

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

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| 1. <u>REPORT DATE:</u> July 32, 2005 | 2. <u>BUREAU AGENDA NO.</u> JUL-2005-OSA-0216* |
| 3. <u>BUREAU:</u> Office of Special Assistants | |
| 4. <u>SECTION(S):</u> | 5. <u>PUBLIC MEETING DATE:</u> July 14, 2005 |
| 6. <u>APPROVED BY:</u> Director: C.W. Davis 7-1827 Mgr/Spvr: K.G. Sophy 7-8108 Legal Review: | |
| 7. <u>PERSONS IN CHARGE:</u> AA Arnold 7-8032 | 9. <u>EFFECTIVE DATE OF FILING:</u> N/A |
| 8. <u>DOCKET NO.:</u> A-110550F0160 | DOCKETED JUL 21 2005 |

10. (a) CAPTION (abbreviate if more than 4 lines)
 (b) Short summary of history & facts, documents & briefs
 (c) Recommendation

(a) Joint Application of PECO Energy Company and Public Service Electric and Gas Company (Joint Applicants) for Approval of the Merger of Public Service Enterprise Group Incorporated with and into Exelon Corporation – **Initial Decision Granting Motion to Dismiss Protest and Petition to Intervene**

(b) On February 4, 2005, Joint Applicants filed a joint Application requesting an order approving, to the extent necessary, the merger of Public Service Enterprise Group Incorporated (PSEG) (PSE&G's corporate parent) with and into Exelon Corporation (Exelon) (PECO's corporate parent). Notice of the Application was published in the *Pennsylvania Bulletin* on February 19, 2005. On March 7, 2005, Eric Joseph Epstein (Epstein) filed a Protest and Petition to Intervene. Joint Applicants filed an Answer in Opposition and Motion to Dismiss. By Initial Decision issued April 26, 2005, presiding Administrative Law Judge (ALJ) Marlane R. Chestnut granted the Motion to Dismiss and dismissed the Protest and Petition to Intervene of Epstein. Exceptions to the Initial Decision were filed by Epstein, the Office of Consumer Advocate, the Office of Small Business Advocate, and the Department of Environmental Protection (DEP). Replies to Exceptions were filed by the Joint Applicants.

(c) The Office of Special Assistants recommends that the Commission adopt a proposed Opinion and Order denying the Exceptions consistent with the discussion and adopting the Initial Decision consistent with the discussion contained therein.

Order Doc. No. 546488

Calendar Doc. No. 554177v1

11. MOTION BY: Commissioner Chm. Holland
 SECONDED: Commissioner Cawley

Commissioner Shane - Yes
 Commissioner Pizzigrilli - Yes
 Commissioner Fitzpatrick - Yes

CONTENT OF MOTION: Staff recommendation adopted.

**DOCUMENT
FOLDER**



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

July 18, 2005

A-110550 F0160

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Joint Application of PECO Energy Company and Public Service Electric and Gas Company for Approval of the Merger of Public Service Enterprise Group Incorporated with and into Exelon Corporation.

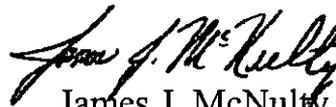
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To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on July 14, 2005 has adopted an Opinion and Order in the above-entitled proceeding.

An Opinion and Order has been enclosed for your records.

Very truly yours,


James J. McNulty
Secretary

Enclosure
Certified Mail
LJM

See attached list for additional parties of record

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105

Public Meeting held July 14, 2005

Commissioners Present:

Wendell F. Holland, Chairman
James H. Cawley, Vice Chairman
Bill Shane
Kim Pizzingrilli
Terrance J. Fitzpatrick

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Joint Application of PECO Energy Company
and Public Service Electric and Gas Company
*for Approval of the Merger of Public Service
Enterprise Group Incorporated with and into
Exelon Corporation*

A-110550F0160

DOCKETED
SEP 16 2005

OPINION AND ORDER

Before the Commission for consideration are Exceptions filed to the April 26, 2005 Initial Decision of Administrative Law Judge (ALJ) Marlane R. Chestnut. In the Initial Decision, ALJ Chestnut granted a Motion to Dismiss Protest of Mr. Eric Joseph Epstein filed by PECO Energy Company and Public Service Electric and Gas Company (alternately, Joint Applicants) and dismissed the Protest of Mr. Epstein and further denied Mr. Epstein's Petition to Intervene in the above-captioned proceedings. Mr. Epstein's Protest and Intervention were contested by the Joint Applicants on the primary basis of standing.

