaint filed by UMC. According to UMC's Complaint, defendants, including PPL, prepared marketing materials explaining, among things, the "rationale" for providing the sales tax audit service. Primary among the stated rationales was, "**Displace other utility consultants.**" (Exhibit "A," Document No. P014308). Distilled to its essence, the verified allegations in the Complaint

portray a public utility using its monopoly power to eliminate competition for rate consulting services in the PPL franchise territory. At a minimum, the allegations bolster plaintiffs' contention that PPL was financially motivated to harm plaintiffs' business interests in the PPL franchise territory. Plaintiffs do not believe that it is any coincidence that the UMC/Spectrum Joint Venture and the marketing materials are dated during the same time period during which plaintiffs contend they were subject to active interference by PPL.<sup>1</sup>

In addition to the relevance to PPL's motive in harming plaintiffs' financial interests, the information sought by plaintiffs is also directly relevant to the Counterclaim filed by PPL. PPL contends in its counterclaim, *inter alia*, that plaintiffs interfered with its contractual relationship with its customer Buck Company, Inc., by obtaining "confidential" customer information in contravention of appropriate procedures. Nonetheless, it is clear from the marketing materials attached to the UMC Complaint that confidentiality was never an issue for PPL when it came to providing "confidential" customer information to its own deregulated subsidiary. It would be wholly inappropriate for PPL to be permitted to claim that it is entitled to damages for plaintiffs' alleged inappropriate acquisition of "confidential" customer information, when PPL had a business relationship whereby by agreement it provided this information to Spectrum and UMC, one of plaintiffs' competitors.

Finally, one of PPL's "defenses" to plaintiffs' claims is that its conduct was "privileged" because it was a "competitor" of plaintiffs. The fact that PPL funneled information and business to one of its unregulated subsidiaries demonstrates that PPL's defense badly misses the mark. Plaintiffs

---

<sup>1</sup>The allegations made by UMC suggest possible antitrust violations. It appears that PPL was using its monopoly power in its franchise territory (including its monopoly over customer account information) to obtain a competitive advantage in the utility consulting industry. *See, Viacom v. Time Incorporated*, 785 F.Supp. 371 (S.D.N.Y. 1992).

believe that the reason PPL did not enter into the Joint Venture Agreement directly with UMC was because PPL, a regulated public monopoly, was not authorized by the PUC to engage in competitive utility consulting services. Thus, the entire UMC/Spectrum arrangement is directly relevant in undermining one of PPL's principal defenses.

## II. Argument

### Plaintiffs' Subpoena Duces Tecum Should Not Be Quashed as it Seeks Information Directly Relevant to Plaintiffs' Claims for Tortious Interference with Contractual Relations

Spectrum points to plaintiffs' Complaint to support its argument that the information sought by plaintiffs is not relevant to its claims. In particular, Spectrum notes that nowhere in plaintiffs' detailed Complaint is UMC mentioned. (Spectrum's Memorandum of Law, p. 1). Plaintiffs submit that this is a red herring. As noted above, plaintiffs did not learn of the UMC/Spectrum Joint Venture, and the fact that PPL sought to "displace other utility consultants" within the PPL franchise territory, until October, 2000, well after their Complaint was filed. Even assuming, *arguendo*, plaintiffs knew of the dealings between PPL and UMC/Spectrum at the outset of this litigation, there would be no need for plaintiffs to refer to UMC or Spectrum in the Complaint to make the information sought by plaintiffs discoverable.

The gravamen of plaintiffs' Complaint is that PPL tortiously interfered with plaintiffs' contractual relations. In support of its claims, plaintiffs are entitled to introduce evidence of PPL's motive in interfering with these relationships, what PPL's intent was in dealing with plaintiffs' customers, whether such interference was undertaken maliciously, and whether the conduct was improper. See, e.g., Restatement (Second) of Torts, §§ 766, 767. Similarly, in defending against PPL's counterclaim, plaintiffs are entitled to show that, contrary to the position taken in its pleadings, customer information was not treated as confidential on a uniform basis and, in fact, was disseminated

to the UMC/Spectrum Joint Venture for competitive purposes. There is nothing in the law which requires a party to plead such evidentiary issues in a Complaint (i.e. every piece of evidence which supports a party's claims); to the contrary, a party is not permitted to plead all such evidentiary matters.

In this case plaintiffs have uncovered *verified* allegations that directly support their position that PPL intended to harm its financial interests through its arrangement with its own subsidiary and one of plaintiffs' competitors. It is difficult to imagine a clearer expression of PPL's motive than the fact that they intended to "displace other utility consultants" within that private market. Plaintiffs have alleged in this lawsuit that one of PPL's motives in harming plaintiffs was that they were costing PPL tremendous amounts of money through their rate consulting operations. Plaintiffs do not believe that it is any coincidence that, as alleged in the verified UMC Complaint, UMC agreed not to provide rate consulting services in the PPL franchise territory in return for the Joint Venture Agreement. This information directly supports plaintiffs' theory. The only reason that PPL would ever seek to tie in this promise to the arrangement is that rate consulting, as alleged by plaintiffs, costs PPL tremendous amounts of money. By controlling the flow of consulting work to a Joint Venture that had inside information on each of PPL's customers, PPL could effectively minimize, if not totally displace, rate consultants in the PPL territory. It is difficult to imagine a set of facts which bear more directly on plaintiffs' claims.

In light of the above, plaintiffs easily satisfy the liberal discovery standard set forth in Pa.R.C.P. 4003.1(a). It is well settled that a party can obtain discovery regarding any matter, not privileged,<sup>2</sup> which is relevant to the subject matter involved in the pending action, whether the matter sought relates to the claim or defense of the party seeking discovery. Standard Pennsylvania Practice,

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<sup>2</sup> Spectrum does not contend that any information sought is privileged.

§34:14 (Lawyer's Co-op. 1996). If the information sought to be discovered is reasonably calculated to lead to the discovery of admissible evidence, then it is not ground for objection that the information sought will be inadmissible at trial. Pa.R.C.P. 4003.1(b).

Although Spectrum contends that the information sought by plaintiffs is not relevant, the "requirement of relevancy should be broadly and liberally interpreted . . . If there is any conceivable basis of relevancy, the discovery should be permitted." In re: Greco Appeal, 30 D.&C. 3d 661, 662-663 (1981). In determining whether discovery is calculated to lead to discoverable evidence, doubts are to be resolved in favor of relevancy. Id. at §34:14. The burden is on the party objecting to the discovery to demonstrate that discovery should not be allowed. Schwab v. Milks, 8 D.&C. 4th 557 (1990); Mazzucca v. Methodist Hospital, 47 D.&C. 3d 55 (1986).

In this case it does not require a broad interpretation of relevance to conclude that the information sought is discoverable. As explained more fully above, the information sought by plaintiffs is directly relevant to their claims and demonstrates, among other things, PPL's financial motive in harming plaintiffs' interests.

Finally, Spectrum argues that responding to plaintiffs' subpoena duces tecum would be extremely burdensome and argues that the subpoena duces tecum would require Spectrum to search every one of its files. Plaintiffs presume that Spectrum maintains some organization to its files. It also presumes, since Spectrum entered into a joint venture with UMC, that it has files that are directly related to the subject matter of plaintiffs' subpoena - i.e. the Joint Venture between UMC and Spectrum. In addition, according to the pleading filed by UMC, the Joint Venture was terminated by Spectrum on March 12, 1999. Therefore, plaintiffs' discovery focuses on a limited time period and a limited venture - not every one of Spectrum's files. Additionally, if Spectrum's argument was bonafide, one would have thought that Spectrum would have contacted plaintiffs to discuss the

difficulties they were encountering in responding to the subpoena in an effort to discuss any logistical problems. This has never occurred. In fact, Spectrum has failed to file a certificate in accordance with C.C.R.C.P. 206 I.A.(1), which requires counsel for the moving party to certify that a good faith effort was made to resolve the parties' dispute.

**III. Conclusion**

For the foregoing reasons, Spectrum's Motion to Quash should be denied.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By:   
Ethan N. Halberstadt  
Attorneys for Plaintiffs/  
Counterclaim Defendants  
Commercial Utility Consultants and  
Public Utility Service Corporation

Dated: January 10, 2001

CERTIFICATE OF SERVICE

FILED

I, Ethan N. Halberstadt, Esquire, hereby certifies that a true and correct copy of the foregoing

01 JAN 10 PM 2:27

Plaintiffs' Memorandum of Law in Opposition to Spectrum Energy Services' Motion to Quash was served via first class mail, postage prepaid upon the following:

OFFICE OF THE  
PROTHONOTARY  
CHESTER CO., PA.

Malcolm J. Gross, Esquire  
Gross, McGinley, LaBarre & Eaton, LLP  
33 South Seventh Street  
P.O. Box 4060  
Allentown, PA 18105-4060

Glen R. Stuart, Esquire  
Bryant D. Lim, Esquire  
Morgan Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921

COUNSEL FOR SPECTRUM ENERGY SERVICES  
CORPORATION

COUNSEL FOR PENNSYLVANIA POWER & LIGHT  
COMPANY

Date: January 10, 2001



Ethan N. Halberstadt

Exhibit A

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

UTILITIES MANAGEMENT  
CONSULTANTS, INC.,  
P.O. Box 510  
Wallingford, PA 19086,  
Plaintiff,

NO.: 99-05926

v.

PP&L RESOURCES, INC.  
Two North Ninth Street, 22<sup>nd</sup> Floor  
Allentown, PA 18101  
and  
PP&L SPECTRUM, INC.  
Two North Ninth Street, 22<sup>nd</sup> Floor  
Allentown, PA 18101  
and  
PP&L, INC.  
Two North Ninth Street, 22<sup>nd</sup> Floor  
Allentown, PA 18101,  
Defendants.



1999-05926-0008

Complaint In

Montgomery County Prothonotary

William E Donnelly

Monday, December 20, 1999 2:19:00PM

COMPLAINT

1. Plaintiff, Utilities Management Consultants, Inc. ("Plaintiff"), is a Pennsylvania corporation with an address of P.O. Box 510, Wallingford, PA 19086. At all times relevant hereto, Plaintiff was in engaged in the business of energy and tax savings consulting business.

2. Defendant, PP&L Resources, Inc., is believed to be a Pennsylvania corporation with a principal place of business at Two North Ninth Street, 22<sup>nd</sup> Floor, Allentown, PA 18101, and at all times relevant hereto was a public utility.

3. Defendant, PP&L Spectrum, Inc., is believed to be a Pennsylvania corporation with a principal place of business at Two North Ninth Street, 22<sup>nd</sup> Floor, Allentown, PA 18101, and at all times relevant hereto was an energy service company.

4. Defendant, PP&L, Inc., is believed to be a Pennsylvania corporation with a principal place of business at Two North Ninth Street, 22<sup>nd</sup> Floor, Allentown, PA 18101, and at all times relevant hereto was an electric company.

5. Plaintiff, upon information and belief, avers that the Defendants are related entities.

6. On or about November 3, 1995, Plaintiff was solicited by representatives of Defendants to pursue an energy tax savings program for Defendant, PP&L, Inc., franchise customers.

7. On or about December 4, 1995, Plaintiff and Defendant, PP&L Spectrum, Inc., with the approval and authorization of Defendant, PP&L, Inc., entered into a certain Joint Venture Agreement prepared by Defendant, PP&L, Inc., for the purposes of assisting customers to obtain energy tax exemptions and tax credits (the "Agreement"). A true and correct copy of the Agreement is attached hereto as Exhibit "A" and incorporated herein by reference.

8. The Agreement in part imposes an affirmative obligation on Defendant, PP&L Spectrum, Inc., to market the energy savings services to Defendant, PP&L, Inc., franchise customers.

9. Prior to Plaintiff entering into the Agreement with Defendant, PP&L Spectrum, Inc., the Defendants, through their authorized representatives, represented to Plaintiff that they would collectively utilize their resources to market the energy savings services to all of their potential customers. The promised marketing consisted, among other things, of using Defendant, PP&L, Inc., employees and direct mailing to Defendant, PP&L, Inc., franchise customers.

10. In reliance upon these representations made by the Defendants, Plaintiff entered into the Agreement.

11. As part of the Agreement, and based on the representations of Defendants, Plaintiff agreed not to perform any rate work within Defendant, PP&L, Inc.'s, franchised territory.

12. Immediately following the execution of the Agreement, Plaintiff set out to perform its obligations under Section 4.1 of the Agreement.

13. In or about May 1996, Plaintiff attended a marketing planning group meeting put on by representatives of the Defendants. At the meeting, Defendants

provided Plaintiff with written materials regarding the energy savings program. A copy of the materials is attached hereto as Exhibit "B" and incorporated herein by reference.

14. At the meeting, the Defendants represented that they would diligently market the program to Defendant, PP&L, Inc., customers in or about August of 1996.

15. Upon information and belief, Plaintiff avers that Defendants failed to launch the program in August of 1996 as represented to it by Defendants in May of 1996.

16. Thereafter, Plaintiff repeatedly inquired of the Defendants as to when and if the Defendants were going to launch and market the program. The Defendants represented to Plaintiff that the program would be launched and marketed immediately.

17. Upon information and belief, Plaintiff avers that the program was not launched and marketed until April of 1997.

18. Subsequent to the termination of the Agreement, Plaintiff learned that the program that was marketed by the Defendants was dramatically different and reduced in scope. Plaintiff was never advised of any changes made by the Defendants in the programs potential and scope. Plaintiff was advised that the program would be completely marketed within six to ten months from the first launch date to more than 1,210 Defendant, PP&L, Inc., franchise customers.

19. The Agreement was terminated on March 12, 1999.

#### COUNT I

20. Plaintiff incorporates herein by reference Paragraphs 1 through 19 of its Complaint as fully as though set forth at length.

21. Plaintiff avers that Defendants breached their agreements and promises to timely market and launch the program to their customers by failing to launch the program to their customers in a timely manner and by misrepresenting to Plaintiff the fact that they would market and launch the program in a timely manner.

22. As a result of the breaches set forth above, Plaintiff has suffered damages in the nature of lost profits under the Agreement and loss of opportunity to perform rate work in Defendant, PP&L, Inc.'s, franchise territory.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to enter judgment in its favor and against the Defendants, jointly and severally, in an amount in

excess of \$50,000.00, together with interest, attorney's fees, costs, and such other further relief as the Court deems appropriate.

#### COUNT II

23. Plaintiff incorporates herein by reference Paragraphs 1 through 22 of its Complaint as fully as though set forth at length.

24. Plaintiff avers that Defendants breached their covenant of good faith and fair dealing by not marketing and launching the program in a timely manner and by not disclosing to Plaintiff the reasons why the program was not launched and marketed in a timely manner.

25. Plaintiff avers that had Defendants advised Plaintiff of the reasons why they did not launch and market the program, Plaintiff would have had the opportunity to terminate the Agreement and engage in other business in the Defendants' territory.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to enter judgment in its favor and against the Defendants, jointly and severally, in an amount in excess of \$50,000.00, together with interest, attorney's fees, costs, and such other further relief as the Court deems appropriate.

#### COUNT III

26. Plaintiff incorporates herein by reference Paragraphs 1 through 25 of its Complaint as fully as though set forth at length.

27. Plaintiff avers that the representations made by Defendants regarding their efforts to market and launch the program and the time period in which they were going to launch and market the program were false.

28. Defendants knew or should have known those representations to be false at the time when they made those representations.

29. As a result of Plaintiff's justifiable reliance upon those representations, Plaintiff has suffered injuries which injuries include among other things loss of profits under the Agreement and loss of business opportunities.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to enter judgment in its favor and against the Defendants, jointly and severally, in an amount in

excess of \$50,000.00, together with interest, attorney's fees, costs, and such other further relief as the Court deems appropriate.

COUNT IV

PLAINTIFF V. DEFENDANT, PP&L, INC.

30. Plaintiff incorporates herein by reference Paragraphs 1 through 29 of its Complaint as fully as though set forth at length.

31. Plaintiff avers that Defendant, PP&L, Inc., knowingly, intentionally and without justification, privilege or license, wrongfully intefered with Plaintiff's existing contractual relatoinship with Defendnat, PP&L Spectrum, Inc., by among other things, not diligently marketing the program, not advising Plaintiff of the changes made in the marketing strategy for the program, and not utilizing Defendant, PP&L, Inc., employees.

WHEREFORE, Plaintiff respectfully requests this Honorable Court to enter judgment in its favor and against the Defendants, jointly and severally, in an amount in excess of \$50,000.00, together with interest, attorney's fees, costs, and such other further relief as the Court deems appropriate.



Michael J. Troiani, Esquire ID#54871  
Joseph M. Jachetti, Esquire ID#81531  
Dubin, Stein & Troiani, L.L.P.  
21 W. Third Street  
Media, PA 19063-2803  
(610) 892-9400  
Attorneys for Plaintiff

VERIFICATION

I verify that I am authorized to make this affidavit on behalf of UTILITIES MANAGEMENT CONSULTANTS, INC., and that the statements made in the foregoing pleading are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

  
SIGNATURE  
VICE PRESIDENT MARKETING  
TITLE

**EXHIBIT "A"**

## AGREEMENT

THIS AGREEMENT ("Agreement"), dated as of December 4, 1995, by and between UTILITIES MANAGEMENT CONSULTANTS, INC., a Pennsylvania corporation with a business address of 200 Beaumont Drive, Wallingford, Pennsylvania 19086 ("UMC") and SPECTRUM ENERGY SERVICES CORPORATION, a Pennsylvania corporation with a business address of Two North Ninth Street, Allentown, Pennsylvania 18101 ("Spectrum").

## BACKGROUND

A. UMC is in the business of consulting customers in obtaining energy savings through tax credits and energy tax exemptions.

B. Spectrum is in the business of providing all types of unregulated energy services to customers.

C. UMC and Spectrum desire to enter into a business venture as joint venturers for the sole purpose of assisting customers to obtain energy tax exemptions and tax credits.

In consideration of the mutual agreements made herein, the parties hereto, intending to be legally bound, certify and agree to the formation of a joint venture (the "Joint Venture"), and to continue the Joint Venture, as follows:

### SECTION 1

#### FORMATION, NAME, PLACE OF BUSINESS, PURPOSE AND TERM

1.1 Formation. UMC and Spectrum acknowledge the formation of a Joint Venture, as of the date of this Agreement pursuant to and in accordance with the provisions of this Agreement.

1.2 Name. The Joint Venture shall trade under the name of UMC-Spectrum Energy Services of Pennsylvania.

1.3 Place of Business. The principal office and place of business of the Joint Venture shall be 830A Putnam Boulevard, Wallingford, Pennsylvania 19086, or such other place as the parties shall from time to time determine.

1.4 Purpose. The purpose and character of the Joint Venture is to perform energy audits for customers and represent them at hearings before the appropriate government bodies to obtain energy tax exemptions and tax credits.

1.5 Purpose Limited. The Joint Venture shall not engage in any business other than as provided in this Agreement.

1.6 Term. The term of this Agreement and of the Joint Venture will commence as of the date of this Agreement and will continue from year to year unless (i) terminated at any time by either party by giving the other party sixty (60) days prior written notice of termination, or (ii) terminated automatically as herein provided.

## SECTION 2

### PERCENTAGE INTERESTS, CAPITAL CONTRIBUTIONS AND DISTRIBUTIONS

2.1 Percentage Interests. UMC and Spectrum shall each own a fifty percent (50%) interest in the Joint Venture (the "Percentage Interest").

2.2 Capital Contributions. Any capital contributions of cash or property shall be made to the Joint Venture at such time, in such manner, and in such amounts as UMC and Spectrum may hereafter determine by unanimous agreement. Such capital contributions shall be made or paid, as the case may be, in proportion to the Percentage Interests of the parties, which shall always be in an equal amount.

2.3 Mandatory Monthly Distributions. To the extent that the Joint Venture has available cash after reasonable out-of-pocket expenses for travel (including, without limitation, reimbursement for car mileage, hotels and meals), distributions of cash shall be paid monthly in accordance with the Percentage Interests of the parties.

## SECTION 3

### MANAGEMENT AND ACTIVITIES OF THE JOINT VENTURE

3.1 Management and Authority. Subject to and limited by the express provisions of this Agreement, UMC and Spectrum shall each share equally in the management of the Joint Venture and shall have equal authority (i) to manage the operations and affairs of the Joint Venture, (ii) to make all decisions regarding the business of the Joint Venture, (iii) to conduct the day-to-day operations of the Joint Venture, and (iv) have the rights and powers provided by Pennsylvania law. Any action within the scope of the purposes of the Joint Venture taken by either UMC or Spectrum on behalf of the Joint Venture shall constitute the act of and serve to bind

the Joint Venture. In the course of the exercise of their respective authority, UMC and Spectrum shall each take all actions necessary to protect the interest of the other. To simplify operations of the Joint Venture, Spectrum designates UMC as manager of the day-to-day affairs of the Joint Venture.

3.2 Joint Venture Activities. The Joint Venture may engage in any kind of lawful activity, and perform and carry out contracts of any kind, necessary or advisable in connection with the accomplishment of the business purposes of the Joint Venture set forth in Section 1.4 of this Agreement.

3.3 Other Activities and Competition. The parties shall not be required to manage the Joint Venture as its sole and exclusive function. The parties may have other business interests and may engage in other activities in addition to those relating to the Joint Venture; provided, however, that neither party may engage in any other activities that would directly compete with the Joint Venture's business. Neither the Joint Venture nor any party shall have any right, by virtue of this Agreement or the Joint Venture relationship created hereby, in or to such other business ventures or activities of the other party or to the income or proceeds derived therefrom.

## SECTION 4

### POWERS AND DUTIES OF SPECTRUM AND UMC

4.1 Powers and Duties of UMC. Subject to and limited by the express provisions of this Agreement and the laws of Pennsylvania, and consistent with the Joint Venture's authorized activities set forth in Section 3 of this Agreement, UMC's powers and duties shall include, but shall not be limited to, the following:

(i) To render all services necessary in connection with preparing and filling applications on behalf of customers for tax credits and/or refunds and negotiating with government bodies to obtain energy savings through tax credits and/or refunds.

(ii) To negotiate all fees, terms and conditions of the energy savings agreements with customers, which agreements shall be substantially in the form of Exhibit "A" attached hereto and incorporated herein by reference (the "Customer Contracts").

(iii) To bill and collect from customers all fees earned under Customer Contracts.

(iv) To cause the Joint Venture to execute the Customer Contracts and any other necessary agreements in connection with obtaining tax credits and/or refunds for customers.

(v) To execute any and all instruments as are necessary to carry out the intentions and purposes of the above powers.

(vi) To deposit and disburse the Joint Venture's funds in a manner consistent with the provisions of this Agreement.

(vii) To keep, or cause to be kept, full and accurate records of all transactions of the Joint Venture.

(viii) To prepare, or cause to be prepared, all information returns, compliance documents and reports for the Joint Venture.

(ix) To prepare, or cause to be prepared, and delivered to Spectrum the reports and other information (including, but not limited to, the reports and information set forth in Section 6.1) which are reasonably necessary for Spectrum to be completely advised of the continuing operations of the Joint Venture.

(x) To take any and all action which is permitted under Pennsylvania law and which is customary or reasonably related to the business of the Joint Venture.

4.2 Powers and Duties of Spectrum. Subject to and limited by the express provisions of this Agreement and the laws of Pennsylvania, and consistent with the Joint Venture's authorized activities set forth in Section 3 of this Agreement, Spectrum's powers and duties shall include, but not be limited to, the following:

(i) To market the energy savings services of the Joint Venture to potential customers who could benefit from energy tax credits and/or refunds.

(ii) To perform energy audits of potential customers.

(iii) To review with customers the Joint Venture's standard Customer Contract for energy savings service.

(iv) To take any and all action which is permitted under Pennsylvania law and which is customary or reasonably related to the business of the Joint Venture.

4.3 Limits on the Powers of UMC and Spectrum. The parties shall not cause or permit the Joint Venture to do the following:

(a) Comingle the Joint Venture's funds with those of any party or other person or entity, or permit another to employ such funds or assets in any manner except for the exclusive benefit of the Joint Venture.

(b) Except with the prior written approval of both parties, neither of the parties shall:

(i) sell, assign, exchange, mortgage, pledge or otherwise transfer or convey or refinance any interest in the Joint Venture or any Joint Venture asset;

(ii) cause the Joint Venture to merge with or into any corporation, partnership, or other entity;

(iii) convert the Joint Venture to a corporation;

(iv) change the nature of the business of the Joint Venture;

or

(v) engage in any other activity not specifically permitted herein.

4.4 Time to Be Devoted to Business. The parties shall devote such time to the Joint Venture's business as necessary to accomplish the purposes of the Joint Venture as set forth in Section 3 hereof.

4.5 Compensation of Parties. No party shall be entitled to compensation for its services rendered on behalf of the Joint Venture.

## SECTION 5

### REPRESENTATIONS, WARRANTIES AND COVENANTS

#### 5.1 Representations and Warranties.

(a) UMC makes the following representations and warranties to Spectrum:

(i) UMC is validly organized under the laws of Pennsylvania and has the legal power and authority to enter into this Agreement and to consummate the transactions contemplated hereby in accor-

dance with the terms and conditions thereof. The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby (and corresponding execution of Customer Contracts or other related agreements on behalf of the Joint Venture) do not contravene any law or contractual restrictions on or affecting UMC. This Agreement (and any other agreements or documents related hereto to which UMC is a party) is (are) a legal, valid and binding obligation(s) of UMC, enforceable in accordance with its terms except as such enforceability may be affected by bankruptcy, insolvency, reorganization or other similar laws affecting creditors' rights and equitable principles.

(ii) No authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution, delivery and performance by UMC of this Agreement, the Customer Contracts and any other agreements or documents related thereto or to the Joint Venture and the consummation of the transactions thereby.

(iii) There is no pending action or proceeding before any court, governmental agency or arbitrator against or directly involving UMC which seeks to restrain or that would otherwise have a material adverse effect on the transactions contemplated by this Agreement and any other agreements executed in connection with the transactions contemplated hereby.

(iv) UMC is not aware that it is in breach of or in default under (A) any applicable law or administrative regulation of Pennsylvania or the United States or any applicable judgment or decree, or (B) any loan agreement, indenture, lease, sublease, bond, note, resolution, agreement or other instrument to which UMC is a party or otherwise subject, and no event has occurred and is continuing which, with the passage of time or the giving of notice or both, would constitute an event of default under any such instrument.

(v) No fact is known to UMC that materially adversely affects or in the future may (so far as UMC can now foresee) materially adversely affect the business, property or assets, or financial condition of UMC.

(b) Spectrum makes the following representations and warranties to UMC:

(i) Spectrum is validly organized under the laws of Pennsylvania and has legal power and authority to enter into this Agreement and to consummate the transactions contemplated hereby in accordance with the terms and conditions thereof. The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby do not contravene any law or contractual restrictions on or affecting Spectrum. This Agreement (and any other agreements or documents related hereto to which Spectrum is a party) is (are) a legal, valid and binding obligation of Spectrum enforceable in accordance with its terms except as such enforceability may be affected by bankruptcy, insolvency, reorganization or other similar laws affecting creditors' rights and equitable principles.

(ii) No authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution, delivery and performance by Spectrum of this Agreement and any other agreements or documents related thereto or the Joint Venture and the consummation of the transactions thereby.

(iii) There is no pending action or proceeding before any court, governmental agency or arbitrator against or directly involving Spectrum, which seeks to restrain or that would otherwise have a material adverse effect on the transactions contemplated by this Agreement and any other agreements executed in connection with the transactions contemplated hereby.

(iv) Spectrum is not aware that it is in breach of or in default under (A) any applicable law or administrative regulation of Pennsylvania or the United States or any applicable judgment or decree or (B) any loan agreement, indenture, lease, sublease, bond, note, resolution, agreement or other instrument to which Spectrum is a party or otherwise subject, and no event has occurred and is continuing which, with the passage of time or the giving of notice or both, would constitute an event of default under any such instrument.

(v) No fact is known to Spectrum that materially adversely affects or in the future may (so far as Spectrum can now foresee) materially adversely affect the business, property or assets, or financial condition of Spectrum, the Joint Venture or the Project.

## SECTION 6

### ACCOUNTING AND REPORTS

6.1 Books and Records. UMC shall maintain at the office of the Joint Venture full and accurate books of the Joint Venture on the accrual method of accounting showing all receipts and expenditures, assets and liabilities, profits and losses and all other records necessary for recording the Joint Venture's business and affairs. Spectrum and its duly authorized representatives shall have the right to inspect and copy any or all of the books and records during reasonable business hours upon reasonable notice to UMC, and shall have, on demand, true and full information of all matters affecting the Joint Venture.

6.2 Bank Accounts. All funds of the Joint Venture shall be deposited and kept in a bank account in the name of the Joint Venture. All monies payable to the Joint Venture shall be deposited in such account. All withdrawals from the Joint Venture bank account shall be made only for purposes of the Joint Venture and shall be signed by UMC.

## SECTION 7

### TRANSFER OF INTERESTS

No party shall sell, assign, encumber, transfer or otherwise hypothecate its interest in the Joint Venture unless such party shall have first obtained the express written consent of the other party. Any attempted action in violation of this provision shall be null and void.

## SECTION 8

### TERMINATION

8.1 Causes of Termination. The Joint Venture shall terminate when its existence is required to be terminated under Section 1.6 hereof, unless one of the following events occurs, in which case any such event shall cause a termination of the Joint Venture prior to the time the Joint Venture would have been terminated in accordance with Section 1.6 hereof:

(a) Immediately, upon the assignment for the benefit of creditors by, or the filing of a petition in bankruptcy by or against, or upon the appointment of a receiver of, UMC or Spectrum.

(b) Immediately upon the sale, transfer, encumbrance, assignment or hypothecation of a party's interest in the Joint Venture.

8.2 Termination. If this Agreement is terminated before the Joint Venture receives payment in full under and with respect to any Customer Contract during the term of this Agreement, both parties shall continue to receive distributions derived from payment under all Customer Contracts still in effect, until the payment obligations under such Customer Contracts are satisfied in full and the proceeds thereof distributed in accordance with this Agreement.

## SECTION 9

### MISCELLANEOUS PROVISIONS

9.1 Ownership of Joint Venture Assets. Assets owned by the Joint Venture shall be held in the name of the Joint Venture or in the name of a nominee. No successor or assign of any Joint Venturer shall have any right, title or interest in and to any assets of the Joint Venture by reason of the manner in which title shall be held; and all such assets shall be treated as assets of the Joint Venture subject to the terms of this Agreement.

9.2 Successors and Assigns. The covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the successors and permitted assigns of the respective parties hereto.

9.3 Applicable Law. This Agreement shall be construed and enforced in accordance with the laws of Pennsylvania. The Joint Venture shall be governed by Pennsylvania law.

9.4 Counterparts. This Agreement may be executed in several counterparts, all of which together shall constitute one agreement binding on all the parties hereto, notwithstanding that all the parties have not signed the original or the same counterpart.

9.5 Severability. If any provision of this Agreement, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Agreement, or the application of such provision to any person or circumstance other than those to which it is held invalid, shall not be affected thereby.

9.6 Headings and Terminology. All section headings or captions contained in this Agreement are inserted only as a matter of convenience and in no way define, limit, or extend the scope or intent of this Agreement or any provision hereof.

9.7 Notices. All Notices to be given under this Agreement shall be sent to the following Persons:

UMC: Utilities Management Consultants, Inc.  
200 Beaumont Drive  
Wallingford, Pennsylvania 19086

Attention: Safwat Attia

Spectrum: Spectrum Energy Services Corporation  
Two North Ninth Street  
Allentown, Pennsylvania 18101

Attention: Daniel J. Persa, President

9.8 Entire Agreement. This Agreement embodies the entire agreement between the parties with respect to the Joint Venture, and shall not be amended or modified unless in writing and signed by both parties. All prior agreements, representations and statements are merged into this Agreement.

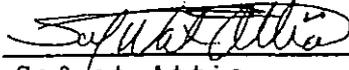
9.9 Indemnification. Each party agrees to save, indemnify and hold the other parties harmless from and against any and all claims, demands, actions, and liabilities (including attorney's fees) arising out of or in any manner connected with such party's performance or failure to perform whether on account of said party's negligence, gross negligence, malfeasance or otherwise.

9.10 Arbitration. All disputes arising out of this Agreement shall be submitted by the parties to this Agreement to the American Arbitration Association in Lehigh County, Pennsylvania. Any decision rendered then shall be final and binding on the parties hereto.

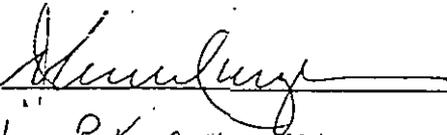
IN WITNESS WHEREOF, this Agreement has been executed as of the day and year first above written.

