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April 22, 2019

VIA ELECTRONIC FILING

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

Re: William Roll v. Pennsylvania Electric Company
Docket No. C-2018-3001668

Dear Secretary Chiavetta:

Enclosed please find Exceptions on behalf of Pennsylvania Electric Company to the Initial Decision issued on April 3, 2019 with regard to the above-referenced proceeding. This document has been served on the Complainant as shown in the Certificate of Service.

Please contact me if you have any questions regarding this matter.

Very truly yours,



Teresa Harrold

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Enclosures

c: Commission's Office of Special Assistants (via email only at ra-OSA@pa.gov)
As Per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WILLIAM ROLL

v.

PENNSYLVANIA ELECTRIC COMPANY

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Docket No. C-2018-3001668

**EXCEPTIONS
ON BEHALF OF
PENNSYLVANIA ELECTRIC COMPANY**

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Counsel for Pennsylvania Electric Company

Dated: April 22, 2019

I. INTRODUCTION

In accordance with the Pennsylvania Public Utility Commission's ("Commission") regulations at 52 Pa. Code § 5.533, Pennsylvania Electric Company ("Penelec" or the "Company") is filing the following Exceptions to the Initial Decision of Administrative Law Judge ("ALJ") Dennis J. Buckley issued on April 3, 2019 in the above-referenced proceeding.

II. FACTUAL BACKGROUND

On May 4, 2018, William Roll ("Complainant")¹ filed a formal Complaint at the Commission against Penelec stating that the Company was responsible for damage that allegedly occurred at 1007 North Second Street, Altoona, Pennsylvania ("Service Location") after the Company disconnected service in January 2018 upon the request of the Complainant's tenant.

On May 23, 2018, the Company filed an Answer and New Matter to the Complaint. In its Answer, the Company admitted that a customer at the Service Location had contacted the Company in January 2018 to discontinue service and that the Company had lawfully discontinued service pursuant to 52 Pa. Code § 56.72(1). The Complainant never contacted the Company to set up a Continuance of Service Contract ("CSC"), which, if previously established, would have resulted in service transferring into the name of the Complainant. Accordingly, the Company denied that it had failed to provide safe, adequate and reliable service to Complainant. Also on May 23, 2018, the Company filed Preliminary Objections requesting that the Commission dismiss the Complainant because the sole requested form of relief sought by the Complainant was damages, which the Commission does not have jurisdiction to award.²

¹ The account that is the subject of this proceeding is in the name of Joanne Roll, William Roll's wife. "Complainant" refers to William and Joanne Roll interchangeably.

² *Elkin v. Bell Tel. Co. of Pa.*, 420 A.2d 371 (Pa. 1980); *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1978); see *Nagy v. Bell Tel. Co. of Pa.*, 436 A.2d 701 (Pa. Super. Ct 1981).

On July 19, 2018, Deputy Chief ALJ Joel H. Cheskis issued an Interim Order granting the Company's Preliminary Objections striking the Complainant's claim for monetary damages. However, ALJ Cheskis further held that the Complainant raised other issues that may be under the Commission's jurisdiction to resolve.

On July 25, 2018, an Interim Order was issued by Chief ALJ Charles E. Rainey, Jr., referring the case to the Commission's Mediation Unit. The parties were unable to resolve the Complaint during mediation.

On September 14, 2018, a hearing notice was issued scheduling an initial telephonic hearing for October 9, 2018 to be held before ALJ Dennis J. Buckley.

On October 9, 2018, the hearing convened as scheduled. The Complainant appeared and provided testimony on his own behalf. The Complainant submitted no exhibits. Counsel for the Company appeared with two witnesses on behalf of the Company: Gina Dietrich, an Advanced Business Analyst employed by the Pennsylvania Compliance Division of FirstEnergy Corp. ("FirstEnergy"), and Carol Caltagirone, a Supervisor in the FirstEnergy Customer Service Center. The Company submitted five exhibits that were received into evidence:

- Penelec Exhibit 1, a Customer Contact History for the period October 2, 2017 to August 30, 2018 for the Complainant;
- Penelec Exhibit 2, a redacted Customer Contact History from September 15, 2017 to February 17, 2018 for the tenant at the Service Location;
- Penelec Exhibit 3, a Statement of Account in the name of JoAnne Roll, the Complainant's wife, from February 8, 2018 to September 23, 2018;
- Penelec Exhibit 4, a Service History Chart for the Service Location; and

- Penelec Exhibit 5, Commission’s Bureau of Consumer Services (“BCS”) Opening and Closing Reports, Case No. 3591277.

