

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

In the Matter of)	
)	
RCN TELECOM SERVICES OF)	
PHILADELPHIA, INC.)	
)	
v.)	PA No. 01-03
)	
PECO ENERGY COMPANY)	
)	
and)	
)	
EXELON INFRASTRUCTURE SERVICES, INC.)	

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

RCN Telecom Services of Philadelphia, Inc. ("RCN"), complainant in the above-captioned matter, by undersigned counsel, herewith opposes the Motion of PECO Energy Co. ("PECO") filed on August 9, 2001, for leave to file a Motion to Strike.¹ As demonstrated in the simultaneously filed Opposition to the Motion to Strike, there is no basis for striking any of RCN's Reply filed on July 9, 2001. That being so, there is no reason for the Bureau staff to grant PECO the extraordinary relief it seeks in its Motion for Leave to File.

As PECO should well know — having itself previously sought to have the strictest possible interpretation of the Pole Attachment Complaint rules imposed on RCN — the applicable rules strongly disfavor pleadings other than for extensions of time beyond those called

¹ RCN's Opposition would normally have been due on August 23, 2001. However, on August 22, 2001, RCN filed a Motion for Extension of Time to permit it to respond to PECO's Motion and the accompanying Motion to Strike on August 31, 2001, in light of the circumstances recited in RCN's Motion. On August 23, 2001, the Bureau orally granted RCN's request for extension of time.

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for in the rules.² To overcome this strong presumption against the filing of multifarious pleadings, PECO simply alleges that certain allegations in RCN's Reply mischaracterize the record. The record, however, speaks for itself; the Bureau staff will undoubtedly review all the filings both of RCN and PECO and is fully capable of reaching its own conclusions about the record and the parties' charges concerning each other's conduct and pleadings.

The specific allegations to which PECO objects are, on their face, advocacy of a particular point of view, and as such are well within any reasonable pleading guidelines. RCN submits that its interpretation of the record is wholly consistent with the facts as presented heretofore as set forth fully in RCN's Opposition to the Motion to Strike. In any event, however, if Motions to Strike were permitted in each instance in which one party to a sharply contested matter believed its opponent's interpretations of the record were unjustified, there would be no end to the filing and necessary consideration of such additional pleadings. Particularly in the context of pole attachment complaints, in which simplicity and expeditious resolution are deemed especially important, such additional pleadings are singularly out of place.

While not directly applicable to FCC practice, the federal rules of civil procedure and federal practice thereunder illustrate the scope and limits of motions to strike. Federal Rule of Civil Procedure 12(f) thus provides for a motion to strike in instances where the pleading sought to be stricken is redundant, immaterial, impertinent, or scandalous or where defenses are legally insufficient.³ In general, federal courts disfavor such motions because striking a portion of a

² 47 C.F.R. § 1.1407(a).

³ F.R.C.P. Rule 12(f).

pleading is a drastic remedy and is infrequently granted.⁴ The material challenged in the motion must have no bearing on the issues and be prejudicial to defendant.⁵ Scandalous material is generally unnecessarily reflective on the moral character of an individual or is material expressed in repulsive language incompatible with the court's dignity.⁶ Plainly, none of these criteria are remotely applicable to this matter, and RCN is entitled to present its case without needing PECO's concurrence.

The essence of PECO's allegations concerning certain statements in RCN's Reply is that PECO believes they mischaracterize the record. There is simply no doctrine or procedural rule known to RCN which permits a party that disagrees with its opponent's view of the record to have such views stricken.⁷ PECO simply overreaches and seeks relief which does not lie for the reasons advanced. Beyond the foregoing, this is not the first time PECO has improperly sought to give itself additional and unsanctioned opportunities to address the merits.⁸

⁴ See 5 Wright & Miller, *Federal Practice & Procedure*, s 1380 at 783; Moore's *Federal Practice*, § 12.37[1] (Mathew Bender, 3rd ed.); *Resolution Trust Corp. v. Vanderweele*, 833 F. Supp.1383, 1387 (N.D. Ind. 1993) (motion to strike should not be granted when defense depends upon disputed issues of fact or unclear questions of law).

⁵ *FRA Sp.A. v. Surg-O-Flex of America*, 415 F. Supp. 421, 427 (S.D.N.Y. 1976).

⁶ See, e.g., *Khalid Bin Talal v. E.F. Hutton & Co.*, 720 F. Supp. 671, 686 (N.D. Ill. 1989).

⁷ Thus, in its Motion to Strike, PECO says that "[n]o reasonable reading of [PECO's statements] could lead one to conclude that PECO thinks the grandfathering provision of the NESC allow for 'perpetual safety violations.'" *Id.* at ¶ 9. "Therefore," says PECO, "this attempt by RCN to attribute an obviously incorrect argument to PECO must be stricken." Apparently, therefore, PECO believes that all "obviously incorrect arguments" should be stricken. This is a novel doctrine of law not previously known to RCN.

⁸ In its July 9, 2001 Reply RCN noted at 34 that PECO's Response improperly addressed matters which were already fully litigated in RCN's Initial Complaint and PECO's Response to that Initial Complaint. RCN noted also at 39 n.100 that in its Response EIS purported to reserve the right to file further pleadings as it deemed appropriate, notwithstanding the provisions of

In sum, there is no need to allow PECO another opportunity to plead the merits of its case and, as demonstrated in the accompanying Opposition to Motion to Strike, there is no merit in the substance of PECO's Motion to Strike. If, on the other hand, there were any such merit, PECO has not demonstrated why the normal review of pleadings would be inadequate for the staff to reach its own conclusions. Moreover the prompt resolution of this complaint, involving large and on-going losses being experienced by RCN as a consequence of PECO's unlawful rates and activities, is particularly important to RCN. Consideration of further unnecessary pleadings, especially those such as PECO's Motions, merely clutters the record, and should not be tolerated.

Wherefore, RCN opposes PECO's Motion for Leave to File Motion to Strike.

Respectfully submitted,

RCN Telecom Services of Philadelphia, Inc.

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Date: August 29, 2001

§ 1.1407(a).

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2001, copies of the foregoing Opposition to Motion of PECO Energy Company for Leave To File Motion To Strike were served on the following by hand delivery* and first-class U.S. mail, postage-paid:

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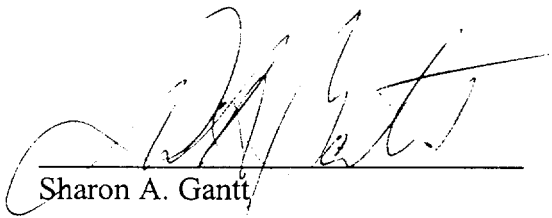
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