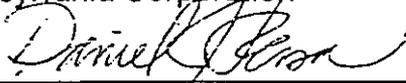
Utilities Management Consultants, Inc., a  
Pennsylvania Corporation

By:   
Michael Granwehr, Witness

By:   
Safwat Attia, President

Spectrum Energy Services Corporation, a  
Pennsylvania Corporation

By:   
P. Kierzkowski, Witness

By:   
Daniel J. Persa, Vice President

g:\steno\pr\lcl\joinvent.agr  
01/23/96 10:19 AM

May 9, 1996

SPECTRUM / PPE L

BRAD SITLER

# SALES AND USE TAX

- Sales and Use Tax imposed on energy and production equipment
- Tax imposed after first year of operation
- Tax exemption based on site survey by Commonwealth
- Tax collected by energy and equipment provider

P 014306

# SALES AND USE TAX

- Energy and machinery used specifically in manufacturing/processing of new products are exempt from tax
- Overpayments result from blanket applications of tax and low incidence of new site surveys

# SALES AND USE TAX AUDIT SERVICE

P 014308

## ■ Rationale

- Increase revenue
- Displace other utility consultants
- Position Spectrum as a full service energy provider
- Increase customer loyalty

# SALES AND USE TAX AUDIT SERVICE

P 014309

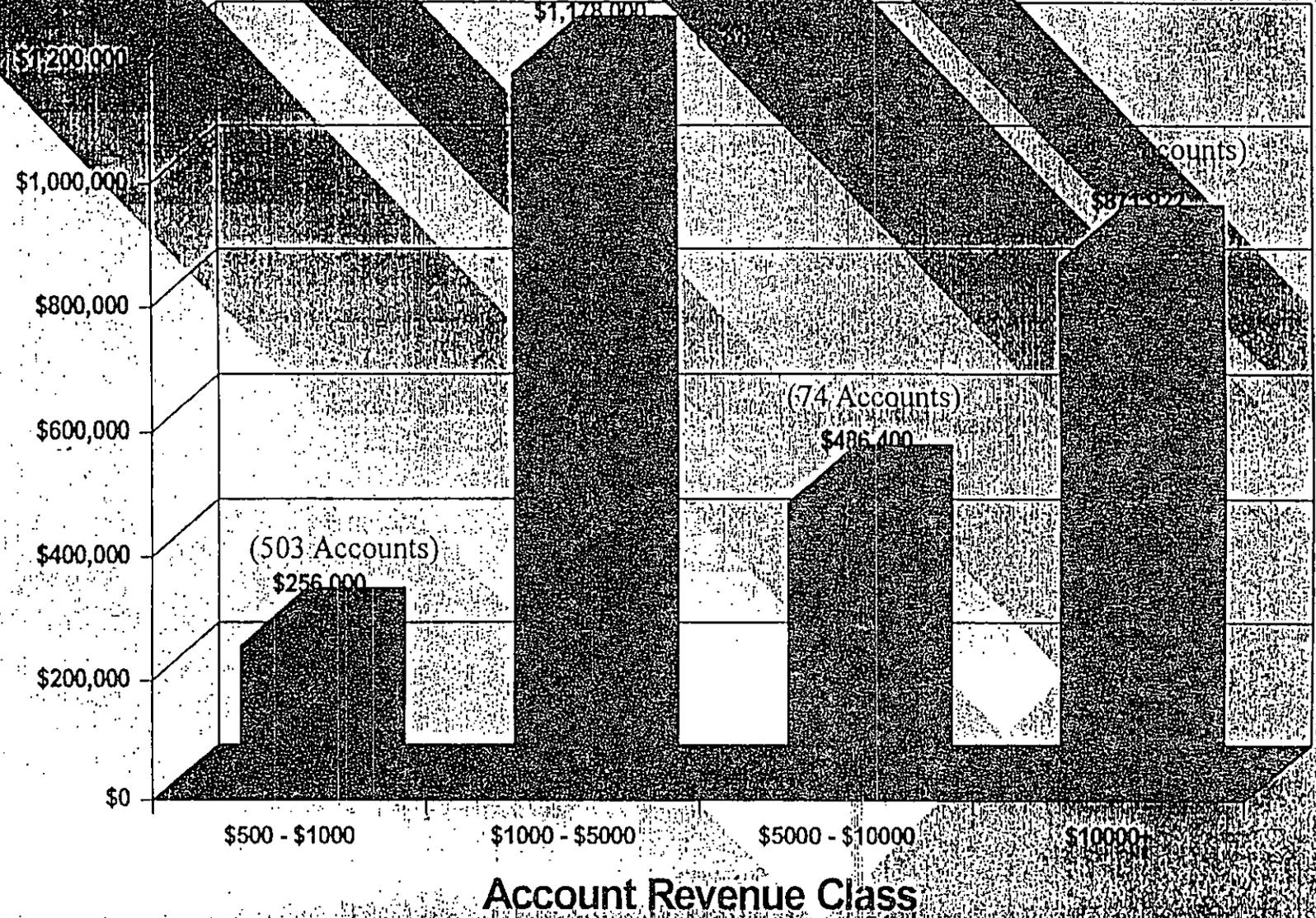
- Spectrum contracts with UMC to perform audits
- Spectrum receives one-half consultant's fees (one-quarter of total overpayment)
- UMC conducts audit and represents customer at all levels of appeals
- UMC and Spectrum share all information through audit process

CONSERVATIVE PROTECTION BASED ON 50% of RECOVERY in OVERPAYMENTS # 11,169,288

\$ 2,792,322 (14)

# SALES AND USE TAX MARKET REVENUE

Total Potential Market Revenue



P 014310

# SALES AND USE TAX ACCOUNT STRATEGY

P 014311

## ■ HAND-HOLD - Extensive A/M Involvement

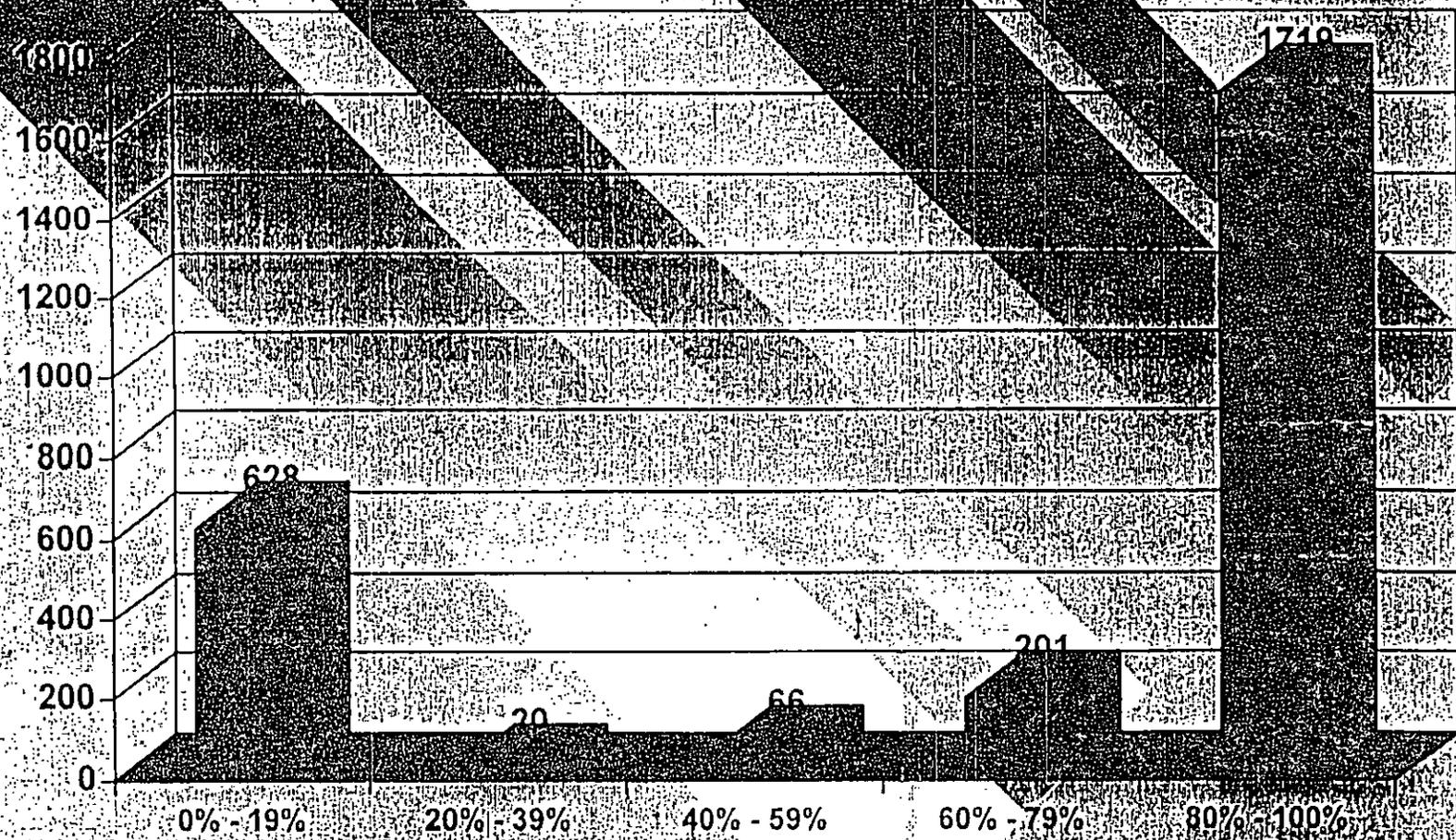
- (14.5 hours/acct.)
- 1. Phone Calls/Letter (1 hr.)
- 2. Introduction (3.5 hrs.)
- 3. Plant Tour (6.5 hrs.)
- 4. Close-Out Conf. (3 hrs.)
- 5. Follow-Up Call/Letter (.5 hrs.)

# SALES AND USE TAX

## ACCOUNTS - TAX EXEMPT %

P 014312

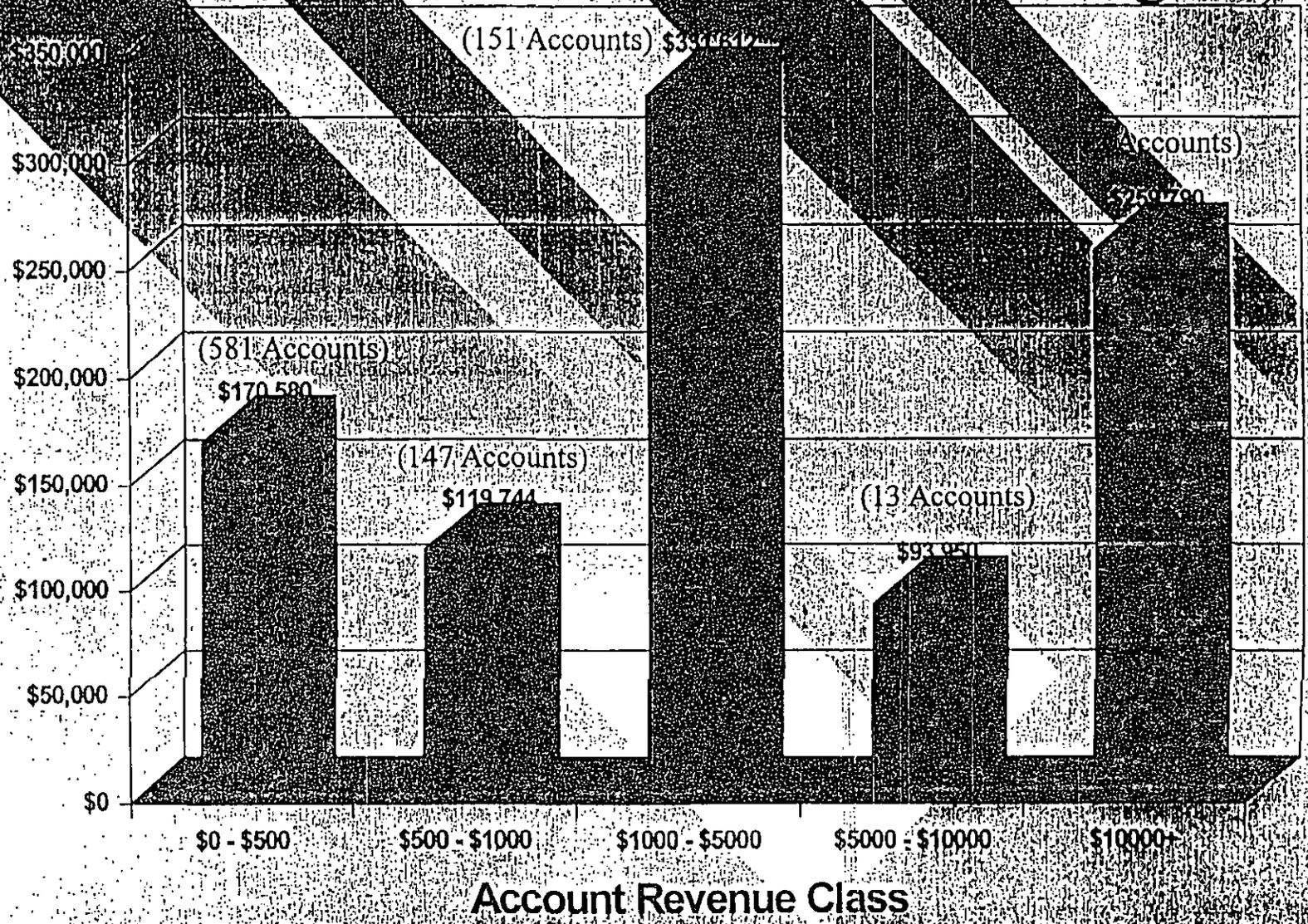
# of Accounts



Tax Exempt %

# SALES AND USE TAX MARKET REVENUE (Sample region)

Total Potential Market Revenue



# SALES AND USE TAX ACCOUNT STRATEGY

## ■ HAND-SHAKE - Minor A/M Involvement

(7 hours/acc.)

1. Phone Calls/Letter (1 hr.)
2. Introduction (3 hrs.)
3. Close-Out Conf (2.5 hrs.)
4. Follow-Up Call/Letter (.5 hrs.)

# SALES AND USE TAX ACCOUNTS STRATEGY

## ■ HAND-OFF - Minimal A/M involvement

(1 hour/acct.)

1. Phone Calls/Letter (1 hr.)

**SALES AND USE TAX AUDIT SERVICE  
MARKET ANALYSIS - Sample Region**

<u>ACCOUNT STRATEGY</u>	<u>ACCOUNT CLASS</u>	<u># OF ACCTS.</u>	<u>PROBABILITY*</u>	<u>POTENTIAL REVENUE**</u>	<u>HOURS***</u>	<u>REVENUE/HOUR***</u>
<b>HAND-HOLD</b>						
(14.5 hours/acct.)	\$10,000 +	11	L	\$59,081	77	\$767.29
	\$5000 - \$10000	13	M	\$41,837	124	\$337.39
	\$1000 - \$5000	124	H	\$144,713	1488	\$97.25
	\$500 - \$1000	111	H	\$17,524	1332	\$13.16
	\$0 - \$500	230	H	\$16,952	2760	\$6.14
	TOTALS:	489		\$280,106	5781	\$48.46
<b>HAND-SHAKE</b>						
(7 hours/acct.)	\$10,000 +	11	U	\$24,045	47	\$508.35
	\$5000 - \$10000	13	L	\$22,137	62	\$358.49
	\$1000 - \$5000	127	M	\$121,542	699	\$174.00
	\$500 - \$1000	115	H	\$48,296	719	\$67.19
	\$0 - \$500	387	H	\$7,922	2419	\$3.28
	TOTALS:	653		\$223,941	3946	\$56.77
<b>HAND-OFF</b>						
(1 hour/acct.)	\$10,000 +	12	U	\$25,379	12	\$2,114.90
	\$5000 - \$10000	13	U	\$8,745	13	\$672.67
	\$1000 - \$5000	151	L	\$75,353	151	\$499.02
	\$500 - \$1000	147	M	\$52,522	147	\$357.29
	\$0 - \$500	581	M	\$56,240	581	\$96.80
	TOTALS:	904		\$218,237	904	\$241.41

<b>* PROBABILITY LEGEND</b>	
U = unlikely probability of success	(10%)
L = low probability of success	(25%)
M = medium probability of success	(50%)
H = high probability of success	(75%)

\*\* ADJUSTED FOR PROBABILITY OF SECURING ACCOUNT  
 \*\*\* ADJUSTED FOR NUMBER OF HOURS EXPENDED(4.5 hrs./hand hold acct.; 4 hrs./hand shake acct.)

P 014316

**SALES AND USE TAX AUDIT SERVICE  
MARKET ANALYSIS - Sample Region**

P 014317

**ACCOUNT STRATEGY**

**ACCOUNT CLASS    # OF ACCTS.    SPECTRUM REVENUE\*\*    HOURS\*\*\*    REVENUE/HOUR\*\*\***

**HAND-HOLD**  
(14.5 hours/acct.)

\$10,000 +	11	\$59,081	77	\$767.29
\$5000 - \$10000	13	\$41,837	124	\$338.76
\$1000 - \$5000	124	\$144,713	1488	\$97.25
\$500 - \$1000	111	\$17,524	1332	\$13.16
\$0 - \$500	230	\$18,952	2760	\$6.14
<b>TOTALS:</b>	<b>489</b>	<b>\$280,106</b>	<b>5781</b>	<b>\$48.46</b>

**HAND-SHAKE**  
(7 hours/acct.)

\$10,000 +	11	\$24,045	47	\$508.35
\$5000 - \$10000	13	\$22,137	62	\$358.49
\$1000 - \$5000	127	\$121,542	699	\$174.00
\$500 - \$1000	115	\$48,296	719	\$67.19
\$0 - \$500	387	\$7,922	2419	\$3.28
<b>TOTALS:</b>	<b>653</b>	<b>\$223,941</b>	<b>3945</b>	<b>\$56.77</b>

**HAND-OFF**  
(1 hour/acct.)

\$10,000 +	12	\$25,379	12	\$2,114.90
\$5000 - \$10000	13	\$8,745	13	\$672.67
\$1000 - \$5000	151	\$75,353	151	\$499.02
\$500 - \$1000	147	\$52,522	147	\$357.29
\$0 - \$500	581	\$56,240	581	\$96.80
<b>TOTALS:</b>	<b>904</b>	<b>\$218,237</b>	<b>904</b>	<b>\$241.41</b>

**TARGETED MARKET STRATEGY**

HAND-HOLD	\$10,000 +	11	\$59,081	77	\$767.29
HAND-HOLD	\$5000 - \$10000	13	\$41,837	124	\$337.40
HAND-SHAKE	\$1000 - \$5000	127	\$121,542	699	\$173.88
HAND-OFF	\$500 - \$1000	147	\$52,522	147	\$357.29
DO NOT PURSUE	\$0 - \$500	N/A	N/A	N/A	N/A
<b>TOTALS:</b>		<b>298</b>	<b>\$274,982</b>	<b>1047</b>	<b>\$262.64</b>

# SALES AND USE TAX

## "NPV" - TARGET STRATEGY

### ■ TARGETED MARKET STRATEGY

(sample region)

Account Class

Net Present Value

\$10,000 +

\$ 25,002

\$5000 - \$10000

\$ 17,456

\$1000 - \$5000

\$ 49,576

\$500 - \$1000

\$ 21,959

TOTAL:

\$113,993

# SALES AND USE TAX HAND-HOLD STRATEGY

- 24 Accounts

- Team Members

Eight Account Manager Team Members

- Account Managers target 1 to 5 accounts

- Account Managers average 3 accounts each

- Time Frame

- complete in 6 months

# SALES AND USE TAX HAND-SHAKE STRATEGY

- 127 Accounts

- Team Members

  - 12 Account Managers

    - Account Managers target 1 to 40 accounts

    - Account Managers average 10 accounts each

- Time Frame

  - complete in 10 months

# SALES AND USE TAX HAND-OFF STRATEGY

P 014321

- Mailing to customers only
- Phone referral to UMC
- No other Account Manager Involvement
- Timing
  - mail to 10% of target customers/month
  - complete in 10 months

FEB 02 2001

*JBM*

COMMERCIAL UTILITY CONSULTANTS: IN THE COURT OF COMMON PLEAS  
& PUBLIC UTILITY SERVICE  
CORPORATION COMPANY : CHESTER COUNTY, PENNSYLVANIA

-vs-

: NO. 99-09799

PENNSYLVANIA POWER & LIGHT  
COMPANY a/k/a PP&L

: CIVIL ACTION

OFFICE OF THE  
PROthonotary  
CHESTER CO., PA  
JAN 30 PM 4:10  
CLERK

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Ethan N. Halberstadt, Esquire, Attorney for Plaintiffs  
Glen R. Stuart, Esquire, Attorney for Defendant  
Malcolm J. Gross, Esquire, Attorney for Spectrum Energy Services Corporation

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**ORDER**

AND NOW, this 30<sup>th</sup> day of January, 2001, after telephone conference with counsel to the parties on January 17, 2001, and review of their letter briefs submitted thereafter, and upon consideration of the Stipulation and order Referring Matters to the Pennsylvania Public Utility Commission Under The Doctrine of Primary Jurisdiction, it is hereby ORDERED that:

1. All discovery in this case shall be stayed during the pendency of proceedings before the Public Utility Commission.
2. Oral argument scheduled for January 31, 2001 on Motion of Spectrum Energy Services Corporation to Quash Subpoena or for other Protective relief is continued generally.

3. Upon resolution of proceedings before the PUC, the parties shall schedule an administrative conference with the undersigned to address all remaining discovery issues.

BY THE COURT:



Katherine B. L. Platt, J

JBM

COMMERCIAL UTILITY CONSULTANTS  
and PUBLIC UTILITY SERVICE  
CORPORATION

Plaintiffs/Counterclaim Defendants,

v.

PENNSYLVANIA POWER & LIGHT  
COMPANY,

Defendant/Counterclaimant.

IN THE COURT OF COMMON PLEAS OF  
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION — LAW

JURY TRIAL DEMANDED

NO. 99-09799

(Consolidated Cases)

01 JAN 30 11 11 AM '00  
OFFICE OF THE CLERK  
CHESTER COUNTY, PA

**STIPULATION AND ORDER REFERRING MATTERS TO THE PENNSYLVANIA PUBLIC  
UTILITY COMMISSION UNDER THE DOCTRINE OF PRIMARY JURISDICTION**

**Background**

1. Plaintiffs, utility consulting companies, have alleged that the defendant, the Pennsylvania Power & Light Company, now known as PPL Electric Utilities Corporation (hereinafter "PPL") has tortiously interfered with plaintiffs' contractual relationships with their customers.

2. PPL has brought a counterclaim against plaintiffs alleging that plaintiffs tortiously interfered with PPL's contractual relations with PPL's customers.

3. PPL has informed plaintiffs and the Court of its intention to file a Motion to Dismiss and/or to Stay Proceedings on the basis that some of the issues raised by plaintiffs invoke the primary jurisdiction of the Pennsylvania Public Utility Commission ("PUC"). In doing so, PPL has not conceded that plaintiffs' theories implicating the primary jurisdiction of the PUC actually provide any basis for a tortious interference claim.

4. The parties have reviewed this matter with the Court which, during an administrative conference, advised the parties to confer with respect to the issues which may be appropriate for

referral to the PUC.

5. The parties have reviewed the pleadings and discovery and have agreed that several issues in this case fall within the primary jurisdiction of the PUC.

Agreement

NOW THEREFORE, upon consideration of the foregoing, the parties, by and through their respective counsel, stipulate and agree as follows:

1. The following issues raised by plaintiffs shall be referred to the PUC under the doctrine of primary jurisdiction for determination:

(A) Under PPL's interruptible rates, was PPL required to calculate the 500 MW cap as (a) the twelve month average of each customer's monthly Maximum On-peak Demand less the customer's contract Firm Power, or (b) as the total of each customer's maximum monthly demand during the previous 12 month period less the customer's contract Firm Power?

(B) Whether PPL was authorized by tariff and/or applicable law to offer customers the restoration of EDI-3 benefits in accordance with the customer's original base year period if the customer agreed to discontinue service under the Optional Interruptible Provisions of LP-4 and LP-5?

(C) Under PPL's Industrial Development Initiatives Rider, if the customer's usage during the twelve months ending December 31, 1991 was representative of the customer's expected normal usage pattern during that time, was PPL authorized to use another base period in applying

the Rider?

(D) Whether PPL was permitted to provide marketing support and customer account information to the joint venture of PP&L Spectrum, Inc. and Utilities Management Consultants, Inc., which marketing support and information was not made available to other utility consulting companies and businesses?

(E) Where the language of PPL's LP-5 tariff states that interruptible service contracts are to be for a period of one year, may PPL and a customer privately agree to limit the term of the interruptible service contract to 6 months?

2. After a certified copy of the record is transferred to the PUC by the Prothonotary's office, plaintiffs shall take appropriate action in order to move the foregoing issues before the PUC for determination.

3. Discovery with respect to the foregoing issues shall proceed before the PUC and all discovery with respect to said issues in this Court shall be stayed.

4. As a result of the referral of the foregoing issues to the PUC, the deadlines set forth in the Court's Administrative Order dated November 28, 2000 (the "Deadlines") are suspended pending further Order of Court. After the foregoing issues have been determined by the PUC and the primary jurisdiction of the PUC has been relinquished, the parties shall request an Administrative

FEB 02 2001

gbr

Conference for the purpose of re-establishing the Deadlines.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: E. N. Halberstadt  
Ethan N. Halberstadt  
Attorneys for Plaintiffs

Dated: 1/23/01

MORGAN, LEWIS & BOCKIUS LLP

By: Glen R. Stuart  
Glen R. Stuart  
Bryant D. Lim  
Attorneys for Defendant

Dated: 1/23/01

01 JAN 30 PM 4:10  
REGISTERED  
CLERK

**ORDER**

AND NOW, this 24<sup>th</sup> day of January, 2001, upon consideration of the parties' Stipulation, it is hereby ORDERED that said Stipulation is approved as an Order of Court and that the foregoing issues are hereby referred to the Pennsylvania Public Utility Commission for determination. The Prothonotary's Office is hereby directed to take appropriate action to forward a certified copy of the record in this action to the Pennsylvania Public Utility Commission.

BY THE COURT:

Katherine B. L. Platt  
Katherine B. L. Platt, J.

CASE SUMMARY REPORT

99-09800 COMMERCIAL UTILITY CONSULTANTS V. PENNSYLVANIA  
A POWER & LIGHT COMPANY  
OTHER

CASE INITIATION DATE 11/23/99 03:25 P NOT ACTIVE SINCE 03/31/00  
CASE STATUS ENDED REOPEN DATE 00/00/00  
ARBITRATION DATE ARBITRATION TIME  
TRIAL READY DATE 11/22/00  
JUDGE PAULA FRANCISCO OTT 11/23/99 thru 02/17/00  
JUDGE KATHERINE B. L. PLATT 02/17/00  
PLAINTIFF

R-973954

COMMERCIAL UTILITY CONSULTANTS

1556 MCDANIEL DR  
WESTTOWN BUSINESS CENTER  
WEST CHESTER PA 19380  
ATTORNEY: 057544 TEL: 610-354-9700 11/23/99  
ETHAN N. HALBERSTADT  
POWELL TRACHTMAN LOGAN CARRLE  
475 ALLENDALE ROAD, STE 200  
KING OF BRUSSIA, PA 19406

CERTIFIED FROM THE RECORD  
ATTEST *Colin W. [Signature]*  
DEPUTY PROTHONOTARY

4-13-01

VS.

DEFENDANT

PENNSYLVANIA POWER & LIGHT COMPANY (N/K/A)

A/K/A PP&L  
2 NORTH 9TH ST  
ALLENTOWN PA 18101  
ATTORNEY: 041302 TEL: 215-963-5883 01/21/00  
GLEN R. STUART  
MORGAN LEWIS & BOCKIUS LLP  
2000 ONE LOGAN SQUARE  
PHILADELPHIA, PA 19103-6993  
ATTORNEY: 078738 TEL: 215-963-5165 01/21/00  
BRYANT DAVID LIM  
MORGAN LEWIS & BOCKIUS LLP  
1701 MARKET STREET  
PHILADELPHIA, PA 19103-2921

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APR 12 2001

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APR 09 2001

PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

DATE DOCKET INFORMATION

- ① 11/23/99 APPEARANCE OF  
ETHAN N. HALBERSTADT  
FOR COMMERCIAL UTILITY CONSULTANTS
- ② 11/23/99 COMPLAINT FILED  
BY PTLF
- ② 12/14/99 SERVED  
PENNA POWER & LIGHT CO NKA PP&L INC  
ON 12/03/99 AT 02:35 P
- ③ 01/21/00 PRELIMINARY OBJECTIONS OF  
DEFT
- ③ 01/21/00 JURY

CASE SUMMARY REPORT

③ 01/21/00  
01/21/00  
01/21/00

TRIAL DEMANDED  
CERTIFICATION OF SERVICE  
APPEARANCE OF  
GLEN R. STUART  
FOR PENNSYLVANIA POWER & LIGHT COMPANY (N/K/A)  
APPEARANCE OF  
BRYANT DAVID LIM  
FOR PENNSYLVANIA POWER & LIGHT COMPANY (N/K/A)

④ 02/10/00  
02/10/00  
02/10/00

BRIEF BY  
DEFT IN SUPPORT OF PRELIMINARY OBJECTIONS  
TO PLTF'S COMPLAINT

⑤ 02/17/00

CERTIFICATION OF SERVICE  
PRAECIPE FOR DETERMINATION

⑥ 03/01/00  
03/01/00

ORDER  
TO ASSIGN CASE TO JUDGE

⑦ 03/01/00  
03/01/00

PLATT  
PER C/A

⑧ 03/01/00  
03/01/00

RESPONSE  
TO DEFT'S PRELIMINARY OBJECTIONS BY PLTF'S

⑧ 03/01/00  
03/01/00

CERTIFICATION OF SERVICE  
PRAECIPE FOR DETERMINATION BY  
PLTF

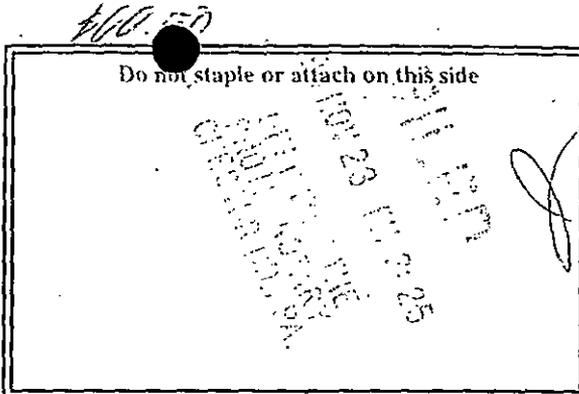
⑨ 03/31/00  
03/31/00

CERTIFICATION OF SERVICE  
BRIEF BY  
PLTF

CERTIFICATION OF SERVICE  
ORDER - CONSOLIDATION  
OF 3-30-2000 BY PLATT, J. THIS ACTION TO BE  
CONSOLIDATED UNDER CASE #99-09799. SEE ORDER.  
COPIES SENT

GLEN R. STUART, ESQUIRE  
ETHAN N. HALBERSTADT, ESQUIRE  
BRYANT DAVID LIM, ESQUIRE

CHESTER COUNTY COURT OF COMMON PLEAS  
CIVIL COVER SHEET



1. CASE CAPTION: COMMERCIAL UTILITY CONSULTANTS v. PENNSYLVANIA POWER & LIGHT COMPANY, now known as PP&L, INC.  
1A. CASE NO.: 99 09800

2. PLAINTIFF(s): (Name, address)  
COMMERCIAL UTILITY CONSULTANTS  
1556 McDaniel Drive  
Westtown Business Center  
West Chester, PA 19380

3. PLAINTIFF'S COUNSEL:  
(Name, firm, address, telephone and attorney ID#)  
Ethan N. Halberstadt / Atty ID#57544  
Powell, Trachtman, Logan, Carrle,  
Bowman & Lombardo, P.C.  
475 Allendale Rd., Suite 200  
King of Prussia, PA 19406  
610.354.9700

4. DEFENDANT(s): (Name, address)  
PENNSYLVANIA POWER & LIGHT  
COMPANY, Now known as PP&L, INC.  
2 North 9th Street  
Allentown, PA 18101

5. ARE THERE ANY RELATED CASES?  
(see C.C.R.C.P. 200B )  
 Yes  No  
IF YES, SHOW CASE NOS. AND CAPTIONS:  
Commercial Utility Consultants and  
Public Utility Service Corporation v.  
Pennsylvania Power & Light Company,  
now known as PP&L, Inc.

6. IF THIS IS AN APPEAL FROM A DISTRICT JUSTICE JUDGMENT, WAS APPELLANT  PLAINTIFF OR  DEFENDANT IN THE ORIGINAL ACTION?

7. CASE CODE: 43 DESCRIPTION: (see reverse side) Other

8. IS THIS AN ARBITRATION CASE?  Yes  No  
(Arbitration Limit is \$50,000. See C.C.R.C.P. 1301.1)

**ARBITRATION CASES ONLY**  
An Arbitration hearing in this matter is scheduled for \_\_\_\_\_ at \_\_\_\_\_ in the Jury Lounge, Chester County Court House, West Chester, PA. The parties and their counsel are directed to report to the Juror's Lounge for an arbitration hearing in this matter on the date and time set forth above.  
This matter will be heard by a Board of Arbitrators at the time, date and place specified but, if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial *de novo* on appeal from a decision entered by a judge.

**NOTICE OF TRIAL LISTING DATE**  
Pursuant to C.C.R.C.P. 249.3, if this case is not subject to compulsory arbitration it will be presumed ready for trial twelve (12) months from the date of the initiation of the suit and will be placed on the trial list one (1) year from the date the suit was filed unless otherwise ordered by the Court.  
To obtain relief from automatic trial listing a party must proceed pursuant to C.C.R.C.P. 249.3(b), request an administrative conference and obtain a court order deferring the placement of the case on the trial list until a later date.

FILE WITH: Prothonotary of Chester County, 2 North High Street, Suite 130, P.O. Box 2748, West Chester, PA 19380-0991

THIS COVER SHEET IS REQUIRED BY C.C.R.P. 1018.1 (b) AND MUST BE SERVED UPON ALL OTHER PARTIES TO THE ACTION IMMEDIATELY AFTER FILING. SUBMIT ENOUGH COPIES FOR SERVICE

SEE REVERSE SIDE FOR CASE CODES AND DESCRIPTIONS (DETACH PRIOR TO FILING OUT)



**POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.**

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

FILED  
MAR 23 11 30 AM '05  
CLERK OF COURT  
JUDICIAL CENTER  
PHILADELPHIA, PA

COMMERCIAL UTILITY CONSULTANTS 1556 McDaniel Drive Westtown Business Center West Chester, PA 19380,  Plaintiff  v.  PENNSYLVANIA POWER & LIGHT COMPANY now known as PP&L, Inc. 2 North 9 <sup>th</sup> Street Allentown, PA 18101,  Defendant.	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA    CIVIL ACTION -- LAW  JURY TRIAL DEMANDED  NO.
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**COMPLAINT**

**NOTICE**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.**

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**LEGAL REFERENCE SERVICE**  
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West Chester, PA 19380  
(610) 429-1500

**AVISO**

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las páginas siguientes, usted tiene veinte (20) días de plazo al partir de la fecha de la demanda y la notificación. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomará medidas y puede continuar la demanda en contra suya sin previo aviso o notificación. Además, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

**LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELEFONO A LA OFICINA CUYA DIRECCIÓN SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.**

**SERVICIO DE REFERENCIA LEGAL**

**Telephono:**  
**SERVICIO DE REFERENCIA LEGAL**  
15 West Gay Street  
West Chester, PA 19380  
Telephono: (610) 429-1500

**POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.**

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

FILED  
NOV 23 PM 3:25  
CLERK OF COURT  
CHESTER COUNTY, PA

COMMERCIAL UTILITY CONSULTANTS 1556 McDaniel Drive Westtown Business Center West Chester, PA 19380,  Plaintiff,  v.  PENNSYLVANIA POWER & LIGHT COMPANY now known as PP&L, Inc. 2 North 9 <sup>th</sup> Street Allentown, PA 18101,  Defendant.	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA    CIVIL ACTION – LAW  JURY TRIAL DEMANDED  NO.
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**COMPLAINT**

1. Plaintiff herein is Commercial Utility Consultants ("CUC"). CUC is a sole proprietorship with a usual place of business at 1556 McDaniel Drive, Westtown Business Center, West Chester, Pennsylvania 19380.

2. Defendant herein is the Pennsylvania Power & Light Company, now known as PP&L, Inc. (hereinafter "PP&L"), a Pennsylvania public utility with a registered place of business located at 2 North 9<sup>th</sup> Street, Allentown, Pennsylvania, 18101.

3. CUC is in the business of, *inter alia*, providing utility consulting services. CUC generally provides utility consulting services pursuant to "shared savings" written contracts with its customers. The "shared savings" agreements are typically one page documents wherein the utility consultant agrees to review the rates, tariffs, discounts, riders and total charges that apply

to the customer's utility billings and to submit recommendations to the customer for possible savings, credits or refunds. No payment is owed to the consultant unless the customer implements the recommendation and experiences utility savings, credits, or refunds.

