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February 17, 2016

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Via Overnight Federal Express

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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Harrisburg, PA 17105

FEB 17 2016

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**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 Response to Motion to Strike New Matter of Respondent, PECO Energy Company 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 215-569-5793.

Sincerely,



CHRISTOPHER A. LEWIS

Enclosures

cc: As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, :
Bureau of Investigation and Enforcement, :
Complainant :
v. :
PECO Energy Company, :
Respondent :

Docket No. C-2015-2514773

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FEB 17 2016

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

**PECO ENERGY COMPANY'S
RESPONSE TO MOTION TO STRIKE NEW MATTER**

Respondent, PECO Energy Company (“PECO” or the “Company”) respectfully requests that this Honorable Commission deny the Motion to Strike paragraphs 1, 73, 157, and 160 of PECO’s New Matter, filed by the Pennsylvania Public Utility Commission’s (“Commission’s”) Bureau of Investigation and Enforcement (“I&E”).

I. INTRODUCTION

On November 25, 2015, I&E filed a Formal Complaint in this proceeding asserting a fusillade of claims, all of which seek to hold PECO legally responsible in a circuitous fashion for a third-party excavator’s failure to comply with the excavator’s duties under the Pennsylvania One Call Law.¹ On January 8, 2016, PECO filed an Answer and New Matter, pointing out, among other things, that most of the allegations in I&E’s Complaint involved work or conduct that was wholly unrelated to the August 7, 2013 incident in which the excavator, Eastern Caisson Corporation (“Eastern Caisson”), struck the main and that Eastern Caisson had failed to submit a

¹ Pennsylvania’s Underground Utility Line Protection Law, PA Act 287 of 1974, as amended by Act 121 of 2008, 73 P.S. 176 *et. seq.* (the “PA One Call Law” or the “Act”).

locate request through the PA One Call System before commencing excavation. (New Matter ¶ 14). Additionally, PECO's Answer and New Matter pointed out that Eastern Caisson had failed to exercise due care to locate the main, (New Matter ¶ 85), and that I&E had misconstrued PECO's Gas Damage Prevention procedure, the requirements of which are triggered by a PA One Call locate request, which was never made in this particular instance, (New Matter ¶¶ 8, 28). PECO's Answer and New Matter further pointed out that: 1) PECO's locating contractor, USIC, accurately marked the gas main, where necessary, for all excavators who submitted locate requests before they began their excavations; 2) PECO's Damage Prevention Inspector visited the Rosemont College site multiple times in response to locate requests made by contractors working on the project; and 3) PECO's Damage Prevention Inspector installed permanent marker posts on the site to alert all contractors of the location of the gas main. The marker posts were in close proximity to and visible from the excavation site on August 7, 2013, when Eastern Caisson drilled into and damaged PECO's gas main.

I&E has now moved to strike certain portions of the New Matter for alleged failure to adhere to the Commission's regulations regarding New Matter. Specifically, I&E moves to strike: 1) paragraph 1 of the New Matter, which incorporates PECO's "introductory comments" and Answers to I&E's Complaint; 2) paragraph 73 of the New Matter, which I&E contends merely reiterates facts already laid out in I&E's Complaint; and 3) paragraphs 157 and 160 of the New Matter, which I&E characterizes as allegations of "opinions and conclusions" rather than facts or affirmative defenses.

As explained more fully below, I&E's Motion to Strike should be summarily denied. I&E has ignored the most fundamental of the Commission's Rules of Practice and Procedure, namely, the overarching command that the Commission's regulations are to be construed

liberally to secure the just, speedy and inexpensive resolution of Commission proceedings. 52 Pa. Code § 1.2(a). This regulation further directs the Commission or presiding officer at any stage of a proceeding to disregard an error or defect of procedure that does not affect the substantive rights of the parties. *Id.*

I&E's Motion should be denied not only because it seeks a strict construction of the Commission's pleading rules and elevates form over substance in contradiction of Section 1.2(a), but also because it simply misreads the applicable rule governing New Matter. Section 5.62(b), on which I&E relies, states 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.

