

Legal Department  
2301 Market Street / S23-1  
Philadelphia, PA 19103

Direct Dial: 215.841.6863

April 8, 2019

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

**Re: Rama Construction, Inc., T/A Ramada Inn, International Airport  
v. PECO Energy Company, Docket No. C-2008-2058320**

**Rama Construction, Inc. T/A Ramada Inn, International Airport  
v. Celeren Corporation, Docket No. C-2009-2089694**

Dear Secretary Chiavetta:

PECO Energy Company's *Exceptions* are enclosed for filing.

Very truly yours,



Ward L. Smith  
Counsel for PECO Energy Company

WS/adz  
Enclosures

c: Honorable Marta Guhl, ALJ  
Certificate of Service

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION


RAMA CONSTRUCTION, INC. :  
T/A RAMADA INN :  
INTERNATIONAL AIRPORT : DOCKET NO. C-2008-2058320  
:  
v. :  
:  
PECO ENERGY COMPANY :  
:  
RAMA CONSTRUCTION, INC. :  
T/A RAMADA INN :  
INTERNATIONAL AIRPORT : DOCKET NO. C-2009-2089694  
:  
v. :  
:  
CELEREN CORPORATION :

CERTIFICATE OF SERVICE

I, Ward L. Smith, hereby certify that I have this day served a copy of the *Exceptions* of PECO Energy Company in the above matter, upon all interested parties via email to:

John Dorsey, Esquire  
jdorsey@davisbucco.com  
Paul A. Bucco, Esquire  
paulbucco@davisbucco.com  
Davis & Bucco, P.C.  
Suite 100  
10 East Sixth Avenue  
Conshohocken, PA 19428

Dated: April 8, 2019

  
\_\_\_\_\_  
Ward L. Smith  
Counsel for PECO Energy Company  
2301 Market Street, S23-1  
Philadelphia, PA 19103  
Phone: (215) 841-6863  
Fax: 215.568.3389  
Ward.Smith@exeloncorp.com

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Rama Construction t/a</b>	:	
<b>Ramada Inn International Airport</b>	:	
	:	
<b>v.</b>	:	<b>C-2008-2058320</b>
	:	
<b>PECO Energy Company</b>	:	

<b>Rama Construction t/a</b>	:	
<b>Ramada Inn International Airport</b>	:	
	:	
<b>v.</b>	:	<b>C-2009-209694</b>
	:	
<b>Celeren Corporation</b>	:	

**Exceptions of PECO Energy Company**

**Contents**

Introduction ..... 1

Exception One – The Dean Deposition is Not Admissible Against PECO ..... 1

    A. Rama’s Request to Admit the Dean Deposition and PECO’s Motion to Exclude It ..... 1

    B. The Initial Decision Ruling..... 3

    C. PECO Was Not “Present or Represented” or “Constructively Represented” at the Dean  
    Deposition ..... 4

Conclusion ..... 9

## **Introduction**

On March 19, 2019, the Commission served the Initial Decision (“I.D.”) of Administrative Law Judge Marta Guhl. By Secretarial Letter on that date, the Commission stated that exceptions, if any, must be filed within 20 days of the issuance of Secretarial Letter (that is, by Monday, April 8, 2019).

The I.D. is favorable to PECO, and PECO does not take exception to its conclusions. However, there is one evidentiary issue that PECO believes the Commission should address and reverse. The I.D. (pp. 14-16) admitted the transcript of a deposition of Gary Dean (the “Dean Deposition”), who was a corporate officer of Celeren, because Mr. Dean’s last known location was more than 50 miles outside of Pennsylvania. The I.D. concluded that this rendered him “unavailable” pursuant to Pa. Rule of Civil Procedure 4020(a)(3)(b), and that consequently his deposition was admissible against PECO. Under that Rule, however, a deposition of an unavailable deponent becomes admissible against a party only if that party “was present or represented at the taking of the deposition.” Pa. Rule of Civil Procedure 4020(a). PECO was not present or represented at the Dean Deposition. Nor (as Rama contends) was PECO “constructively represented” at the Dean Deposition. The Dean Deposition therefore is not admissible against PECO, and PECO takes exception to the ruling admitting the Dean Deposition into the record against it.

### **Exception One – The Dean Deposition is Not Admissible Against PECO**

#### **A. Rama’s Request to Admit the Dean Deposition and PECO’s Motion to Exclude It**

The prefiled written direct testimony of Rama witness Thomas Wolf, which was served on July 10, 2018, included, as Exhibit C-2, a deposition of Gary Dean (the “Dean Deposition”). At the time of the deposition Mr. Dean was a corporate designee of Celeren Corporation. *See*

I.D., p. 6, pp. 14-16; Rama Statement No. 1, Direct Testimony of Thomas Wolf, Exh. C-2. The Dean Deposition was taken by Rama in its suit against Hess Corporation in a civil case in Montgomery County. PECO was not a party to the Rama/Hess proceeding and was not present or represented at the Dean Deposition. *See* Dean Deposition, pp. 1-2 (Caption and List of Appearances).

On August 3, 2018, PECO filed a Motion in Limine to strike or limit the admissibility of the Dean Deposition because it is an out-of-court declaration that Rama offered for the truth of the matters asserted therein, and it is thus inadmissible hearsay. (PECO's Motion in Limine is available on the Commission's website at <http://www.puc.state.pa.us/pcdocs/1579647.pdf>.)