4. CUC's customers find its contracts attractive because they do not have to pay CUC anything unless savings are found. As is standard in the utility consulting industry, CUC generally receive 50% of any credit or refund they obtain for their clients, as well as 50% of the savings that results from its recommendations over a period of time. Once the period expires, the customer continues to enjoy the full amount of the savings as long as the rate remains available. Pursuant to this arrangement, CUC only receives payment for as long as its customer continues to enjoy the savings resulting from their recommendations.

5. As a result of years of experience in the industry, CUC has expertise in examining its customers' utility billings and in finding rates and tariffs that will save its customers significant sums.

6. In the event that the CUC is able to find savings for its customers, it typically submits a written letter of recommendation to the customer or sets up a face-to-face meeting to review the recommendations and, depending upon the recommendation made, to review the pros and cons of implementing the recommendation. In most instances, however, there is no downside to a recommendation. Most recommendations involve rate changes that have no impact on the customer's operations.

7. It was not until recently that there were changes effected by the legislature to begin to "deregulate" utility service in Pennsylvania. These changes are slowly being made. At the time of most of the events described in this Complaint, however, public utilities in Pennsylvania were not deregulated. As a result, the public utility servicing a particular area had a literal monopoly on utility service in that area.

8. As a result of this virtual monopoly, prior to deregulation the public utilities had very little need for marketing their services or for showing their customers ways in which the

customer could lower its utility bills. From a practical standpoint, there was no competition for the public utility and any recommendation to the customer that would save the customer money would necessarily mean less money for the public utility. Under these circumstances, the public utilities had little incentive to save their customers money in their utility bills.

9. Although every public utility has a statutory duty to provide customers with the most advantageous rate available, PP&L frequently failed to do so. Simply put, although PP&L had a legal duty to inform its customers about the availability of better rates, it had not economic incentive to do so; by passively allowing its customers to use higher rates than necessary, PP&L enjoyed a substantial windfall at its customers' expense.

10. Utility consultants, such as CUC, are successful in finding their customers savings for the foregoing reasons. Although lower rates and tariffs are available, the public utility has no incentive to bring these rates and tariffs to the customer's attention. CUC, on the other hand, is highly motivated to find lower rates and tariffs for its customers because they are only paid if they succeed in doing so.

11. Like other public utilities, at all times relevant to this lawsuit PP&L had "marketing representatives" who were its primary contact with industrial customers for purposes of, *inter alia*, marketing the benefits of increasing production, and therefore electric usage, in the PP&L distribution area. Marketing representatives also purportedly assisted industrial customers in understanding PP&L's complex rate structure, and making decisions about what rate was best for their business. Given its "public utility" status, customers were generally led to believe that the marketing representatives were looking out after the customer's best interests.

12. CUC has had substantial success assisting PP&L's industrial customers achieve significant savings in their electric utility costs.

13. In every instance, CUC's recommendations to its industrial customers were entirely consistent with the principles and policies giving rise to the recommended rate, including, *inter alia*, economic development and system reliability. However, in many instances

PP&L chose to ignore those principles and policies in order to increase its bottom line at its customers', and the Commonwealth's, expense.

14. Over the course of their dealings in the PP&L region, it is estimated that CUC has saved their customers millions of dollars in utility savings, further advancing the policies and principles which gave rise to the approval of the economic development and system reliability rates. However, these savings have partially diminished the substantial windfall which PP&L enjoys when charging more than the most advantageous rates available.

15. In addition to undermining PP&L's windfall, CUC has also caused PP&L representatives to be put in the uncomfortable position of having failed to disclose or recommend the most advantageous rate available. CUC's successes often lead to distrust and tension between the marketing representative and his customer contact, as the customer cannot understand why they were forced to pay a consultant to find a cheaper rate or tariff. The marketing representatives often come away looking badly in the eyes of the customer.

16. In addition to the foregoing, PP&L's marketing representatives envy what they perceive to be the large sums of money earned by CUC. Some PP&L's representatives have taken the "if you can't beat them join them approach" and have become utility consultants themselves. Others, including at least one high level PP&L employee, Oliver Kaspar, have moonlighted as a utility consultant in competition with CUC while still an employee of PP&L.

17. The upshot of the foregoing is that PP&L, by and through its agents, employees and representatives, has taken affirmative action designed to interfere with CUC's ability to service their customers and to obtain the greatest level of savings for its customers. This active interference has taken numerous forms.

18. At all relevant times PP&L was aware of the written contracts that CUC maintains with its customers. Correspondence to CUC's customers makes clear that, at all material times, PP&L was aware of the terms of the written contracts between CUC and its customers.

19. In addition to the foregoing, one PP&L representative, Larry Collins, went so far

as to misrepresent himself to CUC in an effort to gain information about its utility consulting business. Mr. Collins contacted CUC and advised that he was "Carroll Collins" and that he represented Schoolhouse Graphics and that he might be able to get additional business for CUC through the Lancaster County School District. Mr. Collins requested all sales materials from CUC, which were forwarded by CUC's sales manager. CUC thereafter investigated the matter and learned that the person who had called was, in fact, Larry Collins. Mr. Collins was not interested in CUC's materials for Schoolhouse Graphics or the Lancaster County School District; rather, he was gathering information on behalf of PP&L.

20. At the time of the foregoing incident, Larry Collins had already displayed open hostility towards CUC in conjunction with some of CUC's clients. For instance, after CUC had presented recommendations to Kutco Printing & Products, Inc. and Reading Alloys, Mr. Collins advised those customers that they did not need CUC's assistance, that they should stay away from companies like CUC, that the customers should not deal with CUC but should deal directly with PP&L, and that PP&L would provide the same service as CUC without charge. At the time he made these statements Mr. Collins was aware that the customers were under written contract with CUC. In addition, as it relates to Kutco Printing & Products Company, Mr. Collins refused to apply PP&L's Industrial Development Initiatives Rider as required by the terms of PP&L's own tariff. When advised that he was applying the tariff improperly, Mr. Collins informed CUC that he could implement the IDIR anyway that he wanted.

21. Mr. Collins is not the only PP&L representative to interfere with CUC's customer contracts. In fact, PP&L representatives regularly interfered with CUC's contractual relations by informing CUC's customers that the customers did not need CUC's assistance and that PP&L would do the work for the customers at no charge. These statements were not made in the context of general marketing, but rather with full knowledge of the terms of CUC's shared savings agreements, the fact that CUC's had already provided recommendations to their customers, and with the intent to induce the customers to breach their contracts with CUC.

Without access to PP&L's files, CUC cannot identify every client with whom PP&L actively interfered. However, the clients include Kutco Printing & Products Company, Bigbee Steel and Tank Company, Buck Company, Inc., Gentex Corporation, Carlisle Plastics, Inc., AMC, Polymer Dynamics, Inc., and Reading Alloys.

22. Another way in which PP&L has taken affirmative steps to interfere with CUC contractual relations with its customers is by actually assisting the customer in purportedly terminating CUC contracts. CUC has repeatedly come across instances in the PP&L territory where it has made recommendations to customers that would save the customer large sums of money, only to receive a purported termination letter following the presentation or recommendation. In most instances the customer thereafter implements the recommendation that was provided by CUC. CUC has received such termination letters from customers such as Gentex Corporation, Carlisle Plastics, Inc., Buck Company, Inc., and Polymer Dynamics, Inc.

23. For example, PP&L went so far as to provide the actual wording to Buck Company, Inc., on how to terminate its utility consulting contract for which CUC provides sub-consulting services. Individuals at the highest levels of PP&L were aware of this interference, participated in same, but took no steps to stop same.

24. In addition to Buck Company, Inc., PP&L's interference has so dramatically harmed CUC's contractual relations with its clients that CUC was forced to commence legal action against other clients at great expense to CUC. This includes Gentex Corporation, Carlisle Plastics, Inc., and Bigbee Steel and Tank Company, former customers of CUC. In each instance CUC received a termination letter, which purportedly terminated the parties' utility consulting contract. In each instance, the client thereafter implemented CUC's recommendations and refused to compensate CUC.

25. Without the opportunity to review PP&L's files, there is no way for CUC to identify every customer with whom PP&L has interfered. However, CUC believes that there are numerous accounts that have been the subject of active interference by PP&L. The reason that

CUC cannot identify every such customer is because every such interference is not accompanied by a "termination" letter and there is often no explanation offered by the customer as to why they are not implementing CUC's recommendations. In addition, PP&L's interference takes other forms, as described below.

26. In addition to the foregoing interference, PP&L has actively interfered with CUC's contractual relations with its customers by providing false and misleading information to CUC's customers respecting the recommendations provided by CUC. By way of example, one of the more profitable recommendations for CUC has been the "interruptible" rate offered by PP&L. This is a very costly rate for PP&L in that it affords commercial users literally millions of dollars in savings over other "non-interruptible" rates. In essence, the interruptible rate is much less expensive than other rates because the user agrees, under certain conditions, to reduce its "demand" at the request of the utility. The downside is that by reducing its demand its operations may be affected; the upside is the tremendous utility savings the user can realize as a result.

27. At all relevant times PP&L was aware that CUC was advising qualifying industrial customers of the substantial benefits which their facilities would enjoy by subscribing to an "interruptible rate"; accordingly PP&L took affirmative steps to mislead customers respecting the risks and benefits of the interruptible rate and to effectively foreclose the rate to CUC's customers. These customers include the West Company, All-Steel, Inc., Longacre, and Fasson. PP&L was aware that, by doing so, CUC would be harmed.

28. PP&L attempted to obstruct access to the "interruptible rate" through several fronts. PP&L took the position that the rate was unavailable based upon an interpretation of the applicable tariffs which it knew was false and was contrary to its own testimony before the Pennsylvania Public Utility Commission. By closing the interruptible rate to new customers, PP&L hoped to deprive CUC and its customers of millions of dollars of utility savings.

29. As a result of the position taken by PP&L, CUC customers found that the interruptible rate was not available or, in the alternative, that they would be forced to litigate

against PP&L before the PUC in order to obtain access to the rate. For many of CUC's clients, the prospect of litigating against a public utility was a taunting and unacceptable solution to the problem. In other situations, CUC would retain counsel on behalf of their clients to fight for the right to the interruptible rate. CUC do not seek damages for those customers who entered into settlement agreements, together with CUC, with PP&L regarding the customers' entitlement to and/or credits for the interruptible rate.

30. Even when PP&L took the position that the rate was available for customers, it presented false and misleading statistics to CUC's customers in an effort to dissuade the customer from implementing the interruptible rate. For instance, PP&L misrepresented to the customers the historical data respecting past interruptions. More specifically, PP&L routinely showed customers PP&L's history of interruptions from 1993 through 1996 showing 14 "interruptions." In fact, there were only 5 interruptions during that time period. In addition, PP&L would offer its customers incentives to leave the interruptible rate in violation of the applicable tariffs, notwithstanding the fact that the incentives were not authorized by applicable law. PP&L knew that in the event the customer left the interruptible rate that CUC would be harmed and intended this result.

31. An example of the foregoing type of interference involves PP&L decision to re-institute "grandfathered" riders such as the Economic Development Initiatives Rider on customers' accounts who agreed to terminate interruptible service - in violation of the customers' interruptible contracts - notwithstanding the fact that such termination was not authorized by the applicable tariffs. PP&L took these affirmative steps, in violation of its own tariffs, with CUC's customers Carlisle Plastics, Inc. and Gentex Corporation. In addition, with respect to Carlisle Plastics, PP&L violated its own tariff by allowing Carlisle Plastics to leave the interruptible rate after six months and restoring the EDI credits. With respect to Gentex Corporation, PP&L provided false and misleading information regarding future savings in an effort to induce Gentex Corporation to terminate the interruptible rate.

32. Similarly, PP&L interfered with CUC's contractual relations with its customers by refusing to provide its clients with tariff options and/or benefits which the clients were legally entitled to receive. PP&L would take these positions because of the CUC's involvement in the process. For instance, PP&L refused to apply its tariffs as required by law in conjunction with C.R. Industries, a client of CUC.

33. In addition to the foregoing, PP&L interfered with CUC's ability to service their customers by taking actions designed to prevent CUC from delaying and/or obtaining account information from PP&L. Since PP&L had a literal monopoly on utility service in its area, it was the sole source of historical and usage data for CUC's customers in the area. In order to obtain this information from PP&L, CUC's would have its customers execute authorizations permitting the release of the information to CUC. Notwithstanding these authorizations, PP&L would refuse the authorizations and/or intentionally delay responding to same. In addition, when the requests for information were made PP&L would notify its marketing representatives of same. Once notified that CUC was seeking account information, PP&L representatives would thereafter meet with CUC's customers and attempt to dissuade the customers from doing business with CUC. For instance, PP&L delayed in providing account information to Bigbee Steel and Tank Company in order to provide its account representative an opportunity to present recommendations to CUC's client. As a direct result of these actions, CUC lost substantial revenues.

34. The foregoing interference by PP&L was done intentionally as part of an ongoing pattern and practice designed to harm CUC's financial interests. In addition and/or in the alternative to the foregoing, PP&L was aware that the interference with CUC's contractual relations and resultant financial harm to CUC was an inevitable consequence of its conduct.

35. Another form of damage caused by PP&L's interference is that it effectively destroys CUC's ability to obtain ongoing and future business from its clients. In ordinary circumstances, once clients realize the substantial savings that they are earning as a result of

CUC's involvement, they are very receptive to additional recommendations from CUC.

36. As a result, CUC is typically able to provide ongoing recommendations to clients after they execute their contracts. In many instances CUC will focus on electric, sewer and gas recommendations. Clients will often implement electric, sewer, and/or gas recommendations through CUC and PP&L's interference with CUC's contractual relations, as described above, effectively precludes CUC from maintaining and growing an ongoing relationship with the clients. The financial harm to CUC as a result is substantial.

37. The actions by PP&L, as described above, were not privileged and had no legitimate business justification.

38. The actions by PP&L, as described above, were not isolated instances, but were part of an ongoing malicious campaign designed to harm CUC's interests. Given the ongoing nature of PP&L's conduct, and the outrageousness of its activities, especially in light of the monopoly position that it holds, CUC is entitled to punitive damages in addition to such compensatory damages as may be allowed by law.

WHEREFORE, plaintiff requests this Court to enter judgment in their favor in an amount in excess of \$50,000.00, plus interest, costs, and such other relief as the Court deems appropriate.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

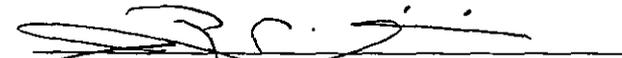
By:

  
\_\_\_\_\_  
Ethan N. Halberstadt  
Attorneys for Plaintiff

Dated: 11/23/99

VERIFICATION

I, Joseph P. McGillian, owner of Commercial Utility Consultants, plaintiff in the within action, verify that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

  
Joseph P. McGillian

Date: 11/23/99

COUNTY OF CHESTER - OFFICE OF THE SHERIFF

CIVIL PROCESS  
COSTS / PROCEDURE  
(610) 344-5978

N. CHURCH ST., SUITE 126  
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WEST CHESTER, PA 19380-0991  
FAX: (610) 344-5345

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SHERIFF SERVICE  
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INSTRUCT

AVAILABLE

1. PLAINTIFF/S/ COMMERCIAL UTILITY CONSULTANTS	2. COURT NUMBER 99-0980
3. DEFENDANT/S/ PENNSYLVANIA POWER & LIGHT COMPANY (PP&L)	4. TYPE OF WRIT OR COMPLAINT CIVIL COMPLAINT
5. NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC. TO SERVICE OR DESCRIPTION OF PROPERTY TO BE LEVIED, ATTACHED OR SOLD. PENNSYLVANIA POWER & LIGHT COMPANY, now known as PP&L, INC.	
6. ADDRESS (Street or RFD, Apartment No., City, Boro, Twp., State and ZIP Code) 2 North 9th Street, Allentown, PA 18101	

7. INDICATE UNUSUAL SERVICE:  PERSONAL  PERSON IN CHARGE  DEPUTIZE  CERT. MAIL  REG. MAIL  POSTED  OTHER

Now, Nov 23 19 99, I, SHERIFF OF CHESTER COUNTY, PA, do hereby deputize the Sheriff of Lehigh County to execute this Writ and make return thereof according to law.  
This deputation being made at the request and risk of the plaintiff. Robert A. Erling  
SHERIFF OF CHESTER COUNTY

8. SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE:  
PLEASE DEPUTIZE SHERIFF OF LEHIGH COUNTY TO EFFECTUATE SERVICE TO LEHIGH CO. SHERIFF: PLEASE SERVE PERSON-IN-CHARGE  
Check made payable to Lehigh Co. in the amount of \$32.00 is enclosed for Lehigh County Sheriff's cost. 1 check copy # 31054 @ 32.00

NOTE ONLY APPLICABLE ON WRIT OF EXECUTION: N.B. WAIVER OF WATCHMAN- Any deputy sheriff levying or attaching any property under writ may leave same without a watchman, in custody of whomever is found in possession, after notifying person of levy or attachment, without liability on the part of such deputy or the sheriff to any plaintiff herein for any loss, destruction or removal of any such property before sheriff's sale thereof.

9. PRINT/TYPE NAME AND ADDRESS OF ATTORNEY/ORIGINATOR Ethan N. Halberstadt 475 Allendale Road, Suite 200 King of Prussia, PA 19406	10. TELEPHONE NUMBER 610.354.9700	11. DATE 11.23.99
ATTORNEY I.D. 57544	12. SIGNATURE <u>Ethan N. Halberstadt</u>	

SPACE BELOW FOR USE OF SHERIFF ONLY - DO NOT WRITE BELOW THIS LINE

13. I acknowledge receipt of the writ or complaint as indicated above	SIGNATURE of Authorized CCSD Deputy or Clerk and Title <u>[Signature]</u>	14. Date Filed 11-23-99	15. Expiration/Hearing date 12-23-99
16. I hereby CERTIFY and RETURN that I <input checked="" type="checkbox"/> have personally served, <input type="checkbox"/> have legal evidence of service as shown in "Remarks", <input type="checkbox"/> have executed as shown in "Remarks", the writ or complaint described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at the address inserted below by handling a TRUE and ATTESTED copy thereof.			
17. <input type="checkbox"/> I hereby certify and return a NO SERVICE because I am unable to locate the individual, company, corporation, etc., named above. (See remarks below)			

18. Name and title of individual served (if not shown above) <u>Annette Taylor PK</u>	19. A person of suitable age and discretion than residing in the defendant's usual place of abode <input type="checkbox"/>									
20. Address of where served (complete only if different than shown above) (Street or RFD, Apartment No., City, Boro, Twp., State and ZIP code) <u>Legal Agent 12/3/99</u>	21. Date of Service 12/3/99	22. Time 2:35 PM								
23. ATTEMPTS	Date	Time	Date	Time	Date	Time	Date	Time	Date	Time
24. Advance Costs 177456 11-23-99 3800	25. Service Costs	26. Notary Cert.	27. Mileage or Postage	28. Total Costs	29. COSTS DUE OR REFUND					

30. REMARKS: 800  
SHERIFF'S SALE AND/OR EVICTION SCHEDULED FOR:  
DATE: \_\_\_\_\_ TIME: \_\_\_\_\_  AM  PM  
IF YOU WISH TO PROCEED WITH SALE - ADVISE THIS OFFICE 24 HOURS PRIOR TO SALE DATE.  
NOT AFFIDAVIT OF SERVICE

31. AFFIRMED and subscribed to before me this	SO ANSWER <u>Lee Letzer</u>	33. Date
34. day of _____ 19 _____	32. Signature of Dep. Sheriff	33. Date
37. _____	35. Signature of Sheriff of Chester County <u>Robert A. Erling</u>	36. Date
Prothonotary/Deputy/Notary Public	38. Signature of Foreign Sheriff	39. Date

40. I ACKNOWLEDGE RECEIPT OF THE SHERIFF'S RETURN SIGNATURE OF AUTHORIZED ISSUING AUTHORITY AND TITLE. 41. Date Received

COMPENSATION UTILITY CONSULTANTS  
VS  
PENNSYLVANIA POWER & LIGHT CO.

BOOK: 1999 07 3502  
CASE: 1999-NC-1217  
EXPIR: 23-Dec-1999  
DEPOSIT: 32.00

WRIT : COMPLAINT IN CIVIL ACTION  
99-09800 (CHESTER COUNTY)  
SERVE: PENNSYLVANIA POWER & LIGHT  
AT : 2 N. 9TH ST.; ALLENTOWN, PA 18101

PAID

RETURN OF SERVICE

1. NAME OF INDIVIDUAL SERVED: Annette Taylor  
2. RELATIONSHIP TO DEFENDANT: Legal agent  
3. DATE: 12-3-99 19 99 TIME: 2:35 PM. HOURS  
4. LOCATION OF SERVICE: 2 N. 9th St.  
Allentown

5. UNABLE TO LOCATE:  
( ) NUMBER OF ATTEMPTS TO LOCATE DEFENDANT AT LAST KNOWN ADDRESS:  
1. DATE & TIME \_\_\_\_\_ 2. DATE & TIME \_\_\_\_\_  
3. DATE & TIME \_\_\_\_\_ 4. DATE & TIME \_\_\_\_\_  
5. DATE & TIME \_\_\_\_\_ 6. DATE & TIME \_\_\_\_\_

ACCEPTANCE OF SERVICE

I HEREBY ACCEPT SERVICE OF THE LEGAL PROCESS AS OUTLINED ON THE FRONT OF THE DOCUMENT. THIS SERVICE IS ACCEPTED ON BEHALF OF THE LISTED DEFENDANT(S) AND I HEREBY CERTIFY THAT I AM AUTHORIZED TO DO SO.

PRINTED NAME OF AUTHORIZED AGENT \_\_\_\_\_ SIGNATURE OF AUTHORIZED AGENT \_\_\_\_\_  
DATE: \_\_\_\_\_ TIME: \_\_\_\_\_

SO ANSWERS

SWORN AND SUBSCRIBED BEFORE ME ON  
December 7, 1999  
Susan J. Sedora

Joe Jeter  
DEPUTY SHERIFF  
P. M. Ladd  
SHERIFF OF LEHIGH COUNTY

NOTARIAL SEAL  
SUSAN J. SEDORA, NOTARY PUBLIC  
CITY OF ALLENTOWN, LEHIGH COUNTY, PA  
MY COMMISSION EXPIRES JUNE 25th, 2001

IN THE COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA

COMMERCIAL UTILITY  
CONSULTANTS,

Plaintiff,

v.

PENNSYLVANIA POWER &  
LIGHT COMPANY, now known as  
PP&L, INC.,

Defendant.

CIVIL ACTION - LAW

NO. 99-09800

JURY TRIAL DEMANDED

HON. PAULA FRANCISCO OTT

ORAL ARGUMENT REQUESTED

ORDER

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2000, upon consideration of the Preliminary Objections of Defendant PP&L, Inc. and any response thereto, it is hereby ORDERED that the Preliminary Objections are SUSTAINED. Plaintiff's Complaint is hereby DISMISSED WITH PREJUDICE.

BY THE COURT:

\_\_\_\_\_  
Paula Francisco Ott, J.

Glen R. Stuart  
Identification No. 41302  
Bryant D. Lim  
Identification No. 78738  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
(215) 963-5883/5165

FILED  
00 JUN 01 01:01

PROthon  
PENN. JUDICIAL  
CHESTER COUNTY

Attorneys for Defendant  
PP&L, Inc.

COMMERCIAL UTILITY  
CONSULTANTS,

Plaintiff,

v.

PENNSYLVANIA POWER &  
LIGHT COMPANY, now known as  
PP&L, INC.,

Defendant.

COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

NO. 99-09800

JURY TRIAL DEMANDED

HON. PAULA FRANCISCO OTT

ORAL ARGUMENT REQUESTED

PRELIMINARY OBJECTIONS OF DEFENDANT PP&L, INC.

Pursuant to Pennsylvania Rule of Civil Procedure 1028, defendant Pennsylvania Power & Light Co. (now known as PP&L, Inc.) ("PP&L"), by and through its undersigned counsel, hereby raises preliminary objections to the Complaint of Plaintiff and in support thereof avers as follows:

1. On November 23, 1999, Plaintiff Commercial Utility Consultants ("CUC") filed a Complaint against PP&L (the "Complaint").

2. The Complaint alleges that Plaintiff provides certain utility consulting services for customers. Compl., ¶ 3.

3. The Complaint alleges that Plaintiff enters into one-page “shared savings” written contracts with its customers. *Id.*

4. The Complaint alleges that Plaintiff “agrees to review the rates, tariffs, discounts, riders and total charges that apply to the customer’s utility billings and to submit recommendations to the customer for possible savings, credits or refunds.” *Id.*

5. The Complaint alleges that it “is standard in the utility consulting industry ... [that] CUC generally receive 50% of any credit or refund they obtain for their clients, as well as 50% of the savings that results from its recommendations over a period of time.” *Id.*, ¶ 4.

6. The Complaint alleges that “PP&L had a legal duty to inform its customers about the availability of better rates, . . .” *Id.*, ¶ 9.

7. The Complaint alleges that PP&L marketing representatives “assisted industrial customers in understanding PP&L’s complex rate structure, and making decisions about what rate was best for their business.” *Id.*, ¶ 11.

8. The Complaint alleges that PP&L, as the public utility providing the utility services, “has taken affirmative action designed to interfere with CUC’s ability to service their customers and to obtain the greatest level of savings,” and, therefore, tortiously interfered with Plaintiff’s existing contractual relations. *Id.*, ¶ 17.

9. The Complaint also alleges that “PP&L’s interference ... effectively destroy[ed] CUC’s ability to obtain ongoing and future business from its clients[,]” and, therefore, tortiously interfered with Plaintiff’s prospective contractual relations. *Id.*, ¶¶ 35-36.

I. **PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER FOR FAILURE TO STATE A CAUSE OF ACTION FOR EXISTING CONTRACTUAL RELATIONS -- Pa. R. Civ. P. 1028(a)(4)**

10. Plaintiff's cause of action against PP&L for tortious interference with existing contractual relations is legally insufficient as a matter of law because it fails to state a claim upon which relief can be granted.

11. The Complaint alleges that Plaintiff's customers engage Plaintiff "to review the rates, tariffs, discounts, riders and total charges that apply to the customer's utility billings and to submit recommendations to the customer for possible savings, credits or refunds." Compl., ¶ 3.

12. The Complaint fails to allege that Plaintiff's written contracts with its customers are for a definite period of time.

13. There is a presumption under Pennsylvania law that such contracts are terminable at-will.

14. The contractual relationships between Plaintiff and its customers are in the employment context.

15. The Complaint fails to state a claim for tortious interference with existing contractual relations because, under Pennsylvania law, one cannot tortiously interfere with an existing terminable-at-will relationship in the employment context.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection as to all claims for tortious interference with Plaintiff's existing contracts, dismiss all such claims with prejudice, and award defendant its costs, expenses and such other relief deemed just and appropriate.

**II. PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER  
FOR FAILURE TO STATE A CAUSE OF ACTION FOR PROSPECTIVE  
CONTRACTUAL RELATIONS -- Pa. R. Civ. P. 1028(a)(4)**

16. Plaintiff's claims against PP&L for tortious interference with prospective contractual relations (including its claims that PP&L's alleged interference caused its customers not to continue existing contracts terminable-at-will) are legally insufficient as a matter of law because they fail to state a claim upon which relief can be granted.

17. The Complaint alleges that the parties compete with each other by providing the same services to the customers at issue. *See, e.g.*, Compl., ¶¶ 3, 11 and 21.

18. Plaintiff fails to state a claim for tortious interference with prospective contractual relations because, under Pennsylvania law, the Complaint does not establish that PP&L employed wrongful means or created an unlawful restraint of trade.

19. Plaintiff fails to state a claim for tortious interference with prospective contractual relations because the competitor's privilege, in the absence of wrongful means or an unlawful restraint of trade, precludes Plaintiff from asserting a cause of action for tortious interference with prospective contractual relations.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection as to all claims for tortious interference with Plaintiff's prospective contractual relations, dismiss all such claims with prejudice, and award defendant its costs, expenses and such other relief deemed just and appropriate.

**III. PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES FAILS AS A MATTER OF LAW BECAUSE PLAINTIFF'S UNDERLYING TORT CLAIMS FAIL AS A MATTER OF LAW; IN THE ALTERNATIVE, PLAINTIFF HAS NOT ALLEGED FACTS SUFFICIENT TO DEMONSTRATE EVIL MOTIVE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS -- Pa. R. Civ. P. 1028(a)(4)**

---

20. The Complaint seeks punitive damages against PP&L. Compl., ¶ 38.

21. Plaintiff has no valid tort claims and, therefore, no valid claim for punitive damages.

22. Alternatively, even if a tort claim survives PP&L's demurrers in Paragraphs 10 to 19 above, Plaintiff has not alleged facts sufficient to demonstrate outrageous conduct, evil motive or reckless indifference on the part of PP&L.

23. Therefore, Plaintiff's demand for punitive damages should be stricken from the Complaint.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection to Plaintiff's claim for punitive damages, dismiss that claim with prejudice, and award defendant its costs, expenses and such other relief deemed just and appropriate.

**IV. PRELIMINARY OBJECTION AND MOTION TO STRIKE BASED UPON PLAINTIFF'S FAILURE TO JOIN IN SEPARATE COUNTS ITS SEPARATE CAUSES OF ACTION, THEREBY FAILING TO CONFORM TO THE RULES OF LAW AND RULES OF COURT -- Pa. R. Civ. P. 1020(d)(1), 1028(a)(2)**

---

24. The Complaint alleges that PP&L tortiously interfered with Plaintiff's *existing* contractual relations. Compl., ¶¶ 21-25.

25. The Complaint also alleges that PP&L tortiously interfered with Plaintiff's *prospective* contractual relations, including the continuation of existing terminable-at-will

contracts. *Id.*, ¶¶ 35-36.

26. Under Pennsylvania law, tortious interference with *existing* contractual relations is a different cause of action, with different elements and subject to different defenses, than tortious interference with *prospective* contractual relations.

27. Pa. R. Civ. P. 1020(d)(1) requires as follows:

If a transaction or occurrence gives rise to more than one cause of action against the same person, including causes of action in the alternative, they *shall be* joined in separate counts in the action against any such person.

(Emphasis added.)

28. Plaintiff has failed to comply with Pa. R. Civ. P. 1020(d)(1) by failing to set forth its separate claims for tortious interference with existing and prospective contractual relations (and for punitive damages) in separate counts, and, therefore, the Complaint should be stricken.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection, strike the Complaint for failure to conform to law or rule of court, and award defendant its costs, expenses and such other relief deemed just and appropriate.

**V. PRELIMINARY OBJECTION AND MOTION TO STRIKE BASED UPON PLAINTIFF'S FAILURE TO ATTACH THE WRITTEN CONTRACTS AT ISSUE, THEREBY FAILING TO CONFORM TO THE RULES OF LAW AND RULES OF COURT -- Pa. R. Civ. P. 1019(h), 1028(a)(2)**

29. The Complaint alleges that Plaintiff "provides utility consulting services pursuant to 'shared savings' written contracts with their customers." Compl., ¶ 3.

30. The Complaint further identifies with specificity certain customers with whom Plaintiff alleges PP&L tortiously interfered with those written contracts. *Id.*, ¶ 21.

31. The Complaint purports to state claims for tortious interference with existing

contractual relations, and with the continuation of existing contractual relations. *See, e.g., id.*, ¶¶ 17, 32, 35 and 36.

32. Pa. R. Civ. P. 1019(h) states as follows:

A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

33. Plaintiff failed to comply with Pa. R. Civ. P. 1019(h) by failing to attach a copy of each contract upon which the Complaint is based.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection, strike the Complaint for failure to conform to law or rule of court, and award defendant its costs, expenses and such other relief deemed just and appropriate.

**VI. PRELIMINARY OBJECTION AND MOTION TO STRIKE BASED UPON PLAINTIFF'S INCLUSION OF SCANDALOUS AND IMPERTINENT MATTER, THEREBY FAILING TO CONFORM TO THE RULES OF LAW AND RULES OF COURT -- Pa. R. Civ. P. 1028(a)(2)**

---

34. For the reasons set forth above, Plaintiff's Complaint fails to state a cause of action for tortious interference with existing and/or prospective contractual relations. By way of alternative argument, in the Complaint, Plaintiff includes scandalous and impertinent matter directed at the personal activities of two PP&L employees, Oliver Kasper and Larry Collins. Compl., ¶¶ 16 and 19.

35. The allegation directed to Mr. Kasper is that he has "moonlighted as a utility consultant in competition with Plaintiffs while still an employee of PP&L." *Id.*, ¶ 16.

36. The allegation directed to Mr. Collins is that he personally contacted Plaintiff

CUC and allegedly misrepresented himself in order to gain information about CUC's utility consulting business. *Id.*, ¶ 19.

37. Plaintiff does not allege that the alleged individual conduct of Messrs. Kasper and Collins was sanctioned by PP&L. Nor were the individual activities of Messrs. Kasper and Collins directed to the alleged contractual relationships between CUC and its customers.

38. Therefore, the allegations directed to the personal activities of Messrs. Kasper and Collins neither relate to nor support Plaintiff's purported claims for tortious interference with Plaintiff's contractual relationships with its customers.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection, strike the scandalous and impertinent matter referenced herein, and award defendant its costs, expenses and such other relief deemed just and appropriate.

**VII. PRELIMINARY OBJECTION AND MOTION TO STRIKE BASED UPON THE INSUFFICIENT SPECIFICITY OF THE PLEADING -- Pa. R. Civ. P. 1028(a)(3)**

39. For the reasons set forth above, Plaintiff's Complaint fails to state a cause of action for tortious interference with existing and/or prospective contractual relations. By way of alternative argument, to the extent that the Complaint seeks to allege tortious interference with unidentified existing or prospective contractual relationships, the Complaint fails to provide sufficient specificity regarding the identity of the unidentified existing and/or prospective contractual relationships with which Plaintiff contends PP&L interfered. *See, e.g.*, ¶¶ 25, 26, and 36.

40. Through its filing of the writ of summons in August 1997 at Docket No. 97-06580, and the pendency of that matter for more than two years, as well as its participation in

litigation against at least three of its customers (Compl., ¶ 24), and its participation in proceedings before the Pennsylvania Public Utility Commission involving other customers (including Plaintiff's retention of counsel to represent the other customers in said proceedings) (*id.*, ¶ 29), Plaintiff has had the opportunity to pursue discovery directed to these allegations.

41. Plaintiff should not be permitted to proceed with claims against PP&L for tortious interference with *unidentified* contractual relationships.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection, strike those allegations directed to Plaintiff's unidentified customers, and award defendant its costs, expenses and such other relief deemed just and appropriate. Alternatively, PP&L requests that the Court direct Plaintiff to provide sufficient specificity about the identity of any customers beyond those already identified in the Complaint.