In its Motion to Strike, I&E reads the second sentence of this regulation—the authorization to allege new facts in New Matter—as a limitation on the first—the requirement that affirmative defenses be set forth in New Matter. I&E's position is that *only* new facts can be averred in New Matter, not legal "opinions or conclusions", and therefore I&E contends that the legal positions advanced by PECO in its Answer and New Matter are effectively out of bounds. But I&E's construction of Section 5.62(b) cannot possibly be correct, because it would mean that a party could never assert an affirmative defense, which the first sentence plainly allows. Indeed, if an affirmative defense is not raised, it is waived. Nothing in the Commission's rules requires PECO to present a truncated version of the facts or its affirmative defenses and I&E cites no authority whatsoever to support this rigid construction of Section 5.62(b).

I&E's Motion is litigation for litigation's sake—the very antithesis of Section 1.2(a)—and should be denied summarily.

II. BACKGROUND

Except as specifically admitted below, each of the allegations in I&E's Motion to Strike is expressly denied:

1. On November 25, 2015, I&E filed a Formal Complaint ("I&E's Complaint") at Docket No. C-2015-2514773, the content of which is described above.

2. I&E's Complaint alleges, among other things, that PECO failed to follow its own damage prevention procedures. (Complaint ¶ 37). I&E's Complaint ignores the fact that the sections of PECO's Gas Damage Prevention procedure that applied to the August 7, 2013 incident are triggered, in the first instance, by the submission of a locate request through the PA One Call System. No such locate request was submitted for Eastern Caisson's work before the August 7, 2013 incident.

3. I&E's Complaint seeks multiple forms of relief as described in I&E's Motion to Strike, but granting such relief is not in the public interest and should be avoided because the end-result would: 1) increase liabilities and costs borne by natural gas distribution companies ("NGDCs") (and ultimately their customers); 2) diminish the accountability of excavators to operate safely around utility equipment; and 3) encourage negligent, careless and reckless behavior. (New Matter ¶ 89).

4. On January 8, 2016, PECO, through counsel, filed an Answer and New Matter at the above docket. The gist of the Answer and New Matter is described above.

III. MOTION TO STRIKE

A. Paragraph 1 of PECO's New Matter, Which Incorporates its Introductory Comments and Answers to I&E's Complaint, is Sufficiently Pled New Matter Under 52 Pa. Code § 5.62(b).

5. I&E has accurately quoted Section 5.62(b) of the Commission's Rules of Practice and Procedure, which states 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. In its "introductory comments" and Answers to I&E's Complaint, PECO has endeavored to correct the numerous omissions and misstatements contained in I&E's Complaint. More to the point, PECO has complied with Sections 5.61(b)(2), (3) and (4) of the Commission's Rules of Practice and Procedure, which require answers to complaints to "advise the parties and the Commission as to the nature of the defense, admit or deny specifically all material allegations of the complaint, and state concisely the facts and matters of law relied upon. 52 Pa. Code § 5.61(b)(2), (3) and (4). These factual allegations and affirmative defenses are also set forth in detail, in separately numbered paragraphs, under the heading of "New Matter."

In *LouiGens Piller v. Philadelphia Gas Works*, PUC Docket No. C-2013-2365623, 2013 WL 3971559 (Initial Decision July 29, 2013), Administrative Law Judge Susan D. Colwell explained the purpose of these pleading rules:

The Respondent's answer, when filed, may be accompanied by new matter, which pleads one or more affirmative defenses and sets forth the facts necessary to support the affirmative defenses. 52 Pa. Code § 5.62(b). This pleading is important because affirmative defenses which are not pleaded are waived, and because facts appearing in new matter which are not contradicted in a responsive pleading filed by the complainant can be used to support a motion for judgment on the pleadings or summary judgment after the pleadings are closed.