On April 3, 2019, an Initial Decision was issued which sustained the Complaint against the Company, finding that the Company violated section 1501 of the Public Utility Code when it did not set up a CSC for the Complainant at the Service Location in 2007. The Initial Decision imposed a civil penalty of \$1,000.00 on the Company.

III. EXCEPTIONS

A. The Commission has no jurisdiction to find the Company in violation of section 1501 of the Public Utility Code for an alleged action that occurred in 2007.

At the hearing in this matter, the Complainant alleged that he set up a CSC with Penelec in 2007, which Penelec disputes.³ In the Initial Decision, the ALJ held that the Company violated section 1501 of the Public Utility Code finding that the Company did not code the Complainant’s account with a CSC in 2007.⁴ The ALJ also assessed a \$1,000 penalty for this violation.⁵ Pursuant to the three-year statute of limitations in section 3314(a) of the Public Utility Code, the Commission has no jurisdiction to find the Company in violation of the Public Utility Code or assess a penalty for an act that allegedly occurred in 2007.⁶

Section 3314(a) of the Public Utility Code states as follows:

General rule. — No action for the recovery of any penalties or forfeitures incurred under the provisions of this part, and no prosecutions on account of any matter or thing mentioned in this part, shall be maintained unless brought within three years from the date at which the liability therefor arose, except as otherwise provided in this part.⁷

³ Tr. at 27.

⁴ I.D. at 3.

⁵ *Id.*

⁶ 66 Pa. C.S. § 3314(a).

⁷ *Id.*

The three-year statute of limitations in section 3314(a) is non-waivable and may be raised at any time during the course of a proceeding.⁸ The Commission has no jurisdiction to hear cases brought more than three years after an alleged violation of the Public Utility Code occurs.⁹

Here, based on an allegation raised by the Complainant at hearing that he set up a CSC with Penelec in 2007,¹⁰ the ALJ found Penelec in violation of section 1501 of the Public Utility Code and assessed a penalty of \$1,000 for not coding the Complainant's account with a CSC.¹¹ Under section 3314(a) of the Public Utility Code, however, the Complainant is time-barred from pursuing this action, because the date of the alleged violation of section 1501 for failure to code the Complainant's account with a CSC is more than three years ago. The Commission has no jurisdiction to find the Company in violation of the Public Utility Code for any action that occurred in 2007 and may not assess a penalty to the Company.

“The defense of the statute of limitations is not a technical defense but substantial and meritorious....Such statutes are not only statutes of repose, but they supply the place of evidence lost or impaired by lapse of time, by raising a presumption which renders proof unnecessary.”¹² From a due process perspective, application of the statute of limitations in section 3314(a) is particularly appropriate in this proceeding in light of the Complainant's unsubstantiated allegation that at some point in 2007, the Company violated section 1501 of the Public Utility Code by failing to place a CSC on the account. Due to the significant passage of time, the Company is at a distinct

⁸ *Jahnene Hasty; v. Phila. Gas Works*, Docket No. C-2014-2419203 (I.D. entered Nov. 18, 2014, *aff'd* Jan. 27, 2015) (holding that billing and reliability issues that began nine years prior to the complaint were barred under section 3314(a)); *In Hynn Yoo and Yu Shin Yoo; v. Phila. Gas Works*, Docket No. C-2013-2369915 (I.D. entered Apr. 7, 2014, *aff'd* Jul. 10, 2014) (holding that section 3314(a) bars a complaint regarding incorrect charges from nine years prior even though the complainants did not receive notice of the incorrect charges until recently).

⁹ *Id.*

¹⁰ Tr. at 27. At no time prior to the hearing in this proceeding did the Complainant allege a CSC was established in 2007.

¹¹ I.D. at 3.

¹² *United States v. Oregon Lumber Co.*, 260 U.S. 290, 299-300 (1922).

disadvantage as it is unable to produce a witness who would have any recollection of a phone call with the Complainant from 2007 and phone call recordings from that time no longer exist.