On August 23, 2018, Rama served its "Opposition to Respondent-PECO's Motion in Limine." In its Opposition, Rama claimed that: (1) the Dean Deposition is admissible against PECO because PECO was "constructively represented" by Hess at the Dean Deposition, and (2) Mr. Dean works in New Jersey at a location that is "more than 50 miles away outside of the Commonwealth," and he is thus "unavailable" under Rule 4020. (Rama's Certificate of Service, but not its substantive document, is available on the Commission's website. A copy of the Rama Opposition is attached as Attachment A.)

At the evidentiary hearing, the ALJ and the parties discussed PECO's Motion in Limine. Tr. 4-16. (A copy of those transcript pages is attached as Attachment B.) During that discussion, it became apparent that ALJ Guhl had not been served with or seen Rama's Opposition regarding the Dean Deposition. The parties thus verbally stated their arguments. Rama stated (Tr. 10-12) that PECO had been constructively represented by Hess at the Dean Deposition because the Hess litigation and the PECO litigation involve the "exact same claims" and are "basically the exact same thing." PECO stated (Tr. 11-12) that it had not been "constructively represented" by Hess

Corporation during the Dean Deposition, because PECO and Hess are not affiliates, the deposition was taken in a civil case that did not involve regulatory issues, the civil case against Hess involved natural gas service while the complaint against PECO involves electric utility service, and Hess had no knowledge of or access to transactions between PECO and Rama, and therefore could not have represented PECO's interests in the deposition

The ALJ did not rule at hearing. She provisionally admitted the Dean Deposition, but reserved her ruling until such time as she had the opportunity to fully review Rama's written submittal.

### **B. The Initial Decision Ruling**

The I.D. (pp. 14-16) reviews the parties' arguments regarding the Dean Deposition and concludes that the Dean Deposition is not hearsay because Mr. Dean's last known location was in South New Jersey more than 50 miles outside of the Commonwealth, and that Mr. Dean was therefore "unavailable" pursuant to Pennsylvania Rule of Civil Procedure 4020(a)(3)(b). The I.D. does not address the claim that PECO was constructively represented by Hess at the Dean Deposition. The I.D. states (emphasis added):

The Commission recently confirmed that hearsay evidence which is properly objected to cannot be used to support a factual finding of the Commission. In *Frompovich v. PECO*, Docket No. C-2015-2474602, pp. 16-18 (Opinion and Order entered May 3, 2018), the Commission addressed the role of hearsay evidence in Commission proceedings and stated that if properly objected to, hearsay may not be used to support a factual determination of the Commission.

However, Rule 4020 of the Pennsylvania Rules of Civil Procedure provides, in pertinent part, that deposition testimony may be entered into evidence when:

(a) At the trial, any part or all of *a deposition*, so far as admissible under the rules of evidence, *may be used against any party who was present or represented at the taking of the deposition or who had notice thereof* if required, in accordance with any one of the following provisions: \* \* \*

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose *if the court finds*:

(a) that the witness is dead, or

(b) *that the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth*, unless it appears that the absence of the witness was procured by the party offering the deposition, or

(c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or

(d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or

(e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

*See, Pa.R.C.P. 4020(a)(3); See also, Missett v. Hub Int'l Pa., LLC, 6 A.3d 530, 542-43 (Pa.Super. 2010).*

Mr. Gary Dean was the corporate designee of a now defunct company, Celeren. Without even reaching his willingness to submit as a witness in this matter or appear under subpoena, his deposition testimony is admissible because he is outside of the Commonwealth. It is a known fact that Mr. Dean is in Hammonton, New Jersey employed by South Jersey Energy. This last known location was more than 50 miles away outside of the Commonwealth. Therefore, Mr. Dean is “unavailable” pursuant to Rule 4020(a)(3)(b). Since the Dean deposition is admissible under Rule 4020, it is hearsay evidence not properly objected to and should not be stricken from the record.

Based on the above, PECO’s Motion in Limine related to the Dean deposition is denied.

**C. PECO Was Not “Present or Represented” or “Constructively Represented” at the Dean Deposition**

Pennsylvania Rule of Civil Procedure 4020(a)(3) allows depositions to be admitted against a party in limited circumstances when two material conditions are met: (1) the party against whom the deposition is to be used “was present or represented at the taking of the deposition” AND (2) the deponent is determined to be unavailable for any of a number of



specified reasons, including that the deponent is “at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth.” As Rama stated in its Opposition (pp. 2-3, emphasis added): “When deposition testimony is from a previous matter, *the party against whom the testimony is offered must have been ‘represented or present’ during the deposition producing the testimony for it to be admissible.*”

No one claims that PECO was actually “represented or present” during the Dean Deposition. Nor could they make that claim, as PECO was not a party to the *Hess v. Rama* litigation, and was not present or represented at the taking of the Dean Deposition. Direct Testimony of Thomas Wolf, Exh. C-2, p. 2 (Dean Deposition Caption and List of Appearances).<sup>1</sup>

Instead, Rama claims that PECO was “constructively represented” because the Hess litigation and the PECO litigation involve the “exact same claims” (Tr. 10) and are “basically the exact same thing.” (Tr. 12).

