



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

IN REPLY PLEASE
REFER TO OUR FILE

January 28, 2016

Rosemary Chiavetta
Pa. Public Utility Commission
2nd Floor, 400 North Street
P.O. Box 3265
Harrisburg, PA 17105

Re: Pennsylvania Public Utility Commission Bureau of Investigation and
Enforcement v. PECO Energy Company; Docket No. C-2015-2514773

Dear Secretary Chiavetta:

Enclosed for filing is the Motion to Strike on behalf of the Bureau of Investigation and Enforcement in the above-referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

If you have any questions on this matter, please call me at 717-214-9594.

Sincerely,

A handwritten signature in blue ink that reads "Heidi L. Wushinske".

Heidi L. Wushinske
Prosecuting Attorney
Attorney ID No. 93792

Enclosures

cc: As per Certificate of Service
Paul Metro, Gas Safety Chief

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2015-2514773
	:	
PECO Energy Company,	:	
Respondent	:	

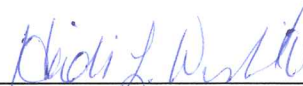
NOTICE TO PLEAD

Pursuant to 52 Pa. Code § 5.103, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission (Commission) has filed a Motion to Strike in the above-referenced matter. You are hereby notified to file a written response, pursuant to 52 Pa. Code § 5.103(c), within twenty (20) days of the service of the Notice.

Your Answer must be verified and the original sent to:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

A copy should also be served on the undersigned counsel.



Heidi L. Wushinske
Prosecutor
Attorney I.D. 93792

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 214-9594

Dated: January 28, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	Docket No. C-2015-2514773
	:	
PECO Energy Company,	:	
Respondent	:	

**MOTION OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT
TO STRIKE THE NEW MATTER OF PECO ENERGY COMPANT**

TO THE HONORABLE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

The Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”), by and through its prosecuting attorneys, pursuant to 52 Pa. Code § 5.103, files this Motion respectfully requesting that this Commission strike certain portions of the New Matter of PECO Energy Company (“PECO” or “Respondent”) for failure to adhere to the Commission’s regulations regarding New Matter. 52 Pa. Code §5.62. Specifically, I&E moves to strike PECO’s “introductory comments” and Answers to I&E’s Complaint, which PECO has attempted to incorporate by reference as “New Matter.” PECO’s “introductory comments” and Answers to I&E’s Complaint are not “New Matter,” as contemplated by the Commission’s regulations. *See* 52 Pa. Code §5.62.

In effect, PECO attempts to circumvent the Commission’s regulations regarding New Matter by incorporating by reference its “introductory comments,” which are

essentially a brief in support of its position, as well as all of its Answers to I&E's Complaint. These portions of the *Answer and New Matter of PECO Energy Company* total nearly 33 pages and are procedurally deficient. In addition to being procedurally deficient, this alleged "New Matter" is not New Matter at all because it does not consist of new material facts. *See* 52 Pa. Code §5.62 (requiring New Matter to be under the heading of "New Matter" and consist of additional material facts that are not denials of the averments of the preceding pleading). As such, PECO's introductory comments and Answers to I&E's Complaint, which it has attempted to incorporate by reference as "New Matter," are procedurally deficient and should not be considered New Matter.

In addition, I&E moves to strike Paragraphs 73, 157, and 160 of PECO's New Matter. These Paragraphs do not consist of additional material facts. Paragraph 73 contains a mere recitation of facts laid out in I&E's Complaint. As such, Paragraph 73 does not contain *additional* material facts, as required by the Commission's regulations. 52 Pa. Code §5.62. Paragraphs 157 and 160 consist of PECO's opinions and conclusions, rather than facts. Therefore, Paragraphs 157 and 160 are not New Matter as they do not consist of material facts at all, let alone additional material facts.

I. BACKGROUND

1. On November 25, 2015, I&E filed a Formal Complaint against Respondent at Docket No. C-2015-2514773, alleging that Respondent violated certain provisions of the Code of Federal Regulations related to pipeline safety, as well as the Commission's regulations.