Two limited exceptions to section 3314(a) exist, neither of which apply here. First, the filing of an informal complaint tolls the statute of limitations if the filing occurred within the three-year period.¹³ The Complainant did not file an informal complaint on this subject until March 6, 2018, 11 years after the alleged section 1501 violation occurred.¹⁴ Second, the doctrine of equitable estoppel may toll the statute of limitations, which applies when, based on fraud or concealment by a utility, a complainant fails to file an action within the required three-year period. The doctrine of equitable estoppel may also apply where unintentional deception occurs due to misleading utility action, such as if a utility misleads a customer regarding the resolution of an issue or evades responding to a customer for a significant period of time contributing to the customer's delay in filing a complaint.¹⁵ The doctrine of equitable estoppel is also inapplicable in this proceeding. There was no record of a CSC on the customer's account, so the Company's representatives were not in a position to either knowingly or unknowingly deceive the customer.¹⁶ The Complainant did not contact the Company regarding a CSC until February 2018, and in response, the Company placed a CSC on the Complainant's account.¹⁷ The Company engaged in no actions that misled or delayed the Complainant, or in any way prevented the Complainant from filing a complaint at an earlier time. Because the Company played no role in the failure of the

¹³ *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Phila. Gas Works*, Docket No. C-2012-2304183 (Order dated Dec. 8, 2016); *Lester Ely v. Pa. American Water Co.*, Docket No. C-20055616 (Order entered July 10, 2006).

¹⁴ See Penelec Exhibit 5.

¹⁵ *SBG Management Services, Inc./Colonial Garden Realty Co., L.P. v. Phila. Gas Works*, Docket No. C-2012-2304183 (Order dated Dec. 8, 2016); *Lester Ely v. Pa. American Water Co.*, Docket No. C-20055616 (Order entered July 10, 2006).

¹⁶ Tr. at 15, 18, 30, and 31.

¹⁷ *Id.* at 32.

Complainant to file an action within the required three-year period, the doctrine of equitable estoppel does not apply.

Accordingly, the three-year statute of limitations in section 3314(a) of the Public Utility Code is fully applicable to this proceeding. As discussed further below, the Company disputes that a violation of the Public Utility Code ever occurred here. Nonetheless, a review of the merits of this case is unnecessary as the Commission is required to dismiss the Complainant pursuant to section 3314(a). The Initial Decision's finding that the Company violated section 1501 of the Public Utility Code for an action that occurred in 2007 is improper and outside Commission jurisdiction.

B. The Complainant failed to meet his burden of proof that the Company violated section 1501 of the Public Utility Code.

Under Section 332(a) of the Public Utility Code, the Complainant maintains the burden of proof in this proceeding.¹⁸ The first step in carrying the burden of proof is establishing a *prima facie* case that Penelec violated the Public Utility Code, the Commission's regulations, or a Commission order. Only if the Complainant establishes a *prima facie* case does it become the responsibility of the respondent to provide rebuttal evidence.¹⁹ In order to establish a *prima facie* case, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.²⁰ Mere bald assertions, personal opinions or perceptions, when not substantiated by facts, do not constitute evidence.²¹

¹⁸ 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Commw. Ct. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992).

¹⁹ *Waldron v. Phila. Elec. Co.*, 54 Pa. P.U.C. 98 (Order entered Mar. 14, 1980); *Replogle v. Pa. Elec. Co.*, Docket No. F-06727378 (Order entered Oct. 9, 1980).

²⁰ *Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

²¹ *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987); *Mid-Atlantic Power Supply Assoc. v. Pa. Public Utility Comm'n*, 746 A.2d 1196, 1200 (Pa. Commw. Ct. 2000).

Although the factual burden may shift during the course of a proceeding, the Complainant always maintains the overarching burden of proof in the proceeding. It is clearly established that the Complainant's "burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence."²² A preponderance of evidence is demonstrated where the evidence presented is more convincing, even by the smallest degree, than the evidence presented by the opposing party.²³

In order for the Commission to sustain a formal complaint, the Complainant must demonstrate that an "act or thing done or omitted to be done by any public utility [is] in violation, or claimed violation, of any law which the Commission has jurisdiction to administer, or of any regulation or order of the commission."²⁴ Section 1501 of the Public Utility Code states, in relevant part: "every public utility shall furnish and maintain adequate, efficient, safe and reasonable service and facilities...."²⁵ As part of formal complaint proceedings, the Commission evaluates whether a complainant establishes that a preponderance of the evidence indicates that a utility has violated section 1501 of the Code.

In this proceeding, the Complainant wholly fails to establish a *prima facie* case that the Company violated section 1501 of the Public Utility Code. The Complainant provided no evidence demonstrating that the Company failed to set up a CSC at the Service Location other than asserting at the hearing that he established a CSC when he purchased the Service Location.²⁶ He offered no specific testimony or exhibits to corroborate this generic allegation. This statement alone is

²² *Lansberry*, 578 A.2d at 602.

²³ *Pa. Pub. Util. Comm'n v. HIKO Energy, LLC*, Docket No. C-2014-2431410 (I.D. entered Aug. 21, 2015); *see also Se-Ling Hosiery, supra*.

