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February 26, 2016

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, Pennsylvania 17120

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SECRETARY'S BUREAU

Re: *International Brotherhood of Electrical Workers Local 614 v. PECO Energy Company*
Docket No. C-2016-2525801

Dear Secretary Chiavetta:

Attached please find a copy of IBEW Local 614's Answer to Preliminary Objections, which has been filed electronically, in the above-captioned matter.

Copies have been served per the attached Certificate of Service.

Very truly yours,

SPEAR WILDERMAN, P.C.

BY: CHARLES T. JOYCE

CTJ/tj
Encs.

cc: Darryl Lawrence, Senior Assistant Consumer Advocate (w/enc.)
Michael S. Swerling, PECO Energy Company (w/enc.)
Karl A. Fritton, Esquire (w/enc.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

International Brotherhood of Electrical Workers, Local 614, Complainant	:	
v.	:	Docket No. C-2016-2525801
PECO Energy Company (Electric), Respondent	:	

ANSWER TO PRELIMINARY OBJECTIONS

Pursuant to 52 Pa. Code § 5.101(f), International Brotherhood of Electrical Workers, Local 614 ("Local 614"), submits this Answer to the Preliminary Objections of PECO Energy Company ("PECO") dated February 16, 2016.[1]

I. Background

1. Admitted.

2. Admitted.

3. Admitted. By way of further answer, Local 614's Complaint also averred that PECO "is using, and intends to continue using" contractors whose employees are either not qualified to perform the work in a safe manner, or are not properly instructed by PECO in the safe performance of the work. Local 614 Complaint ¶¶ 17 and 20-25.

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[1] Local 614 notes that while its counsel was served with the document on February 16, 2016, the Office of Consumer Advocate (which intervened in this matter on February 12, 2016) does not appear on the Certificate of Service. It is unclear, therefore, whether the document was properly served as required by

4. Admitted. By way of further answer, Local 614's Complaint averred that PECO is failing to adequately supervise and inspect the work of contractors, and that those same inadequate procedures will be used for Long-Term Infrastructure Improvement Plan ("LTIIP") work. Local 614 Complaint ¶¶ 17, 21, and 23-24.

5. Admitted.

6. Admitted in part and denied in part. It is admitted that PECO's LTIIP Petition stated: "PECO anticipates that it will use outside contractors to perform much of the work it is planning to undertake to implement its LTIIP." PECO LTIIP Petition (Docket No. P-2015-2471423), p. 16, ¶ 32. It is denied that either PECO's LTIIP Petition or the accompanying testimony on file with the Commission discussed competitive bidding or the percentage of work that would be performed by outside contractors. It appears that such information may have been provided in response to a data request that does not appear in the public docket of the case.

7. Admitted in part and denied in part. It is admitted that many of these statements appear in PECO's LTIIP Petition. It is denied that the statements are complete and accurate representations of the statements made in PECO's LTIIP Petition, particularly as it relates to the statement that PECO will "pursue contractors who employ personnel through the building trades." PECO's LTIIP Petition does not contain any statement concerning PECO's active pursuit of union contractors. Rather, the LTIIP Petition simply notes that some contractors use union personnel and some do not. Specifically, the LTIIP Petition stated: "Most independent contractors employ personnel through the building trade unions, which have apprenticeship programs to ensure that

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the Commission's regulations. 52 Pa. Code §§ 1.54 to 1.59. Out of an abundance of caution, however, Local 614 is filing this Answer to Preliminary Objections within 10 days of the date of purported service.

employees are qualified to perform assigned work. Employee qualification programs for non-union independent contractors are stringently reviewed to assess the contractor's training program, such as on-the-job training and certification programs." PECO LTIIP Petition, p. 16, ¶ 32.

8. Admitted.

9. Admitted.

10. Admitted in part and denied in part. It is admitted that the Commission's order approving PECO's LTIIP contains the quoted statement. It is denied that this statement constitutes Commission "approval" of PECO's use of outside contractors, PECO's method of selecting and evaluating contractors, or PECO's competitive bid process. The Commission's statement means only that PECO has alleged facts sufficient to meet the requirements of the LTIIP regulations requiring that an LTIIP include a "workforce management and training program designed to ensure that the utility will have access to a qualified workforce to perform work in a cost-effective, safe and reliable manner." 52 Pa. Code § 121.3(a)(7).