While it might be easier for a complainant to have the respondent comply with Section 5.62(b) by rigorously scrubbing its pleading to ensure that no new fact and no affirmative defense appears in the answer portion of the pleading, because Section 1.2(a) of the Commission's Rules of Practice and Procedure mandates that the rules be liberally construed, the failure of a respondent to apply such surgical precision scrutiny does not render the pleading fatally defective. *See, e.g., Petition of West Penn Power Company d/b/a Allegheny Power for Acceleration of its Competitive Procurement Plan and Request for Expedited Consideration*, PUC Docket No. P-0072342 (Order entered Mar. 20, 2009) (holding that company's replies to answers were proper because the answers raised additional issues that could be considered new matter). Indeed, as explained below, I&E did answer paragraph 1 of PECO's New Matter, so no purpose would be accomplished by striking this paragraph.

7. PECO's "introductory comments" consist of approximately four pages. PECO's Answers to I&E's Complaint consist of approximately 29 pages because PECO endeavored to correct the numerous omissions and misstatements contained in I&E's Complaint. Under the heading of New Matter, specifically, in paragraphs 2 through 190 of the New Matter, PECO has attempted to present in detail, as discretely as possible, all the additional material facts and affirmative defenses that were either raised or explained in the introductory comments and the Answers to I&E's Complaint. The introductory comments and Answers provide useful context and background for these facts and defenses, so there is no harm from incorporating them by reference in paragraph 1 of the New Matter, nor is it prejudicial to require I&E to admit or deny the substance of the facts and defenses asserted therein.

8. I&E has suffered no prejudice from PECO's incorporating by reference the arguments, legal conclusions and denials of the averments in I&E's Complaint. To the contrary,

as explained by ALJ Colwell, the entire purpose of New Matter is to raise these issues so that facts which are not contradicted can serve as the basis for a dispositive motion and so that the respondent does not waive any of its rights to present affirmative defenses. *See LouiGens Piller v. Philadelphia Gas Works*, PUC Docket No. C-2013-2365623, 2013 WL 3971559 (Initial Decision July 29, 2013).

In its Reply to New Matter, I&E has attempted to avoid responding to both the additional material facts alleged by PECO and PECO's affirmative defenses by mischaracterizing factual allegations as conclusions of law, claiming lack of knowledge of the relevant facts, making blanket denials of uncontested and incontestable legal propositions, or simply responding that an allegation is "denied" without providing any supporting factual basis for the denial. For example, paragraph 14 of PECO's New Matter alleges that "Eastern Caisson engaged in excavation for the installation of the light poles on August 7, 2013 without first submitting a locate request as required by the PA One Call Law." Instead of responding directly to this key allegation, I&E's Reply states: "Denied. The averment states a conclusion of law to which no response is required. To the extent a response is required, it is denied." (Reply to New Matter ¶ 14).

I&E cannot possibly be prejudiced by PECO's incorporation by reference in paragraph 1 of the New Matter because I&E could—and, in fact, did—simply make a denial of PECO's allegations—just as I&E did for nearly all of the allegations in the remainder of the New Matter. I&E's reply to paragraph 1 of PECO's New Matter consists of the following four sentences, the last of which is a simple general denial of the introductory comments and Answers to I&E's Complaint:

1. Denied. PECO attempts to incorporate by reference the entirety of its "introductory comments," as well as 85 paragraphs

of its answer to I&E's Complaint. This is not permitted under the Commission's regulations and should not be deemed new matter. Moreover, much of PECO's "introductory comments" contain arguments and conclusions of law to which no response would be required, even if properly filed as new matter. To the extent a response is required, the allegations contained in PECO's "introductory comments" and answer to I&E's Complaint (Paragraphs 1-85), these allegations are denied.

I&E's claim of prejudice is therefore without merit.

9. Since I&E has already replied to paragraph 1 of PECO's New Matter by relying on its customary practice of making general denials, no substantive right of I&E is at stake in its Motion. Because the Commission's Rules of Practice and Procedure are to be liberally construed, because PECO has complied with the Rules by filing a detailed Answer and New Matter in response to I&E's Complaint, and because there is no prejudice to I&E from being required to respond to the substance of the additional material facts and affirmative defenses raised by PECO, I&E's Motion to Strike paragraph 1 of PECO's New Matter, which incorporates its "introductory comments" and Answers to I&E's Complaint, should be denied.

