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October 22, 2015

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

RE: Susan Kreider v. PECO Energy Company
Docket No. C-2015-2469655

Dear Ms. Chiavetta:

Enclosed for filing is the *Amended Final Answer of PECO Energy Company to Motion of Amicus Curiae for Leave to File Answer to Respondent's Petition for Reconsideration* with regard to the matter referenced above.

Yesterday, PECO attempted to file its Answer using the P- docket number that has been assigned to its Petition for Reconsideration. That filing was rejected by the Commission. When PECO went to refile in the C- docket, it inadvertently filed an earlier draft version of its Answer.

This Amended Final Answer uses PECO's final version (as originally filed in the P-docket), but with the C- docket designation.

I apologize for the confusion.

Very truly yours,

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

Ward Smith
Counsel for PECO Energy Company

WS/ab
Enclosure

cc: Honorable Darlene Heep, ALJ (via electronic mail)
Certificate of Service (via regular mail)
Laura Sunstein Murphy (via regular mail)
Edward Lanza, Esquire (via electronic mail)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SUSAN KREIDER	:	
Complainant	:	
	:	
v.	:	DOCKET NO. C-2015-2469655
	:	
PECO ENERGY COMPANY	:	
Respondent	:	
	:	

**AMENDED FINAL ANSWER OF PECO ENERGY COMPANY
TO
MOTION OF *AMICUS CURIAE*
FOR LEAVE TO FILE ANSWER TO RESPONDENT’S PETITION FOR RECONSIDERATION**

On October 15, 2015, Laura Sunstein Murphy filed a Motion requesting permission to act as *amicus* in this proceeding and, in that role, to file an Answer to PECO’s Petition for Reconsideration. For the reasons set forth below, PECO believes that the Commission should deny Ms. Sunstein Murphy’s motion.

Any substantive document filed by an *amicus* should be styled as a brief, rather than as an answer to a petition. This distinction is not academic. As PECO demonstrates in this Answer: (1) An *amicus*, by definition, is not a party to the proceeding, and (2) as a non-party, an *amicus* does not have the same role or rights as a party litigant in the proceeding. Instead, the role of *amicus* is limited to the filing of briefs.

PECO recognizes that Ms. Sunstein Murphy already filed one *amicus* brief in this proceeding, without the consent of the parties or the Commission, as she is entitled to do pursuant to 52 Pa. Code §5.502(e) – and that she could file a second *amicus* brief, under that

same rule, without seeking consent. However, that is not what Ms. Sunstein Murphy has requested in her Motion. Instead, she has bypassed the allowable approach of filing a brief and has instead requested that she be allowed to file an answer to a petition – and the filing of an answer to a petition is an action that is specifically limited to entities that can demonstrate their party standing.

Having already filed an *amicus* brief without consent in this proceeding, Ms. Sunstein Murphy and her counsel are clearly aware that the option of filing a brief without consent is available to her. Her Motion therefore raises concern that Ms. Sunstein Murphy, through her counsel, is seeking to alter her role in this proceeding to go beyond normal *amicus* activities and instead act as a party litigant. Accordingly, PECO requests specific ordering paragraphs that limit the role of Ms. Sunstein Murphy to the filing of briefs unless and until she obtains party status in this docket.

I. Argument

A. As an *amicus*, Ms. Sunstein Murphy is not a party to this proceeding.

Ms. Sunstein Murphy has not filed a motion to intervene in this proceeding pursuant to 52 Pa. Code § 5.93, and thus is not a party to this proceeding.¹

¹ It seems unlikely that Ms. Sunstein Murphy could meet the standard for intervention set forth at 52 Pa. Code §5.92. To have standing a person must have a direct, immediate and substantial interest in the subject matter of the proceeding. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); Landlord Service Bureau, Inc. v. Equitable Gas Co., 79 Pa. P.U.C. 342 (1993); Re Equitable Gas Co., 76 Pa. P.U.C. 23 (1992); Nye v. Erie Insurance Exchange, 470 A.2d 98 (Pa. 1983). In her *amicus* pleading, the only personal interest in this proceeding that Ms. Sunstein Murphy claims (¶ 13) is that the instant proceeding may affect her prosecution of a claim in another pending Commission