**VIII. PRELIMINARY OBJECTION AND MOTION TO STRIKE BASED UPON PLAINTIFF'S INCLUSION OF SCANDALOUS AND IMPERTINENT MATTER, THEREBY FAILING TO CONFORM TO THE RULES OF LAW AND RULES OF COURT -- Pa. R. Civ. P. 1028(a)(2)**

---

42. Plaintiff filed the instant Complaint on November 23, 1999.

43. On the very same day, Plaintiff CUC, together with Public Utility Service Corporation, also filed another Complaint (the "CUC/PUSC Complaint") in which it repeated each and every allegation included in the instant Complaint. *See Ex. A.*

44. As far as they relate to CUC, the Complaints contain the same facts and legal theories.

45. Plaintiff has included scandalous and impertinent matter by filing the duplicative instant Complaint and, therefore, the Complaint should be stricken.

WHEREFORE, defendant PP&L requests that the Court sustain its preliminary objection, strike the Complaint for inclusion of scandalous and impertinent matter, and award defendant its costs, expenses and such other relief deemed just and appropriate.

DATED: January 20, 2000

Respectfully submitted,



---

Gen R. Stuart  
Bryant D. Lim  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
(215) 963-5883/5165

Attorneys for Defendant PP&L, Inc.

OF COUNSEL:

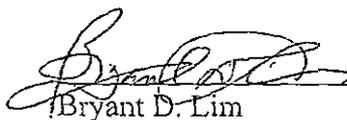
Augustus C. Martin  
PP&L, Inc.  
Two North Ninth Street  
Allentown, PA 18101

CERTIFICATE OF SERVICE

I, Bryant D. Lim, hereby certify that a true and correct copy of the Preliminary Objections of Defendant PP&L, Inc. to Plaintiff's Complaint was served via first class mail on January 20, 2000, on the following:

Ethan N. Halberstadt, Esquire  
POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406

*Attorney for Plaintiff*

  
Bryant D. Lim

OTT

CBS

Glen R. Stuart  
Identification No. 41302  
Bryant D. Lim  
Identification No. 78738  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103  
(215) 963-5883/5165

FILED  
00 FEB 10 AM 9:40

OFFICE OF THE  
PROTHONOTARY  
CHESTER CO. PA.  
Attorneys for Defendant  
PP&L, Inc.

COMMERCIAL UTILITY  
CONSULTANTS,  
  
Plaintiff,  
  
v.  
  
PENNSYLVANIA POWER &  
LIGHT COMPANY, now known as  
PP&L, INC.,  
  
Defendant.

COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA  
  
CIVIL ACTION - LAW  
  
NO. 99-09800  
  
ORAL ARGUMENT REQUESTED  
  
JURY TRIAL DEMANDED.  
  
HON. PAULA FRANCISCO OTT

PRAECIPE FOR DETERMINATION

TO THE PROTHONOTARY:

Kindly submit the following matter to Judge Paula Francisco Ott for determination:

PRELIMINARY OBJECTIONS OF DEFENDANT PP&L, INC.

Date of filing/service: February 9, 2000

Oral argument is requested.



Glen R. Stuart  
Bryant D. Lim  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
(215) 963-5883/5165

Attorneys for Defendant PP&L, Inc.

Glen R. Stuart  
Identification No. 41302  
Bryant D. Lim  
Identification No. 78738  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103  
(215) 963-5883/5165

FILED

DOCTED 10 AM 9:40

OFFICE OF THE  
PROthonARY  
CHESTER CO. PA.

Attorneys for Defendant  
PP&L, Inc.

COMMERCIAL UTILITY  
CONSULTANTS,

Plaintiff,

v.

PENNSYLVANIA POWER &  
LIGHT COMPANY, now known as  
PP&L, INC.,

Defendant.

COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

NO. 99-09800

ORAL ARGUMENT REQUESTED

JURY TRIAL DEMANDED

HON. PAULA FRANCISCO OTT

BRIEF IN SUPPORT OF THE  
PRELIMINARY OBJECTIONS OF DEFENDANT  
PP&L, INC. TO PLAINTIFF'S COMPLAINT

Plaintiff Commercial Utility Consultants ("CUC") filed a Complaint on November 23, 1999 (the "CUC Complaint") against Pennsylvania Power & Light Co. (now known as PP&L, Inc.) ("PP&L"). On that very same day, CUC, along with Public Utility Service Corporation ("PUSC"), had filed another Complaint (the "CUC/PUSC Complaint") which included each and every allegation of the CUC Complaint. See Docket No. 99-09799 (assigned to Judge Katherine B.L. Platt). Due to the duplicative nature of the Complaints, PP&L filed nearly identical Preliminary Objections to both Complaints on January 20, 2000.

Contemporaneous with the filing of this Brief, PP&L has filed its Brief in Support of the Preliminary Objections to the CUC/PUSC Complaint (“PP&L’s CUC/PUSC Brief”), attached hereto as Exhibit A. For the reasons set forth herein and in PP&L’s CUC/PUSC Brief, PP&L respectfully submits that this Court should sustain PP&L’s Preliminary Objections.

I. ARGUMENT

A. The Court Should Grant PP&L’s Preliminary Objections I-VII For The Reasons Fully Set Forth In PP&L’s CUC/PUSC Brief.

In its first seven Preliminary Objections to the CUC Complaint, PP&L raised the same Preliminary Objections it filed in response to the duplicative CUC/PUSC Complaint. *See* Preliminary Objections, I-VII. To avoid unnecessary duplication, PP&L incorporates by reference the PP&L CUC/PUSC Brief attached hereto as Exhibit A. As set forth therein, this Court should sustain PP&L’s Preliminary Objections to the CUC Complaint.

B. The Court Should Grant PP&L’s Preliminary Objection And Motion To Strike Due To Plaintiff’s Inclusion Of Scandalous And Impertinent Matter.

PP&L filed an additional Preliminary Objection to the CUC Complaint to challenge the entirely duplicative nature of this separate Complaint and action. *See* Preliminary Objection, VIII. CUC’s Complaint should be stricken as scandalous and impertinent.

Pa. R. Civ. P. 1028(a)(2) prohibits the “inclusion of scandalous or impertinent matter.” For allegations to be scandalous or impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action. *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 115 (Pa. Commw. 1998). In addition, some courts require the party moving to strike the allegations to demonstrate prejudice. *Commonwealth v. Hartford Acc. & Indem. Co.*, 40 Pa. Commw. 133, 137, 396 A.2d 885, 888 (1979).

It is hard to imagine pleadings more immaterial and inappropriate than the entirely duplicative allegations set forth in the CUC Complaint. Furthermore, PP&L will unquestionably be prejudiced by having to defend itself against two actions containing identical facts and legal theories. The duplicative nature of this action also wastes the precious judicial resources of this Court.

Therefore, this Court should sustain PP&L's Preliminary Objection and strike the CUC Complaint because it contains scandalous and impertinent matter.

II. CONCLUSION

For the reasons stated above and in PP&L's CUC/PUSC Brief, Defendant PP&L respectfully requests that this Court sustain its Preliminary Objections.

DATED: February 9, 2000

Respectfully submitted,



---

Glen R. Stuart  
Bryant D. Lim  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
(215) 963-5883/5165

Attorneys for Defendant PP&L, Inc.

OF COUNSEL:

Augustus C. Martin  
PP&L, Inc.  
Two North Ninth Street  
Allentown, PA 18101



Exhibit A

Glen R. Stuart  
Identification No. 41302  
Bryant D. Lim  
Identification No. 78738  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103  
(215) 963-5883/5165

Attorneys for Defendant  
PP&L, Inc.

---

COMMERCIAL UTILITY  
CONSULTANTS and  
PUBLIC UTILITY SERVICE  
CORPORATION,

Plaintiffs,

v.

PENNSYLVANIA POWER &  
LIGHT COMPANY, now known as  
PP&L, INC.,

Defendant.

---

COURT OF COMMON PLEAS  
CHESTER COUNTY, PENNSYLVANIA

CIVIL ACTION - LAW

NO. 99-09799

ORAL ARGUMENT REQUESTED

JURY TRIAL DEMANDED

HON. KATHERINE B.L. PLATT

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BRIEF IN SUPPORT OF THE  
PRELIMINARY OBJECTIONS OF DEFENDANT  
PP&L, INC. TO PLAINTIFFS' COMPLAINT

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I. INTRODUCTION

Plaintiffs Commercial Utility Consultants (“CUC”) and Public Utility Service Corporation (“PUSC”) (collectively, the “Plaintiffs”) filed a Complaint on November 23, 1999 against Pennsylvania Power & Light Co. (now known as PP&L, Inc.) (“PP&L”) claiming that PP&L interfered with their existing and prospective contractual relations. Because Plaintiffs’ Complaint, inter alia, fails to state a claim upon which relief can be granted and fails to conform to law or rule of court, PP&L filed Preliminary Objections on January 21, 2000.<sup>1/</sup> For the reasons set forth herein, PP&L respectfully submits that this Court should grant PP&L’s Preliminary Objections and dismiss Plaintiffs’ Complaint with prejudice.

II. STATEMENT OF THE CASE

In their Complaint, Plaintiffs allege that they are in the business of providing certain utility consulting services for certain named and unnamed customers. Compl., ¶ 3.<sup>2/</sup> Plaintiffs allege that they enter into one-page “shared savings” written contracts with their customers. *Id.* Pursuant to these contracts, Plaintiffs “agree[] to review the rates, tariffs, discounts, riders and total charges that apply to the customer’s utility billings and to submit recommendations to the customer for possible savings, credits or refunds.” *Id.* Plaintiffs allege that it “is standard in the

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<sup>1/</sup> On November 23, 1999, CUC alone filed a Complaint in this Court alleging identical facts and legal theories. *See* Docket No. 99-09800 (assigned to Judge Paula Francisco Ott). Due to the duplicative nature of the CUC-only Complaint, PP&L filed nearly identical preliminary objections in that case.

<sup>2/</sup> For purposes of testing the legal sufficiency of Plaintiffs’ claims at the preliminary objection stage, all well-pleaded, material and relevant facts (but not conclusions of law, unwarranted inferences of fact, argumentative allegations or expressions of opinion) alleged in the Complaint are deemed true. Thus, the allegations set forth in this Section are based upon Plaintiffs’ allegations in the Complaint.

utility consulting industry ... [that] Plaintiffs generally receive 50% of any credit or refund they obtain for their clients, as well as 50% of the savings that results from their recommendations over a period of time.” *Id.*, ¶ 5.

Just as Plaintiffs allege that they “are in the business of ... providing consulting services,” (*id.*, ¶ 3), they allege that PP&L marketing representatives “assisted industrial customers in understanding PP&L’s complex rate structure, and making decisions about what rate was best for their business.” *Id.*, ¶ 12. They also allege that PP&L representatives informed Plaintiffs’ customers that they “did not need Plaintiffs’ assistance and that PP&L would do the work for the customers at no charge.” *Id.*, ¶ 22. Plaintiffs allege that PP&L, as the public utility providing the utility services, “has taken affirmative action designed to interfere with Plaintiffs’ ability to service their customers and to obtain the greatest level of savings,” and, therefore, tortiously interfered with Plaintiffs’ existing contractual relations. *Id.*, ¶ 18. They also allege that “PP&L’s interference ... effectively destroy[ed] Plaintiffs’ ability to obtain ongoing and future business from its [sic] clients,” and, therefore, tortiously interfered with Plaintiffs’ prospective contractual relations. *Id.*, ¶¶ 36-37.

### III. STATEMENT OF QUESTIONS PRESENTED

A. Where Plaintiffs only have terminable-at-will contracts in the employment context with their customers, can Plaintiffs state a claim for tortious interference with existing contractual relations?

B. Where Plaintiffs’ allegations do not establish that PP&L employed wrongful means or created an unlawful restraint of trade, can Plaintiffs state a claim for tortious interference with prospective contractual relations?

C. Where Plaintiffs' underlying tort claims fail, can Plaintiffs state a claim for punitive damages?

D. Where Plaintiffs fail to join in separate counts their separate causes of action for tortious interference with existing and prospective contractual relations (and for punitive damages), does the Complaint comply with Pa. R. Civ. P. 1020(d)(1)?

E. Where Plaintiffs fail to attach the written contracts at issue, does the Complaint comply with Pa. R. Civ. P. 1019(h)?

F. Where Plaintiffs' Complaint contains scandalous and impertinent matter, does the Complaint comply with Pa. R. Civ. P. 1028(a)(2)?

G. Where Plaintiffs allege tortious interference with unidentified contractual relations, is the Complaint sufficiently pled as required by Pa. R. Civ. P. 1028(a)(3)?

For all the reasons set forth below, this Court should answer each of the foregoing questions in the negative and sustain PP&L's Preliminary Objections.

#### IV. SUMMARY OF ARGUMENT

Plaintiffs' Complaint suffers from numerous substantive and procedural deficiencies. First, Plaintiffs fail to state a cause of action for existing contractual relations because the contracts at issue are terminable-at-will in the employment context; therefore, Plaintiffs cannot state a cause of action for tortious interference with those existing contractual relations. Second, Plaintiffs' claims for tortious interference with prospective contractual relations fail as a matter of law because Plaintiffs, as PP&L's competitors, do not allege that PP&L engaged in "wrongful means" or created an "unlawful restraint of trade." Third, given that Plaintiffs' tort claims fail, Plaintiffs' claims for punitive damages likewise fail. (Alternatively, even if this Court found that

the tort claims somehow survive, Plaintiffs' claims for punitive damages fail because Plaintiffs do not aver facts sufficient to demonstrate "evil motive or reckless indifference to others.")

The Complaint contains the following additional deficiencies:

- ▶ In violation of Pa. R. Civ. P. 1020(d)(1), Plaintiffs fail to join in separate counts their distinct causes of action for tortious interference with existing and prospective contractual relations.
- ▶ In violation of Pa. R. Civ. P. 1019(h), Plaintiffs fail to attach the written contracts at issue.
- ▶ In violation of Pa. R. Civ. P. 1028(a)(2), Plaintiffs include scandalous and impertinent matter concerning the individual acts of two PP&L employees.
- ▶ In violation of Pa. R. Civ. P. 1028(a)(3), Plaintiffs fail to provide sufficient specificity about the identity of certain contractual relations with which Plaintiffs contend PP&L interfered.

In short, this Court should hold that Plaintiffs' Complaint fails to state a cause of action for tortious interference upon which relief can be granted, sustain PP&L's preliminary objections, and dismiss Plaintiffs' Complaint with prejudice.

## V. ARGUMENT

### A. The Court Should Grant PP&L's Preliminary Objections In The Nature Of Demurrers.

Pursuant to Pa. R. Civ. P. 1028(a)(4), PP&L raised three Preliminary Objections in the nature of demurrers. *See* Preliminary Objections, I, II and III. The standard for ruling on such preliminary objections is well-settled. Preliminary objections in the nature of a demurrer must be

sustained when the Complaint fails to set forth factual allegations sufficient to entitle a plaintiff to relief. *Parano v. O'Connor*, 433 Pa. Super. 570, 574, 641 A.2d 607, 609 (1994). Although well-pleaded, material and relevant facts are accepted as true for the purpose of testing the legal sufficiency of a claim, a court should not consider as true the pleading's conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion. *Giffin v. Chronister*, 151 Pa. Commw. 286, 290, 616 A.2d 1070, 1072 (1992). See also *C&K Enterprises, Inc. v. Dallas Area Mun. Auth.*, 16 Pa. D&C 4th 195, 1992 WL 554207, at \*2-3 (Luzerne C.C.P. 1992) (attached hereto as Ex. A)<sup>3/</sup> (where allegations in support of action for tortious interference with contractual relations were "conspicuously devoid" of factual averments necessary to support legal conclusions, the court sustained preliminary objections in the nature of a demurrer). When the facts as pleaded clearly fail to allege a valid cause of action, the court should sustain defendant's demurrer. *Savitz v. Weinstein*, 395 Pa. 173, 174, 149 A.2d 110, 111 (1959).

1. Plaintiffs fail to state a claim for tortious interference with existing contractual relations because one cannot tortiously interfere with an existing terminable-at-will contract.

In its first demurrer, PP&L focuses on Plaintiffs' claim that PP&L tortiously interfered with Plaintiffs' contracts to provide consulting services to their existing customers by inducing or encouraging those customers to terminate those contracts. However, under Pennsylvania law, there is no cause of action for tortious interference with existing terminable-at-will contracts in the employment context.

In *Hennessey v. Santiago*, 708 A.2d 1269, 1278-79 (Pa. Super. 1998), the Pennsylvania

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<sup>3/</sup> For the convenience of the Court and the parties, PP&L attaches hereto all unpublished opinions cited herein.

Superior Court affirmed the trial court's decision to grant defendant's Preliminary Objection with respect to plaintiff's claim for tortious interference with existing contractual relations. In doing so, the Superior Court explained that "an action for intentional interference with performance of a contract in the employment context applies only to interference with a prospective employment relationship whether at-will or not, not a presently existing at-will employment relationship." *Id.* See also *Buckwalter v. Parker*, No. 96-4795, 1998 WL 195701, \*2, \*4 (E.D. Pa. Mar. 25, 1998) (attached hereto as Ex. B) (relying on the Pennsylvania Superior Court's decision in *Hennessy*, the *Buckwalter* court granted defendant's motion for reconsideration and dismissed plaintiff's action for tortious interference), *aff'd*, 175 F.3d 1010 (3d Cir. 1999). Therefore, if Plaintiffs' existing contracts with their customers are terminable-at-will contracts in the employment context, then Plaintiffs have no claim for tortious interference with those contracts.

The existing contractual relations with which PP&L allegedly interfered constitute at-will contracts. Under Pennsylvania law, there is a presumption that employment contracts are at-will. See, e.g., *Stumpp v. Stroudsburg Mun. Auth.*, 540 Pa. 391, 396, 658 A.2d 333, 335 (1995); *Scott v. Extracorporeal, Inc.*, 376 Pa. Super. 90, 94-95, 545 A.2d 334, 336 (1988). In fact, the burden of overcoming the presumption and proving that one is not employed at-will "rest squarely" with the employee. *Luteran v. Loral Fairchild Corp.*, 455 Pa. Super. 364, 370, 688 A.2d 211, 214, *app. denied*, 549 Pa. 717, 701 A.2d 578 (1997).<sup>4/</sup> Courts have found consulting agreements such

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<sup>4/</sup> Plaintiffs do not allege facts supporting any of the following exceptions that could rebut the presumption: (1) an agreement for a definite duration; (2) an agreement specifying that the employee will be discharged for cause only; (3) sufficient additional consideration; or (4) an applicable recognized public policy exception. *Luteran*, 455 Pa. Super. at 370, 688 A.2d at 214 (citing *Robertson v. Atlantic Richfield Petroleum Prods.*

(continued...)

as those allegedly entered into between Plaintiffs and their customers at-will contracts. For example, in *Somers v. Somers*, 418 Pa. Super. 131, 613 A.2d 1211 (1992), the defendant employed plaintiff as a consultant, agreeing that the plaintiff would receive fifty percent (50%) of any net profits concerning the project that was the subject of the Complaint. The *Somers* Court found that the consulting agreement constituted an employment agreement terminable-at-will. *Id.* at 135-36, 613 A.2d at 1213.

Plaintiffs' alleged contracts with their customers here are similar to the consulting agreement in the *Somers* case. The written contracts with Plaintiffs' customers require them "to review the rates, tariffs, discounts, riders and total charges that apply to the customer's utility billings and to submit recommendations to the customer for possible savings, credits or refunds." *See* Compl., ¶ 3. Plaintiffs "only receive payment for as long as their customer continues to enjoy the savings resulting from their recommendations." *Id.*, ¶ 5; *see also id.*, ¶ 11 (Plaintiffs "are highly motivated to find lower rates and tariffs for their customers because they are only paid if they succeed in doing so."). Because Plaintiffs fail to satisfy their burden of overcoming the presumption that their contracts are at-will, the consulting agreements at issue must be considered at-will employment contracts.

Accordingly, Plaintiffs' effort to recover for tortious interference with existing at-will contracts in the employment context is unavailing. This Court should sustain PP&L's demurrer to Plaintiffs' claim for tortious interference with existing contractual relations.

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4/(...continued)

*Co.*, 371 Pa. Super. 49, 57, 537 A.2d 814, 819 (1987), *app. denied*, 520 Pa. 590, 551 A.2d 216 (1988)).

2. Plaintiffs fail to state a claim for tortious interference with prospective contractual relations because Plaintiffs' allegations do not establish that PP&L employed wrongful means or created an unlawful restraint of trade.

In its second demurrer, PP&L focuses on Plaintiffs' separate cause of action for tortious interference with prospective contractual relations (and the continuation of existing contractual relations).<sup>5/</sup> Given that Plaintiffs allege that PP&L and Plaintiffs compete in the business of providing information about utility rates to their customers, Plaintiffs fail to allege facts (as opposed to conclusions) that PP&L acted without privilege or justification, a necessary element of this cause of action. *See, e.g., Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 530 (3d Cir. 1998) (applying Pennsylvania law); and *Silver v. Mendel*, 894 F.3d 598, 602 (3d Cir. 1990) ("In Pennsylvania, however, it is clear that the burden is on the Plaintiff to show an absence of privilege/justification.").<sup>6/</sup>

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<sup>5/</sup> The Pennsylvania Supreme Court has observed that "[d]efining a 'prospective contractual relation' is admittedly problematic. To a certain extent, the term has an evasive quality, eluding precise definition. It is something less than a contractual right, something more than a mere hope." *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 209, 412 A.2d 466, 471 (1979).

<sup>6/</sup> The elements of tortious interference with prospective contractual relations are:

1. the existence of a prospective contractual relationship between the plaintiff and a third party;
2. purposeful action on the part of the defendant, specifically intended to harm the plaintiff by interfering with the prospective contractual relationship;
3. the absence of privilege or justification for such interference;
4. damages resulting from the defendant's conduct; and
5. a reasonable likelihood that the relationship would have occurred but for the interference of the defendant.

*Brokerage Concepts*, 140 F.3d at 530 (analyzing Pennsylvania authority); Restatement  
(continued...)

PP&L's demurrer to this claim is based upon the privilege afforded to competitors to compete with one another in the pursuit of their own interests. In order to invoke that privilege (and before discussing the governing principles under that privilege), PP&L must demonstrate that PP&L and Plaintiffs are competitors. Fortunately, Plaintiffs' Complaint provides substantial support for that conclusion.

Case law precedent and Blacks Law Dictionary define "competitors" as "persons endeavoring to do the same thing and each offering to perform the act . . . or render the services better or cheaper than his rival." *Glberman Assocs. v. J. Kinderman & Sons, Inc.*, No. 98-3711, 1999 WL 98588, at \*5 (E.D. Pa. Feb. 25, 1999) (attached hereto as Ex. C), quoting *Blacks Law Dictionary* 6th ed. (1990), at 284 (emphasis added). With the benefit of that definition, this Court should find that Plaintiffs' allegations demonstrate that PP&L and Plaintiffs are competitors. First, Plaintiffs' description of the services provided by Plaintiffs mirrors their description of the services provided by PP&L's marketing representatives:

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6/(...continued)

(Second) of Torts, § 766 (1977) (emphasis added).

Description of Plaintiffs' Services	Description of PP&L's Services
<p>“Plaintiffs are in the business of, <i>inter alia</i>, providing utility consulting services.... [Plaintiffs] review the rates, tariffs, discounts, riders and total charges that apply to the customer’s utility billings and to submit recommendations to the customer for possible savings, credits or refunds.”</p> <p>Compl., ¶ 3</p>	<p>PP&amp;L’s marketing representatives “assisted industrial customers in understanding PP&amp;L’s complex rate structure, and making decisions about what rate was best for their business.”</p> <p>Compl., ¶ 12.</p>

Second, because Plaintiffs allege that PP&L, as a public utility, “has a statutory duty to provide customers with the most advantageous rate available,” (Compl., ¶ 10), Plaintiffs by definition must compete with PP&L in providing the rate information to their customers. Third, the interference alleged by Plaintiffs is that PP&L informed “plaintiffs’ customers that the customers did not need Plaintiffs’ assistance and that PP&L would do the work for the customers at no charge.” Compl., ¶ 22 (emphasis added). The very nature of that alleged-interference (*i.e.*, to displace and replace Plaintiffs in the provision of the same services) confirms that they compete with each other in that business.<sup>7/</sup>

Given that PP&L is Plaintiffs’ competitor, this Court should assess PP&L’s potential liability for tortious interference under the competitor’s privilege.<sup>8/</sup> In *Brokerage Concepts*, 140 F.3d at 530, the Court described that privilege as follows:

<sup>7/</sup> Comment (c) to Section 768 of the Restatement (Second) of Torts emphasizes that the competitor’s privilege “applies whether the actor and the person harmed are competing as sellers or buyers or in any other way, and regardless of the plane on which they compete.”

<sup>8/</sup> In his treatise, Prosser notes that “considerable weight of authority holds that there is a privilege of competition which extends to inducing the termination of agreements terminable at will, whether they concern equipment or other relations.” W. Prosser, Torts, § 129, at 945-46 (4th ed. 1971).

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if

- (a) the relation concerns a matter involved in the competition between the actor and the other and
- (b) the actor does not employ wrongful means and
- (c) his action does not create or continue an unlawful restraint of trade and
- (d) his purpose is at least in part to advance his interest in competing with the other.

*Id.* (quoting Restatement (Second) of Torts, § 768(1)). See also *Brokerage Concepts*, 140 F.3d at 530 (stating that Pennsylvania courts are guided by the Restatement of Torts in the area of tortious interference); and *Glberman*, 1999 WL 98588, at \*5 (same). The Pennsylvania Superior Court has recognized the policy underlying the competitor's privilege:

One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. In order not to hamper competition unduly, the rule stated in this Section [768] entitles one not only to seek to divert business from his competitors generally but also from a particular competitor. And he may seek to do so directly by express inducement as well as indirectly by attractive offers of his own goods and services.

*Gilbert v. Otterson*, 379 Pa. Super. 481, 489, 550 A.2d 550, 554 (1988) (quoting comment b to Restatement (Second) of Torts, § 768), *app. denied*, 522 Pa. 596, 562 A.2d 320 (1989).

As explained by the Third Circuit, "[t]he Pennsylvania Supreme Court has yet to provide a definition of 'wrongful means,' and thus we turn to the Restatement for guidance." *Brokerage Concepts*, 140 F.3d at 531. In defining what kind of means are wrongful, comment e to Section 768 provides, in part, as follows:

The predatory means discussed in § 767, Comment C, *physical violence, fraud, civil suits and criminal prosecutions*, are all wrongful in the situation covered by this Section.

*Id.* (emphasis added). As a result of these requirements, several courts have required a plaintiff to assert independently actionable conduct in order to assert a cause of action for tortious interference with prospective contractual relations. *See, e.g., DP-Tek, Inc. v. AT&T Global Info. Sol'ns Co.*, 100 F.3d 828, 833 (10th Cir. 1996) (“wrongful means” requires independently actionable conduct); *Amerinet Inc. v. Xerox Corp.*, 972 F.2d 1483, 1507 (8th Cir. 1992) (“Wrongful means,’ as those words are used in Restatement Section 768[1](b), “refer[] to means which are intrinsically wrongful -- that is, conduct which is itself capable of forming the basis of liability of the actor.”), *cert. denied*, 506 U.S. 1080 (1993); *Glaberman*, 1999 WL 98588, at \*5 (dismissing plaintiff’s claim for tortious interference with prospective contractual relations where plaintiff had not alleged “independently-actionable conduct required to support a claim for tortious interference against a business competitor.”).<sup>9/</sup>

The competitor’s privilege exists to protect and promote legitimate business concerns. As explained by the Third Circuit, “[o]ur cases accord substantial deference to defendants whose conduct, despite its conflict with plaintiff’s interest, protects an existing legitimate business

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<sup>9/</sup> *See also San Francisco Design Ctr. Assocs. v. Portman Cos.*, 41 Cal.App.4th 29, 50 Cal. Rptr.2d 716, 723 (1995) (“In order to defeat the privilege the defendant’s conduct must be . . . independently actionable”), *review dismissed*, 50 Cal. Rptr.2d 698, 911 P.2d 1373 (1996); *Conoco Inc. v. Inman Oil Co.*, 774 F.2d 895, 907 (8th Cir. 1985) (same); *Briner Elec. Co. v. Sachs Elec. Co.*, 680 S.W.2d 737, 741 (Mo. Ct. App. 1984) (“competitive conduct which is neither illegal nor independently actionable does not become actionable because it interferes with another’s prospective contractual relations” and “the weight of authority supports the conclusion that the wrongful means tests of section 768 requires independently actionable conduct.”).

concern.” *Windsor Secs., Inc. v. Hartford Life Ins. Co.*, 986 F.2d 655, 665 (3d Cir. 1993).<sup>10/</sup> In addition:

[W]here an actor is motivated by a genuine desire to protect legitimate business interests, this factor weighs heavily against finding an improper interference. These cases also make clear the *social interest in allowing an actor freedom to protect its legitimate business interests*. See Restatement of Torts (Second) § 767(e).

*Id.* (emphasis added). Additionally, “[c]ompetition also provides defendant’s justification for interfering with plaintiff’s at-will contracts. While one cannot interfere as a matter of malice or spite with an at-will contract, it is altogether legitimate for a provider of services to persuade potential purchasers of those services that it can do the superior job.” *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59, 62 (4th Cir. 1993).

With respect to the competitor’s privilege, the *Glberman* case is particularly instructive in analyzing “wrongful means” between competitors. In *Glberman*, plaintiff and defendant entered into a contract in which plaintiff agreed to buy Christmas decorations from defendant and then sold them at a higher price to plaintiff’s customers. *Id.* at \*1. After receiving the order, defendant shipped the products to the customer, but billed the plaintiff not the customer. The plaintiff then billed his customers, who were not aware of the prices paid to the defendant, and therefore unaware of the extent of the “middleman” mark-up. *Id.* After the contract between the plaintiff and defendant expired, plaintiff alleged that defendant contacted plaintiff’s customers,

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<sup>10/</sup> As noted by the *Windsor* court, “[m]ost courts have not infringed on the freedom to keep or to breach a contract traditionally afforded a party by the common law and endorsed by the notion of efficient breach.” 986 F.2d at 664 (citing 3 E. Allan Farnsworth, *Contracts*, § 12.8, at 194-95 (2d ed. 1990)).

informing the customers that they could save 10% to 20% by purchasing the same goods directly from defendant. *Id.* at \*2. On defendant's motion to dismiss plaintiff's claim for tortious interference with prospective business relationships, the Court found that "[i]t is clear on the face of the complaint that defendant was acting as a competitor with plaintiff and seeking to advance its own competitive interests when it contacted plaintiff's customers and attempted to sell its products to them directly." *Id.* at \*5. The Court found that, even though defendant's conduct may have humiliated plaintiff and hurt his business (and defendant acted in "such a way as to intentionally" cause plaintiff embarrassment), this behavior "simply does not constitute the sort of criminal, fraudulent or independently-actionable conduct required to support a claim for tortious interference against a business competitor." *Id.*

Plaintiffs do not allege that PP&L engaged in independently actionable conduct. Nor do they allege that PP&L engaged in "wrongful means," such as physical violence, fraud, civil suits or criminal prosecutions. Viewing the Complaint in a light most favorable to Plaintiffs, the harm alleged amounts at most to a disclosure to PP&L's customers of the risks associated with the interruptible rate, at most affecting Plaintiffs' ability to persuade certain customers to go on or stay on the interruptible rate. Compl., ¶¶ 30-31. This is not the type of "wrongful means" required to support a claim for tortious interference with prospective contractual relations. As in *Glberman*, 1999 WL 98588, \*5, "[i]t is clear on the face of the complaint that defendant was acting as a competitor with plaintiff[s] and seeking to advance its own competitive interests[.]"

Given that the Complaint establishes that PP&L is Plaintiffs' business competitor and fails to allege facts sufficient to overcome the competitor's privilege, PP&L respectfully requests this Court to sustain PP&L's demurrer to Plaintiffs' claims for tortious interference with

Plaintiffs' prospective contractual relations.

3. Plaintiffs fail to state a claim for punitive damages because Plaintiffs' underlying tort claims fail.

In the Complaint, Plaintiffs also seek punitive damages against PP&L. Compl., ¶ 39. As discussed above, Plaintiffs' claims for tortious interference with existing and prospective contractual relations fail. It is axiomatic that a claim for punitive damages arises out of the underlying cause of action, and therefore, absent a viable cause of action, an independent claim of damages cannot stand. *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 101, 555 A.2d 800, 802 (1989). Therefore, Plaintiffs have no valid claim for punitive damages.

Alternatively, even if Plaintiffs' tort claims could survive PP&L's demurrers, Plaintiffs have not alleged facts sufficient to demonstrate outrageous conduct, evil motive or reckless indifference on the part of PP&L. Pennsylvania law makes clear that punitive damages may only be awarded for tortious conduct that is outrageous because of defendant's evil motive or reckless indifference to the rights of others. "Punitive damages are proper only if an actor's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others." *Costa v. Roxborough Mem. Hosp.*, 708 A.2d 490, 497 (Pa. Super.), *app. denied*, 556 Pa. 691, 727 A.2d 1120 (1998). Where the complaint fails to allege facts sufficient to support a finding of outrageous conduct, evil motive, or reckless indifference on the part of a defendant, the court should sustain a preliminary objection to plaintiffs' claim for punitive damages. *Id.*

In *Costa*, the Superior Court affirmed the trial court's decision to sustain the defendant's preliminary objection to the plaintiff's claim for punitive damages, holding as follows: "Taking as true all of the Appellant's pleaded facts as true, there is absolutely no evidence indicating that

Appellee [acted] willfully or recklessly.... Therefore, we find that the court properly sustained Appellee's preliminary objections." *Id.* The Superior Court affirmed the trial court's decision to dismiss plaintiff's claim for punitive damages despite plaintiff's conclusory allegations that defendant acted with "wanton disregard." *Id.* Similarly, in *Richette v. Philadelphia Magazine*, No. 96-802, 1996 WL 756953 (Jan. 23, 1996 Phila. C.C.P.) (attached hereto as Ex. D), the Court stated:

In the case at bar, we find that the allegations contained in Plaintiff's complaint do not contain the requisite facts amounting to outrageous conduct, ill will and actual malice. Since punitive damages are not recoverable under the facts averred in the complaint, Defendants' preliminary objections are granted.

*Id.* at \*5.

Plaintiffs simply do not allege sufficient facts to show that PP&L engaged in any outrageous conduct or acted with an evil motive or ill will towards Plaintiffs.<sup>11/</sup> Even when viewed in a light most favorable to Plaintiffs, Plaintiffs allege that PP&L competed with Plaintiffs and defended itself against Plaintiffs' assertions that PP&L had failed to fulfill its obligations to its customers. Such claims, based on ordinary competition between two businesses, do not meet the standard for an award of punitive damages. Accordingly, the Court should sustain PP&L's Preliminary Objections to Plaintiffs' claim for punitive damages.