Exceptions were filed by Mr. Epstein (Epstein hereafter), appearing *pro se*, on May 16, 2005. On May 16, 2005, Exceptions regarding Epstein's intervention were also received from the Office of Consumer Advocate (OCA). Replies to Exceptions were received from the Joint Applicants on May 26, 2005.

History of the Proceeding

This proceeding is a Joint Application filed on February 4, 2005, by PECO Energy Company (PECO) and Public Service Electric and Gas Company (PSE&G) pursuant to Chapter 11 of the Public Utility Code, 66 Pa. C.S. §§ 1100-1103, *inter alia*, requesting that the Commission issue an order approving, to the extent necessary, the merger of Public Service Enterprise Group Incorporated (PSEG), PSE&G's corporate parent, with and into Exelon Corporation (Exelon), PECO's parent corporation. See April 26, 2005, Initial Decision (I.D.), Finding of Fact 1, *infra*.

Notice of the Joint Application was published in the *Pennsylvania Bulletin* on February 19, 2005. On March 7, 2005, Epstein filed both a Protest and Petition to Intervene. (Finding of Fact 2, *infra*).¹ In his Protest, Epstein stated: (1) he is a PECO shareholder in good standing; (2) he is Chairman of Three Mile Island Alert, Inc. (TMIA), a "safe-energy" organization based in Harrisburg which monitors Peach Bottom, Susquehanna, and Three Mile Island nuclear generating stations; (3) he is Coordinator of the EFMR Monitoring Group, a community based organization which, *inter alia*, monitors radiation levels at Peach Bottom and Three Mile Island nuclear generating stations; (4) he was an active participant and signatory to the Joint Petition for Settlement of the application of PECO for approval of a plan of corporate restructuring, including the creation of a holding company and the merger of the newly formed holding company and Unicom Corporation, Docket No. A-1100550F0147; and (5) he actively participated in the

¹ The ALJ noted that several entities filed Protests or Petitions to Intervene. (I.D. at 1).

settlement negotiations related to the Unicom Merger and “helped to facilitate” the resolution of certain issues, which included nuclear decommissioning. (Petition at 1). Although Epstein referenced TMIA and the EFMR Monitoring Group in the Petition to Intervene, the Petition to Intervene and Protest were filed by Epstein as an individual. *See* I.D., n. 1. Epstein is not a customer of PECO and does not live in PECO’s service territory. Also, Epstein is not a marketer of electricity or gas in PECO’s service territory. (Finding of Fact 3).

On March 24, 2005, the Joint Applicants filed an Answer in opposition to the Epstein Petition to Intervene and a Motion to Dismiss the Protest. The Joint Applicants alleged that Epstein lacked standing and that he attempted to raise issues that are outside the scope of the proceeding and outside the Commission’s jurisdiction. (I.D. at 3).

Subsequent to the prehearing conference, held on March 29, 2005 in Philadelphia, in which Epstein was permitted to participate, the Initial Decision was issued. ALJ Chestnut concluded that Epstein did not demonstrate an interest which was “directly affected and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission in the proceeding.” *See* 52 Pa. Code § 5.72; I.D. at 5. Therefore, the Joint Applicant’s Motion was granted. The Exceptions and Replies were filed as noted.

Discussion

The Joint Applicants and the presiding ALJ addressed two grounds in opposition to the Epstein Protest and Petition to Intervene. Those grounds were: (1) Epstein failed to establish a direct, immediate or substantial interest in the proceeding that would confer the requisite standing to protest or to intervene and (2) the issues raised by Epstein’s Protest and Petition to Intervene were outside the scope of this proceeding. (I.D. at 3).