In its written Opposition, Rama cites two cases in support of its claim that PECO was “constructively represented” in the Dean Deposition: *Gosha v City of Philadelphia*, 30 Pa. D. & C. 3<sup>rd</sup> 190 (Phila. Cty. 1982), and *Beaumont v Etl Services*, 761 A. 2d 166 (Pa. Super. 2000).

In *Gosha*, Ms. Minnie Williams stumbled over a sidewalk crack in front of a Commonwealth of Pennsylvania building in the City of Philadelphia.<sup>2</sup> At that time, the

---

<sup>1</sup> Rama, on the other hand, was a party to the proceeding and was present and represented at the Dean Deposition. And, as Rama and the I.D. both argue, Mr. Dean was located outside of the Commonwealth at the time of the hearing in the instant proceeding. Thus, under the Rule 4020 analysis presented by Rama, the Dean Deposition is admissible as an exception to the hearsay rule *as against Rama*, and may be used to prove the truth of the matters asserted therein *as against Rama*.

<sup>2</sup> Coincidentally, the sidewalk on which she fell was in front of the State Office Building at Broad and Spring Garden, which formerly was the Philadelphia office of the Commission. As a matter of historic interest, Ms. Williams fell during the citywide celebration of the 1974 Flyers’ “championship hockey victory and garnering of the Stanley Cup.” *Gosha* at 192.

Commonwealth had sovereign immunity, and Ms. Williams therefore sued only the City of Philadelphia. She was deposed by the City in April 1978. In September 1978 Ms. Williams died of unrelated causes. In June 1979, Ms. Williams' estate sued the Commonwealth, whose sovereign immunity had recently been eliminated by the General Assembly. Ms. Williams' deposition was admitted into evidence against the Commonwealth, even though the Commonwealth had not been present or represented at the deposition. The *Gosha* court reasoned, *Gosha* at 196, that:

At the time of the deposition all of the appropriate issues were explored by the City. The issues on the questions of liability were identical as to both defendants. The Commonwealth has not particularized any issue or specific issue that was not properly explored and addressed by the City."

In *Beaumont*, the plaintiff Mr. Beaumont was injured in a forklift accident. He sued the designer of the forklift, R-O Simon Corporation, in federal court and was deposed by R-O Simon regarding the circumstances and events of the accident. He also sued Etl Services and Gergely Trucking in state court, but died before the trial in that case. His estate sought to introduce his federal court deposition in the state court proceeding to establish the circumstances and the events of the accident, and the state court allowed it. The Court stated (p. 24):

[Mr. Beaumont] was the only eyewitness to the incident that forms the basis of the suit, namely the forklift falling on him. Mr. Beaumont also would have been a fact witness concerning the injuries he sustained as a result of the accident. The present defendants would want to cross-examine on both of these issues. However, these issues were in fact the ones that were contested by Simon-R.O. in the federal suit. In addition, since Simon-R.O. was the sole defendant in that case and would have been wholly liable for the amount of damages awarded, Simon-R.O. would have had as great an incentive to vigorously cross-examine Mr. Beaumont during the taking of his deposition as the current defendants would have in the trial in this case

Rama relies upon these cases and claims that, as in *Gosha* and *Beaumont*, the Hess case and the instant case involve the "exact same claims" and are the "exact same thing" and that

therefore the Dean Deposition is admissible against PECO because, Rama says, PECO was constructively represented by Hess.

The Hess case and the PECO case did not deal with the “exact same claims” and they are not the “exact same thing.” The I.D. (p. 19) summarizes Rama’s tariff claims in the PECO case as follows:

Rama contends that PECO violated provisions of its tariff in its dealing with Rama and Celeren in this matter. Specifically, Rama alleges that PECO violated Sections 23, 17 and 15 of its Tariff, related to the relationship between Rama and Celeren. Rama contends that Celeren acted as an EGS [Electric Generation Supplier] for all intents and purposes and that PECO owed a duty under its Tariff provisions related to EGSs to protect Rama from Celeren’s actions.

The Hess case was very different than the PECO case, and presented very different issues. First, Hess was a civil case and did not involve any regulatory claims of any sort; the instant claim involves *only* regulatory issues. More specifically, Rama’s claims in this case related to PECO’s Tariff Rules 23, 17 and 15, and Hess is not subject to those tariff rules and would have had no incentive to ask Mr. Dean questions about such claims. Second, the primary claim made by Rama is that Celeren was acting as an *Electricity* Generation Supplier and that PECO had certain responsibilities to oversee an *Electricity* Generation Supplier; Hess was providing natural gas service to Rama, not electric utility service, and Hess therefore would have had no incentive whatsoever to ask questions regarding whether Celeren was acting as an *Electricity* Generation Supplier, or whether PECO had reason to oversee the functions of an *Electricity* Generation Supplier. Third, the instant complaint involves a claim that PECO did not “bypass” Celeren and speak directly to Rama about its bill delinquencies – a claim that the I.D. soundly rejected based on PECO’s records of its “multiple contacts” directly with Rama during the period in question. *See* I.D., Findings of Fact 14-35 and pages 27-35. Hess had no knowledge of or access to PECO’s records of its transactions with Rama and therefore had no

ability or incentive to ask questions at the Dean Deposition on the relative relationship and transactions between PECO, Rama, and Celeren. In sum, the Hess and PECO controversies do not involve the “exact same claims” and are not the “exact same thing.” Hess did not “constructively represent” PECO at the Dean Deposition, and the Dean Deposition should not have been admitted against PECO, even if Mr. Dean is “unavailable” under Rule 4020.<sup>3</sup>

---

<sup>3</sup> PECO believes that its analysis of “constructive representation” disposes of the Dean Deposition. Simply, if PECO was not “constructively represented” at the Dean Deposition, then the Dean Deposition is not admissible against PECO regardless of Mr. Dean’s location or availability. However, since the I.D. admitted the Dean Deposition based on Rama’s analysis of Mr. Dean’s “unavailability,” PECO feels compelled to point out some of the errors in Rama’s analysis of that issue as well.

