

AA 00052.00000 (40/40)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pet-Chem Equipment Corp. :
 :
 v. : C-20077303
 :
 PECO Energy Company :

ORDER DENYING PRELIMINARY OBJECTION
AND SETTING RESOLUTION CONFERENCE

DOCUMENT
FOLDER

Before
Veronica A. Smith
Chief Administrative Law Judge

DOCKETED
MAR 23 2007

On January 22, 2007, Edward Christopher Smith, President, on behalf of Pet-Chem Equipment Corp. (Complainant), filed a Formal Complaint with the Commission against PECO Energy Company (Respondent), alleging a billing dispute. Specifically, Complainant avers that it was overcharged for service in January and February 2006 as a result of being "illegally switched" to Electric America/Commerce Energy as its generation and transmission supplier. Complainant continues that even though it is disputing these bills, Respondent has been charging late fees on the disputed amounts. As relief, Complainant requests that Respondent be directed to credit its account in the amount of \$463.99.

On February 15, 2007¹, Respondent filed an Answer and a Preliminary Objection, addressing the allegations of the Complaint and moving to dismiss the Complaint on the basis that the Complaint is insufficient as to substance in that it fails to allege any violation of the Public Utility Code or a Commission regulation or order.

¹ Respondent was served with a copy of the Complaint on January 25, 2007.

According to Commission records, as of March 20, 2007, Complainant did not file a response to the Preliminary Objection². This matter was assigned to me by Motion Judge Assignment Notice dated February 27, 2007. The Preliminary Objection is ripe for ruling.

Before the Commission are a Complaint and a Preliminary Objection seeking dismissal of the Complaint on the basis that the Commission lacks jurisdiction to grant the relief requested by Complainant.

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code §§5.101-5.103. This practice is similar to Pennsylvania civil practice regarding the filing of preliminary objections. Equitable Small Transportation Interveners v. Equitable Gas Company, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

A preliminary objection in civil practice seeking dismissal of a pleading will be granted only where relief is clearly warranted and free from doubt. Interstate Traveller Services, Inc. v. Pa. Dept. of Environmental Resources, 406 A.2d 1020 (Pa. 1979); Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc., 595 A.2d 172 (Pa. Super. 1991). The Commission has adopted this standard. Montague v. Philadelphia Electric Company, 66 Pa. PUC 24 (1988).

The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the motion, all well-pleaded, material facts of the other party, as well as every inference fairly deducible from those facts. County of Allegheny v. Commw. of Pa., 490 A.2d 402 (Pa. 1985); Commw. of Pa. v. The Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Commw. 1988). The motion may be granted only if the moving party prevails as a matter of law. Roe v. Flaherty, 527 A.2d 211 (Pa. Commw. 1985). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. Dept. of Auditor

² Pursuant to 52 Pa. Code §5.101(f)(1) a reply to the Preliminary Objections was due on or before February 25, 2007.

General, et al v. State Employees' Retirement System, et al., 836 A.2d 1053, 1064 (Pa. Commw. 2003) (citing, Boyd v. Ward, 802 A.2d 705 (Pa. Commw. 2002)).

Complainant alleges that it was switched to another electric supplier without its consent, was overcharged for service and has been wrongfully assessed late fees. Complainant requests a credit to its account in the amount of \$463.99.

Respondent, in its Answer, asserts that Complainant was switched to Electric America/Commerce Energy in 2003 as part of Respondent's Market Share Threshold Program and further avers that this program was approved by the Commission. Respondent goes on to state that Complainant did not immediately opt-out of this program and its electricity was supplied by Electric America/Commerce Energy until January 26, 2006.

Commission regulations permit the filing of new matter. A party may raise as new matter "...[a] material fact which is not merely a denial of the averments of the preceding pleading." New matter should be pleaded in an answer. 52 Pa. Code §5.62(b). Respondent's Answer contains numerous new factual allegations, in addition to those mentioned above, however, none of these allegations are raised as new matter and therefore, cannot be deemed admitted as fact when ruling on the Preliminary Objections. See 52 Pa. Code §5.63.

While Respondent's assertion that its Market Share Threshold Program was approved by the Commission is correct, Respondent's failure to plead as new matter the factual allegations to support its contentions is fatal to its Preliminary Objections. See Petition for Approval of PECO Energy Company's Market Share Threshold Bidding/Assignment Process; Petition for Approval of the "Better Choice" Plan to Meet PECO Energy Company's Threshold Requirements, 2003 Pa. PUC Lexis 7 (February 6, 2003).

