

A Partnership Including
Professional Corporations
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000
Facsimile 202-756-8087
www.mwe.com

Boston
Chicago
London
Los Angeles
Miami
Moscow
New York
Orange County
St. Petersburg
Silicon Valley
Vilnius
Washington, D.C.

MCDERMOTT, WILL & EMERY

Christine M. Gill
Attorney at Law
cgill@mwe.com
202-756-8283

August 9, 2001

VIA HAND-DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

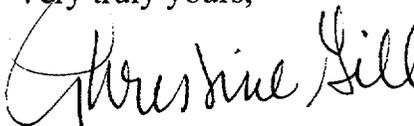
**Re: RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Company
and Exelon Infrastructure Services, Inc.
PA No. 01-003**

Dear Ms. Salas:

Enclosed for filing in connection with the above-referenced matter on behalf of PECO Energy Company, please find the original and four copies of each of the following: (1) Motion for Leave to File Motion to Strike of PECO Energy Company and (2) Motion to Strike of PECO Energy Company. Please return file-stamped copies of these pleadings to our office with our courier.

Thank you for your attention to this matter.

Very truly yours,



Christine M. Gill

Enclosures

template 06c002

EPIDS 06c001

Ms. Magalie R. Salas
Federal Communications Commission
August 9, 2001
Page 2

cc: Kathleen Costello
Karen D. Cyr
L. Elise Dieterich
W. Kenneth Ferree
William L. Fishman
Marsha Gransee
John C. Halderman
William H. Johnson
Cheryl King
James P. McNulty
Louise Fink Smith

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

In the Matter of)	
)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
)	
v.)	
)	
PECO ENERGY COMPANY and EXELON INFRASTRUCTURE SERVICES, INC.)	

To: Cable Services Bureau

**MOTION FOR LEAVE TO FILE MOTION TO STRIKE
OF
PECO ENERGY COMPANY**

Shirley S. Fujimoto
Christine M. Gill
John R. Delmore
Erika E. Olsen
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
202-756-8000

Counsel for Respondent PECO Energy Company

Dated: August 9, 2001

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

In the Matter of)	
)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
)	
v.)	
)	
PECO ENERGY COMPANY)	
and)	
EXELON INFRASTRUCTURE SERVICES, INC.)	

To: Cable Services Bureau

**PECO ENERGY COMPANY'S
MOTION FOR LEAVE TO FILE MOTION TO STRIKE**

Respondent PECO Energy Company ("PECO"), through its undersigned counsel and pursuant to FCC Rule Section 1.1407(a), hereby files this motion for leave to file the accompanying Motion to Strike. Rule Section 1.1407(a) provides that filings other than complaints, responses, replies, and motions for extensions will be considered if first authorized by the Commission. As demonstrated herein and in the Motion to Strike, good cause exists to authorize PECO to file the Motion the Strike and, ultimately, to grant it.

1. In the Reply of RCN Telecom Services of Philadelphia, Inc. ("Reply") dated July 9, 2001, RCN Telecom Services of Philadelphia, Inc. ("RCN") advanced numerous misstatements and mischaracterizations of PECO's statements, arguments, and positions in this matter. Specifically, RCN asserts that based on PECO's representations in the Response, PECO: (1) is unwilling to take responsibility for keeping its poles in compliance with the National

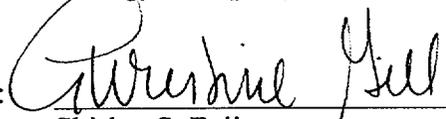
Electrical Safety Code ("NESC"); (2) believes the NESC's grandfathering violations allow for "perpetual violations"; (3) presumes its poles are in compliance with the NESC merely because it has heard nothing from its attachers to the contrary; (4) stated that it (PECO) does not know which attachers and what attachments are on its poles; and (5) believes that the Commission should disregard sworn statements if they were made by a party's employees.