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<sup>11/</sup> In sole support of its claim for punitive damages, Plaintiffs aver that "[g]iven the . . . outrageousness of its activities," the Court should award Plaintiffs punitive damages. Compl., ¶ 39. For purposes of these Preliminary Objections, of course, a court may not consider as true the pleading's conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion. *Giffin*, 151 Pa. Commw. at 290, 616 A.2d at 1072.

B. The Court Should Grant PP&L's Preliminary Objection And Motion To Strike Due To Plaintiffs' Failure To Join In Separate Counts Their Separate Causes Of Action.

PP&L also has asserted that Plaintiffs violated Pa. R. Civ. P. 1020(d)(1) by failing to join in separate counts their separate causes of action. *See* Preliminary Objections, IV. If this Court does not grant PP&L's demurrers, then it should, at a minimum, strike Plaintiffs' Complaint for failing to comply with Pa. R. Civ. P. 1020(d)(1).

Plaintiffs attempt to assert two separate causes of action: (1) tortious interference with *existing* contractual relations (Compl., ¶¶ 22-26); and (2) tortious interference with *prospective* contractual relations, including the continuation of existing terminable-at-will contracts (*id.*, ¶¶ 36-37). Under Pennsylvania law, tortious interference with *existing* contractual relations is a different cause of action, with different elements and subject to different defenses, than tortious interference with *prospective* contractual relations. *Thompson*, 488 Pa. at 208, 412 A.2d at 470-71. *See also Glaberman*, 1999 WL 98588, \*4 n.10 (recognizing that the distinction between the two causes of action is significant under Pennsylvania law).

Pa. R. Civ. P. 1020(d)(1) expressly requires:

If a transaction or occurrence gives rise to more than one cause of action against the same person, including causes of action in the alternative, they *shall be* joined in separate counts in the action against any such person.

(Emphasis added.)

Thus, Plaintiffs have not complied with Pa. R. Civ. P. 1020(d)(1). Pursuant to Pa. R. Civ. P. 1028(a)(2), this Court should strike the Complaint.

C. The Court Should Grant PP&L's Preliminary Objection And Motion To Strike Due To Plaintiffs' Failure To Attach The Written Contracts At Issue.

PP&L also filed a preliminary objection contending that Plaintiffs failed to comply with Pa. R. Civ. P. 1019(h) because they did not attach the written contracts at issue in their Complaint. *See* Preliminary Objections, V. If this Court does not grant PP&L's demurrers, then it should, at a minimum, strike Plaintiffs' Complaint for violating Pa. R. Civ. P. 1019(h), which provides as follows:

A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

*See also Adamo v. Cini*, 656 A.2d 576, 579 (Pa. Commw. 1995) (stating that “[o]rdinarily a complaint should be stricken for failure to attach an essential document.”); *and* 4 Std. Pennsylvania Practice 2d, Complaints, Generally, § 21:68.

Plaintiffs allege that they “provide utility consulting services pursuant to ‘shared savings’ written contracts with their customers.” Compl., ¶ 3; *see id.*, ¶ 22 (further identifying with specificity certain customers with whom Plaintiffs allege PP&L tortiously interfered with those written contracts). Although Plaintiffs’ claims rely on the existence of contractual relations, as set forth in their existing contracts with their customers, Plaintiffs have failed to attach a copy of those contracts. Therefore, this Court should strike their Complaint for failure to comply with Pa. R. Civ. P. 1019(h).

D. The Court Should Grant PP&L's Preliminary Objection And Motion To Strike Due To Plaintiffs' Inclusion Of Scandalous And Impertinent Matter.

For the reasons set forth above, Plaintiffs' Complaint fails to state a cause of action for tortious interference with existing or prospective contractual relations. However, if this Court does not dismiss Plaintiffs' Complaint in its entirety, then it should grant PP&L's preliminary objection to Plaintiffs' inclusion of scandalous and impertinent matter directed at the personal activities of two PP&L employees, Oliver Kasper and Larry Collins. See Preliminary Objections, VI; and Compl., ¶¶ 17 and 20.

Pa. R. Civ. P. 1028(a)(2) prohibits the "inclusion of scandalous and impertinent matter." For allegations to be scandalous or impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action. *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108 (Pa. Commw. 1998). In addition, some courts require the party moving to strike the allegations to demonstrate prejudice. See, e.g., *Commonwealth v. Hartford Acc. & Indem. Co.*, 40 Pa. Commw. 133, 137, 396 A.2d 885, 888 (1979).

A review of the Complaint's allegations directed to Messrs. Kasper and Collins reveals that the allegations are immaterial and inappropriate. For example, the allegation directed to Mr. Kasper is that he has "moonlighted as a utility consultant in competition with Plaintiffs while still an employee of PP&L." *Id.*, ¶ 17. With respect to Mr. Collins, the Complaint alleges that Mr. Collins personally contacted Plaintiff CUC and misrepresented himself in order to gain information about CUC's utility consulting business. *Id.*, ¶ 20.

Plaintiffs do not allege that the alleged individual conduct of Messrs. Kasper and Collins was sanctioned by PP&L. In fact, the allegation that Mr. Kasper "moonlighted as a utility

consultant” (emphasis added), by its very nature, reflects that he was not acting within the scope of his employment at PP&L. *See Kinloch v. Tonsey*, 325 Pa. Super. 476, 482-83, 473 A.2d 167, 170 (1984) (describing “moonlighting” as outside employment conducted during periods and in locations unconnected to regular employment); and *Blacks Law Dictionary*, 6th ed. (1990), at 1008 (defining “moonlighting” as “[w]orking at another job after hours of regular job.”). In addition, the individual activities of Messrs. Kasper and Collins in no manner manifest or support PP&L’s alleged interference with Plaintiffs’ contracts with their customers. In short, there is no nexus between the alleged activities of these PP&L employees and PP&L’s alleged tortious interference. Moreover, these allegations are prejudicial to the PP&L employees named and to PP&L. The allegations of the Complaint may be used to define the scope of discovery. As a result, PP&L will be prejudiced in defending against these irrelevant factual assertions.

Because the allegations directed to the personal activities of Messrs. Kasper and Collins neither relate to nor support Plaintiffs’ purported claims for tortious interference by PP&L with Plaintiffs’ contractual relations, this Court should sustain PP&L’s Preliminary Objection and strike this scandalous and impertinent matter.

E. The Court Should Grant PP&L’s Preliminary Objection And Motion To Strike Based Upon The Insufficient Specificity Of The Complaint.

As set forth above, Plaintiffs fail to state a cause of action for tortious interference with existing and/or prospective contractual relations. However, if this Court does not dismiss the Complaint in its entirety, then it should grant PP&L’s motion to strike Plaintiffs’ allegations directed to unspecified customers. *See Preliminary Objections, VII.*

Plaintiffs’ Complaint fails to provide sufficient specificity regarding the identity of the

unidentified customers with whom Plaintiffs contend PP&L interfered. *See, e.g.*, Compl., ¶¶ 26, 27 and 37. Through their filing of writs of summons in August 1997, *see* Docket Nos. 97-06580 and 97-07178, and the pendency of those matters for more than two years, as well as their participation in litigation against at least four of their customers (Compl., ¶¶ 24-25), and their participation in proceedings before the Pennsylvania Public Utility Commission involving other customers (including Plaintiffs' retention of counsel to represent the other customers in said proceedings) (*id.*, ¶ 30), Plaintiffs have had the opportunity to pursue discovery directed to these allegations. Yet they still attempt to proceed with claims against PP&L for tortious interference with *unidentified* contractual relations.

With respect to such *unidentified* customers, Plaintiffs do not and cannot establish that there was a "reasonable likelihood or probability" that such customers would have become Plaintiffs' customers even in the absence of PP&L's alleged conduct. PP&L has no ability to defend itself against claims that it interfered with unknown and/or unidentified customers. And Plaintiffs should not be permitted to pursue unlimited discovery about PP&L's communications with all other customers with whom Plaintiffs may have sought to establish relations.

Accordingly, PP&L respectfully requests that the Court sustain its preliminary objection and strike those allegations directed to Plaintiffs' unidentified customers. In the alternative, PP&L requests that the Court direct Plaintiffs to provide sufficient specificity relating to the identity of any customers beyond those already identified in the Complaint.

VI. CONCLUSION

For the reasons stated above, defendant PP&L respectfully requests that this Court sustain its Preliminary Objections and dismiss Plaintiffs' Complaint with prejudice.

DATED: February 9, 2000

Respectfully submitted,



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Glen R. Stuart  
Bryant D. Lim  
MORGAN, LEWIS & BOCKIUS LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
(215) 963-5883/5165

Attorneys for Defendant PP&L, Inc.

OF COUNSEL:

Augustus C. Martin  
PP&L, Inc.  
Two North Ninth Street  
Allentown, PA 18101



**C&K Enterprises Inc.**  
v.  
**Dallas Area Municipal Authority**

**No. 4670-C of 1991.**

Court of Common Pleas of Pennsylvania, Luzerne  
County.

August 12, 1992

Preliminary objections to complaint.

**MUNICIPAL CORPORATIONS** ⇔ 226  
268k226

Municipalities are empowered by the Pennsylvania Borough Code, 53 P.S. § 46202, and the Second Class Township Code, 53 P.S. § 65708, to enact ordinances to regulate, transport and dispose of solid waste within their boundaries, and may monopolize and control the business of waste handling even if doing so terminates contracts of private competing waste haulers.

Philip T. Medico Jr, for plaintiff C&K Enterprises Inc. and Searles Sanitation.

Albert J. Flora, for plaintiff Dave Wojciechowicz, t/a Dave's Sanitation.

David Heisler and Robert N. Opel II, for defendant Kingston Township.

Frank Townend, for defendant Dallas Township.

Benjamin R. Jones III, for defendant Dallas Area Municipal Authority.

Theodore L. Krohn and John S. Fine Jr, for defendant Dallas Borough.

TOOLE, P.J.

This matter comes before the court on preliminary objections by defendant, Dallas Area Municipal Authority, Kingston Township, Kingston Township Board of Supervisors, Dallas Township, Dallas Township Board of Supervisors, Dallas Borough, (township defendants), to the complaint filed by plaintiffs, C&K Enterprises Inc., Searles Sanitation and Dave Wojciechowicz, t/a Dave's Sanitation (plaintiffs). [FN1] Plaintiffs' complaint alleges claims for tortious interference of contract and

prospective contracts, deprivation of substantive due process under 42 U.S.C. §1983, and Article 1 and 17 of the Pennsylvania Constitution and deprivation of procedural due process under 42 U.S.C. §1983 and Article 1, section II of the Pennsylvania Constitution. Timely objections and briefs were filed. Oral argument was entertained by the court and the matter is ripe for resolution at this time.

FN1. Also named as defendants were the individual persons who comprise each of the Board of Supervisors and the DAMA Commission.

Plaintiffs' complaint arises out of the actions taken by each township defendant to enact ordinances which regulate the collection, transportation and disposal of solid waste in each of the municipalities. Prior to the ordinances taking effect on July 1, 1991, each resident of these municipalities was free to arrange for the disposal of their waste.

Plaintiffs were all licensed businesses in the solid waste disposal business and had each entered into oral agreements with residents to dispose of the waste. The agreements were for one calendar year periods with practically assured renewals. Simply stated, after the ordinance went into effect, their business with residents in the municipalities terminated completely.

Upon enacting the ordinances, the municipalities named defendant DAMA as their agent to properly carry out the terms of the ordinances. Defendant DAMA then contracted with Danella Environmental Technologies Inc., to actually collect, transport and dispose of the solid waste. [FN2] Since the ordinances had exclusivity provisions, under these terms, it was impossible for individual residents to use any other waste hauler other than through defendant DAMA.

FN2. It is not clear how Danella was awarded the duties as waste hauler for defendant DAMA or whether or not plaintiffs were given the opportunity to bid on the contract. Danella, however, is not a party to this lawsuit and therefore, proper procedure is presumed.

As a result of the termination of their agreements with the residents, plaintiffs filed this suit alleging wrongful interference with existing or prospective contracts and that they have been deprived of their

(Publication page references are not available for this document.)

ability to earn a living and run a business. Specifically, plaintiffs argue that the actions of the township defendants constituted an invalid exercise of police power under color of state law and that they have been deprived of the rights of liberty to contract and engage in lawful occupation.

Defendants demur to and ask that we dismiss the complaint on the basis that the allegations fail to state any cause of action upon which relief can be granted.

The law in Pennsylvania when considering the preliminary objections in the nature of a demurrer is well known. A demurrer should only be sustained in those cases which are free and clear from doubt. *Legman v. Scranton School District*, 432 Pa. 343, 247 A.2d 566 (1968). Where any doubt exists as to whether or not preliminary objections should be sustained, that doubt should be resolved by refusing to sustain the objections. *Commonwealth v. Creamer*, 464 Pa. 2, 345 A.2d 702 (1975). To sustain a demurrer it must appear with certainty that upon the facts alleged the law will not permit recovery by plaintiffs. *Creamer*, *supra*.

Preliminary objections in the nature of a demurrer admit as true all well pleaded material, factual averments and inferences fairly deducible therefrom, but no conclusions of law. *Greenspan v. United Services Auto Assn.*, 324 Pa. Super. 315, 471 A.2d 856 (1984). Further, if a demurrer is sustained, the court must evaluate whether or not there is a reasonable possibility that the plaintiffs can amend the complaint to cure the deficiency. If so, the plaintiffs must be given that opportunity. *Harley Davidson Motor Co. Inc. v. Hartman*, 296 Pa. Super. 37,442 A.2d 284 (1982). With the above as our guide, we shall evaluate defendants' proposals. Defendants initially demur to Count I of plaintiffs' complaint claiming "tortious interference of contract and prospective contracts." The elements of tortious interference with contractual relations are set out in Restatement 2d of Torts, §766. They are: (1) an intentional or improper interfering with a performance of a contract; (2) between another and a third person; (3) inducing or otherwise causing the third person not to perform the contract; and (4) pecuniary loss. The issue before us is the propriety of defendants' actions or, as stated by the defendants, the absence of justification or privilege on the part of defendants.

A review of the case law cited in the briefs convinces us that municipalities do have the right to regulate, transport and dispose of the solid waste within their boundaries. [FN3] Clearly, the process of enacting the ordinances and entering into the agreements with defendant DAMA and Danella is not in and of itself grounds for the lawsuit filed by plaintiffs. Therefore, it is necessary to carefully review the allegations of the complaint to determine if in fact plaintiffs have factually pled the requirements of tortious interference of contract and prospective contracts. In so doing, we are of the opinion that plaintiffs have not met their burden on this issue.

FN3. See *C.E. Refuse Removal Service v. South Hanover Township*, 90 Dauphin Leg. J. 359 (1969); *Borough of Coopersburg v. Cliff*, 16 D&C2d 576 (1958); and *Clearfield Borough v. Rider*, 17 Pa. D. & C. 197 (1931)

Plaintiffs' complaint alleges only that through the adoption and enforcement of the aforesaid ordinance, intentionally and willfully engaged in misconduct with actual malice, by intentionally and improperly interfering with the existing contracts and prospective contractual relations between plaintiffs and adult residents and taxpayers .....

Further, allegations again state only that the conduct of the township defendants acted willfully, intentionally, and with actual malice. [FN4] The allegations are conspicuously devoid, however, of factual averments to support the legal conclusions that are alleged. Nowhere in their complaint do plaintiffs allege the manner of impropriety conducted by the township defendants. Since the law does not prohibit the enactment of the ordinances, the lack of factual averments is sufficient to cause this court to agree with defendants that the demurrer to Count I of plaintiffs' complaint should be sustained.

FN4. Plaintiffs alleged the foregoing in several paragraphs and phrased the wording in several ways.

To further bolster defendants' arguments and confirm our decision that the demurrer to Count I should be sustained, we take note of the language of the ordinance which is attached to plaintiffs' complaint. [FN5] Clearly, the regulation of the waste by the township defendants bears a real and

(Publication page references are not available for this document.)

substantial relationship to the health, safety and welfare of the residents. Additionally, the purpose of the ordinance was identified as being, in part, to handle the waste in the most efficient and economically sound manner, to reduce the volume of garbage and solid waste disposed of within the municipality, and to conserve natural resources and provide a clear and healthy environment to the residents. Plaintiffs have not alleged any facts in their complaint to counter the legitimate goals of the township to the residents. Plaintiffs have not alleged any facts in their complaint to counter the legitimate goals of the township defendants. Therefore, defendants' demurrer to Count 1, tortious interference with contracts and prospective contracts, is hereby sustained.

FN5. Plaintiffs have attached the complete ordinance of the Borough of Dallas. They have informed the court in paragraph 16 of the complaint, however, that each municipal ordinance is identical.

Defendants demur to the remaining counts of the complaint relating to the deprivation of procedural and substantive due process. Specifically, defendants argue that the demurrer should be sustained in that plaintiffs have not been deprived of a constitutionally protected property right. Defendants' position is that the state of the law allows the township defendants to enact ordinances which monopolize and control the collections, transportation and disposal of residential waste. Further, in so doing, the fact that plaintiffs cannot continue with contracts in place does not rise to the level of unconstitutional impairment of contractual obligations.

Plaintiffs correctly highlight the lack of Pennsylvania case law directly on point. It incorrectly argues, however, that the lack of case law restricts this court's ability to sustain the demurrer. We believe the statutory law and the decisional law cited herein supports and sustains the actions of defendants. The Pennsylvania Borough Code as well as the Pennsylvania Second Class Township Code, clearly grant the township defendants' authority for the ordinances enacted. [FN6] A comparison of the relevant Code sections with the ordinances reveals that the township defendants did not overstep the authority granted to them.

FN6. 53 P.S. §46202 and 53 P.S. §65708 respectively. With respect to defendant DAMA, see the Pennsylvania Municipal Authorities Act, 53 P.S. §306.

Although it is our opinion that the minimal case law coupled with legislative acts granting waste handling powers to the township defendants would support sustaining the demurrer, we cannot ignore the case law from other jurisdictions. Foremost, we find persuasive the U.S. Supreme Court cases cited by defendants, *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), and *Gardner v. Michigan*, 199 U.S. 325 (1905), long ago established that municipalities can monopolize and control the business of waste handling, even if doing so terminates the competition and contracts of private waste haulers. Those cases unequivocally addressed the issue of due process rights of private haulers by holding that municipal monopolies of the garbage industry is not regarded as a taking of private property and substantive due process does not protect the property rights of garbage collectors. *Gardner*, supra, 199 U.S. at 333. These cases have continued to be the law.

Plaintiffs' complaint does not contain any allegations nor its brief any argument prompting us to disregard these enunciations by the highest court of the land.

In reaching our decision, we have carefully considered the allegations in the plaintiffs' complaint as well as applicable statutory and decisional law. Our decision then has not been reached lightly. Allowing citizens to have their day in court has become a cornerstone of our society. We cannot, however, ignore the rights of defendants by allowing this matter to continue as it is pleaded. Plaintiffs will be granted an opportunity, if possible, to correct the deficiencies. Therefore, we enter the following

#### ORDER

It is hereby ordered and decreed that defendants' demurrer is sustained.

Plaintiffs shall have 30 days to file an amended complaint.

END OF DOCUMENT



Charles Q. BUCKWALTER, Jr., Plaintiff,  
v.  
Vernon PARKER, Defendant.

No. CIV. 96-CV-4795.

United States District Court, E.D. Pennsylvania.

March 25, 1998.

Donald P. Russo, Allentown, for Charles Q. Buckwalter, Jr., Plaintiff.

Steven R. Wall, Michael S. Burkhardt, Morgan, Lewis & Bockius, Phila, for ICI Explosives USA Inc., ICI Americas Inc., Vernon Parker, Defendants.

#### MEMORANDUM AND ORDER

VAN ANTWERPEN, J.

#### I. INTRODUCTION [FN1]

FN1. This memorandum assumes knowledge of the facts of this case which are fully discussed in *ICI v. Buckwalter Explosives USA, Inc.*, 1998 WL 54355 (E.D.Pa. Jan.8, 1998).

\*1 Defendant Vernon Parker has filed a motion to reconsider our prior order denying summary judgment as to the intentional interference with contract complaint leveled against him by the Plaintiff. For the reasons that follow we will grant the Defendant the relief which he seeks.

On January 8, 1997, this court dismissed every count of the Plaintiff's complaint, except one count of intentional interference of contractual relations against Defendant Vernon Parker. *Buckwalter v. ICI Explosives USA, Inc.*, 1998 WL 54355, \*1 (E.D.Pa. Jan.8, 1998). In his initial motion for summary judgment, Defendant Parker argued that he could not be liable, as a matter of law, for interfering with Plaintiff's employment relationship because Plaintiff was an at-will employee. Defendant, however, presented no case-law to support this position. We therefore asked the parties to re-brief the issue, focusing their attention on matters of fact. *Id.* at \*19-20. The parties submitted their briefs, and on February 27, 1998,

we held that, though we doubted the merits of the Plaintiff's case, the Defendant had not met its burden of showing that there were no issues of material fact and that the Plaintiff was entitled to take his case before a jury. February 27, 1998 Order.

On March 5, 1998, the Defendant filed a motion to reconsider our February 27 Order denying summary judgment. Plaintiff has directed our attention to *Hennessy v. Santiago*, --- A.2d ---, 1998 WL 67586, \*1 (Pa.Super.Feb.20, 1998), a Pennsylvania Superior Court case that was decided on February 20, 1998--after Plaintiff had filed both of his memorandums of law discussing his motion for summary judgment. This case directly supports Defendant's argument that Plaintiff cannot sue the Defendant for intentional interference with contractual relationships because the Plaintiff was an at-will employee. For the reasons discussed below, we will reconsider our prior memorandum and orders in light of *Hennessy* and dismiss the Plaintiff's only remaining claim against Defendant Vernon Parker.

#### II. DISCUSSION

##### A. We Will Reconsider Our Prior Memorandum and Orders in Light of *Hennessy*

The court in *Hennessy*, 1998 WL 67586 at \*9, explicitly held that under Pennsylvania law, "an action for intentional interference with performance of a contract in the employment context applies only to interference with a prospective employment relationship, whether at-will or not, not a presently existing at-will employment relationship."

While we do not agree with the superior court's reasoning in *Hennessy* for the reasons already discussed in our January 8, 1998 Memorandum and Order in this case, *Buckwalter v. ICI Explosives USA, Inc.*, 1998 WL 54355, \*1, \*19 (E.D.Pa. Jan.8, 1998), we believe that *Hennessy* accurately predicts how the Pennsylvania Supreme Court would rule on this matter. As the Third Circuit has explained, "[i]n adjudicating a case under state law, we are not free to impose our own view of what state law should be; rather, we are to apply state law as interpreted by the state's highest court in an effort to predict how that court would decide the precise legal issues before us .... In the absence of

guidance from the state's highest court, we are to consider decisions of the state's intermediate appellate courts for assistance in predicting how the state's highest court would rule." *Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 486 (3d Cir.1997)(quoting *Gares v. Willingboro Township*, 90 F.3d 720, 725. (3d Cir.1996)). Thus, considering the absence of any appellate case-law stating otherwise, we predict that the rule set out in *Hennessy* would be adopted by the Pennsylvania Supreme Court. We will therefore reconsider our prior memorandum and orders in light of this recent decision.

**B. Under *Hennessy*, We Must Grant Defendant's Motion for Summary Judgment as a Matter of Law**

\*2 In our February 27, 1998 Order we stated that, despite our own serious doubts of the merits of the Plaintiff's case, we felt that there was sufficient evidence to entitle the Plaintiff to take its case before a jury on the issue of intentional interference with contractual relationships. We also noted that Plaintiff had (barely) provided sufficient evidence to survive summary judgment on the claim that Mr. Parker interfered with the Plaintiff's contract with ICI by moving the Plaintiff's job to Canada and taking actions to ensure that Plaintiff would not succeed Mr. Parker after the Defendant left the company. Plaintiff, however, cannot succeed, as a matter of law, on his claim that Defendant interfered with his then existing employment relationship with ICI since Plaintiff was an at-will employee and, under *Hennessy*, "an action for intentional interference with performance of a contract in the employment context applies only to interference with a prospective employment relationship, whether at-will or not, not a presently existing at-will employment relationship." 1998 WL 67586 at \*9.

Plaintiff tries to save his claim against Mr. Parker by arguing that Mr. Parker also interfered with the Plaintiff's prospective employment relationships by preventing Plaintiff's transfer to Dallas to work as an assistant to Mr. Brawner. However, Plaintiff fails to provide sufficient evidence from which a reasonable jury could find that Mr. Parker interfered with Plaintiff's prospective 1996 contract.

Indeed, the crux of Plaintiff's case against the Defendant is that Mr. Parker interfered with

Plaintiff's 1992 contract, not that Defendant interfered with the prospective 1996 contract. As Plaintiff himself admits, a "key component of the Plaintiff's interference claim is the allegation that Defendant Vernon Parker did not want the Plaintiff to take over his (Parker's) job because Parker intended to 'take the work with him,' so to speak, after he retired." Plaintiff's February 13, 1998 Supplemental Memorandum of Law ("Plaintiff's Supplemental Memorandum " at 5. Indeed, the grand majority of Plaintiff's Supplemental Memorandum, which sets out the facts which support Plaintiff's case, is devoted to proving that Defendant interfered with the 1992 contract.

Plaintiff, however, fails to provide evidence from which a jury could conclude that Mr. Parker interfered with the Plaintiff's prospective 1996 job in Dallas working for Mr. Brawner. At various points throughout the Supplemental Memorandum Plaintiff asserts that Mr. Parker sabotaged Plaintiff's prospective job working with Mr. Brawner. However, Plaintiff relies solely on assumptions and conjectures.

Plaintiff asserts that Mr. Brawner withdrew Plaintiff's offer after Mr. Brawner visited the U.K. where he met with Messrs. Hammersmith, Ransom & Holdsworth and that Mr. Holdsworth was the Defendant's supervisor. Plaintiff's Supplemental Memorandum at 15. Yet the mere fact that Mr. Brawner withdrew Plaintiff's offer some time after meeting with the Defendant's boss does not, in any way, prove that Mr. Parker interfered with the 1996 contract.

\*3 Plaintiff also asserts that Mr. Clinch, Mr. Brawner's supervisor, wrote a memorandum which stated that he agreed that Mr. Buckwalter should move to Dallas. Plaintiff states that "[i]n this document, Mr. Clinch ... approved the Plaintiff's move to the new position in Dallas. Nevertheless, this job never came about. Therefore the question must be asked: why? This is another jury question. If all the 'channels had been cleared[,] and the transfer ... approved ... then something must have happened to destroy the Plaintiff's chances before the position ever came to pass." Plaintiff's Supplemental Memorandum at 16. Plaintiff, however, presents no evidence that the "something that must have happened," was the interference of Mr. Parker. Again, Plaintiff is trying to make a

case based merely on his own assumptions.

Plaintiff also points to evidence that Mr. Parker was angry at the Plaintiff because of accusations made by the Plaintiff that the Defendant was planning on taking some of ICI's legal business with him when he moved to his new job at a British Law Firm. Plaintiff claims that "what impact all of this had on the Plaintiff's demise three months afterwards is certainly an issue to be looked at by the jury." Plaintiff's Supplemental Memorandum at 17. However, again while Plaintiff shows that Mr. Parker may have had a motive to sabotage Plaintiff's 1996 contract, Plaintiff presents no evidence that Vernon Parker actually did anything to interfere with the prospective 1996 contract.

Plaintiff also points to a 1995 memo, written by Mr. Brawner, which states that Mr. Brawner was "overwhelmed by the ferocity and the uniformity with which the ICI legal function has turned on one of its own that it has hired, rated highly over many years, and now wants to dump." Plaintiff's Supplemental Memorandum at 20. However, this "piece de resistance" (as the Plaintiff calls it) relates to the 1992 contract and not the proposed 1996 contract. Thus, this evidence (even had it named Mr. Parker directly) does not support Plaintiff's claim that the Defendant interfered with his prospective 1996 contract.

One of the reasons that the Plaintiff's job was ultimately withdrawn was that Plaintiff would have worked for Mr. Brawner and Mr. Brawner had decided to leave ICI. "It is the Plaintiff's position that Defendant Vernon Parker influenced the negotiations between Plaintiff and Brawner, and, as part and parcel of these interventions, Brawner became a casualty as well. A jury should be allowed to consider whether Brawner was 'forced to retire' (as intimated by Vernon Parker in his deposition) in order to stop the Plaintiff from getting the Dallas job." Plaintiff's Supplemental Memorandum at 22-23. However, though Plaintiff presents some evidence that Mr. Brawner's retirement may not have been entirely voluntary, again he provides no evidence that Mr. Parker did anything to force Mr. Brawner to retire.

\*4 Finally, Plaintiff points to a memorandum from Mr. Herlihy which states, "From what I have heard of Chuck Buckwalter, I have to question whether we

want him involved in ICI Explosives' issues in the manner which Joe Brawner appears to be contemplating ... shouldn't this be stopped?" Plaintiff's Supplemental Memorandum at 27. Plaintiff claims that the "inference arises, that Mr. Herlihy may have been receiving negative information about the Plaintiff from Defendant or from Defendant's boss, Fred Pearson." Yet again, Plaintiff has provided not one shred of evidence that Mr. Herlihy in fact received any negative information from the Defendant--this is just the Plaintiff's unsupported assumption.

Indeed, after close examination of the evidence offered by the Plaintiff, we find that there is no evidence from which a reasonable jury could conclude that Mr. Parker interfered with the Plaintiff's prospective 1996 contract. And, while there is evidence from which a jury might possibly be able to find that the Defendant interfered with Mr. Buckwalter's existing employment relationship by transferring the Plaintiff's job to Canada, under Hennessy, Plaintiff cannot succeed on this claim as a matter of law. We will therefore grant summary judgment and dismiss the intentional interference of contract claim against Mr. Parker.

### III. CONCLUSION

We will reconsider our January 8, 1998 Opinion and our February 27, 1998 Order in light of Hennessy. We conclude that, as a matter of law, Plaintiff cannot sue the Defendant for intentionally interfering with his employment with ICI as a patent attorney because, under Hennessy, a Defendant cannot interfere with an existing at-will employment relationship. We further find that Plaintiff's claim that Mr. Parker interfered with his prospective 1996 Dallas contract is not supported by any evidence from which a reasonable jury could find for the Plaintiff. We will therefore vacate our February 27, 1998 Order in this case and issue a new order dismissing the intentional interference with contract complaint against Defendant Vernon Parker.

An appropriate order follows.

### ORDER

AND NOW, this 25th day of March, 1998, upon consideration of Defendants' ICI Explosives USA, Inc., ICI Americas, Inc., Imperial Chemical

Industries, PLC, November 14, 1997 Motion for Summary Judgment and Supporting Memorandum of Law; Defendant Vernon Parker's November 14, 1997 Motion for Summary Judgment and Supporting Memorandum of Law; Plaintiff's Complaint; Plaintiff's December 2, 1997 Answer to and Memorandum of Law in Opposition to Motion for Summary Judgment Filed by Defendants ICI Explosives USA, Inc., ICI Americas, Inc., and Imperial Chemical Industries, PLC; Plaintiff's December 2, 1997 Answer to and Memorandum of Law in Opposition to Motion for Summary Judgment Filed by Defendant Vernon Parker; Defendant Vernon Parker's January 30, 1998 Supplemental Memorandum of Law in Support of Summary Judgment; Plaintiff's February 13, 1998 Supplemental Memorandum of Law Filed Pursuant to the Court's Preliminary Memorandum and Order Dated January 8, 1998; Defendant Vernon Parker's March 5, 1998 Motion and Memorandum of Law in Support of His Motion for Reconsideration; and Plaintiff's March 19, 1998 Memorandum of Law in Opposition to Defendant Vernon Parker's Motion for Reconsideration, it is hereby ORDERED consistent with the foregoing memorandum that:

- \*5 1. Defendant Vernon Parker's March 5, 1998 Motion for Reconsideration is GRANTED;
2. This court's February 27, 1998 Order denying Defendant Vernon Parker's November 14, 1997 Motion for Summary Judgment is VACATED;
3. Defendant Vernon Parker's November 14, 1997 Motion for Summary Judgment is GRANTED with respect to Count III of Plaintiff's Complaint charging Vernon Parker with Intentional Interference with Contractual Relationships;
4. The remaining counts of Plaintiff's complaint are DISMISSED against all Defendants pursuant to this court's January 8, 1998 Memorandum and Order;
5. Judgment is entered in favor of all Defendants and against the Plaintiff. This case is closed.

END OF DOCUMENT



GLABERMAN ASSOCIATES, INC., dba  
Christmas Promotions,

v.

J. KINDERMAN & SONS, dba Brite Star  
Manufacturing Company and Brite Star Hong  
Kong.

No. CIV. A. 98-3711.

United States District Court, E.D. Pennsylvania.

Feb. 25, 1999.

MEMORANDUM

ONEILL.

\*1 In this diversity action, plaintiff alleges breach of contract and a variety of commercial torts. [FN1] Before the Court is defendant's motion to dismiss the complaint for failure to state a claim upon which relief can be granted. See Fed.R.Civ.Proc. 12(b)(6). For the reasons set forth below, the motion will be granted.

FN1. Plaintiff filed suit in the United States District Court for the Eastern District of New York. On July 13, 1998, that Court, *inter alia*, granted defendant's motion to transfer venue to this Court. See Court's Memorandum and Order dated July 13, 1998 (Sifton, Chief Judge).

I.

In considering defendant's motion to dismiss, I accept as true the well-pleaded factual allegations in the complaint and construe them in the light most favorable to plaintiff. I may grant the motion only if I determine that plaintiff may not prevail under any set of facts that may be proven consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Jordan v. Fox, Rothchild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir.1994).

II.

The following facts are alleged in plaintiff's complaint. Plaintiff Glaberman Associates, Inc., [FN2] a New Jersey corporation owned by Sam Glaberman, sells Christmas decorations to retailers in the New York and New Jersey areas. Defendant

J. Kinderman & Sons, doing business as "Brite Star Manufacturing Company," ("Brite Star") is a Pennsylvania partnership that manufactures and imports Christmas decorations. (Compl. ¶¶ 1-3.) [FN3]

FN2. D/b/a "Christmas Promotions."

FN3. Defendant contends, and plaintiff has not disputed, that Kinderman & Sons is actually a Pennsylvania corporation. See Mem. and Order dated July 13, 1998, *supra*, at 2, note 1.