11. Denied. As set forth more fully below, Local 614 denies that it is collaterally attacking the Commission's Order approving PECO's LTIIP; that it lacks standing to pursue this matter; that its Complaint is not ripe for adjudication; or that any of its claims are preempted by the Labor Management Relations Act.

II. Answer to Preliminary Objections

A. Legal Insufficiency: Collateral Estoppel[2]

12. Admitted.

13. Denied. PECO has misstated the law of collateral estoppel in Pennsylvania. In a 2008 case in which PECO was the respondent, the Commission accurately summarized the law of collateral estoppel as follows:

> Collateral estoppel operates to prevent a question of law or an issue of fact that has been once litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit. The four requirements for a plea of collateral estoppel to prevail are: (1) the issue decided in the prior adjudication *is identical* with the one presented in the later action, (2) there was a final judgment on the merits, (3) the party against whom the plea is asserted was a *party or in privity with the party* to the prior adjudication, and (4) the party against whom the plea is asserted has had a *full and fair opportunity to litigate* the issue in question in the prior action. *Day*, 464 A.2d at 1318, 1319. Collateral estoppel is a doctrine of issue preclusion that seeks to prevent the relitigation of a finally litigated issue in a subsequent proceeding between the same parties. *Baker v. Pa. Human Relations Comm.*, 75 Pa. Commonwealth Ct. 296, 307, 462 A.2d 881 (1983); *Thomas P. O'Toole, supra.*" *Royce v. PECO Energy Co.*, Docket No. C-20067158, 2008 Pa. PUC LEXIS 1179 (August 26, 2008) (emphasis added).[3]

In the case cited by PECO in this paragraph of its Preliminary Objections, *GPU Industrial Intervenors v. Pa. PUC*, 628 A.2d 1187 (Pa. Commw. Ct. 1993), the

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[2] For purposes of ruling on preliminary objections alleging legal insufficiency, all averments of fact in Local 614's Complaint must be assumed to be true. See, e.g., *County of Allegheny v. Pa.*, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985) ("a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts"); *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 4, 383 A.2d 791, 792 (1977) ("In considering whether the lower court properly sustained appellee's preliminary objections, this Court must assume the truth of the factual averments in appellant's complaint."). It should be noted than rather than using the term "demurrer," the Commission's regulations use the phrase "legal insufficiency." See, e.g., Initial Decision of ALJ Cheskis in *Guesman v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2012-2326301, 2012 Pa. PUC LEXIS 1717 (Nov. 15, 2012) ("In civil practice, a Preliminary Objection based on legal insufficiency is referred to as a demurrer. Preliminary Objections in the form of a demurrer will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. ... Any doubt must be resolved in favor of overruling a demurrer.").

[3] The cases cited therein are *Day v. Volkswagenwerk Aktiengesellschaft*, 318 Pa. Superior Ct. 225, 464 A.2d 1313 (1983) and *O'Toole v. Bell Telephone Co. of Pa.*, 1992 Pa. PUC LEXIS 83 (Pa. PUC 1992).

Commonwealth Court adopted these same requirements and further emphasized that collateral estoppel also requires that the "objecting party must show that 'the fact or facts at issue in both instances were identical; [and] that these facts were essential to the first judgment and were actually litigated in the first cause.'" *Id.*, 628 A.2d at 1192, citing *Schubach v. Silver*, 461 Pa. 366, 377, 336 A.2d 328, 334 (1975).

14. Denied as stated. Local 614's Complaint states that PECO is failing to abide by the terms of its LTIIP which require PECO to "ensure that the utility will have access to a qualified workforce to perform work in a cost-effective, safe and reliable manner." When PECO's LTIIP Petition was filed 11 months ago, PECO stated that it intended to have procedures designed to provide these assurances. PECO's current practices (as described more fully in Local 614's Complaint), however, make it clear that there are significant deficiencies in PECO's procedures. Those deficiencies are allowing work to be performed by contractors in a manner that is neither safe nor reliable. Local 614 is not seeking to collaterally attack or change PECO's LTIIP; it is seeking to enforce the requirements of the LTIIP, since it is apparent that PECO's current procedures are lax and fail to meet the requirements of its approved LTIIP or applicable law.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted in part and denied in part. It is admitted that Local 614 would have been an "interested party" in PECO's LTIIP Petition, and that it chose not to intervene or otherwise participate in that case. It is denied that Local 614 is seeking to have the