²⁴ 66 Pa. C.S. § 701.

²⁵ 66 Pa. C.S. § 1501.

²⁶ Tr. at 11; I.D. at fn. 1.

insufficient to establish a *prima facie* case as it constitutes nothing more than a bald assertion, which does not constitute evidence.²⁷

Commission precedent includes many examples of complainants failing to establish a *prima facie* case who offered *pro se* testimony alleging that a utility acted improperly, but who failed to offer specific evidence demonstrating the utility violated the Public Utility Code.²⁸ In one comparable case, *Diehl v. PPL Electric Utilities Corporation*, complainant Diehl provided testimony that 27 years ago, PPL promised to offer a discounted RTS rate for the life of Diehl's home.²⁹ Based on this alleged promise, Diehl built his new home using high efficiency construction techniques and installing a thermal storage heating system in order to qualify for the RTS rate and had been a customer of the RTS rate ever since.³⁰ However, the Complainant was unable to provide any written documentation regarding PPL's alleged promise, and the ALJ ultimately held that Diehl failed to establish a *prima facie* case that PPL violated the Public Utility Code.³¹ The ALJ did not require PPL to prove that it never promised Diehl a discounted RTS rate for the life of his home because Diehl never established a *prima facie* case.³²

A nearly identical fact pattern exists here. The Complainant alleges that over a decade ago, the Company added a CSC to his account for the Service Location, but he did not provide any independent documentation or witness corroboration to support this allegation.³³ Just as in *Diehl*,

²⁷ See *Pa. Bureau of Corrections v. City of Pittsburgh*, 532 A.2d 12 (Pa. 1987); *Mid-Atlantic Power Supply Assoc. v. Pa. Public Utility Comm'n*, 746 A.2d 1196, 1200 (Pa. Commw. Ct. 2000).

²⁸ See *Robert E. Diehl v. PPL Elec. Utils. Corp.*, Docket No. C-2009-2149261 (I.D. entered Oct. 26, 2010, *aff'd* Mar. 31, 2011); *Ross E. Schell v. SUEZ Water Pa., Inc.*, Docket No. C-2016-2551544 (Order entered Mar. 1, 2018); *Deidra Alston v. National Fuel Gas Distribution Corp.*, Docket No. F-2011-2236871 (Order entered Sept. 26, 2013); *Ross E. Schell v. PPL Elec. Utils. Corp.*, Docket No. C-2016-2566320 (Order entered Jun. 14, 2018).

²⁹ *Diehl v. PPL Elec. Utils. Corp.*, Docket No. C-2009-2149261 (I.D. entered Oct. 26, 2010, *aff'd* Mar. 31, 2011).

³⁰ *Id.*

³¹ *Id.*

³² See *id.*

³³ The Complainant could have, for example, introduced records, including his own notes, related to the CSC and which of his properties they applied to or presented witnesses who were aware of the alleged CSC, such as tenants who may have been informed that they could end service at a time of their choosing because of the CSC. However, no such evidence exists in this proceeding.

the Complainant did not establish a *prima facie* case that the Company violated section 1501 of the Public Utility Code and the burden never shifted to the Company to provide rebuttal evidence. Simply put, the Commission cannot sustain a Complaint based only on an uncorroborated allegation.

Although it seems clear that the factual burden in this case never shifted to the Company in light of the Complainant's failure to establish a *prima facie* case, the Company still provided credible evidence that no CSC was established at the Service Location. The Company's witnesses explained that no Company record exists showing that the Complainant contacted the Company to set up a CSC prior to February 2018.³⁴ It is probative that no such record exists and supports the Company's position that the Complainant never contacted the Company to establish a CSC.³⁵ In further support of this fact, the Company demonstrated that there were gaps in electric service at the Service Location on multiple prior occasions between tenants and the Complainant never contacted the Company to raise a concern.³⁶ In 2016, there was no electric service at the Service Location for a period of 51 days.³⁷ The Complainant specifically did not dispute these gaps in service and provided no explanation regarding why he did not contact the Company afterwards.³⁸ These incidents demonstrate that the Complainant had no expectation that service would return to his name in between tenants, which, in turn, means that he did not believe a CSC was on his account prior to February 2018.

Referring to the Company's CSC policy, the Initial Decision incorrectly concludes that "procedural inconsistencies invite error and undercut the testimony of Penelec's witnesses."³⁹ The

³⁴ Tr. at 15, 18, 30, and 31.