On February 1, 1996, Sam Glaberman and Brite Star entered into a written agreement that was to last through the 1996 calendar year. [FN4] It appears from the complaint that the parties undertook two different sorts of transactions pursuant to this agreement. First, Glaberman served as a sales representative for certain established Brite Star accounts in the New York area, for which he was paid by commission. Second, Glaberman made so-called "drop ship" sales of Brite Star products to his own established customers, who had not previously bought Brite Star products and/or had not been able to obtain credit from Brite Star to buy its products. (Compl. ¶¶ 5, 14, 17.) Pursuant to "drop ship" sales arrangements, which are customary in the Christmas decorations industry, the sales representative (Glaberman) buys decorations from the manufacturer (Brite Star) and sells them at a higher price to his own customers (retailers). Upon receiving an order, the manufacturer ships the products directly to the sales representative's customer but does not bill the customer. Rather, the manufacturer bills the sales representative, who then bills his customers, the retailers. Thus, Glaberman's drop ship customers did not know the prices he paid to Brite Star and therefore could not learn the amount of his "middleman" mark-up. (See Compl. ¶¶ 11-16.)

FN4. Plaintiff incorporates the sales agreement in his complaint, but only one page of the two page contract is attached to the complaint. The entire contract is attached as Exhibit A to Defendant's Supplemental Brief filed August 27, 1998.

The contract between Glaberman and Brite Star expired at the end of 1996 and was not renewed. Glaberman alleges that Brite Star failed to pay \$8,622.07 in commissions due him under this

contract, and sues in part to recover this sum. (Compl. ¶¶ 6-9.) Defendant does not challenge the legal sufficiency of this claim in its motion to dismiss.

\*2 The remainder of plaintiff's claims, which defendant does challenge, concern defendant's alleged conduct immediately following the termination of the parties' contract at the end of 1996. The complaint alleges in relevant part:

19. [After the relationship between plaintiff and defendant terminated] defendant Brite Star ... contacted the "drop ship" customers of Glaberman.

20. Defendant told customers of plaintiff, inter alia, that because Sam Glaberman no longer represented the defendants that the customers could save 10% to 20%. Defendant, Brite Star ... disclosed the prices paid by Glaberman to Brite Star to Glaberman's "drop ship" customers.

21. Defendant, by its aforesaid actions, caused Glaberman embarrassment, harm and damages and/or disparaged plaintiff Glaberman in the Christmas decorations trade....

These allegations are elaborated upon by Sam Glaberman in an affidavit, which I will consider as evidence of additional facts plaintiff might allege in support of its claims should it be granted leave to amend its complaint. According to the affidavit, defendant sent a letter to all plaintiff's drop ship customers stating that they could save 10-20% by buying direct from Brite Star. [FN5] Glaberman further states "on information and belief" that as a follow-up to the letter defendants' representatives

FN5. According to the affidavit, the letter stated:  
Please take notice that as of January 1, 1997 Sam Glaberman and Christmas Promotions no longer represent Brite Star Manufacturing Company.  
Buy direct and save 10% to 20%. Either Leon Vilinsky or John Sherow will be calling you for a February Toy Show appointment.  
Don't wait until late spring to review Christmas decorations. You'll miss early buy order discounts in February.  
Hope you had a good sell-through [sic]  
Regards,  
Sandy Kinderman Vice President  
Brite Star Mfg.

made statements to my drop ship accounts to the effect that I was over charging [sic] them, cheating

them, disclosed my cost prices to my drop ship customers and lowered Brite Stars quotations using exactly the same items I sold to specific drop ship customers to undercut my best prices, to make me look overpriced. Brite Star specifically told my customers what my cost prices were."

(Glaberman Aff. at 10-11.) As a result, plaintiff lost eighteen of his long-time drop ship customers and had to lower his prices to keep three others. (Id. at 11.)

Plaintiff claims that as a result of defendant's actions he has lost or will lose sales of \$1.5 million and profits of \$250,000. He seeks compensatory and punitive damages on a variety of contract and tort theories: (1) breach of contract; (2) breach of defendant's confidential relationship with plaintiff; (3) willful and malicious breach of contract; and (4) tortious interference with plaintiff's business relationships. Plaintiff has withdrawn a claim for unfair competition.

### III.

As an initial matter, I note that the parties disagree as to whether this action is governed by New York or Pennsylvania law. Because there is no conflict between New York and Pennsylvania law with regard to any of plaintiff's claims, I will not engage in a choice of law analysis. See *Williams v. Stone*, 109 F.3d 890, 893 (3rd Cir.1997); *Howard v. Clifton Hydraulic Press Co.*, 830 F.Supp. 708, 712 (E.D.N.Y.1993).

#### A.

Glaberman first alleges that Brite Star breached its contract with him "by disclosing information to plaintiff's customers that defendant was obligated to conceal." (Compl. at ¶ 25.) The information to which plaintiff apparently refers is his costs for Brite Star products. (See Compl. ¶ 20.) In other words, plaintiff claims that Brite Star is liable in contract for disclosing its own prices to potential customers.

\*3 These allegations fail to state a claim for breach of contract for the simple reason that they do not identify any contractual obligation that was breached. [FN6] According to plaintiff's allegations, the one and only written contract between the parties expired in 1996. Plaintiff does not identify, and I have not found, any provision in that contract

requiring that Brite Star keep the prices it charged Glaberman confidential after the parties' relationship expired. (See Def.Supp.Brief, Ex. A.) Nor, as to the drop ship sales, does plaintiff allege or attach to the complaint any contract requiring Brite Star to keep the prices it charged Glaberman secret after the sales were completed. [FN7]

FN6. To state a claim for breach of contract, plaintiff must, of course, allege both the existence and the breach of a contractual obligation. See, e.g. *Universal Marine Medical Supply, Inc. v. Lovecchio*, 1998 WL 354050, at \*7 (E.D.N.Y. June 30, 1998) (setting forth elements of breach of contract claim under New York law); *Rototherm Corp. v. Penn Linen & Uniform Service, Inc.*, 1997 WL 419627, at \*12 (E.D.Pa. July 3, 1997) (setting forth elements of claim under Pennsylvania law).

FN7. Plaintiff appears to argue that both industry custom and an oral promise made by Sandy Kinderman obliged defendant to keep the prices it charged Glaberman confidential from his "drop ship" customers. See Compl. ¶ 15 ("The custom and usage of 'drop ship' sales mandates that shipper's cost prices be kept confidential from drop ship customers. The customer is invoiced by the shipper, the shipper is invoiced by the manufacturer. The manufacturer ships directly to the customer"); *Glaberman Aff.* at 8-9 (stating that Sandy Kinderman "orally agreed that prices charged to Glaberman were to be kept confidential .... he assured me that my cost prices would be kept from my drop ship customers and the packing slips would block out any prices from being shown to the purchasers of the goods.") Plaintiff makes no allegations, however, from whence it could be inferred that such an obligation of confidentiality was to continue even after the shipper-manufacturer relationship had ended. To the contrary, the allegations suggest that such a duty existed only with regard to the actual performance of the "drop ship" sales arrangements.

In any event, any "industry custom" requiring that prices be kept secret even after the drop-ship sale is made and the manufacturer and shipper have terminated their relationship would be an unenforceable artificial restraint on trade. Cf. *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1257 (3d Cir.1985) ("[T]he information SI wishes to enjoin appellants from using (the identity of the vendors and the price of their merchandise) is already in the hands of third parties--i.e., the bearing

suppliers--who have every incentive, and every right, to disclose it to their customers. To prevent appellants from using this information would put an undue burden on the innocent vendors, as well as place an artificial constraint on the free market.")

In sum, there was no contractual obligation that defendant could have breached when it solicited plaintiff's customers in early 1997. Accordingly, plaintiff's claims for breach of contract and for "malicious and willful" breach of contract will be dismissed.

B.

Plaintiff next claims that Brite Star breached a confidential relationship by revealing his costs (i.e., Brite Star's prices) to his retail customers. (See Compl. ¶¶ 28-29.) A tort claim for breach of a confidential relationship may arise where the defendant owes the plaintiff a duty of confidentiality independent of a contract. See, e.g., *Morelli v. Leach & Garner Co.*, 1986 WL 3576, at \*2 (E.D.Pa. March 20, 1986) (applying Pennsylvania law and concluding that, where alleged breach of duty of confidentiality arose within scope of a contract, claim for breach had to be brought in contract rather than tort); *Feinman v. Parker*, 675 N.Y.S.2d 711, 712 (N.Y.App.Div.1998) (breach of a contract does not give rise to tort claim unless duty independent of contract is violated). In a commercial context, such a duty may arise if the relationship between the parties involves a trade secret. [FN8] Thus, the threshold issue presented by plaintiff's claim is "not whether there was a confidential relationship, but whether, in fact, there was a trade secret to be misappropriated." *Tyson Metal Products, Inc. v. McCann*, 376 Pa.Super. 461, 546 A.2d 119, 121 (Pa.Super.Ct.1988). If a trade secret was involved, the next question is whether it was improperly obtained or improperly used or disclosed by the defendant. See *Restatement (First) of Torts* § 757 (1939).

FN8. Aside from trade secret cases, claims concerning confidential relationships (or fiduciary duties) arise in both the New York and Pennsylvania case law in the context of unequal relationships in which one party relies upon or places trust in the greater strength or knowledge of another. See, e.g., *Drapeau v. Joy Technologies, Inc.*, 447 Pa.Super. 560, 670 A.2d 165, 172 (Pa.Super.Ct.1996)

(concurring opinion) (a confidential relationship is one "with trust and reliance on one side and a corresponding opportunity to abuse that trust for personal gain on the other") (citation omitted). The stronger or more knowledgeable party in such relationships may be required to act with the utmost good faith and in the best interests of the weaker party. See e.g., *Rebidas v. Murasko*, 450 Pa.Super. 546, 677 A.2d 331, 334 (Pa.Super.Ct.1996) (attorney trustee in confidential relationship with settlor of trust); *In the Matter of the Estate of Marie Antoinette*, 238 A.D.2d 762, 657 N.Y.S.2d 97, 98 (N.Y.App.Div.1997) (elderly decedent had been in confidential relationship with niece who persuaded her to change her will to niece's benefit); cf. *Societe Nationale D'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Brothers Int'l. Ltd.*, 674 N.Y.S.2d 648, 649 (N.Y.App.Div.1998) (confidential relationship may arise between parties to a business relationship); *Drapeau*, 670 A.2d at 172 (concurring opinion) (same).

No such relationship appears from plaintiff's allegations here. The parties are businesses which are experienced in their industry and undertook an arms-length contractual relationship. There is no basis in the complaint or in reason for finding that defendant was obligated to act in other than its own interests. To the extent plaintiff relied upon defendant to act otherwise, his reliance was unreasonable. See, e.g., *Gaidon v. Guardian Life Ins. Co. of Am.*, 679 N.Y.S.2d 611, 611 (N.Y.App.Div.1998) (even if confidential relationship exists, plaintiff must show his reliance was reasonable to recover for breach).

To determine whether certain information could constitute a trade secret, both New York and Pennsylvania courts look to § 757 of the Restatement (First) of Torts. See *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1256 (3d Cir.1985); *Tyson*, 546 A.2d at 121; *Hancock v. Essential Resources, Inc.*, 792 F.Supp. 924, 926 (S.D.N.Y.1992). The factors to be considered include: (1) to what extent the information is known outside of the owner's business; (2) whether the information is known by others involved in the owner's business; (3) the measures taken by the owner to keep the information secret; (4) the value of the information to the owner and its competitors; (5) the effort and money spent to develop or obtain the information; and (6) the difficulty with which the information could be obtained or duplicated by

others. Restatement (First) of Torts § 757 cmt b.

\*4 Plaintiff appears to allege that two types of confidential information were misappropriated by defendant: (1) the identities of his customers and (2) his costs (i.e., the prices he paid defendant for its products). As to the latter, I think it obvious that plaintiff's costs--i.e., Brite Star's prices-- could not constitute a trade secret. [FN9] Even if they could, however, the information was Brite Star's, not plaintiff's. Absent a contractual obligation not to do so, Brite Star was entitled to disclose its prices to whomever it wished.

FN9. Cf. *Tyson Metal Products, Inc. v. McCann*, 376 Pa.Super. 461, 546 A.2d 119, 121-122 (Pa.Super.Ct.1988) (refusing to enjoin plaintiff's former employee from revealing to a competitor the prices plaintiff paid a supplier and holding that the supplier's price list was not a trade secret); *SI Handling Systems, Inc. v. Heisley*, 753 F.2d 1244, 1257 (3d Cir.1985) (" 'Material sources and costs' are 'something that would be learned in any productive industry.' "), quoting *Van Products Co. v. General Welding and Fabricating Co.*, 419 Pa. 248, 213 A.2d 769, 776 (Pa.1965).

I also think it clear that the identities of plaintiff's customers is not information entitled to trade secret protection. There is nothing in plaintiff's allegations to suggest that his customers were not readily ascertainable to the extent they were not already known to Brite Star. (See Compl. ¶ 14 ("Sales made by "drop ship" were to customers of Glaberman's who were unable to obtain credit from Brite Star and/or were not prior customers of Brite Star.")) At any rate, plaintiff does not allege that he took any steps to keep these customers "secret," that they could have been kept secret, or that defendant could not have identified them easily through independent means. Thus, there are no allegations to support a claim that plaintiff's customer list could constitute a trade secret. Compare *Hancock v. Essential Resources, Inc.*, 792 F.Supp. 924, 926-27 (S.D.N.Y.1992) (noting "[g]enerally where the customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach" to customer information) (citation and inner quotations omitted).

Defendant's alleged disclosures of plaintiff's costs

and its solicitation of his customers did not involve any information entitled to trade secret protection. As plaintiff alleges no other facts that could give rise to a duty of confidentiality on defendant's part, his claim for breach of confidential relationship must be dismissed.

C.

Finally, plaintiff claims that defendant tortiously interfered with his prospective business relations when it "disclosed confidential and private information" to his customers "in such a way as to intentionally cause embarrassment, harm and injury" to his longstanding business relationships. (Compl. ¶¶ 43-44.) Again construing the complaint liberally in plaintiff's favor, these allegations appear to refer to defendant's conduct in disclosing his costs to his customers and stating that plaintiff was "overcharging" and "cheating" them. (See Comp. ¶ 20; Glaberman Aff. at 10-11.)

Both New York and Pennsylvania courts look to the Restatement (Second) of Torts § 768 to define the scope of the cause of action for tortious interference with prospective business relations. [FN10] See, e.g., *Hannex Corp. v. GMI, Inc.*, 140 F.3d 194, 205-206 (2d Cir.1998) (applying New York law); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 529-31 (3d Cir.1998) (applying Pennsylvania law). A claim for this tort will lie only where a defendant acted without privilege or justification and for the purpose of harming plaintiff's business relations. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 530 (3d Cir.1998), citing, inter alia, *Pelagotti v. Cohen*, 370 Pa.Super. 422, 536 A.2d 1337, 1343 (Pa.Super.Ct.1988); *Thompson Coal Company v. Pike Coal Company*, 488 Pa. 198, 412 A.2d 466, 470 (Pa.1979). In this case, defendant claims the competitor's privilege set forth in § 768 of the Restatement (Second) of Torts, which provides in relevant part:

FN10. Plaintiff's complaint merely asserts a claim for "tortious interference" with its "longstanding [business] relationships;" it does not specify whether the claim is one for interference with existing contracts or with only prospective or terminable-at-will contracts. The distinction is significant under both New York and Pennsylvania law, both of which follow the Restatement (Second) of Torts. Compare

§ 768(1), quoted in the text above, with § 768(2) ("The fact that one is a competitor of another for the business of a third person does not prevent his causing a breach of an existing contract with the other from being an improper interference if the contract is not terminable at will.")

It is clear from the complaint, however, that plaintiff can only be asserting a claim for improper interference with prospective business relations, as (1) there is no allegation that defendant interfered with any existing contract between plaintiff and one of its customers and (2) the allegations show that plaintiff's relationships with customers involved only prospective sales or terminable-at-will contracts for sales.

\*5 (1) One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if.

- (a) the relation concerns a matter involved in the competition between the actor and the other and
  - (b) the actor does not employ wrongful means and
  - (c) his action does not create or continue an unlawful restraint on trade and
  - (d) his purpose is at least in part to advance his interest in competing with the other.
- Restatement (Second) of Torts § 768 (1977).

It is clear on the face of the complaint that defendant was acting as a competitor with plaintiff and seeking to advance its own competitive interests when it contacted plaintiff's customers and attempted to sell its products to them directly. [FN11] Plaintiff does not contend otherwise. Accordingly, defendant may be held liable for tortious interference with plaintiff's prospective business relations only if it "employ[ed] wrongful means" in its competitive efforts.

FN11. See BLACKS' LAW DICTIONARY 284 (defining "competitors" as "persons endeavoring to do the same thing and each offering to perform the act, furnish the merchandise, or render the services better or cheaper than his rival"); see also Compl. ¶ 28 (defendant "exploit[ed] information about plaintiff's business for its own economic benefit"), ¶ 32-35 (stating claim, now withdrawn, that defendant unfairly competed with plaintiff).

"Wrongful means" as used in § 768 includes "physical violence, fraud, civil suits and criminal prosecutions," § 768, cmt. e, and may also include conduct that is independently actionable. See *Brokerage Concepts*, 140 F.3d at 531; *Hannex Corp.*, 140 F.3d at 206. No such conduct has been alleged by plaintiff. Plaintiff alleges that defendant disclosed the prices it charged plaintiff to his customers and did so in "such a way as to intentionally" cause plaintiff embarrassment. While this conduct may have humiliated plaintiff and hurt his business, it simply does not constitute the sort of criminal, fraudulent, or independently-actionable conduct required to support a claim for tortious interference against a business competitor. Accordingly, plaintiff's claim for tortious interference must be dismissed.

(2) the remainder of plaintiff's claims are DISMISSED.

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#### Conclusion

Plaintiff's only remaining claim is for the \$8,622.07 in commissions Brite Star allegedly owes it under the 1996 contract. As this claim does not meet the amount in controversy requirement for diversity jurisdiction, see 28 U.S.C. § 1332, I have discretion as to whether I will exercise supplemental jurisdiction over the claim pursuant to 28 U.S.C. § 1367(c). See *Shanaghan v. Cahill*, 58 F.3d 106 (4th Cir.1995); *Friedrich v. U.S. Computer Systems, Inc.*, 1996 WL 32888, at \*3-4 (E.D.Pa. Jan.22, 1996). Because I discern no compelling reason at this early stage of the litigation to exercise supplemental jurisdiction over the claim, I decline to do so. Accordingly, Count I will be dismissed without prejudice. [FN12]

FN12. The attention of plaintiff's counsel is directed to 42 Pa.C.S.A. § 5103(b).

#### ORDER

AND NOW, this day of February, 1999, upon consideration of defendants' motion to dismiss the complaint for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) and the parties' filings related thereto, it is hereby ORDERED that the motion is GRANTED

\*6 (1) plaintiff's first cause of action, for commissions allegedly due from defendants, is DISMISSED without prejudice; and



Lisa A. RICHETTE, Plaintiff,  
v.  
PHILADELPHIA MAGAZINE; Philadelphia  
Magazine, a division of Metrocorp;  
Metrocorp; Eliot Kaplan, Editor Loren Feldman,  
Executive Editor; Duane  
Swierczynski, Defendants.

No. 802.

Court of Common Pleas of Pennsylvania,  
Philadelphia County.

Jan. 23, 1996.

A. Charles Peruto, Philadelphia, PA, for plaintiff.

Alan Lieberman, Schnader, Harrison, Segal &  
Lewis, Philadelphia, PA, for defendants.

ORDER

GRIFO, Senior Judge.

\*1 AND NOW, this 18th day of January, 1996,  
Defendants' Preliminary Objections are hereby  
disposed as follows:

A. Defendants' Preliminary Objection in the nature  
of a demurrer to Count I, Plaintiff's claim for libel,  
is GRANTED.

B. Defendants' Preliminary Objection in the nature  
of a motion for more specific pleading to Count II,  
Plaintiff's claim for invasion of privacy, is  
GRANTED.

C. Defendants' Preliminary Objection in the nature  
of a demurrer to Count III, Plaintiff's claim for  
intentional infliction of emotional distress, is  
GRANTED.

D. Defendants' Preliminary Objection in the nature  
of a demurrer to Count IV, Plaintiff's claim for  
negligent infliction of emotional distress, is  
GRANTED.

E. Defendants' Preliminary Objection in the nature  
of a demurrer to Count V, Plaintiff's claim for false  
light, is GRANTED.

F. Defendants' Preliminary Objection in the nature  
of a demurrer to (first) Count VI, Plaintiff's claim  
for negligence, is GRANTED.

G. Defendants' Preliminary Objection in the nature  
of a demurrer to (second) Count VI, Plaintiff's  
claim for punitive damages, is GRANTED.

H. Plaintiff is hereby granted leave to file an  
amended complaint as to Count II only within  
twenty (20) days.

STATEMENT OF REASONS

Before the Court are Defendants' preliminary  
objections to Plaintiff's complaint setting forth  
seven separate counts, asserting respectively, libel,  
invasion of privacy, intentional infliction of  
emotional distress, negligent infliction of emotional  
distress, false light, negligence, and punitive  
damages. Defendants argue that Plaintiff's complaint  
must be dismissed for failure to state a cause of  
action. In reviewing preliminary objections in the  
nature of a demurrer, the Court must accept as true  
the well-pleaded material facts of the party against  
whom the motion is granted, and all reasonable  
inferences drawn therefrom. *Lampus v. Lampus*, ---  
Pa. ---, 660 A.2d 1308, 1309 (1995). In addition,  
in order to sustain the demurrer, it is essential that  
the Plaintiff's complaint indicate on its face that  
Plaintiff's claim cannot be sustained, and the law  
will not permit recovery. *Id.*

Plaintiff in this action is the Honorable Lisa A.  
Richette, a Court of Common Pleas Judge for the  
First Judicial District of the Commonwealth of  
Pennsylvania. The basis of Plaintiff's defamation  
claim is an article that appeared in the July, 1993,  
edition of Philadelphia Magazine, entitled "Five  
Angry Men". The article focused on the activities of  
a group of elderly men who attend trials for  
entertainment at Philadelphia's City Hall. In  
describing a day in the life of these men,  
collectively known as Roving Jurors, the author  
made passing mention of the Plaintiff, the  
Honorable Lisa A. Richette.

One of the Roving Jurors sitting in Plaintiff's  
courtroom at City Hall is quoted on page 48 as  
saying: "She's an emotional wreck. She's always in

a world of confusion". The same individual is quoted as saying that if he sees the Plaintiff waiting to get to the elevator, he'll slow up just to make sure they don't share a car. Also on page 48, the author of the article describes an incident in the courtroom: \*2 Richeite has just called a recess because the wire on her bench microphone is frayed. She was throwing a minor hissy fit a minute ago, but now she's talking to her court assistants about Israeli chocolate.

On page 50, the article describes Plaintiff on the phone, during recess, apparently to a seamstress. One of the Roving Jurors comments: "There's a case going on and she's worried about a dressmaker". On page 50, two paragraphs later, another Roving Juror refers to Plaintiff as "a horse's ass", in disagreement with a sentence imposed by Plaintiff upon a criminal defendant.

Count I of the complaint avers a cause of action against Defendants for libel. In an action for defamation:

[A] trial court must first determine whether the offending statement, taken in context, would be interpreted by a reasonable reader as defamatory. If not, the court should dismiss the action.

MacElree v. Philadelphia Newspaper, Inc., 437 Pa. Super. 598, 650 A.2d 1068, 1070 (1994). The plaintiff has the burden of proving the defamatory character of the publication. 42 Pa.C.S.A. § 8343(a)(1) (1982). Under Pennsylvania law:

A communication is defamatory if it tends to deter third persons from associating with the subject of the communication or to harm his reputation by lowering him in the estimation of the community.

Parano v. O'Connor, 433 Pa. Super. 570, 574, 641 A.2d 607, 609 (1994).

In determining whether certain types of communications are defamatory, Pennsylvania courts have held that statements which are merely embarrassing or annoying to the subject do not rise to the level of defamation. Kryeski v. Schott Glass Technologies, Inc., 426 Pa. Super. 105, 116, 626 A.2d 595, 600 (1993). Expressions of opinion are not actionable. *Id.* at 116, 626 A.2d at 601. "Whether a particular statement constitutes a fact or an opinion is a question of law for the trial court to determine." Mathias v. Carpenter, 402 Pa. Super. 358, 362, 587 A.2d 1, 3 (1991). A certain amount of vulgar name-calling is tolerated, on the theory

that it is properly understood by reasonable listeners to amount to nothing more. MacElree, 437 Pa. Super. 598 at ---, 650 A.2d at 1071, citing Restatement (Second) of Torts § 566, cmt. e (1984).

In the case at bar, we agree that the descriptions of Plaintiff are unflattering, annoying and embarrassing, but they are far from libelous. Courts in Pennsylvania have found other far more offensive characterizations non-defamatory. See, e.g., MacElree v. Philadelphia Newspaper, Inc., 437 Pa. Super. 598, 650 A.2d 1068, 1070 (1994) (referring to an individual as a racist is not enough to support a defamation action).

We find, therefore, that the statements published about Plaintiff, when taken in context, do not rise to the requisite level to support a claim for defamation. Further, we find that the statements made by the Roving Jurors about Plaintiff constitute expressions of their opinion and, as such, are not actionable. Finally, the vulgar name-calling quoted in the article is not defamatory since reasonable readers recognize that it is merely rhetoric and nothing more. Accordingly, since we find that the published statements are not defamatory and are only expressions of opinion, Plaintiff's claim for libel must be dismissed.

\*3 Plaintiff's second claim is for invasion of privacy. Under Pennsylvania law, the cause of action for invasion of privacy is not one tort, but a complex of four. Curran v. Children's Service Center of Wyoming County, Inc., 396 Pa. Super. 29, 38, 578 A.2d 8, 12 (1990).

These four potential causes of action consist of: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and, (4) publicity that unreasonably places the other in a false light before the public.

*Id.*, citing Restatement (Second) of Torts § 652A (1984). Since Plaintiff fails to aver which tort serves as the basis for her claim in Count II of the complaint, we must grant Defendants' motion for more specific pleading to Count II.

The basis for Count III of Plaintiff's complaint is a claim for intentional infliction of emotional distress. In Pennsylvania, the tort of intentional infliction of emotional distress has not been adopted or made part

of the law. *Armstrong v. Paoli Memorial Hosp.*, 430 Pa. Super. 36, 43, 633 A.2d 605, 608 n.1 (1993). Our Supreme Court, however, has acknowledged that the tort exists as described in Restatement (Second) of Torts § 46(1). *Fewell*, No. 01828 Pitts.1994, 1995 WL 501424, at \*4 (Pa. Super. Aug. 24, 1995). In order to prevail, a Plaintiff must show that the Defendant's conduct was intentional, outrageous, and that the resulting emotional distress has produced medically documented physical symptoms. *Armstrong*, 430 Pa. Super. at 43, 633 A.2d at 608. In the case at bar, we find that the Defendants' conduct does not rise to the level of outrage required to support a claim for intentional infliction of emotional distress. Additionally, since Plaintiff has not averred the existence of medically documented physical symptoms resulting from Defendants' conduct, we must dismiss Count III for failure to state a cause of action.

Count IV of Plaintiff's complaint is a claim for negligent infliction of emotional distress. In order to sustain a cause of action for negligent infliction of emotional distress, a Plaintiff must demonstrate some type of physical injury or harm. *Fewell v. Besner*, No. 01828 Pitts.1994, 1995 WL 501424, at \*5 (Pa. Super. Aug. 24, 1995). See also, *Armstrong v. Paoli Memorial Hosp.*, 430 Pa. Super. 36, 633 A.2d 605 (1993) (physical injury must be averred to sustain action for negligent infliction of emotional distress). Since Plaintiff's complaint does not aver physical harm or injury, we must dismiss Plaintiff's claim for failure to state a cause of action for negligent infliction of emotional distress.

Count V of Plaintiff's complaint states a cause of action for invasion of privacy, false light. Under Pennsylvania law, a Plaintiff must show that a publication is not true, is highly offensive to a reasonable person, and is publicized with knowledge of its falsity and in reckless disregard of the false light in which the Plaintiff would be placed. *Parano*, 433 Pa. Super. at 575, 641 A.2d at 609, citing Restatement (Second) of Torts § 652E, cmt. b (1984). Further, a publication must cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *Neish v. Beaver Newspapers, Inc.*, 398 Pa. Super. 588, 597, 581 A.2d 619, 625 (1990). A tortious invasion of privacy exists only when:

\*4 [T]he defendant knows that the plaintiff, as a

reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.

*Curran*, 396 Pa. Super. at 39-40, 578 A.2d at 12-13, citing Restatement (Second) of Torts § 652E, cmt. c (1984).

In the present case, we find that the statements made by the Defendants in the magazine article cannot be considered highly offensive to a reasonable person. The remarks of a few elderly men who observe trials for entertainment are hardly the kind of offensive comments that serve as the basis for a cause of action for the tort of invasion of privacy. We do not find that Plaintiff has been placed in a false light, nor do we find that a person of ordinary sensibilities would experience intense mental suffering, shame or humiliation as a result of the publication. Accordingly, we dismiss Plaintiff's claim for invasion of privacy, false light.

Count VI (first) of Plaintiff's complaint states a cause of action for negligence. In a defamation action, a public official or public figure must produce clear and convincing evidence of actual malice as a prerequisite to liability. *McDermott v. Biddle*, 436 Pa. Super. 94, 107-08, 647 A.2d 514, 520-21 (1994), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). "Mere negligence or carelessness is not evidence of actual malice". *Reiter*, 436 Pa. Super. at 197, 647 A.2d at 565.

"It is the function of the court to ascertain in the first instance whether the plaintiff is a public or private figure". *Iafrate v. Hadesty*, 423 Pa. Super. 619, 623, 621 A.2d 1005, 1007 (1993). Pennsylvania Courts have consistently held that public officials are public figures who are required to establish actual malice rather than mere negligence in a defamation action. See, e.g., *Sprague v. Walter*, --- Pa. Super. ---, 656 A.2d 890 (1995) (former assistant district attorney must prove actual malice); *Reiter v. Manna*, 436 Pa. Super. 192, 647 A.2d 562 (1994) (political candidate must prove actual malice); *McDermott v. Biddle*, 436 Pa. Super. 94, 647 A.2d 514 (1994) (Supreme Court

Justice must prove actual malice); *Coleman v. Philadelphia Newspapers, Inc.*, 391 Pa. Super. 140, 570 A.2d 552 (1990) (president of city council must prove actual malice).

In light of Plaintiff's position as a Court of Common Pleas Judge, we find that Plaintiff is a public figure who must plead and prove actual malice in a defamation action. Accordingly, we dismiss Count VI (first) of Plaintiff's complaint for failure to state a cause of action.

Count VI (second) of Plaintiff's complaint states a claim for punitive damages. Pennsylvania Courts have addressed the issue of punitive damages in a public official defamation case:

\*5 [I]n order to recover both compensatory and punitive damages, the plaintiff must not only prove actual malice, but must also demonstrate that the defendant acted with common law malice in publishing the defamatory statement. Common law malice involves conduct that is outrageous because of the defendant's evil motive or his reckless indifference to the rights of others, and is malicious, wanton, reckless, willful, or oppressive.

*Sprague*, --- Pa. Super. at %BF---, 656 A.2d at 922.

With regard to proof of actual malice, Pennsylvania Courts have stated:

Reckless disregard for the truth, i.e. actual malice, is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity.... [W]hile it arguably may be negligent not check independently the veracity of information before publication, this fault does not rise to the level of actual malice.

*Reiter*, 436 Pa. Super. at 197, 647 A.2d at 565.

In determining whether a defendant's conduct rises to the requisite level to establish common law malice, the focus is on the defendant's disposition toward the plaintiff at the time of the wrongful act. *Id.* "Thus, before punitive damages will be allowed in a case involving the defamation of a public official, the plaintiff must prove that the defendant

displayed actual or apparent ill will." *Id.* "This is so because punitive damages in public official defamation actions are specifically intended to punish and deter publication with actual or apparent ill will." *Id.* "Therefore, in the context of a public official defamation action, punitive damages must be limited to only those cases where common law malice is shown." *Id.* Accordingly, whenever the defendant's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct resulting from either an evil motive or because of a reckless indifference to the rights of others, an assessment of punitive damages is proper. *Id.*

In the case at bar, we find that the allegations contained in Plaintiff's complaint do not contain the requisite facts amounting to outrageous conduct, ill will and actual malice. Since punitive damages are not recoverable under the facts averred in the complaint, Defendants' preliminary objections are granted.

Finally, "[a] request for punitive damages does not constitute a cause of action in and of itself. Rather, a request for punitive damages is merely incidental to a cause of action". *Nix v. Temple Univ. of the Commw. Sys. of Higher Educ.*, 408 Pa. Super. 369, 380, 596 A.2d 1132, 1138 (1991). Count VI (second) of Plaintiff's complaint is a request for punitive damages that cannot stand as an independent cause of action. Accordingly, we dismiss Count VI (second) for failure to state a cause of action.

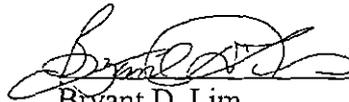
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CERTIFICATION OF SERVICE

This is to certify that in this case, assigned to Judge Katherine B.L. Platt, complete copies of all papers contained in the Brief in Support of the Preliminary Objections of Defendant PP&L, Inc. to Plaintiffs' Complaint and Praecipe for Determination have been served on the following persons, by the following means and on the date stated:

<u>Name:</u>	<u>Means of Service:</u>	<u>Date:</u>
Ethan N. Halberstadt, Esquire POWELL, TRACHTMAN, LOGAN, CARRLE, BOWMAN & LOMBARDO, P.C. 475 Allendale Road, Suite 200 King of Prussia, PA 19406	First Class Mail (postage prepaid)	February 9, 2000

*Attorney for Plaintiffs*



Bryant D. Lim  
Attorney Identification No. 78738  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103  
(215) 963-5165

CERTIFICATION OF SERVICE

This is to certify that in this case, assigned to Judge Paula Francisco Ott, complete copies of all papers contained in the Brief in Support of the Preliminary Objections of Defendant PP&L, Inc. to Plaintiff's Complaint and Praecipe for Determination have been served on the following persons, by the following means and on the date stated:

Name:	Means of service:	Date:
Ethan N. Halberstadt, Esquire POWELL, TRACHTMAN; LOGAN, CARRLE, BOWMAN & LOMBARDO, P.C. 475 Allendale Road, Suite 200 King of Prussia, PA 19406	First Class Mail (postage prepaid)	February 9, 2000

*Attorney for Plaintiffs*

  
Bryant D. Lim  
Attorney Identification No. 78738  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103  
(215) 963-5165

CS.

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OFFICE OF THE  
PROTHONOTARY  
CHESTER CO., PA

COMMERCIAL UTILITY CONSULTANTS : COURT OF COMMON PLEAS

VS. : CHESTER COUNTY, PENNSYLVANIA

PA POWER & LIGHT CO. : NO. 99-09800

PRAECIPE TO REASSIGN

TO THE PROTHONOTARY:

The above-captioned case has been transferred to the HONORABLE  
KATHERINE B.L. PLATT. Please mark your records accordingly.