Rama is incorrect in its analysis of “unavailability.” Rule 4020(a)(3)(b) states that a witness can be deemed unavailable (for purposes of the second necessary test of admissibility) if “the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth.” PECO understands this requirement to present two alternatives – (1) if the person is *inside* the Commonwealth, but more than 100 miles away, they may be deemed unavailable; (2) if the person is *outside* the Commonwealth, they may be deemed unavailable regardless of distance.

In its Opposition, Rama (with no explanation) changes the one-hundred-mile requirement to 50 miles, and then conflates the in-state and out-of-state requirements to a standard (p. 4) of “more than 50 miles away outside of the Commonwealth.” The I.D. (p. 16), adopts this same characterization, stating that [i]t is a known fact that Mr. Dean is in Hammonton, New Jersey employed by South Jersey Energy” and that he is therefore “more than 50 miles away outside of the Commonwealth.”

The Dean Deposition, which was taken in 2011, does state (p. 10) that, at that time, Mr. Dean worked at South Jersey Energy Company and resided in Sewell, New Jersey. PECO can find nothing in the record that establishes his home or work whereabouts during the hearing in this matter, although at page 4 of its Opposition Rama asserts, without proof or explanation, that Mr. Dean was still employed by South Jersey Energy in 2018. But, even assuming that in 2018 Mr. Dean actually still worked at South Jersey Energy in Hammonton and livesd in Sewell, he was not more than 50 (or 100 miles) outside of the Commonwealth, as Rama asserts. According to Google Maps, the South Jersey Energy headquarters in Hammonton are 33.7 miles from the Commission’s hearing rooms at 8<sup>th</sup> & Market, and Mr. Dean’s home in Sewell, New Jersey is 20.9 miles from the hearing rooms.

## Conclusion

The Commission should adopt the Initial Decision, with the single exception noted above; the Commission should conclude that Hess did not “constructively represent” PECO at the Dean Deposition, and that the Dean Deposition is therefore not admissible against PECO.

Respectfully submitted,



---

Ward Smith  
Assistant General Counsel  
PECO Energy Company  
[Ward.smith@exeloncorp.com](mailto:Ward.smith@exeloncorp.com)  
215-841-6863

March 8, 2019

**Rama v PECO**

**C-2008-2058320**

**Attachment A**

**Rama's Opposition to PECO's Motion in Limine**

**DAVIS BUCCO**

By: Paul A. Bucco, Esquire  
John J. Dorsey, Jr., Esquire

Attorney ID Nos. 52561/202029  
10 E. 6<sup>th</sup> Avenue, Suite 100  
Conshohocken, PA 19428  
(610) 238-0880

Attorneys for Complainant

---

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

RAMA CONSTRUCTION, INC. t/a	:	
RAMADA INN INTERNATIONAL AIRPORT	:	
	:	C-2008-2058320
v.	:	
	:	C-2009-2089694
PECO ENERGY,	:	
Defendants	:	

---

**RAMA CONSTRUCTION, INC. t/a RAMADA INN INTERNATIONAL AIRPORT'S  
OPPOSITION TO RESPONDENT-PECO'S MOTION IN LIMINE**

Petitioner, Rama Construction, Inc. t/a Ramada Inn International Airport, files this opposition to PECO Energy's Motion In Limine objecting to the admission of Gary Dean's sworn deposition testimony as an exhibit in this matter, and the 210 Proof of Claims for the Celeren Bankruptcy. Rama states that the sworn deposition of Mr. Dean on the Celeren business operations is not hearsay because it is an exception to hearsay that also is supported by FERC documents. Further, Rule 4020(a) makes this transcript admissible because PECO was constructively represented at the deposition and the deponent is outside the Commonwealth.<sup>1</sup>

**OPPOSITION TO LIMITING THE DEPOSITION OF GARY DEAN**

PECO seeks to limit and/or exclude Rama's use of deposition testimony from Gary Dean of Celeren. PECO claims the testimony is hearsay and therefore should be excluded despite acknowledging the "relaxed" rules of evidence in an administrative proceeding. However, PECO's Motion has ignored that the use of deposition testimony at a trial is governed by Rule

---

<sup>1</sup> Rama has submitted its opposition to limiting the admissibility of the 210 proofs of claim under a separate filing.

4020 of the Pennsylvania Rules of Civil Procedure, and Rule 804(b)(1) of the Pennsylvania Rules of Evidence regarding testimony from a prior matter being an exception to the Hearsay rule. As for the admissibility of former deposition testimony, Rule 4020 is controlling. *Beaumont v. Etl Servs.*, 2000 PA Super 303, ¶ 15, 761 A.2d 166, 173. Rule 4020 provides, in pertinent part, that deposition testimony may be entered into evidence when:

“ (a) At the trial, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with any one of the following provisions:

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

- (a) that the witness is dead, or
- (b) that the witness is at a greater distance than one hundred miles from the place of trial or is outside the Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition, or
- (c) that the witness is unable to attend or testify because of age, sickness, infirmity or imprisonment, or
- (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or
- (e) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.”