2. None of the foregoing assertions are true; as detailed in the Motion to Strike, PECO did not make any of those statements or arguments, or advance positions to that effect, in its Response. RCN has taken PECO's statements, arguments, and positions and misstated or mischaracterized them such that they can be read to reflect negatively upon PECO. Whatever the reason for those misstatements and mischaracterizations, they are false and misleading and their presence in the record should not be countenanced. Thus, PECO respectfully requests that the Commission grant this motion and permit PECO to file its Motion to Strike.

WHEREFORE, THE PREMISES CONSIDERED, PECO respectfully requests that the Commission enter an order granting leave to file the accompanying Motion to Strike.

Respectfully submitted,

PECO Energy Company

By: 

Shirley S. Fujimoto
Christine M. Gill
John R. Delmore
Erika E. Olsen
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
202-756-8000

Its Attorneys

Dated: August 9, 2001

CERTIFICATE OF SERVICE

I, Gloria Smith, hereby certify that on this 9th day of August, 2001, a single copy of the foregoing "PECO Energy Company's Motion For Leave to File Motion to Strike" was served on the following as indicated:

By Messenger

W. Kenneth Ferree
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C740
Washington, D.C. 20554

Kathleen Costello
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

William H. Johnson
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

Cheryl King
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

By U.S. Mail

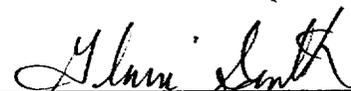
James P. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Louise Fink Smith
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Karen D. Cyr, General Counsel
U.S. Nuclear Regulatory Commission
1 White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

William L. Fishman
L. Elise Dieterich
Swidler Berlin Shereff Friedman, L.L.C.
3000 K. Street, N.W., Suite 300
Washington, D.C. 20007-5116

Marsha Gransee
Office of General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E., Room 10D-01
Washington, D.C. 20426



Gloria Smith
Legal Secretary

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

In the Matter of)	
)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
)	
v.)	
)	
PECO ENERGY COMPANY and EXELON INFRASTRUCTURE SERVICES, INC.)	
)	
To: Cable Services Bureau)	

**MOTION TO STRIKE
OF PECO ENERGY COMPANY**

Shirley S. Fujimoto
Christine M. Gill
John R. Delmore
Erika E. Olsen
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
202-756-8000

Counsel for Respondent PECO Energy Company

Dated: August 9, 2001

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

In the Matter of)	
)	
RCN TELECOM SERVICES OF PHILADELPHIA, INC.)	PA No. 01-003
)	
v.)	
)	
PECO ENERGY COMPANY)	
and)	
EXELON INFRASTRUCTURE SERVICES, INC.)	

To: Cable Services Bureau

**MOTION TO STRIKE
OF PECO ENERGY COMPANY**

Respondent PECO Energy Company ("PECO"), through its undersigned counsel, hereby moves to strike those statements contained in the Reply of RCN Telecom Services of Philadelphia, Inc. ("Reply") dated July 9, 2001 which, as detailed below, constitute misstatements and mischaracterizations of PECO's statements, arguments, and positions in this matter.

1. In its Amended Complaint filed May 4, 2001, RCN Telecom Services of Philadelphia, Inc. ("RCN") made allegations regarding PECO's make-ready charges and practices. PECO responded to those allegations in its Response to Amended Complaint filed June 18, 2001 ("Response"). In its Reply to the Response, RCN misstated and mischaracterized numerous statements, arguments, and positions that PECO made therein. Whatever the reason for those misstatements and mischaracterizations, they are false and misleading. Thus, their

presence in the record should not be countenanced. Accordingly, PECO is filing this Motion to Strike.¹

2. The statements with which PECO takes issue are detailed in the following sections. Many of them focus on RCN's erroneous claims that PECO stated that it (PECO) shuns responsibility for compliance with the National Electrical Safety Code ("NESC") and that its (PECO's) pole attachment records are virtually nonexistent. At the outset, PECO emphasizes that its Response plainly demonstrates that it takes its NESC compliance obligation very seriously and recognizes that, as the owner of the poles, it is ultimately responsible for maintaining their compliance with the NESC. PECO's Response also clearly indicates that it keeps substantial pole attachment records despite the fact that it may not have the particular types of records that RCN prefers it would keep.