ALJ Chestnut, on review of 52 Pa. Code § 5.72 and the positions of the parties, concluded that Epstein failed to establish the direct and immediate interest necessary to permit his intervention or to prosecute his protest. (I.D. at 4). The ALJ was persuaded by the following factors. First, the ALJ concluded that Epstein's participation in prior PECO proceedings was not relevant to the question of his participation in the instant proceeding. The ALJ observed that standing is waivable. Consequently, the fact that PECO did not contest Epstein's participation in other PECO proceedings was insufficient, in and of itself, to confer a direct and immediate interest relative to Epstein's participation in this particular proceeding.²

Second, ALJ Chestnut observed that if one were to concede that Epstein had a direct, immediate and substantial interest which may be directly affected by the instant proceeding, these interests were adequately represented by existing participants. (I.D. at 4). The ALJ noted the participation of several customer groups, as well as the public advocates representing the public interest, in this proceeding. She also concluded that these entities have identified issues related to nuclear power generation in their respective Prehearing Memoranda. *Id.* In light of the participation of these entities, ALJ Chestnut concluded there is no aspect of the public interest that requires intervention on the part of Epstein. ALJ Chestnut concluded that Epstein would not be aggrieved in any way as the result of the Commission's final order in the matter. (I.D. at 6).

Third, ALJ Chestnut concluded that Epstein's status as a shareholder of Exelon Corporation is insufficient to confer any direct, immediate or substantial interest in

² The ALJ also noted that since the conclusion of the PECO/Unicom merger proceeding, PECO's generating assets (including its interest and obligations pursuant to the Nuclear Monitoring and Waste Storage Agreement) were transferred to Exelon Generation Company, LLC. (I.D. at 4).

this proceeding. See I.D. at 6, citing *American Society of Utility Investors v. Pa. PUC*, 54 PA PUC 560, 1980 Pa. PUC LEXIS 3, *2.

Finally, the ALJ was not persuaded by the fact that Epstein has been recognized as an expert witness before the Commission on nuclear economics and “has worked cooperatively with AmerGen, FirstEnergy, PPL, PECO Energy, PPLICA, PAIEUG, the OCS and the OTS to resolve nuclear tariffs as sufficient to confer the requisite standing. (I.D. at 6, referencing Epstein Response, Paras. 25 and 26).

ALJ Chestnut additionally concluded that various issues raised by Epstein were either outside the scope of the proceeding, or not within the Commission’s jurisdiction. (I.D. at 8-9; citing *Pa. PUC v. Met-Edison Co.*, 54 PA PUC 276 (1980) and *Re: Petition of Met-Edison Co.*, 65 PA PUC 190 (1987).

In Exceptions, Epstein raises four contentions.³ First, he explains that the Commission has broad discretion in determining standing and argues for the exercise of such discretion in regard to his participation as an intervenor in the present case. Epstein does not articulate the nature of his interest. Epstein, in connection with his concluding argument on this Exception, further points out that he has claimed “representational” standing. (Epstein Exc. at 2). Epstein states that he represents dedicated interests managed and administered by Epstein for ratepayers, citizens and communities in South Central Pennsylvania. *Id.*

In his second Exception, Epstein argues that the ALJ did not consider whether standing is appropriate under 52 Pa. Code § 5.72(a)(3), which permits intervention based

³ Any Exception which is not specifically addressed shall be deemed to have been duly considered and denied. See *Consl. Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); see also, generally, *Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

upon the assertion of an interest of such nature that participation of the petitioner may be in the public interest.

Epstein acknowledges that nuclear power production issues relating to licensing and operations fall primarily under the jurisdiction of the NRC. (Epstein Exc. at 2). However, he explains that the unique and special interest that he represents would assist the Commission in determining to what extent its jurisdictional decisions impact upon or are affected by decisions made by the NRC. (Epstein Exc. at 3). He further maintains that his unique expertise affords him the ability to compare explanations made by PECO Energy to the NRC and to this Commission. *Id.*

Epstein additionally refers to the Joint Petition for Negotiated Settlement, wherein PECO recognized that Epstein and the EFMR Monitoring Group at Peach Bottom have a special interest in the continued safe operation of the Peach Bottom Atomic Power Station. (Epstein Exc. at 3). Based on the foregoing, Epstein argues that this is an interest which comes within the “public interest” criteria of the Commission’s regulations, sub-section (a)(3) and confers standing under sub-section (a)(2). *Id.*

