



Exelon Business Services Company  
Legal Department

2301 Market Street/S23-1  
Philadelphia, PA 19103

215 568 3389 Fax  
www.exeloncorp.com

Direct Dial: 215.841.6863

August 18, 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 Preliminary Objections to the Second Amended Complaint* with regard to the matter referenced above.

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 black ink that reads "Ward L. Smith". The signature is written in a cursive style with a large, sweeping flourish at the end.

Ward L. Smith  
Counsel for PECO Energy Company

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

WS/lo

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**NOTICE TO PLEAD**

Pursuant to 52 Pa. Code §§ 5.61 and 5.101, you are hereby notified that, if you do not file a written response denying or correcting the enclosed PRELIMINARY OBJECTIONS TO SECOND AMENDED COMPLAINT of PECO Energy Company within 10 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, August 18, 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**

Crescent Hotel-Plymouth Meeting, LP	:	
v.	:	C-2008-2068258
PECO Energy Company	:	
Crescent Hotel-Plymouth Meeting, LP	:	
v.	:	C-2008-2068267
UGI Corporation	:	
Crescent Hotel-Plymouth Meeting, LP	:	
v.	:	C-2009-2089563
Celeren Corporation	:	
	:	

**PECO Energy Company’s Preliminary Objections to the Second Amended Complaint**

PECO Energy Company (“PECO”), pursuant to 52 Pa. Code §§ 5.101 and 5.483, makes these Preliminary Objections to the Second Amended Complaint of Crescent Hotel-Plymouth Meeting, LP (“Crescent”).

Crescent’s Second Amended Complaint contains three claims against PECO and Exelon.<sup>1</sup> Count One is directed against PECO, Exelon, and Celeren and claims, among other things, (¶138) that: “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 so that Crescent could take appropriate action to enforce its rights against Celeren and mitigate the alleged delinquency.” As set forth in more detail below, PECO has two preliminary objections to Count One.

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<sup>1</sup> The June 20, 2014 Amended Complaint contained six claims. Count Two is not directed against PECO. Crescent’s claims for breach of contract (previously Count Three) and conversion of money (previously Count Four) are not included in the Second Amended Complaint.

First, as PECO has argued twice before,<sup>2</sup> this claim does not have sufficient specificity to meet the requirements of 66 Pa. C.S. §701. And, while Crescent has responded to PECO's prior filings in this docket by filing an Amended Complaint and a Second Amended Complaint, in both of those documents Count One has remained virtually unchanged since this proceeding began in 2008. PECO therefore reiterates its preliminary objection to Count One on grounds of insufficient specificity.

With that said, in the Second Amended Complaint, Complainant did make one change to Count One by adding a request for attorney's fees. PECO therefore states a Preliminary Objection to the request for attorney's fees, on the grounds that the Commission does not have power to award attorney's fees and that the request therefore constitutes impertinent material that should be stricken from the Second Amended Complaint.

Count Three is directed against PECO, Exelon, and Celeren and is a claim for damages due to fraud. From 2008, when this Complaint was initially filed, until July 2014, when the Second Amended Complaint was filed, this fraud claim was directed solely at Celeren, and did not name PECO or Exelon. PECO states four preliminary objections against Count Two. First, it is a request for damages, which is outside of the Commission's jurisdiction. Second, the legal basis of Count Two is legally insufficient because it relies upon a theory of 52 Pa. Code Chapter 62 that has been rejected by the Commission. Third, Count Two is based upon the predicate assumption that PECO and Exelon are licensed Natural Gas Suppliers; the Commission may take official or judicial notice of its own records to conclude that PECO and Exelon do not have that status. Finally, Count Two should be dismissed because it is being alleged against PECO for the first time in 2014. On the face of the Second Amended Complaint, Complainant alleges that the claimed fraud by Celeren was in existence since at least 2005; moreover, the alleged

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<sup>2</sup> PECO made these arguments in its April 24, 2014 Motion for a More Specific Pleading and in its July 9, 2014 Preliminary Objections to the Amended Complaint.

fraud by Celeren was discovered and pled in 2008. A claim against PECO and Exelon made for the first time in 2014 is thus time-barred under the Commission's rules and should be dismissed.

Count Four is directed against PECO and Exelon. It is a claim for damages for failure to provide notice. PECO has two preliminary objections to Count Three: that it is a claim for damages that should be dismissed, and that it provides insufficient specificity. The preliminary objections to Count Four are integrated with the parallel preliminary objections to Counts One and Three.