*See, Pa.R.E. 4020(a); See also, Missett v. Hub Int'l Pa., LLC, 2010 PA Super 178, 6 A.3d 530, 542-43.*

**1. The Deposition Testimony Is Admissible Under The Hearsay Exception For Prior Testimony And Rule 4020(a) Because PECO was Present or RepresentedAt the Prior Deposition.**

Prior testimony is not hearsay “... if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” *See, Pa.R.E. 804(b)(1); Russell v. Alcoa Inc.*, No. 2008-1528, 2010 Pa. Dist. & Cnty. Dec. LEXIS 678, at 6-7 (C.P. Washington Nov. 1, 2010). When deposition testimony is from a previous matter, the party against whom the testimony is offered must have been “represented or present” during the deposition



producing the testimony for it to be admissible. *See, Pa. R. C.P 4020(a)*. The “represented or present” requirement has been met even if the party is only “constructively represented.” *See, Beaumont v. Etl Servs., 2000 PA Super 303, ¶ 17, 761 A.2d 166, 174 citing Gosha v. City of Philadelphia, 7 Phila. 302 (1982). [30 Pa. D. & C.3d 190 (Phila. Cty. 1982)*. “A party has been ‘constructively represented’ at the taking of the deposition if the party in the previous action had the incentive to vigorously protect the same interests that the parties to the current action would want to protect.” *Beaumont v. Etl Servs., 2000 PA Super 303, ¶ 17, 761 A.2d 166, 174*. In *Beaumont*, the plaintiff’s deposition testimony from another matter was properly admitted in a Pennsylvania state trial because he died before the trial. *Id.* The Pennsylvania state trial defendants were not parties in the prior litigation in which the deposition was taken. *Id. at 304*. However, the defendant in the prior litigation was defending similar claims and exposure arising from the same accident at issue in present Pennsylvania state court litigation. *Id.* In holding the deposition testimony admissible, the Court reasoned the defendant in the prior litigation had the same motivation and interest in defending against the exposure and claims as the present defendant. *Id.* Therefore, the present defendant was “constructively represented” by another party with the same or similar interest in the defense of those claims. *Id.* Similarly, in *Gosha*, the plaintiff was deposed by the defendant City of Philadelphia in a slip and fall claim. *Gosha v. City of Philadelphia, 7 Phila. 302 (1982).30 Pa. D. & C.3d 190 (Phila. Cty. 1982)*. The Commonwealth of Pennsylvania was then joined as a defendant after the plaintiff died of unrelated causes. *Id.* The plaintiff’s deposition was held to be admissible because the City of Philadelphia had the same interests to protect as the Commonwealth during the deposition. *Id.*

Here, PECO objects to the deposition testimony of a Celeren corporate designee in prior action involving Rama and another utility, Hess Corporation, docketed as Delaware County

Court of Common Pleas No. 09-4389 and also before this Commission. The dispute involved the same issues as the instant matter now before the Commission to which PECO is also a party - a utility balance owed by a Rama arising from Rama's relationship with Celeren. Hess, as PECO here, was attempting to collect amounts allegedly owed from Rama despite Rama's payment to Celeren. Therefore, Hess and PECO have the exact same "incentive to vigorously protect the same interests" regarding the non-recognition of Rama's payments to Celeren satisfying any payment obligation to the utility, in that case Hess. Therefore, PECO was "constructively represented" by Hess's defense and/or pursuit of the same claims against Rama during that Celeren deposition of Mr. Dean. Further the proffered deposition testimony creates no prejudice to PECO. The testimony merely outlines the business operation model in effect with the utilities servicing Rama. In fact, the proffered deposition testimony is far more probative than prejudicial to the issues now before the Commission. The deposition testimony provides, from a Celeren deponent, the process for serving Celeren's utility clients under the FERC authority granted for the sale of energy, capacity and ancillary services. Credible evidence in the form of FERC filings supports the deposition testimony and therefore is admissible.

**2. The Deposition Testimony Is Admissible Because Mr. Dean Is Outside of the Commonwealth.**

Mr. Gary Dean was the corporate designee of a now defunct company, Celeren. Without even reaching his willingness to submit as a witness in this matter or appear under subpoena, his deposition testimony is admissible because he is outside of the Commonwealth. Mr. Dean is in Hammonton New Jersey employed by South Jersey Energy. This last known location was more than 50 miles away outside of the Commonwealth. Therefore, Mr. Dean is "unavailable" pursuant to Rule 4020(a).

Accordingly, PECO's Motion in Limine must be denied, especially under the relaxed standard for admissibility acknowledged by PECO for administrative proceedings.

Respectfully submitted,

Date: August 23, 2018

By: /s/ John J. Dorsey  
Paul A. Bucco, Esquire  
John J. Dorsey, Jr., Esquire

**DAVIS BUCCO**

By: John J. Dorsey, Esquire  
Attorney ID No. 202029  
10 E. 6<sup>th</sup> Avenue, Suite 100  
Conshohocken, PA 19428  
(610) 238-0880

Attorneys for Complainant

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

RAMA CONSTRUCTION, INC. t/a  
RAMADA INN INTERNATIONAL AIRPORT

Complainant

v.

