

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 TO STRIKE**

RCN Telecom Services of Philadelphia, Inc. ("RCN"), complainant in the above-captioned matter, by the undersigned counsel, herewith opposes the Motion to Strike portions of RCN's July 9, 2001 Reply filed by PECO Energy Company ("PECO") on August 9, 2001.¹

In essence, PECO objects to RCN's characterization of PECO's positions with respect to the presence of, and concern about, safety code violations on PECO's poles. It is hardly surprising that in a sharply-contested matter such as the present one, adverse parties interpret the record differently. What is surprising is that PECO finds it necessary to burden the Bureau with specific rejoinders to certain of RCN's observations, and to clutter the record with rehashing of

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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what are either normal adversarial differences in interpretation, or, in a number of cases, labored explanations for PECO's original observations in its Response to RCN's Amended Complaint.

Under the circumstances, RCN will not undertake in this Opposition to refute in detail PECO's allegations that RCN has mischaracterized the record. As the Bureau well knows from its adjudication of a growing number of pole attachment complaints, it is a common tactic of the pole-owning utilities -- which, in almost all cases, and certainly in this case, are vastly larger than the attachers -- to use their superior resources to try to plead the attachers to death. RCN will not fall into that trap. Although none of PECO's substantive allegations is correct, RCN declines to enter into a procedurally unsanctioned, expensive, and unnecessary battle over the accuracy of already-filed pleadings. PECO's Response is in the record, and RCN's Reply is in the record, and that should be sufficient for the Bureau to adjudicate this matter.

Nevertheless, to illustrate the lack of merit in PECO's Motion to Strike, RCN provides a few examples demonstrating that PECO's allegations or -- ironically enough -- its characterizations of RCN's Reply, are erroneous.

PECO alleges that RCN erroneously claimed 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."² The problem with these PECO allegations is that RCN's Reply says neither thing. That PECO "shuns" responsibility for compliance with the NESC is PECO's characterization of what RCN said; it is not RCN's.

² Motion to Strike, ¶ 2.

Similarly, RCN nowhere said that PECO's pole attachment records are "virtually nonexistent."³ Similarly, while PECO seeks to strike RCN's contention that PECO merely presumes its poles to be safety-code compliant⁴ on the ground that such an assertion is unjustified by anything in the Response, RCN notes that the Response volunteers that poles needing repair are *presumed* to have been code-compliant before the event necessitating the reconstruction.⁵ Moreover, since Mr. Williams' Declaration twice asserts that PECO lacks comprehensive knowledge of the status of its poles,⁶ PECO's assertion that RCN has overstated the case is hardly persuasive.

Yet another illustration of the erroneous nature of PECO's contentions appears at ¶¶ 13-15. There, PECO notes that RCN contended in its Reply that it was nonsense for PECO to contend in its Response that statements supplied by RCN employees should be disregarded.⁷ But PECO admits that it said in its Response that "due to these patent defects, the Commission must disregard [Mr. Stinson's] review."⁸ Included in these "defects" is that Mr. Stinson is an RCN

³ RCN notes again, however, that PECO's Response admits to the absence of complete or detailed pole attachment records a total of six times: in its Response at ¶¶ 95, 97, 115, 116, and in Mr. Williams' Declaration at ¶¶ 8 and 12.

⁴ Motion to Strike, ¶ 10.

⁵ Response, ¶ 96.

⁶ See Mr. Williams' Declaration at ¶ 8 (PECO lacks "complete records" of the installation and subsequent history of work on individual poles and such data may not even be available). See also ¶ 12 (determination of out-of-compliance attachments virtually impossible based solely on records; it would be extraordinarily difficult, based on PECO's records, to determine whether a pole was out of compliance before RCN attached to it.)

⁷ Motion to Strike, ¶ 13.

⁸ *Id.*, ¶ 14.

employee and "hence, not a disinterested witness."⁹ PECO now claims that it never said Mr. Stinson's review should be disregarded because he is an RCN employee, but only that his review of pole conditions is "undermined."¹⁰ So PECO admits that it earlier said the Commission must "disregard" Mr. Stinson's review, but now alleges that it only said Mr. Stinson's review is "undermined." These hair-splitting dialectics are not only factually erroneous, but confusing, unnecessary, ultimately pointless, and clearly do not warrant the further round of pleadings launched by PECO's Motion to Strike.

PECO's Motion is ambiguous as to the material it seeks to have stricken, requesting, at ¶ 3, that each "type" of alleged misstatement or mischaracterization be stricken from RCN's Reply and accompanying declarations. Were the Commission to do so, however, the record in this case would be rendered a confusing and potentially incomplete, Swiss cheese. Rather than itself identifying the statements to which it objects, PECO asks the Commission to determine which statements, if any, in RCN's Reply constitute "misstatements and mischaracterizations of PECO's statements, arguments, and positions," and then strike them. For the Commission even to attempt to parse RCN's pleadings in that way would, of course, be a hugely time-consuming and wasteful undertaking. The Commission's resources will be better spent, RCN submits, deciding this matter on its merits. Moreover, the Commission will, as does any adjudicatory body, decide which of the parties' assertions to weigh in its ultimate decision in this case; there is no need for the Commission to do so in response to PECO's Motion to Strike.

⁹ *Id.*

¹⁰ *Id.*, ¶ 15.

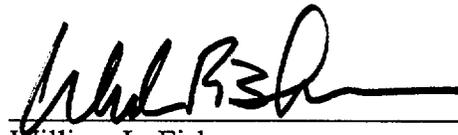
Finally, while PECO characterizes its pleading as a Motion to Strike, and then attacks RCN's assessment of the record by alleging RCN said things it never said and by putting its own verbal spin on what RCN did say, the real purpose of the pleading appears to be to give PECO yet another opportunity -- in violation of the pole attachment complaint rules -- to plead its case: to contend that it does comply with the NESC, and does take its responsibilities as a pole-owning utility seriously. This purpose is evident in ¶¶ 4-7 of the Motion. The Bureau should not countenance such tactics.

Wherefore, RCN urges the Bureau to deny PECO's Motion to Strike.

Respectfully submitted,

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Date: August 29, 2001

CERTIFICATE OF SERVICE

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

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