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April 24, 2014

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

RE: Crescent Hotel – Plymouth Meeting v. PECO Energy Company
PUC Docket No.: C-2008-2068258

Dear Ms. Chiavetta:

Enclosed for filing with the Commission is *PECO Energy Company's Motion to Require the Filing of an Amended and More Specific Complaint*.

I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties. Thank you for your time and attention on this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Ward L. Smith".

Ward L. Smith
Counsel for PECO Energy Company

cc: Cynthia Fordham, Adm. Law Judge (via First Class Mail)

WS/lo

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|--|---|------------------------------------|
| Crescent Hotel – Plymouth Meeting, LP | : | |
| v. | : | Docket No. : C-2008-2068258 |
| | : | |
| PECO Energy Company | : | |
| | : | |
| Crescent Hotel – Plymouth Meeting, LP | : | Docket No. : C-2008-2068267 |
| v. | : | |
| | : | |
| UGI Corporation | : | |
| | : | |
| Crescent Hotel – Plymouth Meeting, LP | : | Docket No. : C-2009-2089563 |
| v. | : | |
| | : | |
| Celeren Corporation | : | |


NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.103, you are hereby notified that, if you do not file a written response denying or correcting the enclosed MOTION TO REQUIRE THE FILING OF AN AMENDED AND MORE SPECIFIC COMPLAINT of PECO Energy Company within 20 days from service of this notice, a decision may be rendered against you. All pleadings, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for PECO Energy Company, Ward L. Smith, and where applicable, the Administrative Law Judge presiding over the issue.

File with:
Rosemarie Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120

With a copy to:
Ward L. Smith, Esq.
PECO Energy Company
2301 Market Street, S-23
Philadelphia, PA 19103

Dated at Philadelphia, PA, April 24, 2014



Ward L. Smith, Esq.
Counsel for PECO Energy Company
2301 Market Street S-23
Philadelphia, PA 19101-8699
215-841-6863

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Crescent Hotel-Plymouth Meeting, LP | : | |
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| Celeren Corporation | : | |

PECO Energy Company’s Motion to Require the Filing of an Amended and More Specific Complaint

PECO Energy Company (“PECO”), pursuant to 52 Pa. Code §§ 5.103 and 5.483, makes this Motion to Require the Filing of an Amended and More Specific Complaint in this proceeding.¹ The crux of PECO’s argument is that, while this proceeding was in stasis for over five years due to bankruptcy of one of the key players, there were significant changes in both the facts and law related to this proceeding. Specifically, one party (Celeren) that was ruled to be an indispensable party is now bankrupt and out of business; the Commission has issued decisions, in closely comparable cases, applying and clarifying the rule that the Commission does not have authority to review “breach of contract” claims; and the Commission has issued an Order, in a closely comparable case, dismissing the Complaint for failure to specify the tariff rules or Commission statutes, regulations, rules or orders that it claimed that PECO violated.

¹ On April 22, 2014, PECO filed a Motion to Lift Stay in this proceeding. PECO anticipates that its Motion to Lift Stay will be granted and requests that, if necessary, the instant Motion be held until the Stay is lifted and then docketed at that time.

PECO respectfully submits that, if this docket proceeds based upon the existing Complaint, the course of this proceeding will be confusing and complex. The confusion and complexity can be substantially eliminated if the Administrative Law Judge exercises her authority, pursuant to 52 Pa. Code § 5.483, to “regulate the course of the proceeding.” Given the fact that this proceeding was originally stayed during the pleading stage, PECO respectfully submits that the most effective method of regulating the course of this proceeding is to require the Complainant to file an amended complaint to address the issues raised in this Motion. This Complainant is a sophisticated commercial entity that is represented by experienced legal counsel, and it will therefore not cause any undue burden to require the filing of an amended complaint.

In support of its Motion, PECO states as follows:

A. Background²

1. This proceeding was initiated on October 1, 2008, when Crescent Hotel Plymouth Meeting, LP (“Crescent”) filed a complaint with the Pennsylvania Public Utility Commission naming, as Respondents, PECO Energy, Exelon Corporation, and UGI Corporation. In 2009 a related docket was opened as *Crescent Hotel v. Celeren*.
2. On April 1, 2009, the Celeren bankruptcy trustee contacted Administrative Law Judge Guy M. Koster and invoked the automatic stay provisions of the United States Bankruptcy Code.
3. On April 2, 2009, Administrative Law Judge Guy M. Koster issued an Order consolidating the various proceedings associated with this complaint, and staying the proceedings until resolution of the Celeren bankruptcy.

² Additional procedural background is provided in PECO’s Motion to Lift Stay and Re-Activate the Proceeding, which was filed on April 22, 2014.

