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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: Philadelphia HGI Associates, LP v. PECO Energy Company
PUC Docket No.: C-2008-2069070

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, appearing to read "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**

Philadelphia HGI Associates, LP	:	
v.	:	Docket No. : C-2008-2069070
	:	
PECO Energy Company	:	
	:	
Philadelphia HGI Associates, LP	:	Docket No. : C-2008-2069128
v.	:	
	:	
Philadelphia Gas Works	:	
	:	
Philadelphia HGI Associates, LP	:	Docket No. : C-2009-2089696
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.
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215-841-6863

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Philadelphia HGI Associates, LP	:	
v.	:	C-2008-2069070
PECO Energy Company	:	
Philadelphia HGI Associates, 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; another party (Hess) has been dismissed from the action but the Complaint still contains multiple claims against it; 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 7, 2008, when Philadelphia HGI Associates, LP, (“Philadelphia HGI”) filed a complaint with the Pennsylvania Public Utility Commission naming, as Respondents, PECO Energy Company, Hess Corporation, Philadelphia Gas Works, and Celeren Corporation.
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 1, 2009, at prehearing conference in this matter Administrative Law Judge Guy M. Koster consolidated the various proceedings associated with this complaint, and stayed 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 1, 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.³ The Complaint is replete with references to Celeren; of the 64 numbered paragraphs in the Complaint, fully 38 paragraphs specifically or by incorporation discuss Celeren. (¶¶2, 9-32, 37-44, 49-51, and 59-64). The course of this proceeding will be much clearer if the Administrative

³ PECO has not been able to determine whether ALJ Koster issued an order deeming Celeren to be an indispensable party in the instant proceeding. However, on November 23, 2008 ALJ Koster did rule that Celeren is an indispensable party in the parallel Rama proceeding at C-2008-2058320. This signifies the central role that Celeren has in this dispute.

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. Status of Claims Against Hess Corporation: On February 9, 2009, ALJ Koster dismissed the Complaint against Hess Corporation; that action was confirmed by Commission Order entered on August 28, 2009. The Complaint has 64 numbered paragraphs; 13 of those paragraphs (§§ 5 and 52-64) discuss Hess Corporation's role in the matters complained about. 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, requires Complainant to remove claims against Hess Corporation.

11. 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 9-22 of the Complaint speak of a written agreement between Philadelphia HGI and Celeren. The Philadelphia HGI/Celeren agreement is appended to the Complaint. The only claim against PECO (Count Two, §§ 33-51) incorporates those paragraphs and then, in §§ 40-41, specifically alleges that Celeren breached an agreement with PECO and that said breach harmed Philadelphia HGI. ("Celeren breached the contract between PECO and Celeren . . . : HGI is a third-party beneficiary of the PECO Tariff. . . .") The claim against Celeren specifically alleges (§ 15) that: "Celeren failed to perform or comply with material conditions of 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 Decision⁴ 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 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.

As noted, ALJ Koster reached the same conclusion in this proceeding. (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.⁵ 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,⁶ 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

⁴ This Initial Decision was adopted by the Commission on February 9, 2009.

⁵ Because Digital 833 did not plead claims against Celeren, that proceeding was not affected by the bankruptcy stay and proceeded to conclusion.

⁶ 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 . . .'"

unreasonable service in violation of Section 1501, or whether it otherwise violated the Code, the Commission's Regulations, or a Commission Order." ⁷

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 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 even more extensive than in the instant proceeding (running to over 70 numbered paragraphs) PECO filed a Preliminary Objection⁸ 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

⁷ Digital 833 Chestnut later withdrew its Complaint, with prejudice, without filing an Amended Complaint.

⁸ 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.

proceeding.⁹ 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 a Second Amended Complaint, consistent with this Order, within thirty (30) days from the date of issuance of this Order.¹⁰

The Complaint in the instant proceeding suffers from this same infirmity of vagueness. The Complaint does specify that the claim (¶¶ 33-51) against PECO is a claim under 66 Pa. C.S. ¶1303 (adherence to tariffs). The Complaint then claims (¶ 41) a violation of PECO's EGS Tariff Rule 16.2 – but *it specifically claims that Celeren, not PECO, violated that Rule.* (“Pursuant to Article 16 of the PECO Tariff, *Celeren breached the contract* between PECO and Celeren. . . .”). Similarly, in ¶42, the Complaint mentions a specific provision of PECO's EGS Tariff, but only to claim that Celeren – not PECO – had responsibilities under the Tariff. (“Pursuant to the PECO Energy Company Competitive Billing Specifications incorporated in the PECO Tariff, *Celeren was responsible* for directly billing HGI for all services rendered by PECO and was responsible for paying all undisputed charges to PECO, ‘regardless of whether the customer has paid the EGS.’” None of these paragraphs even purport to describe a claim against PECO. At a minimum, given that Celeren is now bankrupt and out of business, Complainant should be required to amend this portion of its Complaint to clarify whether it is proceeding with these tariff claims that are nominally directed at Celeren.

⁹ 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.

¹⁰ 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.

The only specific tariff claim that nominally applies to PECO is found in ¶43, where Complainant references a “Service Terms and Conditions” section of the PECO’s Competitive Billing Specifications.

The Complaint recites that “In no event shall these procedures result in a customer being sent two bills covering the same service.” However, the full text of the cited language provides a different context for this claim. The full text reads as follows:

If PECO Energy does not receive payment for undisputed charges within 25-calendar days for residential Customers or 20-calendar days for non-residential Customers after the charges are communicated to the EGS, then PECO Energy may provide notice of breach to the EGS at any time thereafter, at PECO Energy’s discretion. Upon notice of a breach the EGS shall have 20-calendar days to cure. If the EGS has not cured within 20-calendar days, PECO Energy may terminate consolidated EGS billing and take over billing functions for the Customer. In no event shall these procedures result in a Customer being sent two bills covering the same Service.

The Complaint contains no allegation that “these procedures” were ever utilized, and the final language (“In no event . . .”) is thus not implicated by the facts plead in the Complaint. If the claim is that PECO should have triggered these procedures, then the Complaint must specify the source of that obligation – especially given that the full language (not the redacted version quoted in the Complaint) makes it clear that these procedures are to be triggered “at PECO Energy’s discretion.”

Moreover, the Complaint also claims that PECO had numerous duties the source of which is not specified, but instead attributed to generic references. For example, in ¶ 44, the Complaint alleges that “PECO, by the terms of its own Tariff, was obliged to look to Celeren for payment of amounts due” – but without reference to specific tariff provisions that establish that claimed obligation.

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.

12. 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.

13. 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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Counsel for PECO Energy Company and Exelon Corporation

April 24, 2014

**BEFORE THE
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	:	
Philadelphia HGI Associates, LP	:	Docket No. : C-2009-2089696
v.	:	
	:	
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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Cynthia Fordham, Administrative Law Judge
Pa. Public Utility Commission
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Date: April 24, 2014



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