In support of its Preliminary Objections, PECO states as follows:

**A. Background<sup>3</sup>**

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.
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.

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<sup>3</sup> Additional procedural background is provided in PECO's Motion to Lift Stay and Re-Activate the Proceeding, which was filed on April 22, 2014.

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.
8. On April 24, 2014 PECO filed a Motion to Require the Filing of an Amended and More Specific Complaint.
9. On June 5, 2014, ALJ Fordham issued ORDER #3: Order Granting PECO Energy Company's Motion to Lift Stay and Re-Activate this Proceeding. In that Order (Ordering ¶ 1), the ALJ ordered that answers to PECO's Energy Company's Motion to Require the Filing of an Amended and More Specific Complaint must be filed by June 20, 2014.
10. Crescent did not file an answer to PECO's Motion to Require the Filing of an Amended and More Specific Complaint. Instead, on or about June 20, 2014, Crescent filed an Amended Complaint.
11. These preliminary objections are addressed to the Amended Complaint.
12. Crescent did not file an answer to PECO's Preliminary Objections to the Amended Complaint. Instead, on or about July 29, 2014, Crescent filed its Second Amended Complaint.
13. These preliminary objections are addressed to the Second Amended Complaint.

**B. Preliminary Objection to Strike Count One (¶¶ 33-48) and Count Four (¶¶82-95) for Insufficient Specificity**

14. A preliminary objection may be filed for “insufficient specificity of a pleading.” 52 Pa. Code §5.101(a)(3).

15. The Pennsylvania Public Utility Code, 66 Pa. C.S. § 701, sets forth the scope of formal complaint proceedings before the Commission. The Code states that a complaint shall set forth the: “act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the Commission.”

16. Commission precedent in closely comparable cases and the Commission’s rules support the conclusion that Complainant in the instant proceeding should be required to state with specificity which section or sections of PECO’s tariff, regulation, statute, or order that it claims PECO has violated.

a. In *Guntram Weissenberger, et al. v. PECO Energy Company*, C-2010-2182281 (July 8, 2011 Initial Decision), ALJ Dennis J. Buckley granted PECO’s Preliminary Objection for a more specific pleading because the complaint did not specify the tariff, rule, statute, or order that the Complainant claimed that PECO had violated. The case is on all fours with the instant proceeding and is very persuasive guidance for the instant proceeding. In *Weissenberger*, as in the instant proceeding, a billing agent (ConServe in the *Weissenberger* case) had failed to forward payments to PECO after those payments were made to the billing agent by the customer; in both cases the customer claimed that, having paid their billing agent that their utility payment obligations had been met; in both cases the complaint was based on an extensive civil complaint of approximately 70 paragraphs; in neither case had the complainant specified the tariff, regulation, statute or order that it alleged PECO had violated. ALJ Buckley granted PECO’s 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.<sup>4</sup> 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.<sup>5</sup>

b. In the instant proceeding, ALJ Salapa’s Initial Decision dismissing the complaint against Hess Corporation also supports the conclusion that requiring a more specific pleading will help to focus and control the flow of this proceeding. Although Hess’s Preliminary Objection dealt primarily with jurisdictional issues, Ramada’s response to that Preliminary Objection discussed specific portions of the Commission’s regulations that Ramada alleged Hess had violated. ALJ Salapa’s Initial Decision discussed those claims and length and, in the case of Hess, dismissed the claims. While PECO is not suggesting that the a more specific pleading will necessarily result in the dismissal of Ramada’s as-yet-unspecified claims against PECO, it does note that, in the Hess portion of the instant proceeding, when specificity was achieved that allowed ALJ Salapa to make a final determination as to certain claims without the necessity of an evidentiary hearing.

c. 52 Pa. Code ¶5.483 gives the Administrative Law Judge broad authority to “regulate the course of the proceeding.” PECO reiterates its argument, initially made in its Motion to Require

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<sup>4</sup> 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.

<sup>5</sup> 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 Filing of an Amended and More Specific Pleading (¶ 11), that the ALJ should exercise that authority to require a more specific pleading:

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.