In his third Exception, Epstein submits that notwithstanding that several parties to the proceeding have expressed an interest in aspects of issues he intends to raise, no other party can supplant his recognized expertise in nuclear economics, nuclear safety, and nuclear waste isolation. (Epstein Exc. at 4). Consequently, Epstein maintains that other parties cannot adequately represent the interest he would advance in the proceeding and that their participation should not operate as a bar to his participation. *Id.* Here, Epstein makes substantive argument concerning his position on the merits of the proposed merger transaction and how it will impact the production of high-level radioactive waste. (Epstein Exc. at 5-6).

In his fourth Exception, Epstein argues that the presiding ALJ did not acknowledge that he identified “non-nuclear” issues, i.e., issues not related to nuclear power production. Epstein, thereafter, argues that it is discriminatory to leave South-Central Pennsylvanians dependent upon well-intentioned groups from different geographic regions of the state to protect or advocate for their interests. (Epstein Exc. at 11).

In conclusion, Epstein notes that he owns and operates a business in South-Central Pennsylvania (EFMR Monitoring, Incorporated) that, *inter alia*, invests in economic development, distributes potassium iodide free of charge to residents, and provides emergency planning and radiation monitoring at no charge to PECO rate payers, area residents, and concerned citizens living in proximity to Peach Bottom. Thus, Epstein states that he is the only active party in a position to monitor whether reductions in shareholder services will flow back to PECO rate payers. (Epstein Exc. at 12).

In its Exceptions, the OCA argues that Epstein has met the standard for intervention under the “public interest” criterion of the Commission’s regulations and should be permitted to participate, albeit on “appropriate issues.” (OCA Exc. at 2). The OCA argues that Epstein’s expertise is relevant to this proceeding and cites an example in support of its position, the fact that Epstein was intimately involved with the establishment of PECO’s existing Nuclear Decommissioning Cost Adjustment Clause. (OCA Exc. at 9).

In its Replies to the Exceptions, the Joint Applicants state that the Commission need not reach the broader question of the scope of our authority over the “wholesale” generation market. (R.Exc. at 4). The Joint Applicants view the issue at this stage of the proceedings as a narrow one, which is focused on the participation of Epstein. *Id.* The Joint Applicants assert that all but two issues of the twenty-five issues set forth in Epstein’s Protest, pertain to operational or safety-related matters at nuclear plants owned by entities other than PECO. (R. Exc. at 2). Thus, the generational and

nuclear safety issues that Epstein identifies are not properly before this Commission. (R. Exc. at 4). The Joint Applicants state that these issues can be addressed in other proceedings, namely in proceedings before the NRC in which Epstein has intervened. *Id.*

The Joint Applicants also note that Epstein does not have representational standing, as he does not seek to prosecute the interests of an association; that the assertion that standing is appropriate based on the fact that Epstein facilitated the negotiation of a monitoring agreement with PECO Energy and Unicom is contrary to the express terms of the agreement; and that his allegations of a special interest is not sufficient to grant him party status as this interest is not direct, immediate and substantial under the standards of *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975); also *Landlord Service Bureau, Inc. v. Equitable Gas Co.*, Docket No. C-0093481 (Order entered June 8, 1993).

Also, the Joint Applicants rely on *L.G. Spielvogel, P.E., et al. v. PECO, et al.*, Docket No. R-00963728C0001, et al. (Order entered January 17, 1997), 1997 Pa. PUC LEXIS 2, for the proposition that superior expertise in an area does not, in and of itself, confer the requisite interest necessary for standing. (R. Exc. at 8-9). Also, note the Joint Applicants, the issues on which Epstein claims superior expertise are issues that are outside the scope of the proceedings. (R. Exc. at 9-11).

Disposition

On consideration of the Initial Decision and the Exceptions filed thereto, we shall adopt the decision of the ALJ consistent with our discussion herein. Our adoption should not be construed as a pre-disposition concerning any issue pertaining to the scope of issues involved in the instant application. Rather, our determination is focused upon the narrow question of whether or not Epstein should be permitted to intervene pursuant to the public interest criterion of our regulations.