2. In its Complaint, I&E avers that Respondent failed to follow its own damage prevention procedures.

3. I&E's Complaint seeks as relief, that the Commission: (1) find Respondent to be in violation of the Commission's regulations and the Code of Federal Regulations for each of the twenty-one (21) counts set forth in the Formal Complaint; (2) impose a civil penalty upon Respondent in the amount of Three Hundred Fifteen Thousand Dollars (\$315,000); (3) direct Respondent to modify its Gas Damage Prevention procedure, GO-PE-9003, Revision No: 4;(4) direct Respondent to submit the modifications to the Commission's Gas Safety Division; (5) order Respondent to retrain all personnel who are qualified to perform gas infrastructure locates and their supervisors; (6) direct Respondent to create a team to review and revise its Gas Damage Prevention procedure; (7) order Respondent to cease and desist from committing any further violation of gas safety regulations; and (8) order such other remedy as the Commission may deem to be appropriate.

4. On January 8, 2016, Respondent, through counsel, filed an Answer and New Matter at the above docket.¹

¹ Respondent had been granted an extension of time to respond to the Complaint.

II. MOTION TO STRIKE

A. PECO's "Introductory Comments" and Answers to the Commission's Complaint Are Procedurally Deficient In That They Disregard the Heading Requirement and are not Limited to Additional Material Facts.

5. The Commission's Rules of Practice and Procedure at 52 Pa. Code §

5.62(b) state as follows:

(b) An affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of "New Matter." A party may set forth as New Matter another material fact which is not merely a denial of the averments of the preceding pleading.

6. PECO's "introductory comments" and Answers to I&E's Complaint are not limited to additional material facts that are not merely denials of the averments in I&E's Complaint.

7. PECO's "introductory comments" and Answers to I&E's Complaint consist of nearly 33 pages and are not under the heading of "New Matter." PECO cannot overcome this procedural deficiency by merely attempting to incorporate by reference the entirety of these 33 pages in Paragraph 1 of its New Matter.

8. PECO's attempt to incorporate by reference as "New Matter" 33 pages, which includes arguments, legal conclusions, and denials of the averments in I&E's Complaint is prejudicial to I&E because I&E, as the responding party, was forced to attempt to decipher a document that was procedurally deficient pursuant to 52 Pa. Code § 5.62(b). Moreover, it would be virtually impossible for I&E to wade through the unnumbered paragraphs of PECO's "introductory comments" in search of additional material facts.

9. For the reasons set forth above, these defects are sufficient to warrant striking PECO's "introductory comments" and Answers to I&E's Complaint from its "New Matter."

B. Paragraphs 73, 157, and 160 Do Not Consist of Additional Material Facts and Are Not New Matter

10. Paragraph 73 of PECO's New Matter states that "[c]oncrete stairs were present at the time of the August 7, 2013 incident."

11. I&E's Complaint clearly stated that concrete stairs were present at the time of the August 7, 2013 incident. *See* I&E's Complaint at Paragraph 34.

12. Paragraph 73 of PECO's New Matter is not "New Matter" in that it does not consist of additional material facts, as required by 52 Pa. Code § 5.62(b).

13. Paragraph 157 of PECO's New Matter states, "[i]t would not be reasonable to expect PECO to know about excavation activity that is not associated with a PA One Call request."

14. Paragraph 160 of PECO's New Matter states, "I&E's position that PECO should have acted to prevent the August 7, 2103 incident in the absence of a PA One Call request would put the Commission's obligations on pipeline operators ahead of the Pennsylvania General Assembly's obligations on excavators and would inappropriately shift excavator risks and responsibilities under the PA One Call Law from excavators to NGDCs."

15. Paragraphs 157 and 160 of PECO's New Matter consist of opinions and conclusions, and are completely devoid of additional material facts, as required by the Commission's regulations at 52 Pa. Code § 5.62(b).

16. Therefore, Paragraphs 73, 157, and 160 of PECO's New Matter should be stricken.

III. CONCLUSION

For the reasons set forth above, the Bureau of Investigation and Enforcement respectfully requests that the Commission grant this Motion and issue an Order striking the above-cited portions of PECO's New Matter.

Respectfully submitted,



Heidi L. Wushinske
Prosecutor
PA Attorney ID No. 93792

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 214-9594
hwushinske@pa.gov

Dated: January 28, 2016

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Motion to Strike in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

Notification by first class mail addressed as follows:

Christopher A. Lewis, Esq.
Thomas M. Duncan, Esq.
Blank Rome LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103
(Counsel for PECO)



Heidi L. Wushinske
Prosecutor
Attorney ID #93972
(Counsel for Pennsylvania Public Utility
Commission)

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Dated: January 28, 2016