17. In the instant proceeding, it is especially critical that Complainant be required to specify the tariff, rule, statute or order that it claims that PECO violated because the Second Amended Complaint is clearly based, in material part, upon a breach of contract theory – and the Commission does not have jurisdiction over breach of contract claims.

a. Count One of the Second Amended Complaint is replete with references to alleged breaches of contract. Including the introductory material, which is incorporated into Count One, ¶¶ 8-17, 30, 39 and 40 all refer either to an alleged agreement between PECO and Celeren or to a written agreement between Complainant and Celeren, ultimately claiming (¶¶ 39-40) that PECO had duties that arose from or are related to the Complainant/Celeren agreement.

b. 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 Decision<sup>6</sup> dismissing Hess from this 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.

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<sup>6</sup> This Initial Decision was adopted by the Commission on February 9, 2009.

*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).

18. In at least six distinct places in Count One, Complainant alleges that PECO had a duty or breached a duty, but without specifying where in the tariff, rules, statutes, or orders the alleged duty arises:

- a. Paragraph 37 alleges that “PECO and Exelon owed a duty to Rama to investigate whether Celeren qualified as an EGS under the Tariff,” but does not specify where in the tariff, rules, statutes, or orders such an investigative duty arises.
- b. Paragraph 38 alleges that “If Celeren qualified as an EGS, PECO and Exelon owed a duty to Rama to treat Rama as an end user with all of the rights and protections [of] any customer who received electricity directly from PECO and Exelon,” but does not specify where in the tariff, rules, statutes, or orders such a duty arises.
- c. Paragraph 39 alleges that, if Celeren is deemed not to be an EGS, “PECO and Exelon owed a duty to so inform Rama and to provide it with notice that Celeren was not fulfilling the terms of its agreement with PECO and Exelon,” but does not specify where in the tariff, rules, statutes, or orders such a duty to notify arises.<sup>7</sup>

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<sup>7</sup> On its face, ¶ 39 – which is at the core of Count One against PECO -- appears to claim that an alleged private contract between PECO and Celeren created a PECO duty to Ramada. If that is the claim that is being made here, then the claim is a breach of contract claim that falls outside of the Commission’s jurisdiction. It is thus especially important that Ramada be required to specify the tariff, rule, statute or

d. Paragraph 40 states that “Pursuant to the Tariff, the PUC regulations and the applicable statutes, Title 66 of the Pennsylvania Consolidated Statutes, PECO and Exelon owed a duty to Rama to inform it of the alleged delinquencies so that Rama could take appropriate action to enforce its [contract] rights against Celeren,” but does not specify where in the tariff, rules, statutes or orders such a duty to inform arises.<sup>8</sup>

e. Paragraph 41 states that “PECO and Exelon breached their duty by failing to conduct proper due diligence as whether Celeren was a proper EGS and by failing to notify Rama of the alleged delinquency,” but does not specify where in the tariff, rules, statutes or orders such duties arise.

f. Paragraph 42 states that “Because PECO and Exelon breached their duties to Rama, PECO and Exelon allowed charges of approximately \$137,000 to accrue while allowing Rama to continue paying Celeren unaware that Celeren was not remitting the payment to PECO and Exelon,” but does not specify where in the tariff, rules, statutes or orders such duties arise.

19. The Second Amended Complaint contains two citations to specific aspects of a tariff, rule, statute or order. In ¶ 35, the Second Amended Complaint recites the definition of “EGS” or “Electric Generation Supplier” from PECO’s Electric Generation Supplier Tariff. In ¶ 36, the Second Amended Complaint recites the following language from Rule 15.1 of PECO’s Electric Generation Supplier Tariff:

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order that gives arise to this alleged duty, so that the Commission does not foray into the extra-jurisdictional territory of breach of contract.

<sup>8</sup> On its face, ¶ 40 appears to claim that a private contract between Rama and Celeren created a PECO duty to Ramada. If that is the claim that is being made here, then the claim is a breach of contract claim that falls outside of the Commission’s jurisdiction. As with ¶ 38, it is thus especially important that Ramada be required to specify the tariff, rule, statute or order that gives arise to this alleged duty, so that the Commission does not foray into the extra-jurisdictional territory of breach of contract.

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.

20. The ¶ 35 recitation of the tariff definition of an EGS does not provide any specific information regarding Ramada's claims against PECO. Ramada makes no claim, here or elsewhere in the Amended Complaint, that PECO violated this provision of its tariff. Indeed, it does not even take a position on whether Celeren is an EGS, instead positing in ¶¶ 38 and 39 that Celeren may be an EGS (¶ 38), but then again that it may not be an EGS (¶39). Regardless, simply reciting the definition of "EGS" gives no meaningful information as to which tariff, rule, statute or order Ramada claims that PECO violated.