BY THE COURT:

Per Curiam

COMMERCIAL UTILITY CONSULTANTS Plaintiff,	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
v.	CIVIL ACTION — LAW
PENNSYLVANIA POWER & LIGHT COMPANY	JURY TRIAL DEMANDED
Defendant.	NO. 99-09800

**ORDER**

AND NOW, this      day of                      , 2000, upon consideration of defendant Pennsylvania Power and Light's Preliminary Objections to the Complaint and plaintiff Commercial Utility Consultants' response thereto, it is hereby ORDERED that the Preliminary Objections are OVERRULED. Defendant is DIRECTED to file an Answer to the Complaint within ten (10) days of the date of this Order.

BY THE COURT:

\_\_\_\_\_  
, J.

**POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.**

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
By: Mary J. Pedersen  
Attorney Identification No. 80552  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

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CLERK OF THE  
SUPERIOR COURT  
ONE STUBBS CO. PA.

COMMERCIAL UTILITY CONSULTANTS Plaintiff,  v.  PENNSYLVANIA POWER & LIGHT COMPANY Defendant.	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA  CIVIL ACTION — LAW  JURY TRIAL DEMANDED  NO. 99-09800
---	--

**PLAINTIFF'S RESPONSE TO DEFENDANT'S PRELIMINARY OBJECTIONS**

Plaintiff Commercial Utility Consultants ("CUC"), through its undersigned counsel, hereby responds to defendant Pennsylvania Power and Light Company's ("PP&L") preliminary objections as follows:

1. Admitted.
2. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself. A true and correct copy of the Complaint is attached hereto as Exhibit "A."
3. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.
4. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.
5. Denied. The averment of this paragraph attempts to characterize the provisions of

a document of record which speaks for itself.

6. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

7. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

8. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

9. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

**I. Response to Preliminary Objection in the Nature of a Demurrer for Failure to State a Cause of Action for Existing Contractual Relations – Pa. R.Civ.P. 1028(a)(4)**

10. Denied as a conclusion of law to which no response is required.

11. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

12. Denied. To the contrary the Complaint specifically alleges that once plaintiff's recommendations are implemented, the customer is obligated to pay plaintiff for a specific period of time. (Complaint, paragraph 5). That period of time is generally 60 months.

13. Denied as a conclusion of law to which no response is required.

14. Denied. Plaintiff is an independent utility consultant. The "shared savings" agreements are consulting agreements not employment agreements. Plaintiff is not an employee of its customers.

15. Denied as a conclusion of law to which no response is required.

WHEREFORE, plaintiff CUC respectfully requests that this Court overrule defendant PP&L's preliminary objection to plaintiff's claim for tortious interference with existing

contractual relations and award plaintiff such other relief as deemed appropriate by this Court.

**II. Response to Preliminary Objection in the Nature of a Demurrer for Failure to State a Cause of Action for Prospective Contractual Relations – Pa.R.Civ.P. 1028(a)(4)**

16. Denied as a conclusion of law to which no response is required.

17. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

18. Admitted. Plaintiffs are not asserting any claim for tortious interference with prospective contractual relations and therefore, this preliminary objection is improper and unnecessary.

19. Denied as a conclusion of law to which no response is required.

WHEREFORE, plaintiff CUC respectfully requests that this Court overrule defendant PP&L's second preliminary objection and award plaintiff such other relief as deemed appropriate by this Court.

**III. Response to Preliminary Objection to Plaintiff's Claim for Punitive Damages Because the Underlying Tort Claims Fail as a Matter of Law or in the Alternative Plaintiff has not Alleged Facts Sufficient to Demonstrate Evil Motive or Reckless Indifference to the Rights of Others – Pa.R.Civ.P. 1028(a)(4)**

20. Admitted.

21. Denied. To the contrary plaintiff has asserted a valid claim for tortious interference with existing contractual relations.

22. Denied. To the contrary plaintiff's Complaint alleges sufficient facts to demonstrate that defendant's conduct was malicious, outrageous, and in reckless disregard to plaintiff's contractual rights for purposes of disposing of preliminary objections. (See, e.g., Complaint, paragraphs 16-33).

23. Denied.

WHEREFORE, plaintiff CUC respectfully requests that this Court overrule defendant PP&L's preliminary objection to plaintiff's claim for punitive damages and award plaintiff such other relief as deemed appropriate by this Court.

**IV. Response to Preliminary Objection and Motion to Strike Based Upon Plaintiff's Failure to Join in Separate Counts Their Separate Causes of Action, Thereby Failing to Conform to the Rules of Law and Rules of Court – Pa.R.Civ.P. 1020(a)(1), 1028(d)(2)**

24. Admitted. It is admitted the CUC has asserted a claim against PP&L for tortious interference with existing contractual relations. (See, Complaint, paragraphs 16-33).

25. Denied. The allegations of paragraphs 35-36 of the Complaint assert "another form of damage" suffered by plaintiff as a result of defendant's tortious interference with existing contractual relations and do not purport to assert a separate cause of action for tortious interference with prospective contractual relations.

26. Denied as a conclusion of law to which no response is required.

27. Admitted.

28. Denied for the reasons set forth in the foregoing paragraphs which are incorporated herein as if set forth at length.

WHEREFORE, plaintiff CUC respectfully requests that this Court overrule defendant PP&L's preliminary objection to strike plaintiff's Complaint for failure to conform to Pa.R.Civ.P. 1020(d)(1) as said objection is improper and unnecessary and award plaintiff such other relief as deemed appropriate by this Court.

**V. Response to Preliminary Objection and Motion to Strike Based Upon Plaintiff's Failure to Attach the Written Contracts at Issue– Pa.R.Civ.P. 1019(h), 1028(a)(2)**

29. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

30. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

31. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

32. Admitted.

33. Denied as a conclusion of law to which no response is required.

WHEREFORE, plaintiff CUC respectfully requests that this Court overrule defendant PP&L's preliminary objection to strike plaintiff's Complaint for failure to conform to Pa.R.Civ.P. 1020(d)(1), and award plaintiff such other relief as deemed appropriate by this Court.

**VI. Response to Preliminary Objection and Motion to Strike Based Upon Plaintiffs' Inclusion of Scandalous and Impertinent Matter -- Failure to Conform to Rule of Court -- Pa.R.Civ.P. 1028(a)(2)**

34. Denied as a conclusion of law to which no response is required. Denied further for the reason that the corresponding paragraph characterizes the Complaint, a document of record that speaks for itself.

35. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

36. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

37. Denied as a conclusion of law to which no response is required. Denied further for the reason that the corresponding paragraph characterizes the Complaint, a document of record that speaks for itself.

38. Denied for the reasons set forth above in paragraphs 34-37.

WHEREFORE, plaintiffs CUC respectfully requests that this Court overrule defendant

PP&L's preliminary objection seeking to strike plaintiff's Complaint for alleged inclusion of scandalous and impertinent matter and award plaintiff such other relief as deemed appropriate by this Court.

**VII. Response to Preliminary Objection and Motion to Strike Based Upon the Insufficient Specificity of the Pleadings – Pa.R.Civ.P. 1028(a)(3)**

39. Denied as a conclusion of law to which no response is required. Denied further as plaintiff has pled sufficient facts to satisfy the Pennsylvania Rules of Civil Procedure and has set forth a valid cause of action for tortious interference with existing contractual relations.

40. Denied as the averments of this paragraph attempt to incorporate facts and issues not of record in this proceeding. Denied further as plaintiff has pled sufficient facts to satisfy the Pennsylvania Rules of Civil Procedure and has set forth a valid cause of action for tortious interference with existing contractual relations.

41. Denied as a conclusion of law to which no response is required. By way of further answer see answers to paragraphs 39 and 40 above.

WHEREFORE, plaintiff CUC respectfully requests that this Court overrule defendant PP&L's preliminary objection seeking to strike plaintiff's Complaint for alleged inclusion of scandalous and impertinent matter and award plaintiff such other relief as deemed appropriate by this Court.

**VIII. Response to Preliminary Objection and Motion to Strike Based upon Plaintiff's Alleged Inclusion of Scandalous and Impertinent Matter – Pa.R.Civ.P. 1028(a)(2)**

42. Admitted.

43. Denied in part. Admitted in part. It is admitted that on November 23, 1999 CUC and Public Utility Service Corporation filed a Complaint against PP&L in this Court. The

remainder of the averments in this paragraph attempt to characterize the provisions a document of record which speaks for itself.

44. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself.

45. Denied. The averment of this paragraph attempts to characterize the provisions of a document of record which speaks for itself. Denied further as a conclusion of law to which no response is required. It is further denied that the Complaint contains any scandalous or impertinent matter. By way of further answer CUC incorporates its responses to paragraphs 34-38 above as if set forth at length herein.

WHEREFORE, plaintiff CUC respectfully requests that this Court overrule defendant PP&L's preliminary objection seeking to strike the Complaint for alleged inclusion of scandalous and impertinent matter and award plaintiff such other relief as deemed appropriate by this Court.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C., P.C.

Date: March 1, 2000

By: Mary Pedersen  
Ethan N. Halberstadt  
Mary J. Pedersen  
Attorneys for Plaintiff

Exhibit A

CHESTER COUNTY COURT OF COMMON PLEAS  
CIVIL COVER SHEET

Do not staple or attach on this side

RECEIVED  
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CHESTER COUNTY PA.  
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1. CASE CAPTION: COMMERCIAL UTILITY CONSULTANTS v. PENNSYLVANIA POWER & LIGHT COMPANY, now known as PP&L, INC.  
IA. CASE NO.: 99-094600

2. PLAINTIFF(s): (Name, address)  
COMMERCIAL UTILITY CONSULTANTS  
1556 McDaniel Drive  
Westtown Business Center  
West Chester, PA 19380

3. PLAINTIFF'S COUNSEL:  
(Name, firm, address, telephone and attorney ID#)  
Ethan N. Halberstadt / Atty ID#57544  
Powell, Trachtman, Logan, Carrle,  
Bowman & Lombardo, P.C.  
475 Allendale Rd., Suite 200  
King of Prussia, PA 19406  
610.354.9700

4. DEFENDANT(s): (Name, address)  
PENNSYLVANIA POWER & LIGHT  
COMPANY, Now known as PP&L, INC.  
2 North 9th Street  
Allentown, PA 18101

5. ARE THERE ANY RELATED CASES?  
(see C.C.R.C.P. 200B)  
 Yes  No  
IF YES, SHOW CASE NOS. AND CAPTIONS:  
Commercial Utility Consultants and  
Public Utility Service Corporation v.  
Pennsylvania Power & Light Company,  
now known as PP&L, Inc.

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6. IF THIS IS AN APPEAL FROM A DISTRICT JUSTICE JUDGMENT, WAS APPELLANT  PLAINTIFF OR  DEFENDANT IN THE ORIGINAL ACTION?

7. CASE CODE: 43 DESCRIPTION: (see reverse side) Other

8. IS THIS AN ARBITRATION CASE?  Yes  No  
(Arbitration Limit is \$50,000. See C.C.R.C.P. 1301.1)

**ARBITRATION CASES ONLY**  
An Arbitration hearing in this matter is scheduled for \_\_\_\_\_ at \_\_\_\_\_ in the Jury Lounge, Chester County Court House, West Chester, PA. The parties and their counsel are directed to report to the Juror's Lounge for an arbitration hearing in this matter on the date and time set forth above.  
This matter will be heard by a Board of Arbitrators at the time, date and place specified but, if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial *de novo* on appeal from a decision entered by a judge.

**NOTICE OF TRIAL LISTING DATE**  
Pursuant to C.C.R.C.P. 249.3, if this case is not subject to compulsory arbitration it will be presumed ready for trial twelve (12) months from the date of the initiation of the suit and will be placed on the trial list one (1) year from the date the suit was filed unless otherwise ordered by the Court.  
To obtain relief from automatic trial listing a party must proceed pursuant to C.C.R.C.P. 249.3(b), request an administrative conference and obtain a court order deferring the placement of the case on the trial list until a later date.

FILE WITH: Prothonotary of Chester County, 2 North High Street, Suite 130, P.O. Box 2748, West Chester, PA 19380-0991

THIS COVER SHEET IS REQUIRED BY C.C.R.P. 1018.1 (b) AND MUST BE SERVED UPON ALL OTHER PARTIES TO THE ACTION IMMEDIATELY AFTER FILING. SUBMIT ENOUGH COPIES FOR SERVICE

SEE REVERSE SIDE FOR CASE CODES AND DESCRIPTIONS (DETACH PRIOR TO FILLING OUT)

**POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.**

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

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WEST CHESTER, PA

<p>COMMERCIAL UTILITY CONSULTANTS 1556 McDaniel Drive Westtown Business Center West Chester, PA 19380,  Plaintiff</p> <p>v.</p> <p>PENNSYLVANIA POWER &amp; LIGHT COMPANY now known as PP&amp;L, Inc. 2 North 9<sup>th</sup> Street Allentown, PA 18101,  Defendant.</p>	<p>IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA</p>  <p>CIVIL ACTION — LAW</p>  <p>JURY TRIAL DEMANDED</p>  <p>NO.</p>
--	--

**COMPLAINT**

**NOTICE**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

**YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.**

**LAWYER REFERRAL SERVICE**

**LEGAL REFERENCE SERVICE**  
15 West Gay Street  
West Chester, PA 19380  
(610) 429-1500

KOP:149850.12557-01

**AVISO**

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las páginas siguientes, usted tiene veinte (20) días de plazo al partir de la fecha de la demanda y la notificación. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomará medidas y puede continuar la demanda en contra suya sin previo aviso o notificación. Además, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

**LLEVE ESTA DEMANDA A UN ABOGADO INMEDIATAMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELÉFONO A LA OFICINA CUYA DIRECCIÓN SE ENCUENTRA ESCRITA ABAJO PARA A VERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.**

**SERVICIO DE REFERENCIA LEGAL**

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**SERVICIO DE REFERENCIA LEGAL**  
15 West Gay Street  
West Chester, PA 19380  
Telefono: (610) 429-1500

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

COMMERCIAL UTILITY CONSULTANTS 1556 McDaniel Drive Westtown Business Center West Chester, PA 19380,  Plaintiff,  v.  PENNSYLVANIA POWER & LIGHT COMPANY now known as PP&L, Inc. 2 North 9 <sup>th</sup> Street Allentown, PA 18101,  Defendant.	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA    CIVIL ACTION — LAW  JURY TRIAL DEMANDED  NO.
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COMPLAINT

1. Plaintiff herein is Commercial Utility Consultants ("CUC"). CUC is a sole proprietorship with a usual place of business at 1556 McDaniel Drive, Westtown Business Center, West Chester, Pennsylvania 19380.

2. Defendant herein is the Pennsylvania Power & Light Company, now known as PP&L, Inc. (hereinafter "PP&L"), a Pennsylvania public utility with a registered place of business located at 2 North 9<sup>th</sup> Street, Allentown, Pennsylvania, 18101.

3. CUC is in the business of, *inter alia*, providing utility consulting services. CUC generally provides utility consulting services pursuant to "shared savings" written contracts with its customers. The "shared savings" agreements are typically one page documents wherein the utility consultant agrees to review the rates, tariffs, discounts, riders and total charges that apply

to the customer's utility billings and to submit recommendations to the customer for possible savings, credits or refunds. No payment is owed to the consultant unless the customer implements the recommendation and experiences utility savings, credits, or refunds.

4. CUC's customers find its contracts attractive because they do not have to pay CUC anything unless savings are found. As is standard in the utility consulting industry, CUC generally receive 50% of any credit or refund they obtain for their clients, as well as 50% of the savings that results from its recommendations over a period of time. Once the period expires, the customer continues to enjoy the full amount of the savings as long as the rate remains available. Pursuant to this arrangement, CUC only receives payment for as long as its customer continues to enjoy the savings resulting from their recommendations.

5. As a result of years of experience in the industry, CUC his expertise in examining its customers' utility billings and in finding rates and tariffs that will save its customers significant sums.

6. In the event that the CUC is able to find savings for its customers, it typically submits a written letter of recommendation to the customer or sets up a face-to-face meeting to review the recommendations and, depending upon the recommendation made, to review the pros and cons of implementing the recommendation. In most instances, however, there is no downside to a recommendation. Most recommendations involve rate changes that have no impact on the customer's operations.

7. It was not until recently that there were changes effected by the legislature to begin to "deregulate" utility service in Pennsylvania. These changes are slowly being made. At the time of most of the events described in this Complaint, however, public utilities in Pennsylvania were not deregulated. As a result, the public utility servicing a particular area had a literal monopoly on utility service in that area.

8. As a result of this virtual monopoly, prior to deregulation the public utilities had very little need for marketing their services or for showing their customers ways in which the

customer could lower its utility bills. From a practical standpoint, there was no competition for the public utility and any recommendation to the customer that would save the customer money would necessarily mean less money for the public utility. Under these circumstances, the public utilities had little incentive to save their customers money in their utility bills.

9. Although every public utility has a statutory duty to provide customers with the most advantageous rate available, PP&L frequently failed to do so. Simply put, although PP&L had a legal duty to inform its customers about the availability of better rates, it had not economic incentive to do so; by passively allowing its customers to use higher rates than necessary, PP&L enjoyed a substantial windfall at its customers' expense.

10. Utility consultants, such as CUC, are successful in finding their customers savings for the foregoing reasons. Although lower rates and tariffs are available, the public utility has no incentive to bring these rates and tariffs to the customer's attention. CUC, on the other hand, is highly motivated to find lower rates and tariffs for its customers because they are only paid if they succeed in doing so.

11. Like other public utilities, at all times relevant to this lawsuit PP&L had "marketing representatives" who were its primary contact with industrial customers for purposes of, *inter alia*, marketing the benefits of increasing production, and therefore electric usage, in the PP&L distribution area. Marketing representatives also purportedly assisted industrial customers in understanding PP&L's complex rate structure, and making decisions about what rate was best for their business. Given its "public utility" status, customers were generally led to believe that the marketing representatives were looking out after the customer's best interests.

12. CUC has had substantial success assisting PP&L's industrial customers achieve significant savings in their electric utility costs.

13. In every instance, CUC's recommendations to its industrial customers were entirely consistent with the principles and policies giving rise to the recommended rate, including, *inter alia*, economic development and system reliability. However, in many instances

PP&L chose to ignore those principles and policies in order to increase its bottom line at its customers', and the Commonwealth's, expense.

14. Over the course of their dealings in the PP&L region, it is estimated that CUC has saved their customers millions of dollars in utility savings, further advancing the policies and principles which gave rise to the approval of the economic development and system reliability rates. However, these savings have partially diminished the substantial windfall which PP&L enjoys when charging more than the most advantageous rates available.

15. In addition to undermining PP&L's windfall, CUC has also caused PP&L representatives to be put in the uncomfortable position of having failed to disclose or recommend the most advantageous rate available. CUC's successes often lead to distrust and tension between the marketing representative and his customer contact, as the customer cannot understand why they were forced to pay a consultant to find a cheaper rate or tariff. The marketing representatives often come away looking badly in the eyes of the customer.

16. In addition to the foregoing, PP&L's marketing representatives envy what they perceive to be the large sums of money earned by CUC. Some PP&L's representatives have taken the "if you can't beat them join them approach" and have become utility consultants themselves. Others, including at least one high level PP&L employee, Oliver Kaspar, have moonlighted as a utility consultant in competition with CUC while still an employee of PP&L.

17. The upshot of the foregoing is that PP&L, by and through its agents, employees and representatives, has taken affirmative action designed to interfere with CUC's ability to service their customers and to obtain the greatest level of savings for its customers. This active interference has taken numerous forms.

18. At all relevant times PP&L was aware of the written contracts that CUC maintains with its customers. Correspondence to CUC's customers makes clear that, at all material times, PP&L was aware of the terms of the written contracts between CUC and its customers.

19. In addition to the foregoing, one PP&L representative, Larry Collins, went so far

as to misrepresent himself to CUC in an effort to gain information about its utility consulting business. Mr. Collins contacted CUC and advised that he was "Carroll Collins" and that he represented Schoolhouse Graphics and that he might be able to get additional business for CUC through the Lancaster County School District. Mr. Collins requested all sales materials from CUC, which were forwarded by CUC's sales manager. CUC thereafter investigated the matter and learned that the person who had called was, in fact, Larry Collins. Mr. Collins was not interested in CUC's materials for Schoolhouse Graphics or the Lancaster County School District; rather, he was gathering information on behalf of PP&L.

20. At the time of the foregoing incident, Larry Collins had already displayed open hostility towards CUC in conjunction with some of CUC's clients. For instance, after CUC had presented recommendations to Kutco Printing & Products, Inc. and Reading Alloys, Mr. Collins advised those customers that they did not need CUC's assistance, that they should stay away from companies like CUC, that the customers should not deal with CUC but should deal directly with PP&L, and that PP&L would provide the same service as CUC without charge. At the time he made these statements Mr. Collins was aware that the customers were under written contract with CUC. In addition, as it relates to Kutco Printing & Products Company, Mr. Collins refused to apply PP&L's Industrial Development Initiatives Rider as required by the terms of PP&L's own tariff. When advised that he was applying the tariff improperly, Mr. Collins informed CUC that he could implement the IDIR anyway that he wanted.

21. Mr. Collins is not the only PP&L representative to interfere with CUC's customer contracts. In fact, PP&L representatives regularly interfered with CUC's contractual relations by informing CUC's customers that the customers did not need CUC's assistance and that PP&L would do the work for the customers at no charge. These statements were not made in the context of general marketing, but rather with full knowledge of the terms of CUC's shared savings agreements, the fact that CUC's had already provided recommendations to their customers, and with the intent to induce the customers to breach their contracts with CUC.

Without access to PP&L's files, CUC cannot identify every client with whom PP&L actively interfered. However, the clients include Kutco Printing & Products Company, Bigbee Steel and Tank Company, Buck Company, Inc., Gentex Corporation, Carlisle Plastics, Inc., AMC, Polymer Dynamics, Inc., and Reading Alloys.

22. Another way in which PP&L has taken affirmative steps to interfere with CUC contractual relations with its customers is by actually assisting the customer in purportedly terminating CUC contracts. CUC has repeatedly come across instances in the PP&L territory where it has made recommendations to customers that would save the customer large sums of money, only to receive a purported termination letter following the presentation or recommendation. In most instances the customer thereafter implements the recommendation that was provided by CUC. CUC has received such termination letters from customers such as Gentex Corporation, Carlisle Plastics, Inc., Buck Company, Inc., and Polymer Dynamics, Inc.

23. For example, PP&L went so far as to provide the actual wording to Buck Company, Inc., on how to terminate its utility consulting contract for which CUC provides sub-consulting services. Individuals at the highest levels of PP&L were aware of this interference, participated in same, but took no steps to stop same.

24. In addition to Buck Company, Inc., PP&L's interference has so dramatically harmed CUC's contractual relations with its clients that CUC was forced to commence legal action against other clients at great expense to CUC. This includes Gentex Corporation, Carlisle Plastics, Inc., and Bigbee Steel and Tank Company, former customers of CUC. In each instance CUC received a termination letter, which purportedly terminated the parties' utility consulting contract. In each instance, the client thereafter implemented CUC's recommendations and refused to compensate CUC.

25. Without the opportunity to review PP&L's files, there is no way for CUC to identify every customer with whom PP&L has interfered. However, CUC believes that there are numerous accounts that have been the subject of active interference by PP&L. The reason that

CUC cannot identify every such customer is because every such interference is not accompanied by a "termination" letter and there is often no explanation offered by the customer as to why they are not implementing CUC's recommendations. In addition, PP&L's interference takes other forms, as described below.

26. In addition to the foregoing interference, PP&L has actively interfered with CUC's contractual relations with its customers by providing false and misleading information to CUC's customers respecting the recommendations provided by CUC. By way of example, one of the more profitable recommendations for CUC has been the "interruptible" rate offered by PP&L. This is a very costly rate for PP&L in that it affords commercial users literally millions of dollars in savings over other "non-interruptible" rates. In essence, the interruptible rate is much less expensive than other rates because the user agrees, under certain conditions, to reduce its "demand" at the request of the utility. The downside is that by reducing its demand its operations may be affected; the upside is the tremendous utility savings the user can realize as a result.

27. At all relevant times PP&L was aware that CUC was advising qualifying industrial customers of the substantial benefits which their facilities would enjoy by subscribing to an "interruptible rate"; accordingly PP&L took affirmative steps to mislead customers respecting the risks and benefits of the interruptible rate and to effectively foreclose the rate to CUC's customers. These customers include the West Company, All-Steel, Inc., Longacre, and Fasson. PP&L was aware that, by doing so, CUC would be harmed.

28. PP&L attempted to obstruct access to the "interruptible rate" through several fronts. PP&L took the position that the rate was unavailable based upon an interpretation of the applicable tariffs which it knew was false and was contrary to its own testimony before the Pennsylvania Public Utility Commission. By closing the interruptible rate to new customers, PP&L hoped to deprive CUC and its customers of millions of dollars of utility savings.

29. As a result of the position taken by PP&L, CUC customers found that the interruptible rate was not available or, in the alternative, that they would be forced to litigate

against PP&L before the PUC in order to obtain access to the rate. For many of CUC's clients, the prospect of litigating against a public utility was a taunting and unacceptable solution to the problem. In other situations, CUC would retain counsel on behalf of their clients to fight for the right to the interruptible rate. CUC do not seek damages for those customers who entered into settlement agreements, together with CUC, with PP&L regarding the customers' entitlement to and/or credits for the interruptible rate.

30. Even when PP&L took the position that the rate was available for customers, it presented false and misleading statistics to CUC's customers in an effort to dissuade the customer from implementing the interruptible rate. For instance, PP&L misrepresented to the customers the historical data respecting past interruptions. More specifically, PP&L routinely showed customers PP&L's history of interruptions from 1993 through 1996 showing 14 "interruptions." In fact, there were only 5 interruptions during that time period. In addition, PP&L would offer its customers incentives to leave the interruptible rate in violation of the applicable tariffs, notwithstanding the fact that the incentives were not authorized by applicable law. PP&L knew that in the event the customer left the interruptible rate that CUC would be harmed and intended this result.

31. An example of the foregoing type of interference involves PP&L decision to re-institute "grandfathered" riders such as the Economic Development Initiatives Rider on customers' accounts who agreed to terminate interruptible service - in violation of the customers' interruptible contracts - notwithstanding the fact that such termination was not authorized by the applicable tariffs. PP&L took these affirmative steps, in violation of its own tariffs, with CUC's customers Carlisle Plastics, Inc. and Gentex Corporation. In addition, with respect to Carlisle Plastics, PP&L violated its own tariff by allowing Carlisle Plastics to leave the interruptible rate after six months and restoring the EDI credits. With respect to Gentex Corporation, PP&L provided false and misleading information regarding future savings in an effort to induce Gentex Corporation to terminate the interruptible rate.

32. Similarly, PP&L interfered with CUC's contractual relations with its customers by refusing to provide its clients with tariff options and/or benefits which the clients were legally entitled to receive. PP&L would take these positions because of the CUC's involvement in the process. For instance, PP&L refused to apply its tariffs as required by law in conjunction with C.R. Industries, a client of CUC.

33. In addition to the foregoing, PP&L interfered with CUC's ability to service their customers by taking actions designed to prevent CUC from delaying and/or obtaining account information from PP&L. Since PP&L had a literal monopoly on utility service in its area, it was the sole source of historical and usage data for CUC's customers in the area. In order to obtain this information from PP&L, CUC's would have its customers execute authorizations permitting the release of the information to CUC. Notwithstanding these authorizations, PP&L would refuse the authorizations and/or intentionally delay responding to same. In addition, when the requests for information were made PP&L would notify its marketing representatives of same. Once notified that CUC was seeking account information, PP&L representatives would thereafter meet with CUC's customers and attempt to dissuade the customers from doing business with CUC. For instance, PP&L delayed in providing account information to Bigbee Steel and Tank Company in order to provide its account representative an opportunity to present recommendations to CUC's client. As a direct result of these actions, CUC lost substantial revenues.

34. The foregoing interference by PP&L was done intentionally as part of an ongoing pattern and practice designed to harm CUC's financial interests. In addition and/or in the alternative to the foregoing, PP&L was aware that the interference with CUC's contractual relations and resultant financial harm to CUC was an inevitable consequence of its conduct.

35. Another form of damage caused by PP&L's interference is that it effectively destroys CUC's ability to obtain ongoing and future business from its clients. In ordinary circumstances, once clients realize the substantial savings that they are earning as a result of

CUC's involvement, they are very receptive to additional recommendations from CUC.

36. As a result, CUC is typically able to provide ongoing recommendations to clients after they execute their contracts. In many instances CUC will focus on electric, sewer and gas recommendations. Clients will often implement electric, sewer, and/or gas recommendations through CUC and PP&L's interference with CUC's contractual relations, as described above, effectively precludes CUC from maintaining and growing an ongoing relationship with the clients. The financial harm to CUC as a result is substantial.

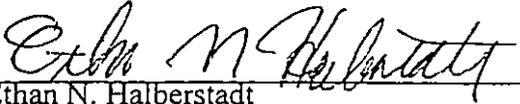
37. The actions by PP&L, as described above, were not privileged and had no legitimate business justification.

38. The actions by PP&L, as described above, were not isolated instances, but were part of an ongoing malicious campaign designed to harm CUC's interests. Given the ongoing nature of PP&L's conduct, and the outrageousness of its activities, especially in light of the monopoly position that it holds, CUC is entitled to punitive damages in addition to such compensatory damages as may be allowed by law.

WHEREFORE, plaintiff requests this Court to enter judgment in their favor in an amount in excess of \$50,000.00, plus interest, costs, and such other relief as the Court deems appropriate.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

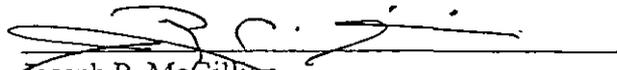
By:

  
Ethan N. Halberstadt  
Attorneys for Plaintiff

Dated: 11/23/99

VERIFICATION

I, Joseph P. McGillian, owner of Commercial Utility Consultants, plaintiff in the within action, verify that the statements made in the foregoing Complaint are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

  
\_\_\_\_\_  
Joseph P. McGillian

Date: 11/23/99

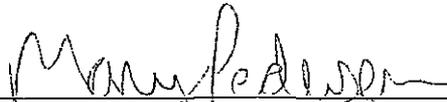
CERTIFICATE OF SERVICE

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I, Mary J. Pedersen, Esquire, hereby certify that a true and correct copy of the foregoing Plaintiff's Response to Defendant's Preliminary Objections was served via first class mail, postage prepaid upon the following:

Glen R. Stuart, Esquire  
Morgan, Lewis & Bockius, LLP  
2000 One Logan Square  
Philadelphia, PA 19103-6993

Date: March 1, 2000

  
\_\_\_\_\_  
Mary J. Pedersen

Platt

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: Ethan N. Halberstadt  
Attorney Identification No. 57544  
By: Mary J. Pedersen  
Attorney Identification No. 80552  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
Tel: 610.354.9700 / Fax: 610.354.9760

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CLERK OF THE  
PROBATE AND  
ESTATE COURT  
CHESTER CO., PA.

<p>COMMERCIAL UTILITY CONSULTANTS Plaintiff,</p> <p>v.</p> <p>PENNSYLVANIA POWER &amp; LIGHT COMPANY Defendant.</p>	<p>IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA</p> <p>CIVIL ACTION - LAW</p> <p>JURY TRIAL DEMANDED</p> <p>NO. 99-09800</p>
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**PRAECIPE FOR DETERMINATION**

Kindly submit the following matter to the Honorable Paula Francisco Ott for determination: Plaintiff's Response to Defendant's Preliminary Objections.

Date of Filing: March 1, 2000

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: Mary Pedersen

Ethan N. Halberstadt  
Atty. I.D. No. 57544  
Mary J. Pedersen  
Atty. I.D. No. 80552  
475 Allendale Road, Suite 200  
King of Prussia, PA 19406  
(610) 354-9700

CERTIFICATE OF SERVICE

I, Mary J. Pedersen, Esquire, hereby certify that on this date a true and correct copy of the Praecept for Determination regarding Plaintiff's Response to Defendant's Preliminary Objections was served via first-class mail, postage prepaid, addressed as follows:

Glen R. Stuart, Esquire  
Morgan, Lewis & Bockius, LLP  
2000 One Logan Square  
Philadelphia, PA 19103-6993

Date: 3/11/2000

Mary J. Pedersen  
Mary J. Pedersen

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SUPERIOR COURT  
PHILADELPHIA, PA

**POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.**

By: Ethan N. Halberstadt

Attorney I.D. #57544

By: Mary J. Pedersen

Attorney I.D. #80552

475 Allendale Road, Suite 200

King of Prussia, PA 19406

Tel: 610.354.9700 / Fax: 610.354.9760

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CHESTER CO., PA.

COMMERCIAL UTILITY CONSULTANTS Plaintiff,	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
v.	CIVIL ACTION — LAW
PENNSYLVANIA POWER & LIGHT COMPANY Defendant.	JURY TRIAL DEMANDED NO. 99-09800

**PLAINTIFF COMMERCIAL UTILITY CONSULTANTS'  
BRIEF IN OPPOSITION TO PRELIMINARY OBJECTIONS OF DEFENDANT  
PENNSYLVANIA POWER & LIGHT COMPANY TO COMPLAINT**

**I. INTRODUCTION**

On November 23, 1999 plaintiff Commercial Utility Consultants ("CUC") filed a Complaint against defendant Pennsylvania Power & Light Co. ("PP&L") asserting a claim for tortious interference with plaintiff's contractual relationship with its existing customers. A true and correct copy of the Complaint is attached to Plaintiff's Response to the Defendant's Preliminary Objections as Exhibit "A." On or about January 21, 2000, PP&L filed preliminary objections to the Complaint.

On November 23, 1999, CUC and another entity Public Utility Service Corporation ("PUSC") filed a Complaint against PP&L seeking damages on behalf of both plaintiffs for PP&L's tortious interference with their existing contractual relations. PP&L filed identical preliminary objections to the CUC/PUSC Complaint. Simultaneously with the filing of this Brief, CUC and

PUSC are filing a Brief in Response to PP&L's Preliminary Objections. CUC hereby incorporates by reference its Brief in Opposition to PP&L's Preliminary Objections filed in the CUC/PUSC matter (hereinafter the "CUC/PUSC brief"). A copy of the CUC/PUSC brief is attached hereto as Exhibit "A". For the reasons set forth in the CUC/PUSC brief, plaintiff CUC requests that this Court overrule PP&L's preliminary objections and direct PP&L to file an Answer to the Complaint as set forth in the proposed Order.

## II. ARGUMENT

### A. **PP&L's Preliminary Objections I-VII Should be Overruled For the Reasons Fully Set Forth in the CUC/PUSC Brief in Opposition to PP&L's Preliminary Objections to the CUC/PUSC Complaint**

PP&L has filed the identical preliminary objections to the Complaint in this matter as it filed to the CUC/PUSC Complaint. CUC has fully responded to those preliminary objections in its CUC/PUSC brief. Therefore, CUC incorporates by reference the CUC/PUSC brief filed in opposition to PP&L's Preliminary Objections to the CUC/PUSC Complaint and which is attached hereto as Exhibit "A". For the reasons set forth therein, CUC requests that this Court overrule PP&L's Preliminary Objections I-VII.