PECO ENERGY,  
EXELON CORPORATION and  
CELEREN CORPORATION

Defendants

C-2008-2058320  
C-2009-2089694

**CERTIFICATE OF SERVICE**

I, John J. Dorsey, do hereby certify and attest that I have served a true and correct copy of the foregoing Opposition to Respondent-Peco’s Motion in Limine upon counsel listed below via U.S. First Class Mail, postage prepaid:

Marta Guhl, Administrative Law Judge  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg, PA 17105-3265

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor  
Harrisburg, PA 17120

Ward L. Smith, Esquire  
2301 Market Street S-23  
Philadelphia, PA 19101-8699

DAVIS BUCCO

By: /s/ John J. Dorsey  
JOHN J. DORSEY, ESQUIRE

Dated: August 23, 2018

**Rama v PECO**

**C-2008-2058320**

**Attachment B**

**Transcript Pages Re Discussion of PECO's Motion in Limine**

COMMONWEALTH OF PENNSYLVANIA  
PUBLIC UTILITY COMMISSION

-----  
Rama Construction, Inc., |  
T/A Ramada Inn |  
International Airport |  
v. |  
PECO Energy Company |  
Billing Dispute

Docket Nos.: C-2009-2089694  
C-2008-2058320

Pages 1 - 142

801 Market Street  
Suite 4063  
Philadelphia, PA 19107

September 11, 2018  
Commencing at 10:19 a.m.

BEFORE:

MARTA GUHL, Administrative Law Judge

APPEARANCES:

JOHN DORSEY, JR., Esquire  
10 East 6th Avenue, Suite 100  
Conshohocken, PA 19428  
For the Complainant

WARD SMITH, Esquire  
2301 Market Street  
Suite 23-1  
Philadelphia, PA 19103  
For the Respondent

REPORTER: ROMANNA DUMYAK

Any reproduction of this transcript  
is prohibited without authorization  
by the certifying agency.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

-----

JUDGE MARTA GUHL: Good morning.

This is the date, time and place in the scheduled hearing of the matter of Rama Construction, Incorporated also known as Ramada Inn International Airport versus PECO Energy Company, Exelon Corporation and Celeren Corporation at Docket Numbers C-2008-2058320 and also 20 - C-2009-2089694.

Today is Tuesday, September the 11th, 2018. My name is Marta Guhl, and I am the Administrative Law Judge who's been assigned to this matter by the Pennsylvania Public Utilities Commission to preside.

We'll note for the record that present in the hearing room is Counsel for Rama Construction, Incorporated, Mr. John Dorsey. Also, it appears that Rama has brought their witness with them today to present for Cross Examination and also rebuttal and surrebuttal testimony.

Also present in the hearing room is Counsel for PECO Energy Company, Mr. Ward Smith. And it appears that PECO has brought its two witnesses with them for the purposes of Cross Examination, rebuttal and surrebuttal testimony.

Now, before we get started with



1 testimony in this case, there was an outstanding  
2 motion in limine from PECO Energy Company that was  
3 filed on August 3rd, 2018 which objected to the  
4 admission of - and limiting rulings regarding the  
5 use of the deposition of Gary Dean, which was  
6 attached as Exhibit C-2 to the Direct Testimony of  
7 Thomas Wolf, and also objected to the testimony and  
8 exhibit regarding proof of claims which was  
9 specifically Mr. Wolf's testimony at page 5, lines  
10 20 through 25 and the attached Exhibit of C-5 to the  
11 Direct Testimony of Thomas Wolf.

12                   On August 23rd, 2018, Rama filed its  
13 response to the motion indicating that the proofs of  
14 claim should be admitted as documents establish - to  
15 establish that PECO properly failed to monitor  
16 Celeren and its activities.

17                   From my reading of the response, it  
18 did not appear that Rama provided any argument or  
19 allegations or assertions related to the deposition  
20 of Mr. Dean.

21                   I have an order prepared. I have not  
22 had an opportunity to issue it at this time, but I  
23 will provide the parties with the gist of what I  
24 will be ruling.

25                   Related to the deposition of Mr. Dean,

1 I agree with PECO in this regard, that this  
2 deposition does constitute hearsay and that it does  
3 not fall under any of the exceptions which would  
4 have allowed the deposition to be admitted as an  
5 exception to the hearsay rule, because PECO did not  
6 have an opportunity to participate in the case where  
7 Mr. Dean was dispo - deposed.

8 As such, the deposition itself cannot  
9 be used to prove the truth of the matter asserted  
10 therein. It can - it can support any testimony that  
11 Mr. Wolf provides related to his understanding of  
12 the relationship between Celeren and Rama as it  
13 relates to his position in this case, but the  
14 deposition itself and truth of the matter asserted  
15 therein will be excluded.

16 Related to the proof of claims, we  
17 have Mr. Wolf's testimony that specifically refers  
18 to them on page 5, lines 20 through 25, and the  
19 proof of claims was also attached to Mr. Wolf's  
20 Direct Testimony as C-5, which basically was a list  
21 of creditors for Celeren Corporation.

22 It should be noted for the record that  
23 Celeren Corporation did declare bankruptcy and went  
24 through bankruptcy proceedings, which ended in 2014.  
25 As of this date, I am not aware of Celeren

1 Corporation existing as an entity any longer. And  
2 so that is the reason why these documents have been  
3 attached.