I. ARGUMENT

3. RCN's misstatements and mischaracterizations of PECO's statements, arguments, and positions do not so much refute PECO's arguments as they simply attempt to portray PECO in an adverse light. RCN's misstatements and mischaracterizations are liberally sprinkled throughout the Reply, whether as a sentence or portions of sentences. Rather than pinpoint every single instance in which RCN made a misstatement or mischaracterization, PECO lists each type of misstatement or mischaracterization below, cites examples from the Reply, and explains why each is plainly erroneous given what PECO actually stated in the Response. All references in the Reply to each type of misstatement or mischaracterization, as well as any references in the declarations attached to the Reply, should be stricken.

¹ The Commission's pole attachment rules do not expressly reference motions to strike. However, they provide that motions not specifically referenced in the rules will be considered if authorized by the Commission. In this case, PECO has filed an accompanying Motion for Leave to File Motion to Strike.

A. PECO's Response Reflects That It Does Comply With The NESC

4. In its Reply, RCN asserts that in the Response, PECO stated an unwillingness to take responsibility for keeping its poles in compliance with the NESC. For example, in the Summary section of the Reply, RCN asserts that "PECO's . . . claim [in the Response] that it does not bear primary responsibility for maintaining its poles in compliance with NESC standards is inconsistent with Commission precedent and must be rejected out of hand."² In Section V of the Reply, RCN claims that "[a]close reading of PECO's contentions . . . indicates that PECO . . . forswears ultimate responsibility for the state of its poles."³ Also in Section V, RCN broadly asserts that the Response evidences a "failure to accept responsibility for whatever safety violations exist on [PECO's] poles"⁴

5. The foregoing statements and others like them are gross misstatements of what PECO actually said in the Response with regard to its NESC compliance responsibilities. PECO never stated nor indicated that does not consider itself responsible for NESC compliance or for correcting safety violations. To the contrary, PECO strongly emphasized its commitment to complying with the NESC, a commitment that is obviously rooted in a belief that it bears the primary responsibility for such compliance. For example, PECO stated in the Response that "PECO's pole management policies are designed at a minimum to ensure compliance with the requirements of the NESC"⁵ PECO's understanding of its responsibilities is also reflected by its statement that 47 U.S.C. § 224(f)(2) must be read to give it discretion to require that any necessary make-ready be performed before a new attacher comes to a pole, because "[o]therwise, *PECO's ability to ensure the integrity of its poles could be detrimentally affected.*"⁶

² Reply of RCN Telecom Services of Philadelphia, Inc. dated July 9, 2001 at iii ("Reply").

³ Reply at 27.

⁴ Reply at 28.

⁵ Response to Amended Complaint of PECO Energy Company dated June 18, 2001 at 41 ("Response").

⁶ Response at 48 (emphasis added).

6. The Response also contains a detailed description of how PECO handles known pole attachment violations.⁷ This description makes clear that PECO takes responsibility for correcting *all* violations of which it is aware. PECO will correct violations it causes, and if it learns that another attacher caused a violation, it will "require [the attacher] to undertake corrective measures. PECO expects the attacher causing the violation to make the correction or pay PECO to do so within a reasonable period of time. . . . no longer than three to four months."⁸

7. The foregoing makes clear that RCN's assertion that PECO shuns responsibility for keeping its poles in compliance with the NESC is a complete misstatement of the Response. As such, all of RCN's statements incorporating that assertion must be stricken.