The Complaint does not mention the Market Share Threshold program. Furthermore, it raises other billing issues, namely the charging of late fees, which is not addressed in Respondent's Answer or Preliminary Objections. Since Respondent failed to present, as new matter, facts which are material to this proceeding but not mentioned in the

complaint, these facts cannot be considered when ruling on the motion. This case presents genuine issues of material fact which remain outstanding and I cannot conclude that Respondent is entitled to judgment as a matter of law. The Preliminary Objections must be denied.

Based upon the pleadings before me, it is my conclusion that this case is appropriate for submission to the Commission's alternative dispute resolution process. Accordingly, this case will be set for a resolution conference to provide the parties with the opportunity to discuss the issues raised in the Complaint. The parties are directed to attempt to resolve this matter themselves and are strongly encouraged to participate in this process. This process is consistent with the Commission's regulations at 52 Pa. Code §§ 5.231(a) and 69.391.

Respondent shall contact Complainant no later than April 6, 2007, to set a mutually convenient date, time and location to conduct a conference to discuss the possible resolution of this case. The conference shall occur no later than April 26, 2007. No later than ten days following the conference, Respondent shall file a report with Herbert R. Nurick, Mediation Coordinator, setting forth:

- (a) The date, time and location of the conference;
- (b) The participants representing each party;
- (c) A statement describing whether a full resolution, including withdrawal of the complaint, was achieved; and, if not, whether the parties consent to have this case set for mediation by Commission staff; and
- (d) A statement listing any resolved issues, if a full resolution was not achieved.

Should the conference not take place by the due date, Respondent shall file a report with the mediator, no later than May 7, 2007, giving the reason(s) why the due date was not met.

The Commission encourages mediation if the parties cannot reach an agreement through the resolution conference.³ If the parties do not reach an agreement on their own, consent to mediate, or if mediation is unsuccessful, they are entitled to a hearing, which will include the

³ Mediation is an informal process in which the parties attempt to resolve the case with the help of a mediator. The mediator is a neutral staff member of the Commission who does not give advice, make a decision or represent any party. Instead, the mediator assists the parties in their efforts to come to an agreement.

presentation of oral testimony and other evidence before a Commission Administrative Law Judge, who will consider the case and issue a written decision.

Finally, it should be noted that the Complainant is a corporation whose President filed the Complaint on its behalf. If the alternative dispute resolution process is unsuccessful, Complainant will be required to be represented at all further stages of this proceeding by an attorney licensed to practice law in the Commonwealth of Pennsylvania 52 Pa. Code §1.21(a).

THEREFORE,

IT IS ORDERED:

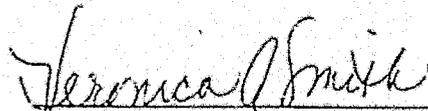
1. That PECO Energy Company's Preliminary Objection moving to dismiss the Complaint filed by Pet-Chem Equipment Corp. at PUC Docket No. C-20077303 is denied.
2. That this case be set for resolution conference.
3. That PECO Energy Company shall contact Pet-Chem Equipment Corp. no later than April 6, 2007, to set a mutually convenient date, time and location to conduct a conference to discuss the possible resolution of the issues raised in the Complaint.
4. That the resolution conference shall take place no later than April 26, 2007.
5. That PECO Energy Company shall file a report addressed to Herbert R. Nurick, Mediation Coordinator, Office of Administrative Law Judge, P.O. Box 3265, Harrisburg, PA 17105-3265, no later than ten days following the resolution conference setting forth:
 - (a) the date, time and location of the conference;
 - (b) the participants for each party

- (c) a statement describing whether a full resolution, including withdrawal of the complaint was achieved; and, if not, whether the parties consent to have this case set for mediation by Commission staff; and
- (d) a statement listing any resolved issued, if a full resolution was not achieved.

6. That, if the resolution conference does not take place by the due date, PECO Energy Company shall file a report with the mediator, no later than May 7, 2007 giving the reason(s) why the due date was not met.

7. That, if the parties do not reach an agreement on their own, consent to mediate, or if mediation is unsuccessful, this matter will be set for hearing

Dated: March 22, 2007



Veronica A. Smith
Chief Administrative Law Judge

Legal Department

Exelon Business Services Company
 2301 Market Street/ 5237
 PO Box 8699
 Philadelphia, PA 19101-8699

Telephone 215 841-5544
 Fax 215 568 3389
 www.exeloncorp.com

Business Services
 Company

Direct Dial: 215-841-6841
 May 30, 2007

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

ORIGINAL

Re: Pet-Chem Equipment Corp. v. PECO Energy Company
Docket Number: C-20077303

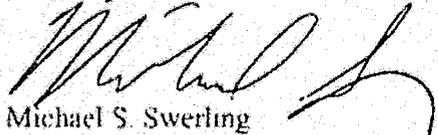
Dear Secretary McNulty:

Pursuant to 52 Pa. Code §5.24(b), PECO Energy Company certifies that the parties in the above referenced complaint have reached an accord.