PECO recognizes that Ms. Sunstein Murphy previously filed an *amicus* brief in this docket. However, the filing of an *amicus* brief does not confer party status on the *amicus*. The Commission's rules specifically state that an *amicus* is not a party:

A person interested in the issues involved in a Commission proceeding, although not a party, may, without applying for leave to do so, file *amicus curiae* briefs in regard to those issues.

52 Pa. Code §5.502(e) (filing of *amicus curiae* briefs) (emphasis added).

Similar guidance can be found in the parallel rules of the Pennsylvania Courts, to which the Commission often turns for guidance in applying its own procedural rules. Rule 1531 of the Pennsylvania Rules of Appellate Procedure provides that guidance, with the Official Note to that rule making it clear that the act of filing an *amicus* brief does not confer party status:

A nonparty may file a brief as of right under Rule 531 (participation by *amicus curiae*) and, therefore, intervention is not necessary in order to participate in the appellate court where the petition for review is filed. However, except as provided in Rule 521(b) (status of Attorney General) and Rule 522(b) (status of Court Administrator), the mere filing of a brief does not confer party status (emphasis added).

The black letter definition of *amicus* also expressly makes the point that an *amicus* participant is, by definition, not a party. Black's Law Dictionary, Seventh Edition (1999 edition), definition of *amicus curiae*: "A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." (emphasis added).

docket. Such a claim is the prototype of a claim of *indirect* interest – which is the normal standard for appearance as an *amicus*.

PECO therefore respectfully requests that the Commission issue an ordering paragraph stating that Ms. Sunstein Murphy’s participation as an *amicus* in this proceeding does not confer party status upon her.

B. As an *amicus*, Ms. Sunstein Murphy’s role in this proceeding is limited to the filing of briefs and nothing more.

The term “amicus” is used once in the Commission’s regulations – at 52 Pa. Code 5.502(e). As quoted above, that provision states that a non-party may file an *amicus* brief without consent of the parties. No role for an *amicus* other than filing of briefs is set forth in the Commission’s regulations.

Accordingly, an *amicus* is not entitled to participate in the various phases, processes and events of litigation “as if” they were a party. A non-comprehensive list of such actions unavailable to non-party *amicus* follows:

- Participate in a prehearing conference²
- Participate in a settlement³
- Enter stipulations⁴

² 52 Pa. Code §5.221 “. . . conferences between the parties may be held at any time . . .”; 52 Pa. Code §5.222 the ALJ “may direct that a prehearing conference be held, and direct the parties to the proceeding to appear to consider the matters enumerated.” (emphasis added)

³ 52 Pa. Code §5.232 “A settlement agreement must specifically identify the parties” who support or oppose it. (emphasis added)

⁴ 52 Pa. Code §5.234 “Parties may stipulate to relevant matters of fact or the authenticity of relevant documents.” (emphasis added)

- Present evidence, cross-examine and otherwise participate at hearing⁵
- Review the transcript for accuracy⁶
- Seek interlocutory review⁷
- Obtain discovery⁸
- Move for the admission of evidence⁹
- File exceptions and reply exceptions¹⁰
- File an appeal to the Commonwealth Court¹¹
- Be placed on the service list¹²

And critically, for purposes of the instant motion, *filing an answer to a petition is an act that is specifically limited to parties:*

⁵ 52 Pa. Code §5.243 “A party has the right of presentation of evidence, cross-examination, objection, motion and argument.” (emphasis added)

⁶ 52 Pa. Code §5.252 “In proceedings when testimony was electronically recorded and subsequently transcribed, a party may review the recording to ensure it was transcribed accurately.” (emphasis added)