4. Consequently, the instant consolidated proceeding has been stayed, with no further activity in the docket allowed, since April 2, 2009, pending closure of the Celeren bankruptcy proceeding.

5. On February 18, 2014, the Bankruptcy Court issued a Final Decree closing the Celeren bankruptcy proceeding.

6. On March 18, 2014, counsel for the Bankruptcy Trustee informed the Commission and the parties, by letter addressed to ALJ Fordham, of the Bankruptcy Court Final Decree.

7. On April 22, 2014, PECO Energy filed and served a Motion to Lift Stay and Re-Activate the Proceeding.

B. Motion to Compel an Amended and More Specific Complaint

8. There have been substantial changes in fact and law that affect the matters discussed in the Complaint. The Complaint operates as a frame for the remainder of the proceeding to develop. Unless the Complaint is amended to address the changed matters, the proceeding will be filled with surplusage and confusing and unduly vague references.

9. **Status of Claims Against Celeren Corporation:** After five years in the bankruptcy courts, the Celeren bankruptcy is complete. Celeren's assets have been disposed of and its debts discharged – and it is no longer in business. On April 2, 2009, in his Stay Order, ALJ Koster ruled that Celeren is an indispensable party to this proceeding. The two claims of the Complaint that allege causes of action against PECO -- Count 1, ¶¶ 23-38, and Count 6, ¶¶66-79 – are also specifically styled as claims against Celeren. Moreover, the Complaint is replete with references to Celeren; of the 79 numbered paragraphs in the Complaint, fully 67 paragraphs specifically or by incorporation discuss Celeren. (¶¶4, 9-14, 16, 17, 19, and 23-79). The course of this proceeding will be much clearer if the Administrative

Law Judge requires Complainant to file an amended complaint that, at a minimum, clarifies whether and how Complainants intend to proceed against Celeren in this docket.

10. Development of Commission Law with Respect to Breach of Contract Claims and Specificity of

Pleading: A central theme of the Complaint is that Complainant was harmed when Celeren and PECO breached contractual obligations to Complainant. Recent Commission jurisprudence supports the conclusion that Complainant should be required to remove those claims from the Complaint and instead describe, with specificity, which portions of PECO's Tariffs, or the Code, the Commission's Rules and Regulations, or a Commission Order, the Complainant claims that PECO violated.

First, it should be noted that one of the primary themes of the Complaint is that Complainant was harmed due to breach of contract. Specifically, paragraphs 9-13 of the Complaint speak of an alleged agreement between PECO and Celeren, and of a written agreement between Crescent and Celeren. The Crescent/Celeren agreement is appended to the Complaint. Both of the claims against PECO (Count 1, ¶¶ 23-38 and Count 6, ¶¶ 66-79) incorporate those paragraphs; one them specifically alleges that PECO had obligations to Crescent that arose from one of the claimed agreements. (¶ 29: "PECO and Exelon owed a duty to provide [Crescent] with written notice that Celeren was not fulfilling the terms of its agreement with PECO and Exelon. . . .") (¶ One of the claims against Celeren specifically alleges (¶ 53) that: "Celeren materially breached the Agreement"

It has been black letter law for decades that the Commission does not have authority to award relief for breach of contract. ALJ Salapa's October 16, 2008 Initial Decision³ dismissing Hess from the *Rama* proceeding provides a summary of historic Commission law on this issue:

The Public Utility Code simply does not give the Commission the authority to entertain an action for breach of contract or to award damages or any other form of relief in an action for breach of

³ C-2008-2058320. This Initial Decision was adopted by the Commission on February 9, 2009.

contract. There is no question that the Commission lacks authority to award damages or any other form of relief in an action for breach of contract. *Terminato v. Pa. National Insurance Company*, 645 A. 2d 1287 (Pa. 1994); *Elkin v. Bell Tel. Co. of Pa.*, 420 A. 2d 371 (Pa. 1980); *Feingold v. Bell Tel. Co. of Pa.* 383 A. 2d 791 (Pa. 1977); *Ostrov v. I.F.T. Inc.*, 586 A. 2d 409 (Pa. Super 1991); *Poorbaugh v. Pennsylvania Public Utility Commission*, 666 A. 2d 744 (Pa. Cmwlth. 1995). As the Commission lacks authority to entertain an action for breach of contract or to award damages or any other form of relief, the complaint should be dismissed with prejudice.

ALJ Koster reached the same conclusion in *Philadelphia HGI v. Hess*, C-2008-2069141 (Page 7 of Initial Decision issued February 9, 2009 and adopted by the Commission on August 28, 2009). In *Digital 833 Chestnut v. PECO*, C-2008-2076610, the Commission further refined its jurisprudence on this issue.