B. PECO Understands The NESC's Requirements With Regard To Safety Violations.

8. In Section V of the Reply, RCN contends that PECO's statements in the Response indicate that PECO "seriously misunderstands the NESC and its treatment of previous attachments" ⁹ In support of that contention, RCN references the declaration of Edmund Feloni, a purported expert it retained.¹⁰ Mr. Feloni's declaration gives the impression that PECO contends that the NESC allows for "perpetual safety violations," or the "grandfathering of violations."¹¹ In other words, that PECO interprets the NESC as allowing attachments that would normally be NESC violations, so long as they are "grandfathered." However, that is not PECO's interpretation. PECO is well aware that true violations of the NESC cannot be grandfathered, and nothing in its Response suggests that it thinks otherwise.

⁷ Response at 44-45.

⁸ Response at 44.

⁹ Reply at 30.

¹⁰ Reply at 30.

¹¹ Reply at 30.

9. In its Response, PECO stated that attachments do not necessarily need to meet the current edition of the NESC; depending on when they were placed on the pole, they may be grandfathered under a previous edition that had different safety standards. PECO explained that "existing violations [*i.e.*, attachments that do not meet the current code] *that comply with the prior applicable editions of the NESC* generally do not need to be modified to meet the latest edition of it [T]he term "preexisting violation" has a very precise definition. It refers to an attachment that is not in compliance with *either* the current NESC (now 1997) *or* any applicable previous editions."¹² No reasonable reading of those statements could lead one to conclude that PECO thinks the grandfathering provisions of the NESC allow for "perpetual safety violations." Therefore, this attempt by RCN to attribute an obviously incorrect argument to PECO must be stricken.

C. PECO's Presumption Of Compliance With The NESC Is Based On Valid Grounds

10. In Section IV of the Reply, RCN asserts that "PECO merely 'presumes' its poles are safety-code compliant because it has heard nothing from its attachers to the contrary."¹³ In support of that assertion, RCN cites to Michael Williams' Declaration, which in actuality does not support the assertion. In fact, nothing in the Response or the attached declarations support RCN's statement. What PECO really said was that when it initially makes attachments to its poles, it does so in compliance with the NESC, and its pole attachment agreements require third-party attachers to do likewise.¹⁴ Additionally, when PECO does subsequent work on the poles, it again makes sure they are in compliance with the NESC.¹⁵ PECO presumes that its poles are in compliance with the NESC *due to those consistently applied standard policies and practices.*

¹² Response at 41-42 (emphasis added) (language in brackets added).

¹³ Reply at 27 n.59.

¹⁴ Response at 41.

¹⁵ Response at 41.

Therefore, RCN's assertion is a mischaracterization of PECO's statements and, thus, must be stricken.

D. PECO Knows Which Attachments And What Attachments Are On Its Poles

11. RCN claims in the Reply that PECO stated in the Response that it (PECO) does not know which attachments and what attachments are on its poles. For example, in Section IV of the Reply, RCN alleges that "[i]n effect, PECO, the owner of some 430,000 poles, does not know what is on them" ¹⁶ It caustically describes PECO in Section V as "a multibillion utility which has few details about the history of its own physical plant, or what is currently attached to the poles" ¹⁷ RCN also works this allegation into Section VII, gratuitously mentioning that "it is startling to learn that PECO literally does not know who or what is on its poles" and notes "PECO's massive ignorance about the status of its poles." ¹⁸

12. PECO finds these allegations highly offensive and urges the Commission to recognize them as a mischaracterization of the record. PECO never said that it does not know which attachments and what attachments are on its poles. Rather, in the statement cited to by RCN, PECO said "PECO keeps various databases on its poles; however, it does not maintain detailed logs of all work done on its poles, and nor is it required to do so." ¹⁹ There is nothing in that statement indicating that PECO, in the inflammatory words of RCN, suffers from "massive ignorance about the status of its poles." ²⁰ Just the opposite, in fact; the statement informs the Commission that PECO keeps numerous computerized records on its poles. While the statement acknowledges that PECO's records do not include detailed logs of all the work performed on

¹⁶ Reply at 27 n.59.

¹⁷ Reply at 28.

¹⁸ Reply at 36 and 36 n.97.