Commission reconsider its prior approval of the LTIIP or workforce program. Indeed, if Local 614 were asking the Commission to reconsider the approval order, Local 614 would have filed a petition under 66 Pa. C.S. § 703(g), which permits the Commission to reconsider any order at any time, after notice and an opportunity to be heard is provided. Local 614, however, is not challenging the approval of PECO's Plan; rather it is seeking to enforce the provisions of PECO's Plan, as expressly provided in the Commission's LTIIP regulations at 52 Pa. Code § 121.8(b).

20. Denied. The requirements of collateral estoppel have not been met. When those requirements are applied to this case, there is no doubt that collateral estoppel does not apply. First, the issues are not identical. The issue in the LTIIP Petition case was whether PECO's workforce plan meets the requirements of the statute and regulations. The issue in this case is whether PECO is complying with its workforce plan, including whether it is assuring that LTIIP work is performed safely. Second, there is not an identity of the parties. As PECO acknowledges in paragraph 19 of its Preliminary Objections, Local 614 did not participate in the LTIIP Petition case. Further, Local 614 was not in privity with any party to that case. Thus, by definition, collateral estoppel cannot apply to Local 614. Finally, even if the issues were identical (which they are not), there is no indication that the issues were actually litigated in the LTIIP Petition case. The Commission's Order on the workforce program issue reiterates statements from PECO's filing, then states: "No comments were received regarding the workforce management and training program." PECO LTIIP Order, p. 18. Thus, there is no indication that the issue of PECO's workforce program was explored by any party to that case, let alone actually litigated.

B. Standing

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Denied. Local 614 has representational standing to represent the interests of its members who are field employees of PECO. Specifically, paragraph 7 of the Complaint avers that PECO's failure to comply with the LTIIP is "having a direct and immediate adverse effect on the safety of Local 614's members who are field employees of PECO and who are being subjected to hazardous conditions on the job." As the authorized representative of its members who are employees of PECO, Local 614 has the right to ensure the safety of those members on the job.

Moreover, the Public Utility Code expressly recognizes the responsibility of the Commission and the utilities it regulates to ensure the safety of utility employees. In particular, Section 1501 (cited in paragraph 6 of the Complaint) requires every utility to "furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and *facilities as shall be necessary or proper for the* accommodation, convenience, and *safety* of its patrons, *employees*, and the public. ... Such service and facilities shall be in conformity with the regulations and orders of the commission." 66 Pa. C.S. § 1501 (emphasis added).

With all due respect to PECO, this Commission has no higher obligation than to ensure the safety of a utility's facilities and to thereby protect the men and women who

must work on those facilities under even the most adverse weather conditions. Frankly, Local 614 finds it offensive for a utility to suggest that utility employees cannot come to this Commission to ask that a utility be stopped from engaging in practices that jeopardize the safety of those employees.

Indeed, the Commission acknowledged the important interest of utility employees in the workforce provisions of the LTIIP. In adopting the interim LTIIP requirements, the Commission specifically relied upon the comments of the Pennsylvania AFL-CIO Utility Caucus (of which Local 614 is a member) and stated: "we adopt the AFL-CIO's suggestion and now clarify that a workforce management and training plan designed to ensure that the utility will have access to a qualified workforce to perform work in a cost-effective, safe and reliable manner is also a necessary element of the LTIIP." *Implementation of Act 11 of 2012*, Docket No. M-2012-2293611, Final Implementation Order (Aug. 2, 2012), p. 18.

Further, Local 614 would note that PECO's claim that Local 614 lacks standing to enforce the workforce and safety provisions of the Commission's order is directly contrary to PECO's averments in paragraph 19 of its Preliminary Objections that Local 614 was an "interested party" in PECO's LTIIP case. PECO cannot have it both ways. It cannot acknowledge that Local 614 would have had standing to participate in the LTIIP case, but then deny Local 614 standing to enforce the order that came out of that very case.