21. The ¶36 recitation of EGS Tariff Rule 15.1 likewise does not provide any meaningful information as to which tariff, rule, statute or order Ramada claims that PECO violated. The Second Amended Complaint merely recites the language of Rule 15.1 and does not contain argument or explanation regarding how PECO is alleged to have violated it. With that said, it appears that Complainant may be arguing some sort of discrimination claim<sup>9</sup> – that is, Complainant may be arguing that PECO owes to it the same duties that PECO owes to customers who do not take service from an EGS, and that PECO somehow failed to meet those duties when interacting with Complainant. But nowhere in the Second Amended Complaint does Complainant discuss the rules that apply to customers who do not take service from an EGS, and nowhere in the Second Amended Complaint does Complainant claim that PECO failed to apply one of those rules to it. It does not even make the broad claim that the two types of customers must be treated the same – that has to be inferred from the citation to EGS Tariff Rule 15.1. And the Second Amended Complaint certainly does not allege that PECO treated Complainant any

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<sup>9</sup> PECO notes that EGS Tariff Rule 15 establishes the Liability rules for EGS interactions and thus has no apparent application to the fact pattern that is pled in the Second Amended Complaint. It is thus especially important that Complainant articulate, in a more specific pleading, whether it is alleging that PECO violated this tariff provision and, if so, how it violated it.

differently than PECO treated its other customers. The reference to EGS Tariff Rule 15.1 thus does not provide any specific claim that PECO violated a tariff, rule, statute or order.

22. Count Four of the Second Amended Complaint makes no mention whatsoever of PECO's tariff, or of the Commission's regulations, the Public Utility Code, or Commission orders. Rather, it appears to be a civil equity claim for unjust enrichment or some similar theory of damage recovery. (See ¶ 99: "Under the circumstances, it was unjust for PECO/Exelon to require Crescent to pay;" ¶ 100: "PECO/Exelon should be required to reimburse and the return the \$125,000 to Crescent.")

23. Complainant should be required to provide a more specific pleading in which it identifies the section or sections of PECO's tariff, or of the Commission's regulations or orders, or the Public Utility Code, it claims that PECO has violated in relation to its Count One.

**B. Preliminary Objection to Strike the Request for Attorney's Fees in Count One (¶ 46(d)) as Impertinent Material**

24. A preliminary objection may be filed for "the inclusion of scandalous or impertinent matter." 52 Pa. Code §5.101(a)(2).

25. The Second Amended Complaint contains a request for attorney's fees. ¶46(d).

26. The Commission does not have power to award attorney's fees and the claim for attorney's fees should thus be stricken as "impertinent matter." The rationale for this approach was set forth by Administrative Law Judge David A. Salapa in *Third Avenue Realty v. Pennsylvania American Water*, C-2010-2167286, Initial Decision issued August 16, 2010 (adopted by the Commission on September 30, 2010). In that Initial Decision (pp. 8-9), ALJ Salapa establishes that the Commission does not have power to award attorney's fees, and that such claims should be stricken at the preliminary objection stage as "impertinent material":

First, I would like to address Respondent's two Preliminary Objections<sup>fn</sup> regarding Complainant's request for attorney fees. It is well established in the courts of this Commonwealth that legal fees are not generally recoverable except where permitted by statute or other recognized exception to this general rule. Corace v. Balint, 418 Pa. 262, 271 (1965); Becker v. Borough of Schuylkill Haven, 200 Pa. Super. 305, 312 (1963); 11 *Pa. Law Encyclopedia* Damages § 33 (1970). Nothing in the Commission's statutes, regulations or orders gives the Commission the power to grant attorney fees in the factual setting of the present Complaint. See Capitol Bus Company v. Leonard M. Smith, Docket No. 20830, (Final Order entered September 23, 1975) 1975 Pa. PUC LEXIS 24; 49 Pa. PUC 428; see also Pennsylvania Public Utility Commission v. Duquesne Light Company, 61 Pa. P.U.C. 495 (1986); Pennsylvania Public Utility Commission v. National Fuel Gas Distribution Corporation, 63 Pa. P.U.C. 68, 71 (1987) (The Commission does not have jurisdiction to award attorney fees and costs); Edward Dugas v. PECO Energy Company, Docket No. Z-01417035, 2004 Pa. PUC LEXIS 50, June 10, 2004, (The Commission was not empowered to award damages, attorney fees or costs); James H. Joseph v. The Bell Telephone Company of Pennsylvania, Docket No. C-00924568, 1993 Pa. PUC LEXIS 55 (The Commission is without authority to award attorney fees). Consequently, the portion of the present Complaint requesting attorney fees is stricken.