Digital 833 was a Celeren-based complaint nearly identical to the instant proceeding.⁴ On August 3, 2009, ALJ Koster issued an Initial Decision dismissing the Digital 833 Complaint against PECO because that complaint alleged breach of contract claims. Digital 833 did not challenge the ALJ's conclusion that the Commission has no authority over breach of contract claims,⁵ but instead claimed that it should have the opportunity to demonstrate that PECO's activities constituted unreasonable utility service. By Order entered on March 26, 2010, the Commission agreed, stating that while the breach of contract claims could not be pursued, Digital 833 should have the opportunity to prove that PECO "provided unreasonable service in violation of Section 1501, or whether it otherwise violated the Code, the Commission's Regulations, or a Commission Order."⁶

The procedure for specifying whether PECO "violated the Code, the Commission's Regulations, or a Commission Order" was further refined by Administrative Law Judge Dennis E. Buckley in *Guntram*

⁴ Because Digital 833 did not plead claims against Celeren, that proceeding was not affected by the bankruptcy stay and proceeded to conclusion.

⁵ See, Digital 833's August 24, 2009 Exceptions, available on the Commission's website, p. 3: "As an initial matter of clarification, Digital 833 does not dispute the general conclusion of the I.D. that the Commission 'lacks authority to entertain an action for breach of contract . . .'"

⁶ Digital 833 Chestnut later withdrew its Complaint, with prejudice, without filing an Amended Complaint.

Weissenberger, et al. v. PECO Energy Company, C-2010-2182281. The *Weissenberger* case involved an entity known as “ConServe,” but in many other respects the case presented issues that are very similar to the instant case. In that case, ConServe had been retained by Weissenberger et al. to manage certain of their properties, including paying utility bills pursuant to a written agreement; ConServe ultimately went out of business having received money from Weissenberger for the purpose of paying utility bills but without forwarding that money to PECO; ConServe filed a complaint against PECO claiming that it had violated the Public Utility Code and regulations, and its own tariff, by not notifying Weissenberger of the delinquency in payment and for other reasons.

Although the Complaint in that case was as extensive as the Complaint in the instant proceeding (running to over 70 numbered paragraphs) PECO filed a Preliminary Objection⁷ seeking a more specific pleading because the Complaint alleged that PECO had violated its tariff, and/or the Code, the Commission’s rules and regulations, or a Commission order –but did not specify which provisions of the tariff, Code, rules, regulations, or order had been violated. ALJ Buckley granted the Preliminary Objection and ordered the Complainant to file a more specific pleading, stating that:

Having reviewed the Amended Complaint, I find that it is, essentially, a stylistic modification of the Complaint originally filed before the Delaware County Court of Common Pleas and is so “summary” in form as to be of little to no use to PECO in preparing a meaningful defense in this proceeding.⁸ The Amended Complaint is, in essence, a series of factual averments which, while informative to PECO, falls short of requirements of 66 Pa. C.S. § 701 and 52 Pa. Code § 5.22(a)(4). The Amended Complaint is lacking in specificity in that it does not identify which tariff or rates PECO should have applied to the Complainants, nor does it provide any relevant information or discussion regarding the periodicity of PECO billing, and, most importantly, it does not specify how PECO’s billing and notifications violated a specific tariff, rule or rate. PECO’s Second Preliminary Objection is sustained, and the Complainants’ will be directed to file

⁷ The filing in *Weissenberger* was actually PECO’s Second Preliminary Objection seeking a more specific pleading. The history of the case is provided in ALJ Buckley’s July 8, 2011 Order.

⁸ PECO notes that, in the instant proceeding, the Complaint similarly appears to have been drafted as a civil complaint, rather than as a complaint focused on a PUC regulatory proceeding.

a Second Amended Complaint, consistent with this Order, within thirty (30) days from the date of issuance of this Order.⁹

The Complaint in the instant proceeding suffers from this same infirmity of vagueness. In the first count against PECO, the Complaint does claim (¶126) that PECO violated one section of its Electric Generation Supplier Tariff, but contains many other alleged violations without reference to PECO's Electric Service Tariff, the Public Utility Code, the Commission's Regulations, or a Commission Order.

The Section of PECO's Electric Generation Tariff that is claimed to have been violated states that:

The Company shall have no duty or liability with respect to electric energy before it is delivered by an EGS to a point of delivery on the Company's distribution system. After its receipt of electric energy and capacity at the point of delivery, the Company shall have the same duty and liability for distribution services to customers receiving Competitive Energy Supply as to those receiving electric energy and capacity from the Company.