In addition, PECO's claim that PECO has not yet awarded any contracts under the LTIIP is irrelevant. First, PECO stated in its LTIIP that it would use the same contracting procedures it had in place and had been using for many years. Specifically, PECO stated

in its LTIIP Petition: "PECO administers a standard process for soliciting contractors. Part of that process includes evaluating the contractors' qualifications to perform work, including technical and financial capabilities and the level of it employees' qualification." PECO LTIIP Petition, p. 16, ¶ 32. PECO then explained its existing practices and how it will continue to follow those same practices for LTIIP work. That is, PECO did not suggest in its LTIIP that it would be adopting any new or different contracting procedures for LTIIP work. Thus, if PECO's current practices do not comport with safety standards, then by definition the LTIIP contracting work will not be consistent with the law's requirements that LTIIP work be performed safely.

Finally, Local 614 would note that a case or controversy can be ripe for Commission determination if a certain situation (that allegedly violates a Commission-enforceable requirement) is likely to occur in the future. Specifically, Section 331 gives the Commission the authority to issue declaratory rulings, as follows: "The commission, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 66 Pa. C.S. § 331(f). Pennsylvania's courts have held that the Commission has the right to issue a declaratory ruling when there is a "definite and concrete controversy" that affects the "legal relations of parties having adverse legal interests" and where the order would provide "specific relief through a decree of a conclusive character (rather than) an opinion advising what the law would be upon a hypothetical state of facts." *Borough of Olyphant v. Pa. PUC*, 861 A.2d 377, 382 (Pa. Commw. Ct. 2004), appeal denied, 585 Pa. 690, 887 A.2d 1242 (2005), citing *Aetna Life v. Haworth*, 300 U.S. 227 (1937).

26. Denied. Local 614 lacks knowledge concerning the specific contracts that PECO may or may not be bidding and strict proof thereof is demanded at hearing.

27. Denied. It is denied that no action has occurred under the LTIIP. Moreover, as stated in the answer to paragraph 25 above (which is incorporated herein by reference), PECO has stated that it will use the same contracting practices it already has in place which Local 614 avers have resulted in and will continue to result in unsafe practices that jeopardize the safety of Local 614's members. Thus, even if one were to assume *arguendo* that LTIIP contracts have not yet been issued, the harm to Local 614's members is real and there is an active controversy on which the Commission can rule pursuant to Section 331(f) and other authority.

C. Legal Insufficiency: Ripeness[4]

28. Admitted.

29. Denied. Local 614's Complaint explains that PECO's LTIIP is based, in part, on the representation that PECO will use its current contracting practices and procedures to comply with the requirement that LTIIP work be performed safely and by qualified personnel. Complaint ¶¶ 11-12. Local 614 then describes a series of incidents showing that PECO's contracting practices and procedures as they are being implemented at the present time are failing to protect the safety of PECO employees who must work on the same facilities. Complaint ¶¶ 19-27. The facts set forth in the Complaint are directly contrary to PECO's representations in the LTIIP that all work will be performed by qualified personnel, all work will be performed safely, and all work performed by

[4] For purposes of ruling on preliminary objections alleging legal insufficiency, all averments of fact in Local 614's Complaint must be assumed to be true. See note 2, above.

contractors will be inspected by qualified PECO employees. Local 614's averments (if proven) are sufficient to constitute violations of PECO's LTIIP.

30. Denied. Local 614's Complaint quotes from the Commission's order approving the LTIIP stating that PECO plans to use contractors. Complaint ¶¶ 11-12.

31. Denied. Local 614 lacks knowledge concerning the specific contracts that PECO may or may not be bidding and strict proof thereof is demanded at hearing.

32. Denied. Local 614 lacks knowledge concerning the specific work that PECO considers to be "performed under the LTIIP." Local 614 has identified specific safety violations that occurred during calendar year 2016 when the LTIIP is effective (Complaint ¶¶ 27.K and 27.L), as well as other safety deficiencies that occurred on projects performed using the same contracting practices and procedures that PECO states it will use for the LTIIP (Complaint ¶¶ 27.A to 27.J).