By copy of this letter, I am alerting the Complainant of its right to object to the closing of this matter in writing to the Public Utility Commission within ten (10) days of the date of this letter.

If additional information is needed about this matter, please contact me at my direct-dial number above. Thank you.

Sincerely,


 Michael S. Swerling
 Counsel for PECO Energy Company

**DOCUMENT
 FOLDER**

cc: Mr. Edward Christopher Smith
 Mediator Herbert Nurick
 PUC Scheduling

RECEIVED
 2007 JUN -4 AM 10:48
 COMMUNICATIONS SECTION

ORIGINAL

RECEIVED

2007 JUN 05 10:19

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PET-CHEM EQUIPMENT CORP.

COMPLAINANT

v

PECO ENERGY COMPANY

RESPONDENT

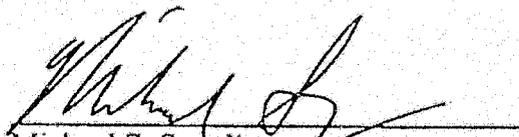
DOCKET NO. C-20077303

CERTIFICATE OF SATISFACTION

I, Michael S. Swerling, Esquire, representing PECO Energy Company ("PECO") in this matter, hereby certify that the issues raised in the Formal Complaint filed by Complainant with the Pennsylvania Public Utility Commission and docketed at Complaint Docket No. C-20077303 has been satisfied.

This Certificate of Satisfaction is provided pursuant to 52 Pa. Code §5.24(b). Unless Complainant files an objection to this Certificate within ten (10) days of its filing, the Formal Complaint shall be withdrawn and the Commission's file closed.

**DOCUMENT
FOLDER**



Michael S. Swerling
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-6841
Michael.Swerling@exeloncorp.com

Date: May 30, 2007

DOCKETED
JUN 05 2007

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

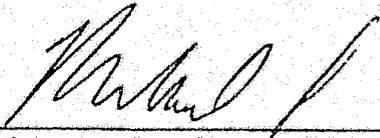
RECEIVED
2007 JUN 14 11:10:19

PET-CHEM EQUIPMENT CORP. :
 :
COMPLAINANT :
 :
v. : DOCKET NO. C-20077303
 :
PECO ENERGY COMPANY :
 :
RESPONDENT :

CERTIFICATE OF SERVICE

I, Michael S. Swerling, hereby certify that I have this day served a true and correct copy of the foregoing document upon the interested parties and in the manner indicated below.

Service by first class mail:
Mr. Edward Christopher Smith
Pet-Chem Equipment Corp.
P.O. Box 206
Flourtown, PA 19031



Michael S. Swerling
Counsel for PECO Energy Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-6841
Michael.Swerling@exeloncorp.com

Dated: May 30, 2007

COMMONWEALTH OF PENNSYLVANIA
PUBLIC UTILITY COMMISSION

DATE: May 31, 2007

SUBJECT: Pet-Chem Equipment Corp. v. PECO Energy Company
C-20077303

TO: Wanda Zeiders
Docket Management

FROM: Linda Salome, ALJ Support Staff
Office of Administrative Law Judge

On May 30, 2007, a Certificate of Satisfaction was filed in the above-captioned proceeding. If no objection is filed to this certificate within 10 days of the filing, this proceeding will be closed.

All parties should be notified that the case is closed and a copy of that notification placed in the document folder.

Attachment

pc: Herbert Nurick, Mediation Coordinator
Beth Plantz
Case File

DOCUMENT
FOLDER

DOCKETED
JUN 1 2007



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

IN REPLY PLEASE
REFER TO OUR FILE

June 26, 2007

C-20077303

PET-CHEM EQUIPMENT CORP.
P O BOX 206
FLOURTOWN PA 19031

PET-CHEM EQUIPMENT CORP.
v.
PECO ENERGY COMPANY

TO WHOM IT MAY CONCERN:

Please be advised that the Commission has marked closed the above-entitled proceeding.

Very truly yours,

James J. McNulty
Secretary

cc: All parties of Record
OFFICE OF ALJ

ane

DOCKETED
JUN 27 2007

DOCUMENT
FOLDER

BA