This reference begs the ultimate question. If the claim is that PECO has a duty to Crescent because, under EGS Tariff Rule 15.1 it owes a duty to other customers, then what is the source of the duty to other customers?

Moreover, the Complaint also claims that PECO violated numerous "duties" that are not tied to the above tariff provision or to any other specified portion of a tariff, Code, regulation, rule, or Order. For example, in ¶127, the Complaint alleges that: "PECO and Exelon owed a duty to Crescent to investigate whether Celeren qualified as an EGS under the Tariff." But the Complaint provides no indication whatsoever of the source of this alleged duty. Is there a tariff provision that states that PECO must perform such an investigation? Does that duty arise from a provision of the Public Utility Code, or

⁹ Ultimately, ALJ Buckley dismissed the *Weissenberger* Complaint with prejudice because the Complainants never complied with his Order to file an Amended Complaint to specify the tariff, Code, regulation, or Order that it claimed PECO was violating.

from a specific a Commission regulation or Order? PECO respectfully submits that proceeding will develop on a much more focused and smoother course if Complainant is required to specify from which portions of PECO's Tariff, or the Code or the Commission's Rules, Regulations, and Orders, these alleged duties arise.

Similar vagueness exists in Count 1, ¶ 28 ("*PECO . . . owed a duty to Crescent to treat Crescent as an end user with all of the rights and protections [of] any customer who received electricity directly from PECO.*"); ¶ 29 ("*PECO and Exelon owed Crescent a duty to so inform Crescent and provide it with notice that Celeren was not fulfilling the terms of its agreement with PECO.*"); ¶ 30 ("Pursuant to the Tariff, the PUC regulations, and the applicable statute, Title 66 of the Pennsylvania Consolidated Statutes, *PECO and Exelon owed a duty to Crescent to inform it of the alleged delinquency. . . .*"); ¶ 31 ("*PECO and Exelon breached their duties by failing to conduct proper due diligence as to whether Celeren was a proper EGS*") and ¶ 32 ("*PECO . . . breached its duties to Crescent*"). In none of those paragraphs, save the extremely generic reference in ¶30, is there any reference to which portions of the tariff, Code, regulations, or orders create the duties that are alleged to have been breached.

In the other claim against PECO (Count 6, ¶¶66-79) there is no reference whatsoever to PECO's Tariff, or to the Code, the Commission's rules or regulations, or a Commission Order.

PECO respectfully submits that the course of this proceeding will be much clearer if the Administrative Law Judge exercises her authority, pursuant to 52 Pa. Code § 5.483, to "regulate the course of the proceeding." Because this proceeding is still at the pleading stage, this can most effectively be done by adopting the procedure used by ALJ Buckley in the *Weissenberger* case: require the Complainants to file an amended complaint that, at a minimum, specifies the source of each duty that it claims PECO violated, by specific reference to the tariff provision, or to the provision of the Code,

Commission rule or regulation, or Commission Order which Complainant claims gives rise to the duty being discussed.

11. No Undue Burden: Complainant is a sophisticated commercial customer who is represented by experienced counsel. Amending its complaint therefore will not create an undue burden on it. Indeed, at some point during this proceeding, it will need to focus its claims to clarify its intentions toward Celeren; remove references to Hess; and remove its claims of breach of contract and replace them with claims that PECO violated specific sections of its tariff, the Code, or the Commission's regulations, rules, or orders. Taking that step at the pleading stage, through an Amended Complaint, likely will conserve resources for the Complainant, the Commission and the other parties by removing materials from the Complaint that are not consistent with the current state of known facts and Commission law.

12. PECO therefore respectfully requests the issuance of an Order stating that:

Within 30 days of the date of this Order, the Complainant shall file an Amended Complaint that:

- a. clarifies whether and how Complainant intends to proceed against Celeren in this docket;
- b. removes claims against Hess Corporation;
- c. removes all breach of contract claims; and
- d. identifies the specific PECO Tariff Provisions, or provisions of the Code, the Commission's Rules and Regulations, or Commission Order, that Complainant alleges that PECO has violated.

Respectfully submitted,



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April 24, 2014

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| Celeren Corporation | : | |

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of PECO Energy Company's Motion to Lift Stay and Re-Activate the Proceeding on the following persons in the manner specified in accordance with the requirements of 52 Pa. Code § 1.54:

VIA E-FILING

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

VIA FIRST CLASS MAIL

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*Representing Crescent Hotel – Plymouth
Meeting, L.P.*

George Miller, Trustee for Celeren Corporation
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Cynthia Fordham, Administrative Law Judge
Pa. Public Utility Commission
801 Market Street, Suite 4063
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Date: April 24, 2014

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