

BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

KA AT FAIRLESS HILLS, LP,
Complainant

vs.

DOCKET NO. C-2017-2592335

PECO ENERGY COMPANY,
Respondent

**RESPONSE OF KA AT FAIRLESS HILLS, LP TO PECO'S
MOTION TO FILE EXCEPTIONS NUNC PRO TUNC**

Complainant KA at Fairless Hills, LP (hereinafter referred to as "KA"), by and through its attorney, David S. Dessen, Esquire, responds to Respondent PECO Energy Company's (hereinafter referred to as "PECO") Motion to File Exceptions Nunc Pro Tunc as follows:

1. Admitted with the clarification that PECO was also ordered to pay KA interest at the legal rate on the \$22,000.00 overpaid by KA as a result of PECO's improper billing.
2. Admitted.
3. Admitted in part. It is admitted that PECO has filed the instant motion for leave to file its Exceptions two days late. It is denied that the "holiday period" is the reason that PECO did not file its Exceptions in a timely manner.
4. No response is required to this averment.
5. Admitted.
6. Denied as stated. 52 Pa. Code § 1.2 is a writing which speaks for itself.
7. Denied as stated. The opinion of the Commonwealth Court in *Info. Connections, Inc. v. Pa. Pub. Util. Comm'n.*, 630 A.2d. 498 (Pa. Cmwlth. 1998) is a writing which speaks for itself. It is specifically denied that the holding in *Info. Connections*, which concerned the decision of the Public Utility Commission to consider Exceptions not filed in the format

specified in 52 Pa. Code § 5.533(b), is relevant to a determination of whether PECO has established the reasonable grounds required by 52 Pa. Code § 1.15(a)(1) to permit the filing of untimely Exceptions.

8. Denied as stated. 52 Pa. Code § 1.15(a)(1) is a writing which speaks for itself.

9. Denied. PECO has not established reasonable grounds for the untimely filing of its Exceptions.

10. Admitted in part. It is admitted that PECO's exceptions were due on January 8, 2018 and that there was a snow storm on January 4, 2018. It is denied that the events described in this averment constitute reasonable grounds that would excuse PECO from timely filing its Exceptions.

Counsel has not found any case interpreting the standard of "reasonable grounds" set forth in 52 Pa. Code § 1.15(a)(1). However, similar language is used as part of the second requirement of the three requirements a petitioner must prove in order to prevail on a petition to open a default judgment. Because both a petition to open a default judgment and a Motion to File Exceptions Nunc Pro Tunc are appeals to a tribunal's equitable powers, the meaning of "reasonable grounds" in § 1.15(a)(1) should be the same as the meaning of "reasonable excuse" in the default judgment context.

In *Myers v. Wells Fargo Bank, N. A.*, 986 A.2d 171 (Pa. Super. 2008), the Superior Court explained that a reasonable excuse for the entry of a default judgment exists and a default judgment may be opened where the failure to answer was due to an oversight, an unintentional omission to act, or a mistake as to the rights and duties of the appellant. *Myers*, 986 A.2d at 177. It is clear from the instant motion that PECO knew that if it wished to dispute the Initial Decision

rendered by ALJ Vero, it had to file Exceptions and that PECO knew when the Exceptions were due. It must be assumed that PECO also knew that pursuant to § 1.15(a)(1), PECO would only have to meet the lesser burden of “good cause” to obtain an extension of time in which to file its Exceptions, if it filed a motion seeking an extension before January 8, 2018. Such a motion could have been filed by any attorney in PECO’s legal department at any time between December 10, 2017 and January 7, 2018.

To establish reasonable grounds, PECO first asserts that because its lead trial counsel voluntarily notified the PUC that she was unavailable from December 21, 2017 through January 3, 2018, PECO was unable to request an extension and unable to prepare its Exceptions. What PECO does not represent to the Commission is that its lead trial counsel was in fact in a location where she could not prepare the necessary documents and/or that no other attorney in PECO’s legal department could have either requested an extension or drafted Exceptions for review and approval by the lead trial counsel. Next, PECO asserts that a result of a snow storm on January 4, 2018 the offices of the City of Philadelphia, Philadelphia schools and the Philadelphia Office of Administrative Law Judge were closed. Significantly, PECO does not represent that its offices were closed or that lead trial counsel or another member of PECO’s legal staff did not have access to the material necessary to draft PECO’s Exceptions.

It is crystal clear that PECO’s failure to timely file Exceptions is not due to an oversight, an unintentional omission to act, or a mistake as to its rights and duties. Rather, PECO found other things more important than timely filing its Exceptions and now asks the Commission to approve its blatant disregard of the Commission’s regulations because it is “only two days late.” Simply put, that is not a “reasonable ground” to support PECO’s request.

11. Admitted in part. It is admitted that this matter involves a financial dispute between two commercial entities. While PECO's loss of use of \$22,000 since June of 2016 may not cause it any hardship, the loss of use of these funds has caused KA a significant hardship and the continued loss of use of these funds and the interest to be earned on that money continues to cause KA a significant hardship.

12. Denied. The Initial Decision of Administrative Law Judge Vero is correct and just.

13. Denied. The record does not reflect that two or more Commissioners requested the Commission review ALJ Vero's Initial Decision within 15 days of the date the Initial Decision was issued and so pursuant to 52 Pa. Code § 5.536(a), the Initial Decision is now the final decision of the Commission. Granting the instant petition will, therefore, affect the substantive rights of KA.

14. PECO has not established reasonable grounds to justify its failure to file Exceptions within the time specified in 52 Pa. Code § 5.533(a) and, therefore, the instant motion should be denied.

WHEREFORE, Complaint KA at Fairless Hills, LP respectfully requests that the Commission deny PECO's Motion to File Exceptions Nunc Pro Tunc.

DESSEN, MOSES & ROSSITTO

Dated: January 18, 2018

BY /s/ David S. Dessen
DAVID S. DESSEN, ESQUIRE
Attorney for Complainant