⁷ 52 Pa. Code §5.302 “During the course of a proceeding, a party may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise.” (emphasis added)

⁸ 52 “[A] party may obtain discovery.” (emphasis added)

⁹ 52 Pa. Code §5.402 “A party shall move the admission of evidence.” (emphasis added)

¹⁰ 52 Pa. Code §5.533 “. . . exceptions may be filed by a party”; 52 Pa. Code §5.535 “A party has the right to file a reply to an exception.” (emphasis added)

¹¹ See Official Note to Pennsylvania Rule of Appellate Procedure 1531. “[P]arty status is a prerequisite to the right to further review.” (emphasis added)

¹² 52 Pa. Code §1.51(b) “Service list for parties. The Commission will make available to filing users on the electronic filing system a service list for each docket in which they are a party that contains the following provisions: (1) The names and addresses of the parties. . . .” (emphasis added)

This provision explains why, as noted at ¶10 of the *Amicus* motion, *amicus* was not served with a copy of PECO’s Petition. The service list is limited to parties, and *amicus* is not a party.

(e) *Form of answers to petitions.* The answer must be in writing and:

(1) Advise the parties and the Commission of the parties' position on the issues raised in the petition.

(2) State the parties' standing to participate in any Commission proceeding resulting from the petition.

52 Pa. Code §5.61(e) (answering a petition) (emphasis added).

In her Motion, Ms. Sunstein Murphy did not even attempt to make a showing that she has standing to participate in this proceeding as a party. To the contrary, she essentially disavowed party status throughout her pleading by couching herself as *amicus*. Her request to be allowed to file an answer to PECO's petition should therefore be denied.

II. Conclusion

For the foregoing reasons, Ms. Sunstein Murphy's appearance in this proceeding should be limited to appearing as an *amicus* and, as such, she may file a second brief without consent. However, she is not a party to this proceeding, and the filing of that brief does not confer party status upon her.

WHEREFORE, PECO respectfully requests that the Commission issue an Order that states:

1. Ms. Sunstein Murphy's Motion for leave to file an answer to PECO's Petition for Reconsideration is denied;
2. Ms. Sunstein Murphy may file an *amicus* brief that responds to issues raised in PECO's Petition for Reconsideration;
3. The filing of an *amicus* brief does not confer party status on Ms. Sunstein Murphy; and


4. Ms. Sunstein Murphy may not perform or participate in any of the actions reserved for parties in this proceeding (unless and until she intervenes and demonstrates party status)

including but not limited to:

- a. Participation in a prehearing conference;
- b. Participation in a settlement;
- c. Entering stipulations;
- d. Presenting evidence, cross-examine or otherwise participating at hearing;
- e. Reviewing the transcript for accuracy;
- f. Seeking interlocutory review;
- g. Obtaining discovery;
- h. Moving for the admission of evidence; and
- i. Filing exceptions and reply exceptions.

Respectfully submitted,

PECO ENERGY COMPANY

By: 
Romulo L. Diaz, Jr., Vice President and General Counsel
Ward L. Smith, Assistant General Counsel
Counsel for PECO Energy Company

Of Counsel

Neal Walters
Michael R. Carroll
Casey G. Watkins
Ballard Spahr LLP

Dated: October 22, 2015

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PENNSYLVANIA PUBLIC UTILITY COMMISSION**

SUSAN KREIDER	:	
Complainant	:	
	:	
v.	:	DOCKET NO. C-2015-2469655
	:	
PECO ENERGY COMPANY	:	
Respondent	:	
	:	

CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a true and correct copy of the foregoing pleading upon the interested parties and in the manner indicated below.

Service by first class mail:

Susan Kreider
169 West Queen Lane
Philadelphia, PA 19144

Rosemary Chiavetta, Secretary
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Dated: October 22, 2015