### B. **PP&L's Eighth Preliminary Objection Should Be Overruled as the Entire Complaint is Not Scandalous and Impertinent**

In its eighth preliminary objection PP&L argues alternatively that the entire Complaint should be stricken because every paragraph allegedly contains scandalous and impertinent matter. Generally, the remedy of striking impertinent matter in a Complaint should only be sparingly exercised and only when a party can affirmatively show prejudice. Pennsylvania Department of Environmental Resources v. Hartford Accident and Indemnity Co., 40 Pa. Commw. 133, 138, 396

A.2d 885 (1979) (declining to dismiss allegedly impertinent damages claim). In this case PP&L is requesting an even more drastic remedy of dismissing the entire Complaint as impertinent. Such relief is completely inappropriate.

PP&L's only basis for asserting that the Complaint in this matter is impertinent is because CUC is a plaintiff in another action along with another entity asserting a claim against PP&L for tortious interference (the "Second Complaint"). In reviewing preliminary objections the court is to consider only the evidence presented in the action presently at issue. No testimony or other evidence outside a complaint may be considered. See, 3 Goodrich Amram §1028(c):8. Thus it is irrelevant to the present action whether the Second Complaint is similar to the Complaint filed in this action or not. The Complaint in this matter sets forth a valid cause of action against PP&L for tortious interference with contractual relations and cannot be dismissed as impertinent simply because CUC is also a party to another similar complaint.

Furthermore, PP&L is not prejudiced by defending two lawsuits and can seek to consolidate the matters before trial if it believes that the matters will involve similar evidence. CUC has no objection to consolidating this matter with the other proceeding. Consolidation will eliminate any prejudice caused by overlapping issues and will also conserve judicial resources.

Consequently as the remedy plaintiff seeks by way of its eighth preliminary objection is completely inappropriate, PP&L's preliminary objection seeking dismissal of the entire Complaint should be overruled.

### **III. CONCLUSION**

For the foregoing reasons, plaintiff Commercial Utility Consultants respectfully requests that this Honorable Court overrule defendant Pennsylvania Power & Light Company's Preliminary

Objections and direct defendant to file an Answer as set forth in the proposed Order.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

Date: 3/1/00

BY: Mary Pedersen  
Ethan N. Halberstadt  
Mary J. Pedersen  
Attorneys for Plaintiff

Exhibit A

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

By: Ethan N. Halberstadt  
Attorney Identification No. 57544

By: Mary J. Pedersen  
Attorney Identification No. 80552

475 Allendale Road, Suite 200

King of Prussia, PA 19406

Tel: 610.354.9700 / Fax: 610.354.9760

Attorneys for Plaintiffs

COMMERCIAL UTILITY CONSULTANTS and PUBLIC UTILITY SERVICE CORPORATION Plaintiffs,	IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
v.	CIVIL ACTION.— LAW
PENNSYLVANIA POWER & LIGHT COMPANY now known as PP&L, Inc. Defendant.	JURY TRIAL DEMANDED NO. 99-09799

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**PLAINTIFFS COMMERCIAL UTILITY CONSULTANTS AND PUBLIC UTILITY  
SERVICE CORPORATION'S BRIEF IN OPPOSITION TO PRELIMINARY  
OBJECTIONS OF DEFENDANT PP&L TO COMPLAINT**

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## I. INTRODUCTION

On November 23, 1999 plaintiffs Public Utility Service Corporation ("PUSC") and Commercial Utility Consultants ("CUC") filed a Complaint against defendant Pennsylvania Power & Light Co. ("PP&L") asserting a claim for tortious interference with plaintiffs' contractual relationship with its existing customers. A true and correct copy of the Complaint is attached to Plaintiffs' Response to Defendant's Preliminary Objections as Exhibit "A." On or about January 21, 2000, PP&L filed preliminary objections to the Complaint. For the reasons set forth herein, plaintiffs request that this Court overrule PP&L's preliminary objections and direct PP&L to file an Answer to the Complaint as set forth in the proposed Order.

## II. COUNTER STATEMENT OF THE CASE

Plaintiffs are in the business of, *inter alia*, providing utility consulting services. (Complaint, paragraph 3). Plaintiffs generally provide utility consulting services pursuant to "shared savings" written contracts with their customers. (Complaint, paragraph 3). The "shared savings" agreements are typically one page documents wherein the utility consultant agrees to review the rates, tariffs, discounts, riders and total charges that apply to the customer's utility billings and to submit recommendations to the customer for possible savings, credits or refunds. (Complaint, paragraph 3). No payment is owed to the consultant unless the customer implements the recommendation and experiences utility savings, credits, or refunds. Once the recommendation is implemented, however, the customer is obligated to pay plaintiffs over a specific period of time. (Complaint, paragraph 5). Once the period expires, the customer continues to enjoy the full amount of the savings as long as the rate remains available. (Complaint, paragraph 5). Pursuant to this arrangement, plaintiffs only receive payment for as

long as their customer continues to enjoy the savings resulting from their recommendations. (Complaint, paragraph 5). As a result of years of experience in the industry, plaintiffs have expertise in examining their customers' utility billings and in finding rates and tariffs that will save their customers significant sums. (Complaint, paragraph 6).

Utility consultants, such as plaintiffs, are successful in finding their customers savings for the foregoing reasons. Although lower rates and tariffs are available, the public utility has no incentive to bring these rates and tariffs to the customer's attention. (Complaint, paragraph 11). The utility consultants, on the other hand, are highly motivated to find lower rates and tariffs for their customers because they are only paid if they succeed in doing so. (Complaint, paragraph 11).

Plaintiffs have had substantial success assisting PP&L's industrial customers achieve significant savings in their electric utility costs. (Complaint, paragraph 13). The principals of plaintiffs have been providing utility consulting in the PP&L region for approximately 20 years. (Complaint, paragraph 13). Over the course of their dealings in the PP&L region, it is estimated that plaintiffs have saved their customers millions of dollars in utility savings, further advancing the policies and principles which gave rise to the approval of the economic development and system reliability rates. (Complaint, paragraph 15). However, these savings have partially diminished the substantial windfall which PP&L enjoys when charging more than the most advantageous rates available. (Complaint, paragraph 15). In addition to undermining PP&L's windfall, plaintiffs have also caused PP&L representatives to be put in the uncomfortable position of having failed to disclose or recommend the most advantageous rate available. (Complaint, paragraph 16).

In order to prevent plaintiffs from continuing their services to customers in PP&L's area and with full awareness of plaintiffs' contractual relationship with those customers, PP&L took affirmative action designed to interfere with plaintiffs' ability to service their customers and to obtain the greatest level of savings for its customers. (Complaint, paragraph 18). In their Complaint, plaintiffs detailed numerous specific instances of active interference by PP&L with plaintiffs' contractual relations with its customers. (See, Complaint, paragraphs 17-34) For example, plaintiffs have averred that the PP&L was aware of plaintiffs' contractual relationship with their customers but nevertheless made deceitful calls to plaintiffs' offices in order to obtain information on their services (Complaint, paragraph 20); made statements indicating that PP&L could perform plaintiffs' services at no charge despite being aware that plaintiffs had already provided recommendations to these customers pursuant to their contract (Complaint, paragraph 22); encouraged and aided plaintiffs' customers to terminate their contracts (Complaint, paragraph 23); in at least one instance provided the actual termination language to plaintiffs' customer (Complaint, paragraph 24); provided false and misleading information to plaintiffs' customers about plaintiffs' recommendations (Complaint, paragraph, 25); took steps to mislead plaintiffs' customers about particular rates and about particular benefits and risks associated with rates which were available and recommended by plaintiffs (Complaint, paragraphs 27 and 28); and provided false and misleading statistics to plaintiffs' customers regarding a particular rate in order to dissuade the customer from implementing that recommendation (Complaint, paragraph 30). As a result of PP&L's interference with plaintiffs' contractual relationships with their existing customers, plaintiffs filed their Complaint seeking damages.

Included among the damages sought by plaintiffs are compensation for the destruction of

plaintiffs' ability to obtain ongoing and future business from its clients. (Complaint, paragraph 36). In ordinary circumstances, once clients realize the substantial savings that they are earning as a result of plaintiffs' involvement, they are very receptive to additional recommendations from plaintiffs. (Complaint, paragraph 36). As a result, plaintiffs typically are able to provide ongoing recommendations to clients after they execute their contracts. (Complaint, paragraph 37). PP&L's interference with plaintiffs' contractual relations effectively terminated plaintiffs' existing contractual relations and precluded plaintiffs from maintaining and growing an ongoing relationship with their existing clients.

### III. COUNTER STATEMENT OF QUESTIONS PRESENTED

A. Whether PP&L's first preliminary objection seeking dismissal of plaintiffs' claim for tortious interference with existing contracts should be overruled since plaintiffs' contracts are not at-will employment agreements?

Suggested Answer: Yes.

B. Whether PP&L's second preliminary objection should be overruled as plaintiffs have not asserted a claim for tortious interference with prospective contractual relationships and thus the preliminary objection is improper and unnecessary?

Suggested Answer: Yes.

C. Whether PP&L's third preliminary objection seeking dismissal of plaintiffs' claim for punitive damages should be overruled where plaintiffs have asserted a valid claim for tortious interference with existing contractual relationships such that punitive damages are recoverable?

Suggested Answer: Yes.

D. Whether PP&L's fourth preliminary objection seeking to strike the Complaint for

failure to plead multiple causes of action in separate counts should be overruled as plaintiffs' have plead only one cause of action?

Suggested Answer: Yes.

E. Whether PP&L's fifth preliminary objection based upon Pa.R.Civ.P. 1019(h) should be overruled where the claim asserted against PP&L is not based upon a writing?

Suggested Answer: Yes.

F. Whether PP&L's sixth preliminary objection seeking to strike two paragraphs of the Complaint based upon PP&L's assertion that they contain scandalous and impertinent matter should be overruled where the paragraphs allege facts which are pertinent to the interference claim and demonstrate examples of PP&L's officers or agents interference with plaintiffs' contracts with their customers?

Suggested Answer: Yes.

G. Whether PP&L's seventh preliminary objection based upon lack of specificity should be overruled where plaintiffs have listed nine customers with whom they alleged PP&L interfered and where plaintiffs have explained their inability at this point in the litigation to list every customer they believe was interfered with by PP&L?

Suggested Answer: Yes.

#### IV. SUMMARY OF THE ARGUMENT

PP&L's preliminary objections are without merit and should be overruled. PP&L's first preliminary objection to plaintiffs' claim for tortious interference with existing contractual relations should be overruled as plaintiffs' contracts are not employment contracts. Plaintiffs are not employees of their customers and therefore the case law cited by PP&L is not applicable to this case. Furthermore, plaintiff's contracts with their customers are not at-will as the customers are not free to terminate the contract at any time once a recommendation is implemented.

PP&L's second and third preliminary objections should be dismissed as plaintiffs have not asserted a claim for tortious interference with prospective contractual relations. PP&L's fourth preliminary objection should be overruled since plaintiff has only asserted one cause of action and therefore, Pa.R.Civ.P. 1020(d)(1) does not apply.

As it relates to PP&L's preliminary objections to plaintiffs' claim for punitive damages, plaintiffs have asserted a valid claim of tortious interference with exiting contractual relations and have asserted facts that support a finding that the defendant acted maliciously or with reckless disregard for the rights of the plaintiffs and thus the preliminary objection should be overruled on that basis as well.

PP&L's fifth preliminary objection pursuant to Pa.R.Civ.P. 1019(h) should be overruled since the claim against PP&L in the Complaint is not based upon a writing and as such no writing is required to be attached to the Complaint.

PP&L's sixth preliminary objection should be overruled since the Complaint does not contain any scandalous and impertinent matter regarding PP&L employees but merely alleges pertinent facts demonstrating PP&L's interference with plaintiffs' contracts and motive in

interfering with plaintiffs' contractual relations. Further, PP&L has failed to prove it suffers from any prejudice by the inclusion of the challenged paragraphs.

Finally, PP&L's seventh preliminary objection should be overruled since plaintiffs have pled sufficient facts regarding what clients were allegedly interfered with such that PP&L can prepare an appropriate response.

In sum, when taking as true all of the allegations in plaintiffs' Complaint, the Complaint sets forth a cause of action for tortious interference with existing contractual relations and therefore PP&L's preliminary objections should be overruled and PP&L should be directed to file an Answer to the Complaint.

## V. ARGUMENT

### A. **PP&L's Preliminary Objections in the Nature of a Demurrer Should be Overruled as Plaintiffs Have Set Forth a Claim for Tortious Interference with Existing Contractual Relations.**

#### 1. **Standard for Preliminary Objections in the Nature of a Demurrer**

It is well settled in Pennsylvania that a preliminary objection in the nature of a demurrer, the end result of which would be dismissal of a cause of action, should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief can be granted. Mazzagatti v. Everingham, 512 Pa. 266, 516 A.2d 672 (1986); County of Allegheny v. Commonwealth, 507 Pa. 360, 490 A.2d 402 (1985). If a demurrer is sustained, the court must evaluate whether or not there is a reasonable possibility that the plaintiff can amend the complaint to cure the deficiency. If so, the plaintiff must be given that opportunity. Harley Davidson Motor Co., Inc. v. Hartman, 296 Pa. Super. 37, 442 A.2d 284 (1982).

The question presented to a court by a preliminary objection in the nature of a demurrer is

whether, on the facts averred in the Complaint, the law says with certainty that no recovery is possible. Where doubt exists as to whether the demurrer should be granted, the doubt should be resolved in favor of overruling the objection. Scarpitti v. Weborg, 530 Pa. 366, 609 A.2d 147 (1992). The plaintiff need not prove his case in the Complaint, rather “[t]he issue then before the court, and the only issue is, whether the facts in the Complaint itself are sufficient to entitle the plaintiff to relief.” International Union of Operating Engineers v. Linesville Construction Co., 457 Pa. 220, 223, 322 A.2d 353, 356 (1974).

For the purpose of testing the legal sufficiency of a pleading, all well-pleaded material and relevant facts are taken as true together with such reasonable inferences that may be drawn, from those facts. Scarpitti, 609 A.2d at 148; Gabel v. Cambuzzi, 532 Pa. 584, 616 A.2d 1364 (1992). Santiago v. Pennsylvania National Mutual Casualty Inc. Co., 418 Pa. Super. 178, 613 A.2d 1235 (1992).

2. **PP&L’s First Preliminary Objection to Plaintiffs’ Claim of Tortious Interference with Existing Contractual Relations Should be Overruled as Plaintiffs’ Contracts do not Involve At-Will Employment Relationships**

In order to assert a claim for tortious interference with contractual relations a party must allege the following: 1) the existence of a contractual relation between the complainant and a third party; 2) the purposeful action on the part of the defendant specifically intended to harm the existing relation; 3) the absence of privilege or justification on the part of the defendant; 4) the occasioning of actual legal damage as a result of the defendant’s conduct. Strickland v. University of Scranton, 700 A.2d 979 (1997). PP&L does not contest that plaintiffs have properly pled these elements. Rather, PP&L erroneously relies upon a line of cases which discusses tortious interference with contractual relations in the context of at will employees. See,

e.g., Hennessy v. Santiago, 708 A.2d 1269 (Pa. Super. 1998); but compare, Curran v. Children's Service Center of Wyoming County, Inc., 396 Pa. Super. 29, 578 A.2d 8 (1990) (holding that a cause of action for intentional interference with an existing contractual relationship may be sustained even though the employment relationship is at-will). This case does not involve an at will employee or, for that matter, an "at will" employment contract.<sup>1</sup>

The present factual situation is similar to the case of Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 482 Pa. 416, 393 A.2d 1175 (1978).<sup>2</sup> In Adler the plaintiff was a law firm which brought suit against former associates for interference with its existing contractual relationships with its clients. Adler, 393 A.2d at 1177. The defendants were attempting to procure business on behalf of their new firm by contacting plaintiff's clients by telephone and in person and informing them that they could leave the plaintiff's firm and by providing them with form letters which could be used to discharge plaintiff. Id. at 1178. The court considered the defendants' conduct and found that it was improper and that the defendants intentionally interfered with plaintiff's existing contractual relationships with their clients. Id. at 1184. The court then reversed the holding of the Superior Court which dismissed the Complaint and reinstated the holding of the Court of Common Pleas which enjoined the defendants from continuing their improper interference with plaintiff's clients. Id. at 1175.

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<sup>1</sup>The utility consulting agreements are not employment contracts, nor are they "at will." Rather, the utility consulting agreements have specified payment terms. A client is not free to terminate the contract at any time. Rather, it is obligated to pay either PUSC or CUC for its recommendations for a period of 60 months.

<sup>2</sup>Applying the rationale used by the defendant, there could not be a claim for tortious interference in the Adler Barish case because the law firm which maintained contractual relations with its clients were "employed" by the clients.

In the present case, plaintiffs are in the business of, *inter alia*, providing utility consulting services pursuant to written contracts with their customers. (Complaint, paragraph 3). Like the attorneys in Adler, the plaintiffs in this case have contractual relationships with their customers but are not considered employees of their customers and do not enter into employment agreements with their customers. Instead the contracts used by plaintiffs are typically one page documents wherein the utility consultant agrees to review the rates, tariffs, discounts, riders and total charges that apply to the customer's utility billings and to submit recommendations to the customer for possible savings, credits or refunds. (Complaint, paragraph 3). When plaintiffs sign these contracts with a customer, they are not put on the customer's payroll as an employee and they do not collect the benefits to which typical employees are entitled. Once the customers implement plaintiffs' recommendations, they are obligated to pay plaintiffs for a specific period of time. There is nothing "at will" about the contractual relationship. Taking all of plaintiffs' allegations as true, plaintiffs have not pled an employment relationship and as such, the case law cited by PP&L is inapplicable and PP&L's first preliminary objection must be overruled.

In an effort to argue that every consulting agreement is an "employment agreement", PP&L places heavy reliance upon Somers v. Somers, 418 Pa.Super. 131, 613 A.2d 1211 (1992). That case, however, does not even deal with tortious interference with contractual relations. Rather, it deals with the breach of an employment agreement. Thus, to the extent Somers has any relevance to a claim for tortious interference, it falls squarely into the line of cases dealing with employers and employees. In fact, in that case the Superior Court had previously affirmed the trial court's earlier holding that the contract at issue was to be construed as an "employment

agreement.” Id. at 1213.<sup>3</sup> PP&L’s reliance upon Somers is therefore totally misplaced. There is nothing in Somers which even remotely suggests that *every* consulting relationship is to be treated like an employer/employee relationship. To the contrary, there is no analysis in the opinion with respect to the issue at all.

As it is clear that plaintiffs’ contracts with their clients are independent consulting contracts, and not employment contracts, PP&L’s case law is inapplicable and plaintiffs have set forth a valid claim for tortious interference with existing contractual relationships. Accordingly, PP&L’s first preliminary objection should be dismissed.

3. **Plaintiffs Have Not Asserted a Claim for Tortious Interference with Prospective Contractual Relations and Therefore PP&L’s Second Preliminary Objection is Improper and Should be Overruled**

PP&L’s second preliminary objection is based upon its misconception that plaintiffs have asserted a claim of tortious interference with prospective contractual relations. Plaintiffs’ Complaint does not include such a claim. Plaintiffs only claim against PP&L is that of tortious interference with the contractual relationships already existing between plaintiffs and their customers. With regard to that claim, plaintiffs seek as one element of damages, the loss of

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<sup>3</sup>The facts of Somers are dramatically different than those in this case. In Somers the plaintiff and his nephew entered into a stock purchase agreement whereby the plaintiff sold to his nephew a portion of his stock in the family corporation and surrendered to the corporation for redemption the remainder of his outstanding shares. Somers, 613 A.2d at 1212. As a result of this transfer, the nephew became the sole stockholder and sole director. Id. In conjunction with this stock transfer agreement the plaintiff and his nephew entered into an employment agreement whereby the uncle was employed by the company as a consultant respecting general corporate matters and with the authority to act for the corporation on one particular project, the Wallkill project. Id. The employment agreement provided the plaintiff with a monthly consulting fee but not a specified term. Id. In addition the employment agreement provided that plaintiff was to receive additional compensation for his services of 50% of any net profits made from the Wallkill project. Id.

ongoing and future business from the clients with whom PP&L interfered.

Specifically the Complaint reads, “[a]nother form of damage caused by PP&L’s interference is that it effectively destroys Plaintiffs’ ability to obtain ongoing and future business from its clients. In ordinary circumstances, once clients realize the substantial savings that they are earning as a result of Plaintiffs’ involvement, they are very receptive to additional recommendations from Plaintiffs.” (Complaint, paragraph 36). Thus, once plaintiffs establish a contractual relationship with a customer and the customer begins to experience savings with respect to one area of savings, in most cases the customer is anxious for plaintiffs to uncover additional areas of savings.<sup>4</sup> As a result of PP&L’s interference with the existing contracts with these customers, plaintiffs are unable to develop and maintain an ongoing relationship with their customers and to benefit from their cross marketing efforts and services. (Complaint, paragraph 37). As such plaintiffs seek to recoup this loss as an element of damages in their tortious interference with existing contractual relations claim. However, plaintiffs have not brought a separate claim against PP&L for tortious interference with prospective contractual relations. Consequently, PP&L’s second preliminary objection is improper and unnecessary and should be overruled.

4. **Plaintiffs Have Alleged Sufficient Facts to Support an Award of Punitive Damages and Therefore PP&L’s Third Preliminary Objection Should Be Overruled**

As set forth in section A(2) above, plaintiffs have set forth a valid claim against PP&L for tortious interference with existing contractual relations and therefore are entitled to seek an

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<sup>4</sup> CUC generally focuses on electric, gas, sewer and water recommendations, and PUSC generally focuses on telecommunications savings.

award of punitive damages for that tort claim. Consequently, PP&L's third preliminary objection should be overruled.

PP&L argues alternatively that plaintiffs failed to plead sufficient facts to support an award of punitive damages. PP&L's assertion is incorrect. Plaintiffs agree that punitive damages are only available where the defendant's conduct was outrageous due to the defendant's reckless disregard to the rights of others. SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 587 A.2d 702 (1991). Thus, the only issue for this Honorable Court's review is whether sufficient material facts have been pled to support the plaintiffs' claim for punitive damages.

Outrageous conduct sufficient to support an award of punitive damages is an act which is done with a bad motive or with reckless indifference to the interests of others. Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989). Reckless indifference to the rights of others or, as it is sometimes referred to, "wanton misconduct" means that "the actor had intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow." Evans v. Philadelphia Transportation Co., 418 Pa. 567, 212 A.2d 440 (1965) (citation omitted). Further, state of mind of the actor, by necessity, must be averred generally. Hall v. Horstman Builders, Inc., 37 Pa. D. & C. 3d 255, 260 (C.P. Crawford, 1984) (holding that the complaint, viewed as a whole, had sufficiently pled specific factual averments and a general averment of the defendant's wanton or malicious state of mind and as such was sufficient to support a claim for punitive damages).

In the case at bar, the Complaint, read in its entirety, sufficiently pleads facts and conduct which would support a finding that the PP&L's actions were, at a minimum, in reckless

indifference to the interests and rights of the plaintiffs. Taken in a light most favorable to plaintiffs, the allegations of the Complaint set forth a malicious and systematic pattern of conduct designed to harm plaintiffs. In direct contrast to the cases cited by PP&L in its brief, plaintiffs have pled more than just bare conclusory allegations that PP&L acted recklessly or maliciously. Plaintiffs have set forth seventeen paragraphs describing PP&L's wrongful conduct. (See, Complaint, paragraphs 17-34). Specifically, plaintiffs have averred that the PP&L was aware of plaintiffs' contractual relationship with their customers but nevertheless made deceitful calls to plaintiffs' offices in order to obtain information on their services (Complaint, paragraph 20); made statements indicating that PP&L could perform plaintiffs' services at no charge despite being aware that plaintiffs had already provided recommendations to these customers pursuant to their contract (Complaint, paragraph 22); encouraged and aided plaintiffs' customers to terminate their contracts (Complaint, paragraph 23); in at least one instance provided the actual termination language to plaintiffs' customer (Complaint, paragraph 24); provided false and misleading information to plaintiffs' customers about plaintiffs' recommendations (Complaint, paragraph, 25); took steps to mislead plaintiffs' customers about particular rates and about particular benefits and risks associated with rates which were available and recommended by plaintiffs (Complaint, paragraphs 27 and 28); and provided false and misleading statistics to plaintiffs' customers regarding a particular rate in order to dissuade the customer from implementing that recommendation (Complaint, paragraph 30). These allegations are more than sufficient to support a claim of punitive damages. See, e.g., Shared Communications Services of 1800-80 JFK Blvd. Inc. v. Bell Atlantic Properties, Inc., \_\_\_ Pa. Super. \_\_\_, 692 A.2d 570 (1997) (awarding over 2 million dollars in punitive damages for defendants tortious interference with a single

contract).

Moreover, the court must keep in mind that we are merely at the pleading stage and that as discovery proceeds and additional facts are uncovered, the outrageousness of the PP&L's actions will become even more clear. As such, PP&L's third preliminary objection should be overruled.

**B. PP&L's Fourth Preliminary Objection in the Nature of a Motion to Strike for Failure to Conform to a Rule of Court Regarding Multiple Causes of Action Should be Overruled Since Plaintiffs Have Only Pled One Cause of Action**

PP&L's fourth preliminary objection is based upon its misconception that plaintiffs have asserted two separate claims for tortious interference with contractual relations. As explained in subpart A(3) this Brief, plaintiffs have only asserted a claim based upon PP&L's tortious interference with plaintiffs' existing contractual relationships. As such, PP&L's fourth preliminary objection in the nature of a motion to strike should be overruled.

**C. PP&L's Fifth Preliminary Objection in the Nature of a Motion to Strike for Failure to Attach Written Contracts Should be Overruled as Plaintiffs' Claim is not Based Upon a Writing**

PP&L's fifth preliminary objection is based upon Pa.R.Civ.P. 1019(h) which requires a party to attach a copy of the writing upon which any claim is based if the pleading asserts that the claim is based upon a writing. Pa.R.Civ.P. 1019(h). This rule is inapplicable to the Complaint at bar.

The nature of plaintiffs' claim against PP&L is in tort for interference with plaintiffs' contractual relationships with its customers. The basis of that claim is the particular conduct of the PP&L that plaintiffs contend was wrongful. The claim is not based upon any written contract that plaintiffs had with PP&L. PP&L's liability does not depend on any language or provision

found in those contracts and therefore, plaintiffs' claim is not based upon a writing as provided in Rue 1019(h). Because Rule 1019(h) is inapplicable to the Complaint, plaintiffs are not required to attach every contract they had with every customer with whom they contend PP&L interfered. Accordingly, PP&L's fifth preliminary objection in the nature of a motion to strike should be denied.

**D. PP&L's Sixth Preliminary Objection in the Nature of a Motion to Strike Paragraphs 17 and 20 of the Complaint Should be Denied as These Paragraphs are Relevant to the Complaint and Because PP&L Failed to Establish It is Prejudiced by their Inclusion**

In its sixth preliminary objection PP&L argues alternatively that paragraphs 17 and 20 of the Complaint assert scandalous and impertinent matter and should be stricken pursuant to Pa.R.Civ.P. 1028(a)(2). The remedy of striking impertinent matter in a Complaint should only be sparingly exercised and only when a party can affirmatively show prejudice. Commonwealth of Pennsylvania Department of Environmental Resources v. Hartford Accident and Indemnity Co., 40 Pa. Commw. 133, 138, 396 A.2d 885 (1979) (declining to dismiss allegedly impertinent damages claim).

In this case paragraphs 17 and 20 make allegations that are pertinent to the issues raised by the Complaint. Although PP&L contends that there is no "nexus" between these allegations and plaintiffs' claims, this is simply not the case. Plaintiffs have alleged specific facts regarding Mr. Collin's and Mr. Kaspar's conduct to demonstrate the malice directed toward plaintiffs and some of the motivation behind PP&L's conduct. Thus, in Paragraph 20 plaintiffs refer to Mr. Collins' covert efforts to uncover information on CUC to demonstrate PP&L's malice towards CUC and the type of conduct directed to CUC. Similarly, in Paragraph 17 plaintiffs explain some of the motivation behind PP&L's actions; namely, that PP&L's representatives envy what

they perceive to be the large sums of money earned by plaintiffs - to the point that at least one high level manager, such as Mr. Kaspar, has taken the "if you can't beat them join them approach" and have become utility consultants.

The Complaint only sets forth those facts relating to the conduct of Mr. Kasper and Mr. Collins which can be imputed to PP&L, which demonstrates their active interference with plaintiffs' existing contracts with its customers on behalf of PP&L, and which demonstrates, in part, PP&L's motivation for harming plaintiffs. It should go without saying that a business entity such as PP&L can only act through its agents, employees and representatives; accordingly it is not necessary for plaintiffs to aver in every allegation that the actions of the particular agent, employee or representative are that of PP&L. Moreover, plaintiffs have specifically alleged in paragraph 18 of the Complaint allege that PP&L "by and *through its agents, employees and representatives* took affirmative steps designed to interfere with Plaintiffs' ability to service their customers and to obtain the greatest level of savings for its customers." (emphasis added). Thereafter, plaintiffs allege in paragraph 20 of the Complaint that Larry Collins is a "PP&L representative". Plaintiffs similarly allege in Paragraph 17 that Mr. Kaspar is a "high level PP&L employee."

It should further be noted that PP&L is attempting to find fault with plaintiffs for attempting to plead facts demonstrating the wrongful nature of PP&L's conduct and some of the motivation underlying same. It is ironic that PP&L finds fault with plaintiffs in this regard, while at the same time complaining that there are insufficient facts to establish an entitlement to punitive damages or insufficient specificity with respect to its claims.

Finally, PP&L has failed to show how the inclusion of these two particular paragraphs

prejudice its case. PP&L's claim of prejudice is its fear that the allegations of the Complaint will shape the discovery in the case. As the allegations relating to the conduct of Kaspar and Collins are relevant to the issues raised by the Complaint, there is no need for fear that they will broaden the scope of discovery in this matter. Furthermore, discovery is far broader than admissibility for trial purposes and therefore merely because something is uncovered in discovery does not automatically indicate that it will be admissible at trial and therefore, there is no prejudice to PP&L's case in permitting the allegations regarding Kaspar and Collins to remain.

**E. PP&L's Seventh Preliminary Objection Regarding Lack of Specificity in the Complaint Should be Dismissed as Plaintiffs' Have Pled Sufficient Facts to Support Their Claim for Tortious Interference**

In the alternative, in its seventh preliminary objection PP&L argues that the Complaint fails to set forth the identity of each and every customer with whom plaintiffs' contend PP&L interfered. This objection should be overruled as the Complaint is sufficiently specific.

Pennsylvania is a fact pleading state, and the Rules of Civil Procedure require only that a plaintiff plead the "material facts" in a "concise and summary-form" Pa.R.Civ.P. 1019(a). A Complaint need only be sufficiently specific so as to enable an opposing party to prepare a response. Commonwealth of Pennsylvania Environmental Pollution Strike Force v. Jeannette, 9 Pa. Commw. 306, 305 A.2d 774 (1973). In the Complaint plaintiffs specifically identify nine customers with whom PP&L interfered. (See, Complaint, paragraph 22). Plaintiffs then explain that they believe that there may be additional customers with whom PP&L interfered but without the opportunity to review PP&L's files, there is no way at the pleading stage, for plaintiffs to identify every such customer. (Complaint, paragraph 26). Plaintiffs' Complaint alleges sufficient facts to enable PP&L to prepare a response. Plaintiffs are not required to plead all of the

evidence necessary to prove their case in the pleadings stage. PP&L may inquire further as to the particular additional customers with whom plaintiffs contend it interfered as discovery progresses and plaintiffs have had the opportunity to review the relevant documents maintained by PP&L in its files. As the Complaint pleads sufficient facts to permit PP&L to formulate a response, PP&L's seventh preliminary objection should be overruled.

## VI. CONCLUSION

For the foregoing reasons, plaintiffs Commercial Utility Consultants and Public Utility Service Corporation respectfully request that this Honorable Court overrule defendant Pennsylvania Power & Light Company's Preliminary Objections and direct defendant to file an Answer as set forth in the proposed Order.

POWELL, TRACHTMAN, LOGAN, CARRLE,  
BOWMAN & LOMBARDO, P.C.

Date: March 1, 2000

By:

  
Ethan N. Halberstadt  
Mary J. Pedersen  
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I, Mary J. Pedersen, Esquire, hereby certify that a true and correct copy of the foregoing Plaintiffs' Brief in Opposition to Preliminary Objections of Defendant PP&L To Complaint was served via first class mail, postage prepaid upon the following:

Glen R. Stuart, Esquire  
Morgan, Lewis & Bockius, LLP  
2000 One Logan Square  
Philadelphia, PA 19103-6993

Date:

3/1/00

Mary Pedersen  
Mary J. Pedersen

FILED

CERTIFICATE OF SERVICE

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I, Mary J. Pedersen, Esquire, hereby certify that a true and correct copy of the foregoing Plaintiff Commercial Utility Consultants Brief in Opposition to Preliminary Objections of Defendant PP&L To Complaint was served via first class mail, postage prepaid upon the following:

Glen R. Stuart, Esquire  
Morgan, Lewis & Bockius, LLP  
2000 One Logan Square  
Philadelphia, PA 19103-6993

Date: 3/1/00

Mary J. Pedersen  
Mary J. Pedersen

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NOTARY  
CHRISTOPHER J. PA...

*gmg*

COMMERCIAL UTILITY CONSULTANTS: IN THE COURT OF COMMON PLEAS  
& PUBLIC UTILITY SERVICE CORPORATION COMPANY : CHESTER COUNTY, PENNSYLVANIA

-VS-

PENNSYLVANIA POWER & LIGHT COMPANY a/k/a PP&L : CIVIL ACTION

NO. 99-09799 ←

COMMERCIAL UTILITY CONSULTANTS : IN THE COURT OF COMMON PLEAS  
: CHESTER COUNTY, PENNSYLVANIA

vs.

PENNSYLVANIA POWER & LIGHT COMPANY a/k/a PP&L : CIVIL ACTION-LAW

NO. 99-09800 ←

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MARCH 23 2000  
CLERK OF COURT

Ethan N. Halberstadt, Esquire, Attorney for Plaintiffs  
Glen R. Stuart, Esquire, Attorney for Defendant  
Bryant David Lim, Esquire, Attorney for Defendant

ORDER

AND NOW, this 30<sup>th</sup> day of March, 2000, by agreement of the parties, it is hereby ORDERED that:

1. The above actions are consolidated at 99-09799 for all purposes and the Prothonotary is ordered to amend the docket accordingly.

BY THE COURT:

*Katherine B. Platt*  
Katherine B. L. Platt J.