33. Denied. The Answers to paragraphs 31 and 32 are incorporated herein by reference.

34. Denied. The Answers to paragraphs 31 to 33 are incorporated herein by reference.

35. Denied. The Answers to paragraphs 31 to 34 are incorporated herein by reference.

36. Denied. Local 614 does not seek to prevent PECO from selecting particular contractors. Local 614 seeks to require PECO to comply with the provisions of the approved LTIIP. The LTIIP includes provisions that require the use of qualified utility employees or contractors to perform all work, and the use of qualified utility employees

to supervise and inspect all work performed by contractors. Complaint Requested Relief ¶ A.

37. Denied. Local 614's allegations are neither speculative nor hypothetical. PECO stated in its LTIIP that it will use the same contracting procedures and practices that it uses currently. Local 614 has averred, and will document at hearings, that those existing practices and procedures as currently implemented by PECO management are resulting in unsafe conditions for PECO's field employees and the public. This is not speculative or hypothetical; the harms to the integrity of PECO's system -- and the risks to the safety of PECO employees who must maintain that system -- are real and will exist under the LTIIP unless PECO is ordered to change the manner in which it implements its contracting practices and procedures.

D. Lack of Commission Jurisdiction: Preemption

38. Admitted.

39. Admitted.

40. Denied as stated. By way of further answer, the Collective Bargaining Agreement ("CBA") between PECO and Local 614 provides PECO with the right to utilize contractors to perform bargaining unit work, provided such assignment does not result in the layoff or reduction in the rate of pay of any bargaining unit member.

41. Admitted.

42. Admitted.

43. Denied. The Answers to paragraphs 31 to 37 are incorporated herein by reference.

44. Denied. Local 614's Complaint asks the Commission to enforce the terms of the Commission order that approved PECO's LTIIP. Those terms require that PECO used qualified employees or contractors. Further the LTIIP requires that if contractors are used their work be adequately supervised and inspected by qualified PECO employees. Local 614 does not know if enforcement of the LTIIP would result in additional work for Local 614 members. Local 614 is not bringing this action to obtain additional work for its members. It is bringing this action to protect the health and safety of its members.

45. Denied. Local 614 is not seeking to interfere with PECO's selection of contractors; however, such contractors must be fully qualified to perform all work contemplated by the LTIIP in a safe and reliable manner. Further, PECO must be able to properly inspect any work performed by contractors, consistent with the Commission's Final Order and the LTIIP. The Answer to paragraph 44 is incorporated herein by reference.

46. Denied. PECO's contention that the Commission cannot address the merits of Local 614's claim because the Commission's statutory and regulatory power to do so has been "preempted" by federal labor law, specifically Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, is simply preposterous.

"States traditionally have great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Zahl v. Harper,* 282 F.3d 204, 211 (3d Cir. 2002), *quoting Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996). Thus, any analysis of whether federal labor law forecloses a state regulatory agency from considering a complaint which raises such concerns must "start with the

basic assumption that Congress did not intend to preempt state law, and local regulations are preempted *only where they conflict* with the federal law, *would frustrate the scheme* behind the enactment of the federal law," *Hudson Co. Building and Construction Trades Council v. City of Jersey City,* 906 F. Supp. 823, 832, (D.N.J. 1996), *citing Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 747 (1985) (emphasis added), or would require that agency to engage in a "substantial ... analysis of the terms of an agreement made between the parties in a labor contract" in order to adjudicate the matter. *Kline v. Sec. Guards, Inc.,* 386 F.3d 246, 252 (3d Cir. 2004), *quoting Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 220 (1985). PECO has not and of course cannot contend that a regulatory requirement mandating that its LTIIP work be done by qualified personnel "in a manner that protects system reliability and the safety of the public" would somehow "conflict with" or "frustrate the scheme of" national labor legislation, 66 Pa. C.S. § 1359 (a). Thus, the Company's only remaining argument for the Commission to stay its hand here is simply that it is a party to a Collective Bargaining Agreement with Local 614, which features a provision establishing PECO's right to use independent contractors to perform bargaining unit work. As the case law shows, however, this fact is not nearly enough to prevent the Commission from ensuring that its Orders are being faithfully followed.