FN: Care must be taken to avoid confusing power with jurisdiction. The difference was explained by the Pennsylvania Supreme Court in Riedel v. The Human Relations Comm'n Of the City Of Reading, 739 A.2d 121, 124 (Pa. 1999):

Jurisdiction and power are not interchangeable although judges and lawyers often confuse them - Hellertown Borough Referendum Case, 354 Pa. 255, 47 A.2d 273 (1946). Jurisdiction relates solely to the competency of the particular court or administrative body to determine controversies of the general class to which the case then presented for its consideration belongs. Power, on the other hand, means the ability of a decision-making body to order or effect a certain result. Delaware River Port Auth. v. PA Public Utility Commission, 408 Pa. 169, 178, 182 A.2d 682, 686 (1962); see also Beltrami Enterprises, Inc. v. Commonwealth of PA, Dep't of Environmental Resources, 159 Pa. Commw. 72, 632 A.2d 989, 993 (Pa. Commw. 1993) (fact that administrative agency may not have power to afford relief in particular case presented is of no moment to determination of its jurisdiction over general subject matter of controversy).

See also, In Re: Melograne, 571 Pa. 490, 812 A.2d 1164 (2002); Bell Telephone Co. of PA v. Philadelphia Warwick Co., 355 Pa. 637, 50 A.2d 684 (1947). The Commission has jurisdiction over the service provided by jurisdictional public utilities, including their rates and billing practices, but it lacks authority or power to award monetary damages. The Commission's lack of authority to award attorney fees is not one of the grounds for granting preliminary objections. Therefore, the correct preliminary objection in this situation is a motion to strike the requested relief as impertinent matter. A prayer for

damages which are not legally recoverable in the cause of action pleaded is “impertinent matter” in the sense that it is irrelevant to that cause of action. See Hudock v. Donegal Mut. Ins. Co., 264 A.2d 668 (Pa.1970).

**C. Preliminary Objection to Strike Counts Three (¶¶ 60-81) and Four (¶¶82-95) Because They Are Requests for the Award of Damages, Which is Outside of the Commission’s Jurisdiction**

27. A preliminary objection may be filed for “lack of Commission jurisdiction.” 52 Pa. Code §5.101(a)(1).

28. The Commission does not have jurisdiction to award damages. *Terminato v. Pa. National Insurance Co.*, 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. 2d409 (Pa. Super. 1991); *Poorbaugh v. Pennsylvania Public Utility Commission*, 666 A. 2d 744 (Pa. Cmwlt. 1995). See also *Rama Construction, Inc. v. Hess Corporation*, C-2008-2058200 (October 16, 2008 Initial Decision Sustaining Preliminary Objections and Dismissing Complaint, pp. 8-9 (in which ALJ David A. Salapa relied upon the above-cited cases to dismiss damage claims in the instant proceeding against Hess Corporation).

29. Count Three of the Second Amended Complaint, ¶¶ 60-81, is a claim for damages due to alleged fraud. See Wherefore clause: “WHEREFORE, Plaintiff Crescent demands judgment . . . against Defendants PECO, Exelon, and Celeren . . . in an amount in excess of \$50,000 . . . .”

30. Count Four of the Second Amended Complaint, ¶¶ 82-95, is a claim for damages due to alleged failure to notify Crescent so that it could pursue its contractual claims against Celeren. See Wherefore clause: ““WHEREFORE, Plaintiff Crescent demands judgment . . . against Defendants PECO Energy and Exelon Corporation . . . in an amount in excess of \$50,000 . . . .”

31. PECO therefore requests, pursuant to 52 Pa. Code §5.101(a)(1), that Complainant's damage claim in Count Two be declared to be beyond the Commission's jurisdiction and that it be stricken.

**D. Preliminary Objection to Strike Count Three For Legal Insufficiency Because the Theory Pled In Count Two Has Been Rejected by The Commission**

32. A preliminary objection may be filed for "legal insufficiency of a pleading." 52 Pa. Code §5.101(a)(4).

33. Count Three contains a discussion (¶¶ 75-80) of the claimed basis for PECO and Exelon's liability for fraud.<sup>10</sup> In a nutshell, the Second Amended Complaint claims that Celeren committed a fraud against it and that PECO and Exelon are responsible, pursuant to 52 Pa. Code §62.102 and §62.114, for the fraud committed by Celeren.