¹⁹ Response at 42; *see also* Response at 51 ("PECO does not, and is not required to, keep detailed logs of all work activities conducted in relation to a particular pole.").

²⁰ Reply at 36 n.97.

each pole, it cannot reasonably be stretched to the exceedingly broad charge that PECO "does not know who or what is on its poles."²¹ Thus, all of RCN's statements incorporating that assertion must be stricken.

E. PECO Does Not Contend That All Declarations Made By Employees Should Be Disregarded

13. In the course of addressing PECO's evidentiary arguments in Section V of the Reply, RCN observes that "perhaps the most trivial of PECO's objections to RCN's sworn statements is that they were supplied by RCN employees and accordingly should be disregarded."²² RCN fervently seeks to discredit PECO for having allegedly made such an argument, calling it "patent nonsense" that "would equally disqualify all of PECO's sworn statements on the same ground."²³ The problem with RCN's line of attack is that PECO never said that RCN's sworn statements should be disregarded because they were made by RCN employees.

14. In the section of the Response cited to by RCN, PECO was addressing a review of PECO's poles conducted by Jonathan Troy Stinson, an RCN employee, which purported to establish that approximately 46% of PECO's poles that require make-ready work have preexisting violations.²⁴ PECO noted a number of problems with the survey, such as the fact that it constituted neither a comprehensive analysis nor a valid statistical sample and the fact that only 2,758 poles out of 430,000 were reviewed.²⁵ PECO also asserted that "the review is undermined by the fact that Mr. Stinson is an RCN employee and, hence, not a disinterested

²¹ Reply at 36.

²² Reply at 32.

²³ Reply at 32.

²⁴ Response at 39.

²⁵ Response at 38-39.

witness."²⁶ PECO concluded with the statement that "due to *these* patent defects, the Commission must disregard [Mr. Stinson's] *review*."²⁷

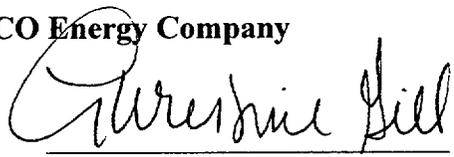
15. The foregoing shows that PECO never said Mr. Stinson's review should be disregarded because he is an RCN employee. Rather, it clearly said that Mr. Stinson's review is *undermined* by the fact that he is an RCN employee; in other words, his employment status goes to the weight the Commission should afford the review. Moreover, PECO's assertion was unmistakably limited to Mr. Stinson's *pole review*; it did not apply to all of his testimony. Thus, RCN's assertion that PECO would have the Commission disregard every declaration by a party's employees is entirely manufactured. Therefore, it must be stricken.

II. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, PECO respectfully requests that the Commission strike those statements contained in the Reply which, as set forth above, constitute misstatements and mischaracterizations of PECO's statements, arguments, and positions in this matter.

Respectfully submitted,

PECO Energy Company

By: 

Shirley S. Fujimoto
Christine M. Gill
John R. Delmore
Erika E. Olsen
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
202-756-8000

Its Attorneys

Dated: August 9, 2001

²⁶ Response at 39.

²⁷ Response at 39 (emphasis added).

CERTIFICATE OF SERVICE

I, Gloria Smith, hereby certify that on this 9th day of August, 2001, a single copy of the foregoing "Motion to Strike of PECO Energy Company" was served on the following as indicated:

By Messenger

W. Kenneth Ferree
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C740
Washington, D.C. 20554

Kathleen Costello
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

William H. Johnson
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

Cheryl King
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W., Room 3-C830
Washington, D.C. 20554

By U.S. Mail

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

Louise Fink Smith
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Karen D. Cyr, General Counsel
U.S. Nuclear Regulatory Commission
1 White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

William L. Fishman
L. Elise Dieterich
Swidler Berlin Shereff Friedman, L.L.C.
3000 K. Street, N.W., Suite 300
Washington, D.C. 20007-5116

Marsha Gransee
Office of General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E., Room 10D-01
Washington, D.C. 20426



Gloria Smith
Legal Secretary