In *Kline v. Sec. Guards, supra,* the United States Court of Appeals for the Third Circuit held that a state law cause of action filed by two unionized steelworkers against a security company retained by the employer for allegedly unlawful surveillance of their activities at work was not preempted by Section 301, even though a collective bargaining agreement between the union and the employer gave the latter extensive "management

rights" to control its facility. In so doing, the court "review[ed] the relevant principles" animating Section 301 preemption, beginning with the United States Supreme Court's decision in *Caterpillar Inc. v. Williams,* 484 U.S. 386 (1987), which held that employees covered by a collective bargaining agreement who also possessed rights under individual employment contracts could bring state breach of contract claims based upon these individual agreements. Section 301, the Court explained, only "governs claims founded directly on rights *created by collective bargaining agreements"* or that are "*substantially dependent on analysis of a collective bargaining agreement.*" *Id.,* at 394. As the workers' state law complaint was based on a contract that did "not require interpretation of the collective bargaining agreement" between their union and their employer, that matter was not preempted, and the state court was free to hear and decide their case. *Kline, supra.* 386 F.3d at 253.

Next, in *Lingle v. Norge Division of Magic Chef, Inc.,* 484 U.S. 399 (1988), the Supreme Court held that an employee's state law "retaliatory discharge" claim against her employer was not preempted by Section 301, even though she, through her union, was protected by a collective bargaining agreement against termination without "just cause." The Court explained that the elements necessary to plead her state cause of action "constituted 'purely factual questions pertaining to the conduct of the employee and the conduct and motivation of the employer,' neither of which 'required a court to interpret any term of a collective-bargaining agreement.'" *Kline, supra,* 386 F.3d at 253, *quoting Lingle,* 486 U.S. at 407. "Accordingly, the Court concluded that the employee's state claim was 'independent' of the relevant collective bargaining agreement for purposes of § 301," and not preempted. *Id.* Moreover, even if resolution of the state law

claim "might well involve attention to the same factual considerations as the contractual determination of whether the employee was fired for just cause" under the CBA, "[s]uch parallelism . . . would not render the state law analysis dependent upon the contractual analysis":

> In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 purposes.

Lingle, 486 U.S. at 410. Applying these principles to the facts before it, the *Kline* court reasoned that "[a]lthough their state claims relate to conduct that Defendants engaged in at Appellants' workplace, those claims . . . are nonetheless grounded in substantive rights granted under state law." Thus, the "essential question is not whether Appellant's claims relate to a subject – management rights – contemplated by the CBA . . . . Rather, the dispositive question here is whether Appellants' state claims require any *interpretation* of a provision of the CBA." 386 F.3d at 256 (emphasis in the original). As they did not, the court concluded, they should remain with the state court for resolution.

Following *Kline*, two decisions of the United States District Court for the Eastern District of Pennsylvania, issued just in the past year, further explored the limits of §301 preemption in factual situations similar to the case at hand. In *Stellar v. Allied Signal, Inc.*, 98 F. Supp. 3d 790 (E.D. Pa. 2015), the district court engaged in a thorough survey of preemption jurisprudence, and held that a state action filed by the widow of a deceased Mack Truck auto worker under a Pennsylvania common law right to sue employers for negligence over certain asbestos-related illnesses was not preempted, even

though the collective bargaining agreement between the employer and the autoworker's union featured "numerous provisions concerning workplace safety and exposure to a variety of hazardous conditions." 98 F. Supp. 3d at 800. The state claim, according to the court, principally alleged that "Defendant Mack breached its duty as an employer to provide a safe work environment for employees. *Id.* at 798. And, while the employer tried to argue that this duty "was in some way altered" by the CBA's workplace safety provisions, the court was having none of it:

> Here, the duty that was allegedly violated is one imposed by Pennsylvania common law and does not derive from any CBA between Mack and the Union. . . . [T]he duty to provide a safe work environment preceded and exists independent of the CBA, [and] Defendant's argument that the Court will have to analyze the CBA to determine the "scope" of that duty is not persuasive. . . .
>
> Defendant has not pointed to any portion of the CBA that somehow modifies – either by enlarging, diminishing, or even refining - the duty imposed by the common law. Even if the common law duty was somehow expanded by the CBA, Plaintiffs are not basing their claim on any expansion because there is no reference to a CBA in their complaint. . . . Importantly, Plaintiff's negligence claim is not based upon Defendant's failure to follow a procedure established by a CBA . . . . [Thus], the Court does not have to interpret any of the clauses in the CBA in order for Plaintiff's to establish the scope of the duty. . . .
>
> In sum, 'not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement is preempted by § 301 or other provisions of the federal law.'