34. This argument has already been made and rejected in the parallel *Ramada Hotel* proceeding at docket number C-2008-2058320 In his October 16, 2008 Initial Decision dismissing Hess from that proceeding, Administrative Law Judge Salapa explained (pp. 10-11) that this legal argument is without merit:

Rama also argues in its answer to Hess's preliminary objections that pursuant to 52 Pa. Code §§62.102(d) and (e), Hess, as a licensed natural gas supplier, is responsible for violations of the Public Utility Code by unlicensed non-traditional marketers and unlicensed marketing services consultants regarding fraudulent, deceptive or other marketing or billing acts committed by the non-traditional marketer or marketing services consultant. Rama contends that Celeren, as a non-traditional marketer or marketing services consultant, committed fraud by not paying Hess pursuant to its contract with Hess after Rama paid Celeren pursuant to its contract with Celeren. Rama concludes that Hess is therefore responsible for Celeren's violation of the Commission's regulations. This argument is also without merit.

The Commission regulation at 52 Pa. Code §62.101 defines a nontraditional marketer as a community based organization, or a civic, fraternal or business association. Rama's complaint does not allege that Celeren is any of these. Furthermore, both the definition for nontraditional marketer and marketing services consultant state that neither one collects natural gas supply costs from a retail gas customer as defined by 66 Pa. C.S. §2202 and is not responsible for

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<sup>10</sup> This argument was added in the Second Amended Complaint; it was not in the Complaint or the Amended Complaint.



payment of the costs of the natural gas to suppliers or producers. Since the complaint alleges that Celeren collected money from Rama pursuant to its contract with Rama but failed pay Hess pursuant to its agreement with Hess, Celeren is neither a nontraditional marketer or marketing services consultant as defined by 52 Pa. Code §62.101. Therefore as a matter of law, Hess was not responsible for Celeren's conduct pursuant to 52 Pa. Code §§62.102(d) and (e).

35. Claim Three relies upon an argument that has already been declared to be legally insufficient, and thus should be dismissed.

**E. Preliminary Objection to Strike Count Three For Legal Insufficiency Because the Theory Pled In Count Two Is Predicted On the Assumption That PECO and Exelon are Natural Gas Suppliers (NGS's) Under the Law, and the Commission May Take Judicial of Official Notice That This is Not True**

36. A preliminary objection may be filed for "legal insufficiency of a pleading." 52 Pa. Code §5.101(a)(4).

37. The legal theory of Count Three, set forth at ¶¶ 75-80, is that PECO and Exelon are Natural Gas Suppliers and are therefore liable for the fraud of Celeren. In making that argument, the Second Amended Complaint specifically alleges (¶76) that PECO and Exelon are licensed NGSs.

38. Normally, a preliminary objection must accept as true the factual allegations made in a complaint. However, the Commission also has the authority, pursuant to 52 Pa. Code 5.408, to take official and judicial notice of fact.

39. Neither PECO nor Exelon is a licensed NGS. The Commission maintains a complete and up-to-date list of licensed NGSs on its website, and neither PECO nor Exelon is on that list.

40. PECO requests that the Commission take official or judicial notice of the contents of its own records to conclude that neither PECO nor Exelon is a licensed NGS.

41. PECO further requests that, since Count Three is based on the incorrect assumption that PECO and Exelon are licensed NGSs, once the Commission concludes that PECO and Exelon are not licensed EGSs, it should dismiss Count Three.

42. Administrative efficiency warrants this step. There is no point in having extended litigation over a matter that has a factual predicate – whether PECO and Exelon are licensed NGSs –that can be easily disposed of by review of the Commission’s own records.

**F. Preliminary Objection to Strike Count Three Because It Is Time-Barred Under the Public Utility Code**

43. The Public Utility Code, 66 Pa. Code §1312(a), states that the Commission shall have the power and authority to order refunds for a period “within four years prior to the filing of the complaint.”

44. The Complaint did not contain a claim of fraud, or responsibility for Celeren’s fraud, against PECO and Exelon.

45. The Amended Complaint did not contain a claim of fraud, or responsibility for Celeren’s fraud, against PECO and Exelon.