³⁵ *In re Order Amending Rules 803(6), 803(8) & 803(10)*, 2016 Pa. LEXIS 2548 (Pa. 2016) ("On analysis, absence of an entry in a business record is circumstantial evidence—it tends to prove something by implication, not assertion.").

³⁶ See Penlec Exhibit 4; Tr. 23.

³⁷ See *id.*

³⁸ See Tr. 23 and 27 ("But they have a good record of that obviously, you know.").

³⁹ I.D. at 9.

Initial Decision explains that written confirmation of the CSC established in February 2018 was provided by the Company to the Complainant despite the Company's testimony that a CSC is created by telephone.⁴⁰ However, there is no record evidence that written confirmation of the CSC was provided in February 2018. The Company's witness explained that a CSC is established by telephone and not followed by written confirmation.⁴¹ The Complainant also stated that he "never got anything in the mail," and "it's an agreement over the telephone."⁴² Therefore, the record evidence establishes that the Company properly followed its CSC policy in February 2018, and the ALJ erred in discrediting the Company's witnesses on this basis.

The Initial Decision also erroneously questions the credibility of the Company's witnesses because they are not testifying "from personal experience or by reference to any record of evidentiary value."⁴³ The Company was unable to offer a record of a CSC into evidence because no CSC was ever established before February 2018, and therefore, no such record exists. The non-existence of this record supports the Company's position rather than undermines it.⁴⁴ Further, the Initial Decision's suggestion that the testimony of the Company's witnesses is not credible because it is not based on "personal experience" is incorrect. Two of the Company's witnesses stated that they personally reviewed the Complainant's account and the Company had no record of a CSC prior to February 2018.⁴⁵ Both of the witnesses have over 40 years of professional experience with the Company and established that they review customer account information as part of their professional duties.⁴⁶ Witness Caltagirone specifically explained the Company's policy for setting

⁴⁰ *Id.*

⁴¹ Tr. at 33.

⁴² *Id.* at 27.

⁴³ I.D. at 10.

⁴⁴ *In re Order Amending Rules 803(6), 803(8) & 803(10)*, 2016 Pa. LEXIS 2548 (Pa. 2016) ("On analysis, absence of an entry in a business record is circumstantial evidence—it tends to prove something by implication, not assertion.").

⁴⁵ Tr. at 15, 18, 30, and 31.

⁴⁶ *Id.* at 14, 15, 29, and 30.

up a CSC and that after a customer calls in requesting a CSC, the customer's account is coded with a CSC.⁴⁷ Therefore, because the Company has no record of a CSC on the Complainant's account, a CSC was never set up. This testimony is relevant, credible, and supports the Company's position that the Complainant never set up a CSC.⁴⁸

The Complainant failed to establish a *prima facie* case that the Company violated section 1501 of the Public Utility Code. However, in light of the credible evidence presented by the Company at hearing, even if the Complainant had established a *prima facie* case, the Complainant would fail to carry the burden of proof. The Complainant's uncorroborated allegation that he set up a CSC in 2007 does not outweigh the evidence offered by the Company that no record of a CSC exists prior to February 2018 and that the Complainant never raised any concern regarding the gaps in electric service at the Service Location over the years. A preponderance of the evidence does not support that the Company violated section 1501 of the Public Utility Code or any other Commission precedent or regulation. Accordingly, the Commission should dismiss the Complaint for the Complainant's failure to meet his burden of proof.

⁴⁷ *Id.* at 32-34.

⁴⁸ If an uncorroborated allegation or "bald assertion" is sufficient to sustain a complaint, the likelihood of frivolous complaint filings would increase. This concern is even greater if defendants are unable to rebut an uncorroborated allegation by explaining that they have no records indicating the allegation occurred. When an allegation is false, the defendant will have no records showing the allegation is true.

IV. CONCLUSION

For all of the foregoing reasons, Pennsylvania Electric Company requests that its Exceptions be granted, and the Initial Decision of Administrative Law Judge Dennis J. Buckley be modified accordingly.

Respectfully submitted,

Dated: April 22, 2019



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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

WILLIAM ROLL

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PENNSYLVANIA ELECTRIC COMPANY

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CERTIFICATE OF SERVICE

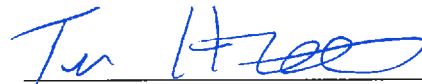
I hereby certify that I have this day served a true copy of the Exceptions on behalf of Pennsylvania Electric Company upon the individuals listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

Service by First Class Mail, postage prepaid, as follows:

William Roll
2524 Highland Avenue
Huntingdon, PA 16652

Administrative Law Judge Dennis J. Buckley
Office of Administrative Law Judge
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Dated: April 22, 2019



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