B. Paragraph 73 of PECO's New Matter Consists of Additional Material Facts, and Paragraphs 157 and 160 of PECO's New Matter Constitute Affirmative Defenses, All of Which Were Sufficiently Pled Under the Commission's Rules.

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

11. Paragraph 34 of I&E's Complaint states: "In addition to soil fill, a considerable concrete structure, including stairs, was installed directly above PECO's gas main." (Compl. ¶ 34).

12. In its Motion to Strike, I&E argues that paragraph 73 cannot be included in "New Matter" because it does not consist of additional material facts, as required by 52 Pa. Code §

5.62(b). However, I&E fails to acknowledge that paragraphs 74 through 78 of the New Matter then go on to explain that the location of the concrete stairs is wholly irrelevant to the August 7, 2013 incident because the excavation occurred elsewhere and no PA One Call locate request was submitted for the concrete stairs. It would be impossible for the Commission to understand PECO's defense and paragraphs 74 through 78 of the New Matter unless PECO first referenced the existence of the concrete stairs in paragraph 73. Furthermore, while paragraph 34 of I&E's Complaint alleges the *location* of the concrete stairs, paragraph 73 of PECO's New Matter identifies *when* those concrete stairs were present on the site, i.e., August 7, 2013.

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." (New Matter ¶ 157).

14. Paragraph 160 of PECO's New Matter states, "I&E's position that PECO should have acted to prevent the August 7, 2013 incident in the absence of a PA One Call request would put the Commission's obligations on pipeline operators ahead of the Pennsylvania's General Assembly's obligations on excavators and would inappropriately shift excavator risks and responsibilities under the PA One Call Law from excavators to NGDCs." (New Matter ¶ 160).

15. Paragraph 157 is a factual allegation that can be proven by any form of admissible evidence, including opinion testimony. Since this fact was not presented in I&E's Complaint, it is obviously an additional material fact that is properly pled in PECO's New Matter.

16. Paragraph 160 is a legal conclusion that was and can be asserted in PECO's New Matter to support PECO's affirmative defenses.

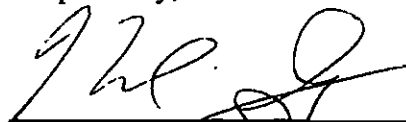
17. I&E's Motion to Strike paragraphs 73, 157 and 160 of PECO's New Matter is meritless and should be denied summarily.

IV. CONCLUSION

For the reasons set forth above, PECO respectfully requests that the Commission deny I&E's Motion to Strike. If the Commission finds that paragraphs 1, 73, 157 or 160 of PECO's New Matter are not pled consistent with 52 Pa. Code § 5.62(b), as liberally construed in accordance with 52 Pa. Code § 1.2(a), PECO respectfully requests that the Commission allow PECO to amend its New Matter to avoid creating any prejudice to PECO's defense in this proceeding.

Dated: February 17, 2016

Respectfully,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing Response to Motion to Strike New Matter upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Notification by First Class Mail addressed as follows:

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Michael L. Swindler, Esq.
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Harrisburg, PA 17105-3265

Dated: February 17, 2016


Thomas M. Duncan

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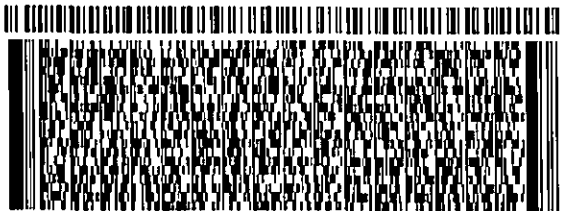
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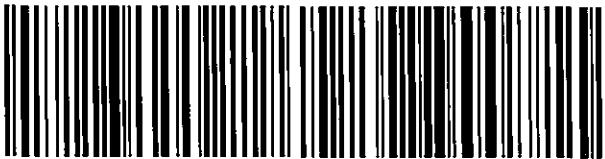
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