ALJ Chestnut correctly noted that, notwithstanding that our rules of practice and procedure are patterned after the rules of Pennsylvania rules for civil practice in the courts, intervention is a matter within the sound discretion of the Commission.

Allowance of intervention is a matter within the discretion of the Commission. *City of Pittsburgh v. PA Public Utility Comm'n*, 153 Pa.Super. 83, 33 A.2d 641(1943), *N.A.A.C.P., Inc. v. PA Public Utility Comm'n*, 5 Pa.Comm. 312, 290 A.2d 704 (1972). "The interest of a petitioner seeking intervention must be direct and immediate." *Re Pennsylvania Power & Light Company*, 50 Pa. PUC 38, 40 (1976).

(I.D. at 4).

On consideration of the positions of the parties, we note that Epstein and the participants essentially concede that he is unable to affirmatively demonstrate an interest which is direct, immediate, and substantial. The parties also concede that Epstein does not have an interest which will be directly affected and as to which he may be bound by the action of the Commission in the proceeding.

On careful review of the pleadings, we acknowledge Epstein's expertise in the areas of nuclear decommissioning, nuclear waste isolation, nuclear economics, nuclear safety, universal service, and community investment. *See Epstein Protest*, para. 10. We further acknowledge his prior history of active participation in matters involving nuclear generation. However, this expertise and the prior participation of Epstein do not, based on the facts of this case, support intervention based on the public interest criterion on our regulations. On balance, we find that Epstein's asserted interest does not go beyond the interest of all citizens in seeking compliance with the law, or is speculative in relation to the proposed transaction.

The requirement of a “substantial” interest means there must be some discernible adverse effect to some interest other than the general interest in having others comply with the law. See *William Penn Parking Garage*, 464 Pa. at 195, 346 A.2d at 282; also *Friends of the AtGlen-Susquehanna Trail, Inc. v. PA. PUC*, 717 A. 2d 581 (Pa. Cmwlth. 1998), *appeal denied* 559 Pa. 695 (1999). Also, the requirement that an interest be “direct” means that a person claiming to be aggrieved must show causation of the harm by the matter of which he or she complains. Epstein can point to no disruption of any of the settlements, stipulations, or accords with which he has familiarity, or with which he has previously been involved, that will be adversely affected by the proposed transaction.

Finally, we acknowledge the “regional” concern articulated by Epstein, namely that the interests of South-Central Pennsylvanians in the proposed transaction may not be adequately represented absent his participation. On review of this aspect of Epstein’s argument, we generally agree with the position of the Joint Applicants that this appears to show an intent by Epstein to vindicate an interest in a representational sense when, in fact, Epstein pursues his Protest and Intervention as an individual. We are not persuaded that this interest is not adequately protected by other active participants.

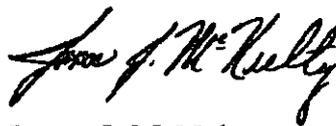
Conclusion

Based on the foregoing, we shall adopt the Initial Decision of ALJ Chestnut to the extent consistent with the discussion in this Opinion and Order. Our adoption of the Initial Decision relative to the participation of Epstein should not be construed as a disposition on the merits concerning the scope of this proceeding; **THEREFORE,**

IT IS ORDERED:

1. That the Initial Decision of Administrative Law Judge Marlane R. Chestnut issued April 26, 2005, is adopted consistent with the discussion in this Opinion and Order.
2. That the Exceptions of Eric Joseph Epstein are denied.
3. That the Exceptions of the Office of Consumer Advocate are denied consistent with the discussion in this Opinion and Order.
4. That the Protest filed by Eric Joseph Epstein is, hereby, dismissed.
5. That the Petition to Intervene filed by Eric Joseph Epstein is, hereby, dismissed.