4                   Specifically, PECO argued the proof of  
5 claim to any testimony that's related to them should  
6 be excluded because they deal with a fraud claim  
7 that had previously been dismissed in this matter.  
8 PECO also notes that I precluded Rama from  
9 conducting extensive discovery regarding the proof  
10 of claim as it would have been unduly burdensome and  
11 unlikely to produce evidence that would have been  
12 useful.

13                   Rama asserts the proof of claims were  
14 useful in establishing a pattern of behavior by  
15 Celeren, which PECO should have been aware of and  
16 monitoring. PECO - I apologize. Rama alleges that  
17 Celeren was an electric gas generation supplier or  
18 an EGS and that PECO had a duty to monitor its  
19 activity under PECO's tariff.

20                   While I'm uncertain regarding the  
21 claims that Celeren was an EGS as licensed by the  
22 Commission, I do believe that there may be some  
23 probative value in Mr. Wolf's testimony regarding  
24 the proof of claims. There were a number of  
25 creditors that Celeren had and could have been

1 customers of PECO. A pattern of delinquent payments  
2 by Celeren could show that PECO may have been aware  
3 of issues with this particular party. While it may  
4 not specifically address a particular issue related  
5 to notice to Rama in this matter, it is relevant to  
6 the behavior that is at issue in this case, i.e.,  
7 the delinquent payments.

8                   Of course, this does not mean that  
9 PECO cannot object on the basis of relevancy at the  
10 time of the hearing, but I will allow the testimony  
11 to stand as it is and the motion in limine related  
12 to this particular issue is denied.

13                   At this point, if the parties have any  
14 other preliminary matters that they want to address  
15 before we get started, I will discuss them at this  
16 point.

17                   ATTORNEY SMITH: Just one from me that  
18 is related to what you just spoke about, and it is  
19 that Rama did provide two separate documents that  
20 were answers to PECO's motion in limine. One of  
21 them, as you noted, was addressed to the 210 proofs  
22 of claim. They did provide a completely separate  
23 document that was their Answer to the Gary Dean  
24 portion of the motion in limine.

25                   So I wanted to make sure that Your

1 Honor was aware of that before issuing a final  
2 ruling, so that we don't get into a loop on that.

3 JUDGE: All right.

4 The only one that I received via  
5 electronic mail was the - was the one related to the  
6 proofs of claim.

7 Mr. Dorsey, do you have a copy of  
8 the -?

9 ATTORNEY DORSEY: I do, Your Honor. I  
10 do have one for myself. I just wrote a quick note  
11 on top.

12 I did enter - my opposition was based  
13 on Rule 420a and basically the case law that says if  
14 the party is constructively represented in a  
15 deposition because the claims of the previous  
16 testimony are the same claims as the claims asserted  
17 now, then the testimony is admissible.

18 I have here - just indulge me because  
19 I just wrote a note to myself at the top. But the  
20 case law states that previous deposition testimony  
21 is admissible under rule 420a and b if the party was  
22 constructively represented. Here the exact same  
23 claims in the Hess litigation, for which Hess took  
24 Mr. Dean's deposition are the exact same claims at  
25 issue here with the PECO matter. And the case law

1 is clear. In similar cases where there's been, for  
2 example, a personal injury case and one property  
3 owner has taken a deposition and then subsequent  
4 property owner comes in, then that person is - if  
5 the claim's the same and the interests are the same,  
6 being that they had the same vigorous interest in  
7 protecting in deposing or defending.

8 I believe they were both e-filed the  
9 same day.

10 JUDGE: They may have been, but I  
11 don't think your legal assistant provided me with  
12 copies of both.

13 ATTORNEY DORSEY: Okay.

14 ATTORNEY SMITH: And I'm prepared to  
15 briefly provide PECO's response to that file on the  
16 record, just for - so you have it available.

17 JUDGE: All right.

18 So I do have - there does appear to  
19 have been a separate filing related to opposition to  
20 PECO's motion in limine from Rama related to the  
21 deposition of Mr. Dean. It appears that there was  
22 some sort of oversight where I was not directly  
23 served with a copy of that. I'll have to go back  
24 and check in our electronic system to make sure that  
25 it was properly served with the Secretary's Bureau

1 and that it's in our system.

2 But I will - since Mr. Ward has also -  
3 Mr. Smith has also indicated that he was aware of  
4 it, then I will assume that it had been properly  
5 served.

6 So Mr. Smith, do you have any  
7 response?

8 ATTORNEY SMITH: Yes. Our basic  
9 response is that PECO was not constructively  
10 represented by Hess in that proceeding for the  
11 following reasons.

12 First, PECO and Hess are not  
13 affiliates.

14 Second, this was a civil case between  
15 Rama and Hess in the Cumberland County Court. It  
16 did not involve issues with regulatory law or duties  
17 by PECO or by any entity in that situation.

18 Third, that case, because it was  
19 dealing with Hess dealt only with gas - natural gas  
20 utility service. The case against PECO here deals  
21 only with electric utility service. There are  
22 different regulations and different statutes that  
23 affect the provision of service for those two types  
24 of service.

25 Next, Hess is not an electric

1 distribution company or provider of last resort.  
2 PECO is both of those things and, therefore, a  
3 different set of regulations apply to its  
4 responsibilities than apply to Hess.