Stellar, supra, 98 F. Supp. 3d at 800; 801-802; 803; 804. The court concluded that where the party pushing preemption "has not shown how the common law duty is impacted by the mere presence" of a collective bargaining provision, "nor has it shown that the Court

will have to interpret any of the terms of" a CBA to adjudicate the state law dispute, such a claim is simply "not preempted by § 301." *Id.* at 804.

Finally in a case decided just this past November, *McNeal v. Arcelormittal USA, Inc.*, 2015 U.S. Dist. LEXIS 152975 (E.D. Pa. November 12, 2015), the district court found that a Pennsylvania lawsuit brought by two injured steelworkers against the parent company of their employer, alleging failure to "provide a reasonably safe environment free from hazards and unseen dangers" and "to provide proper training to its employees regarding proper safety techniques" was not preempted, even though the men were covered by a CBA, and indeed, referenced that Agreement in their state court complaint. 2015 U.S. Dist. LEXIS 152975 at *8-9. When the defendant pointed this fact out, and even noted "a number of instances where" the factual and legal allegations in the complaint "directly mirror[ed]" the employer's "alleged obligations under the CBA," the court remained unwilling to find § 301 preemption, holding that to "merely identify 'parallelism' between the CBA and Plaintiff's complaint", or the "mere mention of the CBA in the complaint, or even the need to reference it in the course of adjudicating the claim . . . is insufficient to sustain complete preemption under Section 301" when the plaintiff's claims "rest on duties that preceded and exist independent of any duties provided in the CBA.." :

> Plaintiffs pled a state law claim for negligence against Defendants that is independent from the duties articulated in the CBA: under Pennsylvania common law, the parent company may owe a duty to provide a safe work environment to the employees of a wholly-owned subsidiary. Defendants have failed to show that the Court will have to interpret any of the terms of the CBA in order to adjudicate Plaintiff's claims, or that Plaintiff's claims are otherwise rooted in the contract.

2015 U.S. Dist. LEXIS 152975 at *10-11. Therefore, the court allowed the state law action to proceed.

Applying these precedents to Local 614's Complaint before the Commission exposes the legal bankruptcy of PECO's preemption claim. While there exists a provision in CBA between the parties which provides PECO with the right to utilize outside contractors to perform bargaining unit work, this right neither enlarges, diminishes or even refines PECO's statutory duty under the Public Utility Code and the Company's Commission-approved LTIIP itself to strictly use "qualified employees" of its own or of independent contractors who can perform the ongoing and contemplated work "in a cost-effective, safe and reliable manner." Local 614 has lodged this Complaint with the Commission because of its fundamental belief, backed by strong documentary evidence, that PECO has not, and as currently constituted cannot, fulfill this state imposed duty with the contractors it currently is using, and is planning to use, to complete its LTIIP. Nor can the Company fulfill the mandate contained in the Commission's Final Implementation Order that "work performed by independent contractors" be properly "inspected by utility employees."

These charges can be thoroughly investigated and resolved by the Commission without any interpretation of, or even any reference to, the CBA between Local 614 and PECO; the Complaint does not even mention the provision relied upon by the Company, nor is there any explicit or implicit dispute over what that provision says or means. As in the cases discussed above, the Union's claims here are wholly independent of its rights and obligations existing within the CBA, and are grounded firmly upon principles contained in the statutory laws of this Commonwealth, in the Commission's regulations,

and indeed, in PECO's own LTIIP, as approved by the Commission in its October 22, 2015 Opinion and Order. In law and in fact, the CBA is, for the purposes of adjudicating the instant Complaint, an utter irrelevancy, and therefore cannot constitute a proper basis for federal preemption under Section 301 of the LMRA.

III. Conclusion

WHEREFORE, International Brotherhood of Electrical Workers, Local 614, respectfully requests the Commission to dismiss the Preliminary Objections of PECO Energy Company and to assign this matter to an Administrative Law Judge for the taking of evidence and the preparation of an Initial Decision.

Respectfully submitted,

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Dated: February 26, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served this day a true copy of the foregoing document upon the parties listed below by electronic mail and U.S. mail, first-class, postage prepaid, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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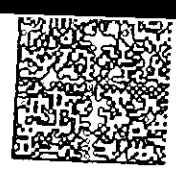

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