

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
RCN TELECOM SERVICES OF)
PHILADELPHIA, INC.)
)
v.) PA No. 01-03
)
Exelon Corp. f/k/a/)
PECO ENERGY COMPANY)
)

OPPOSITION TO MOTION TO DISMISS

On April 16, 2001, Exelon Corporation filed a Motion to Dismiss in the above-captioned matter, alleging that the Pole Attachment Complaint filed by RCN Telecom Services of Philadelphia, Inc. ("RCN") against Exelon, f/k/a PECO Energy Company on March 16, 2001 is defective in that Exelon was never formerly known as PECO Energy Company, Exelon is merely a controlling parent of PECO Energy Company and is entitled to the protection of its separate corporate existence, that Exelon had no legal ownership of the assets which are the subject of RCN's Complaint, and that the FCC lacks jurisdiction over Exelon. This is RCN's Opposition.

Although Exelon's Motion requires a formal response, no extensive discussion of the matter is required.¹ RCN will shortly be filing an Amended Complaint in this matter, adding a

¹ While undue formalism is to be avoided, RCN notes that Exelon's Motion is unauthorized. The Pole Attachment rules do not provide for motions to dismiss: "Section 1.1407(a) of the Commission's Rules provides for a response to a complaint and a reply by the complainant to the response. It further provides that 'no filings, and no motions other than for extensions of time will be considered unless authorized by the Commission.'" *Texas Cable and Telecommunications Association v. GTE Southwest, Inc.*, 14 FCC 2975 at ¶ 17 (1999). (Footnote

number of counts to Count I as set forth in the Initial Complaint, and recasting the matter to substitute PECO Energy Company and Exelon Infrastructure Services, Inc. as the formal respondents. Although Exelon filed a Motion to Dismiss, it and PECO Energy Company also responded on the merits to RCN's Initial Complaint and both in the Motion to Dismiss and in the Response it is fully acknowledged that PECO Energy Co. is a proper respondent in RCN's Complaint.² Accordingly, while RCN does not necessarily agree with all of Exelon's or PECO Energy Co.'s argumentation with respect to the appropriateness of naming Exelon as the respondent, nor that the Commission lacks jurisdiction over Exelon, the matter would appear to be moot. Indeed, Exelon itself recognized that RCN would in all likelihood simply refile its Complaint or file an Amended Complaint to cure the alleged defect in the identification of the respondent.³ RCN is content to proceed against PECO Energy Co. itself, as well as to add as a respondent Exelon Infrastructure Services Inc. which, as alleged in the Amended Complaint, has participated integrally in the make-ready issues addressed in the Amended Complaint.

To the extent any further discussion of the merits is required, RCN simply notes that it was not able to determine the formal ownership of PECO's poles based on the publicly available information reviewed by RCN prior to filing the Initial Complaint. Even if the Complaint as initially brought erred in naming the respondent, the error is harmless. Neither Exelon nor PECO Energy Co., nor Exelon Infrastructure Services, Inc. is prejudiced by the substitution of the latter

omitted; subsequent history omitted).

² "[T]he poles [at issue in this case] are owned and administered by PECO." Motion to Dismiss Exelon Corporation, filed April 16, 2001, at 2. The "proper party is PECO." *Id.* at 3.

³ Response to Complaint at 3.

two entities for Exelon. In such circumstances, amendment is liberally allowed under the Federal Rules of Civil Procedure.⁴ *A fortiori*, the Commission should allow RCN to amend its Complaint. The Commission's processes, of course, should look to substance rather than to form. Dismissing the Complaint because of a technical error in identifying the respondent or misnaming the respondent, rather than permitting the Complainant to cure such error, would be inconsistent with traditional administrative practice and would not serve the ends of justice.⁵

WHEREFORE, RCN opposes the Motion to Dismiss its Complaint as now amended, naming as respondents PECO Energy Company and Exelon Infrastructure Services, Inc., but does not oppose dismissal only as to Exelon Corporation.

Respectfully submitted,

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April 30, 2001

⁴ See Fed. R. Civ. Proc. 15(a).

⁵ See, e.g., *McClelland v. Andrus*, 606 F.2d 1278, 1285 (DC Cir 1979) ("[C]ourts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings."); *Pacific Gas & Electric Co. v. FERC*, 746 F.2d 1383 (9th Cir. 1984) (stating the same).

CERTIFICATE OF SERVICE

I, hereby certify that on the 30th day of April, 2001 copies of the foregoing Opposition to Motion to Dismiss were sent via hand delivery* or first class U.S. mail, postage-paid to the following parties.

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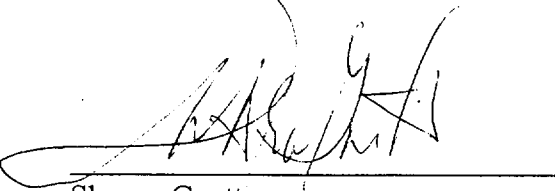
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