5                   And finally, the transactions in  
6 question for PECO were - the transactions they  
7 questioned for this proceeding were only for PECO.  
8 The records exist only in PECO's. CIMS system has  
9 had no access to or knowledge of the transactions  
10 and the communications between PECO and Ramada or  
11 PECO and Celeren. And for those reasons, it was not  
12 possible for Hess to constructively represent PECO  
13 in that proceeding.

14                   JUDGE: So, Mr. Dorsey, I've briefly  
15 skimmed Mr. Dean's testimony so I have an idea - a  
16 general idea of what the deposition contained. But  
17 I don't know what the underlying claims were related  
18 to the reasons why the deposition was taken in the  
19 first place. What was the claims related to Hess  
20 Corporation versus Rama Construction?

21                   ATTORNEY DORSEY: It was basically the  
22 exact same thing. There was an allegation. It was  
23 basically a lack of credit for payments made to  
24 Celeren as being credited to the utility that  
25 ultimately supplied to Celeren Energy that



1 ultimately provided to Rama. It's - the purpose of  
2 Mr. Dean's testimony is being used to show how  
3 Celeren operated. That his testimony is that he had  
4 received a - or negotiated a settlement and received  
5 negotiated payments with the utility and then they  
6 had a separate deal with the client. And that's it  
7 was in that middle ground, the pricing between the  
8 two that they made their money.

9                   And that is it's our understanding  
10 that they were supplying energy, among other things.

11                   ATTORNEY SMITH: And PECO was not  
12 there to ask questions about the scope of that  
13 relationship. Although, I will point out that we  
14 are going to cross examine on the Dean deposition to  
15 find out why Mr. Wolf reads it a certain way.

16                   That is that not - what Mr. Dorsey  
17 just said is not what Mr. Dean said about Rama's  
18 role, so it's - we're in a very odd situation where  
19 I need to stand firm against this deposition coming  
20 in because I need to protect PECO's due process  
21 rights to be able to be engaged in the deposition of  
22 witnesses before their testimony is allowed to come  
23 into the case. And that's the Brokovich case that I  
24 cited in our motion in limine.

25                   But the actual text of this deposition

1 supports PECO's, case not Rama's case. So I'm going  
2 to cross examine as to why Mr. Wolf thinks it  
3 supports his case regardless. If it comes in for  
4 the truth of the matter asserted, it improves PECO's  
5 case, not theirs.

6 ATTORNEY DORSEY: Well, I would submit  
7 that there's no - there should be no opposition to  
8 the testimony from the -.

9 ATTORNEY SMITH: As I said, the reason  
10 I need to stay firm on it is I need to protect our  
11 due process rights and not to have testimony come in  
12 that we did not have the opportunity to engage in  
13 Cross Examination on.

14 JUDGE: Understood.  
15 All right.

16 Here's what we're going to do. Since  
17 I didn't have an opportunity to fully digest your  
18 opposition to the motion in limine related to Mr.  
19 Dean's deposition, I'm going to put my ruling on  
20 abeyance for now. I'm going to try to take the  
21 opportunity over our lunch break today to look at it  
22 a little more closely.

23 Right now what I'm going to do is I'm  
24 going to allow testimony and Cross Examination on  
25 these issues, and if Mr. Smith wants to make a

1 standing objection, he's more than welcome to do so.  
2 And I will try to come back with a further ruling on  
3 it after our lunch break today so that moving  
4 forward the parties will be clear whether the  
5 deposition will be excluded or not.

6 ATTORNEY DORSEY: Thank you, Your  
7 Honor.

8 ATTORNEY SMITH: We do make that  
9 standing objection. We also make a standing  
10 objection on the other half of the motion in limine  
11 on the 210 proofs of claim, which we would depending  
12 upon the way - on the testimony that is developed  
13 and how the arguments are used in briefs, we would  
14 preserve the right to restate, argue that arguments  
15 related to the 210 proofs of claims are time marked  
16 because they were not raised until 2014 as against  
17 any party and it's against PECO and, therefore,  
18 cannot be a part of the case that deals with events  
19 in 2007 and 2008.

20 JUDGE: Understood. And when we get  
21 to those portions of testimony, you can certainly -  
22 so it's very clear for the record, you can make your  
23 objection at that point.

24 ATTORNEY SMITH: Thank you.

25 JUDGE: All right.

1                   Mr. Dorsey, anything - are there any  
2 other preliminary matters that we need to address?

3                   ATTORNEY DORSEY: No, Your Honor.

4                   JUDGE: And I apologize for the  
5 oversight regarding ---.

6                   ATTORNEY DORSEY: I can have my office  
7 resend it this morning so it's in your e-mail.

8                   JUDGE: Yeah. It looks like from - I  
9 mean, I looked at that document once during the  
10 process of trying -.

11                   ATTORNEY DORSEY: It's a lot of -  
12 between the two similar cases, two similar attorneys  
13 to -.

14                   JUDGE: Yeah. It might have just been  
15 an oversight. And like I said, Mr. Ward doesn't  
16 dispute that they go it, so my guess is it was  
17 properly served. It just didn't get served on me  
18 electronically. And that's what I rely on.

19                   ATTORNEY DORSEY: I'll have my office  
20 send it to you right now.

21                   JUDGE: That's fine. Thank you.

22                   Mr. Dorsey, if you want your copies  
23 back, you can have them back.

24                   All right.

25                   So let us move forward. Since this is