46. The claim that PECO and Exelon are responsible for Celeren’s fraud was first made on or about July 29, 2014, in the Second Amended Complaint.

47. The Second Amended Complaint specifically alleges (¶161) that the fraud in question occurred between 2005 and 2008. (“PECO, Exelon, UGI and Celeren have committed and carried out a systematic and widespread course of fraudulent and deceptive conduct from 2005 to approximately 2008.”

46. The Complainant discovered or otherwise knew of the existence of this claimed fraud by sometime in 2008. The original complaint in this matter, filed in October 2008, contained a claim for fraud against Celeren and described the alleged fraud by Celeren in detail.

47. In 2008, the Complainant was aware of the legal theory it now claims as the basis for extending the fraud claim to PECO and Exelon. The original complaint in the parallel *Ramada Hotel* matter, filed by the same law firm that represents Crescent Hotel in this matter, contained a claim in which it made precisely the same legal claim against Hess.

48. Accepting as true the matters pled in the various complaints, the Complainant thus had knowledge, by sometime in 2008, of the factual and legal bases for its fraud claim.

49. Complainant did not make a claim for fraud against PECO or Exelon until July 29, 2014. This is more than four years after the Complainant had knowledge of the legal and factual basis for the claim. The claim against PECO and Exelon is time-barred and thus should be dismissed.

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

1. Within 20 days of the date of this Order, the Complainant shall file a Third Amended Complaint that identifies specific provisions of PECO's tariff, the Commission's regulations, the Public Utility Code, or a Commission order that Complainant alleges that PECO has violated.
2. The attorney fee claim of Count One is dismissed.
3. Counts Three and Four are dismissed because it is a claim for damages.

4. Count Three is dismissed because it is based upon a legal theory (that NGSs are responsible for a fraud by Celeren) has been rejected by the Commission as legally insufficient.
5. Count Three is dismissed because the Commission takes official or judicial notice that PECO and Exelon are not licensed Natural Gas Suppliers.
6. Count Three is dismissed as to PECO and Exelon because it is time-barred.

Respectfully submitted,



Ward L. Smith  
Assistant General Counsel  
Exelon Business Services Company  
Attorney I.D. 47670  
2301 Market Street  
S23-1  
Philadelphia, PA 19103  
215-841-6863  
[ward.smith@exeloncorp.com](mailto:ward.smith@exeloncorp.com)

Counsel for PECO Energy Company and Exelon Corporation

August 18, 2014

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**


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

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**VERIFICATION**

I, Ward L. Smith, hereby declare that I am counsel for PECO Energy Company; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Pleading are true to the best of my knowledge, information and belief, and that I make this verification subject to the penalties of 18 Pa. C.S. § 4904 pertaining to false statements to authorities.

Date: August 18, 2014

  
\_\_\_\_\_  
Ward L. Smith, Esq. (Pa. I.D. 47670)  
Counsel for PECO Energy Company  
2301 Market Street  
Philadelphia, PA 19101-8699  
Phone: 215.841.6863  
Fax: 215.568.3389

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**CERTIFICATE OF SERVICE**

I hereby certify and affirm that I have this day served a copy of *PECO Energy Company's Preliminary Objections* 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, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

**VIA FIRST CLASS MAIL**

Paul A. Bucco Esquire  
Robert D. Ardizzi, Esquire  
Davis Bucco & Ardizzi  
10 East Sixth Avenue, Suite 100  
Conshohocken, PA 19428

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

George Miller, Trustee for Celeren Corporation  
c/o Linda Richenderfer, Esq.  
Klehr Harrison  
919 Market Street, Suite 1000  
Wilmington, DE 19801-3062

*Representing Celeren Corporation*


Cynthia Fordham, Administrative Law Judge  
Pa. Public Utility Commission  
801 Market Street, Suite 4063  
Philadelphia, PA 19107

Frank H. Markle, Esq.  
UGI Corporation  
460 North Gulph Road  
King of Prussia, PA 19406

*Representing UGI Energy Services*

Celeren Corporation  
Two Bala Plaza, Suite 300  
Bala Cynwyd, PA 19004

Date: August 18, 2014

  
Ward L. Smith, Esq. (Pa. I.D. 47670)  
Counsel for PECO Energy Company  
2301 Market Street  
Philadelphia, PA 19101-8699  
Phone: 215.841.6863  
Fax: 215.568.3389