BY THE COMMISSION



James J. McNulty,
Secretary

(SEAL)

ORDER ADOPTED: July 14, 2005

ORDER ENTERED: JUL 18 2005

Joint Application of PECO Energy Company and Public Service Electric and Gas Company for
Approval of the Merger of Public Service Enterprise Group Incorporated with and Into Exelon
Corporation
Docket Number A-110550F0160

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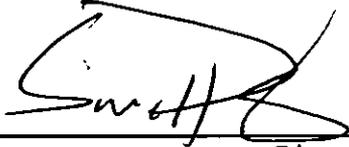
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(Senator Anthony H. Williams)

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 14 day of July, 2005,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of an Order an official Commission document entered, issued, or otherwise promulgated under date of July 14, 2005 at Docket No. A-110550 F0160 on behalf of:

RICHARD P MATHER SR ESQUIRE
PAMELA G BISHOP ESQUIRE
SCOTT PERRY ESQUIRE
DEPT OF ENVIRONMENTAL PROTECTION
RACHEL CARSON STATE OFFICE BLDG
400 MARKET STREET 9TH FL
HARRISBURG PA 17101-2301



Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

SECRETARY'S BUREAU RECORD RETENTION
PA PUBLIC UTILITY COMMISSION
KEYSTONE BUILDING 2ND FLOOR
400 NORTH STREET
Harrisburg, PA 17105-3265

RECEIVED
05 JUL 20 AM 9:08
PA.P.U.C.
SECRETARY'S BUREAU

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 19th day of July, 2005

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of an Opinion and Order an official Commission document entered, issued, or otherwise promulgated under date of July 18, 2005 at Docket No. A-110550 F0160 on behalf of:

KENNETH L MICKENS ESQUIRE
ROBERT V ECKENROD ESQUIRE
PA PUC OTS
PO BOX 3265
HARRISBURG PA 17105-3265

Cathy Royer
Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

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400 NORTH STREET
Harrisburg, PA 17105-3265

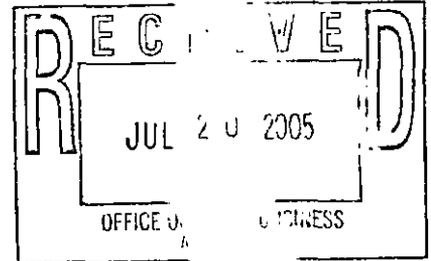
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05 JUL 21 PM 1:28
PA PUC
SECRETARY'S BUREAU

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this _____ day of _____, 20__,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of an Opinion and Order an official Commission document entered, issued, or otherwise promulgated under date of July 18, 2005 at Docket No. A-110550 F0160 on behalf of:

KAREN S MILLER ESQUIRE
OFFICE OF SMALL BUSINESS
ADVOCATE
SUITE 1102 COMMERCE BUILDING
300 NORTH SECOND STREET
HARRISBURG PA 17101



Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

SECRETARY'S BUREAU RECORD RETENTION
PA PUBLIC UTILITY COMMISSION
KEYSTONE BUILDING 2ND FLOOR
400 NORTH STREET
Harrisburg, PA 17105-3265

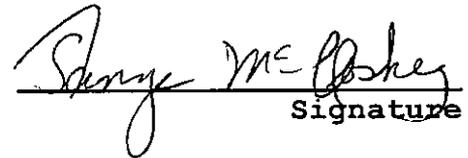
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2005 JUL 25 PM 3:32
SECRETARY'S BUREAU

ACKNOWLEDGEMENT OF RECEIPT & ACCEPTANCE OF SERVICE

AND NOW, to wit, this 18th day of July, 2005,

the undersigned, as evidenced by execution hereof, acknowledges receipt, and accepts service of an Opinion and Order an official Commission document entered, issued, or otherwise promulgated under date of July 18, 2005 at Docket No. A-110550 F0160 on behalf of:

TANYA J MCCLOSKEY ESQUIRE
JAMES MULLINS ESQUIRE
OFFICE OF CONSUMER ADVOCATE
5TH FLOOR FORUM PLACE
555 WALNUT STREET
HARRISBURG PA 17101


Signature

Kindly sign and date this acceptance of service and acknowledgement of receipt, and, return the same for filing to:

SECRETARY'S BUREAU RECORD RETENTION
PA PUBLIC UTILITY COMMISSION
KEYSTONE BUILDING 2ND FLOOR
400 NORTH STREET
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