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January 27, 2003

BY HAND

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

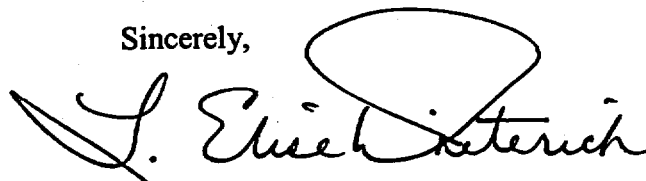
Re: RCN Telecom Services of Philadelphia, Inc. v. PECO Energy Company
and Exelon Infrastructure Services, Inc., PA No. 01-003

Dear Secretary Dortch:

Enclosed for filing are an original and four copies of "Opposition of RCN Telecom Services Of Philadelphia, Inc., To Petition For Reconsideration of Infrasure, Inc." in the above-referenced case. Also enclosed is a copy to be date-stamped and returned.

If you have any questions regarding the attached, please contact the undersigned.

Sincerely,



L. Elise Dieterich

Enclosures

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

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

**OPPOSITION OF RCN TELECOM SERVICES OF PHILADELPHIA, INC.
TO PETITION FOR RECONSIDERATION OF INFRASOURCE, INC.**

**By: Andrew D. Lipman
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**Attorneys for RCN Telecom Services of
Philadelphia, Inc.**

Dated: January 27, 2003

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

In the Matter of)	
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EXELON INFRASTRUCTURE SERVICES, INC.)	
Respondent)	

**OPPOSITION OF RCN TELECOM SERVICES OF PHILADELPHIA, INC.
TO PETITION FOR RECONSIDERATION OF INFRASOURCE, INC.**

RCN Telecom Services of Philadelphia, Inc. ("RCN"), pursuant to Federal Communication Commission ("FCC" or "Commission") Rule 1.106(g),¹ hereby opposes the Petition for Reconsideration of InfraSource, Inc. ("InfraSource Petition"), insofar as InfraSource seeks to have the Enforcement Bureau address in the first instance issues pertaining to RCN's Amended Complaint regarding make-ready charges and to reopen matters decided by the Cable Bureau over a year ago. Indeed, the Petition filed by InfraSource is not one for "reconsideration" of the action taken by the Enforcement Bureau in its December 18, 2002, Phase I Order,² at all. Rather, it is an improper attempt to re-brief pending issues with respect to make-ready charges,

¹ 47 C.F.R § 1.106(g).

² In the Matter of RCN Telecom Services of Philadelphia, Inc., v. PECO Energy Company and Exelon Infrastructure Services, Inc., *Phase I Order*, DA 02-3458, rel. December 18, 2002 ("Phase I Order").

which the Phase I Order expressly deferred.³ To the extent that the InfraSource Petition argues matters not addressed by the Phase I Order (*i.e.*, issues that the Phase I Order did not consider and which, therefore, cannot be “reconsidered”), RCN respectfully submits that the InfraSource Petition is an abuse of the FCC’s rules, and should be disregarded.

In the event, however, that the InfraSource Petition is taken under advisement, RCN strenuously opposes InfraSource’s untimely, inappropriate, and procedurally improper attempt to reargue (1) the question of the Commission’s jurisdiction with respect to InfraSource and (2) the Cable Bureau’s decision, over a year ago, to allow RCN’s Amended Complaint regarding make-ready charges to proceed as a part of the current docket. In support of its opposition, RCN refers to and incorporates by this reference the points and authorities set forth in its earlier pleadings responding to InfraSource’s prior argument on these points.⁴

1. Commission Jurisdiction Over InfraSource.

As InfraSource admits in its Petition, its argument that the Commission lacks jurisdiction over InfraSource was already fully briefed in its response to RCN’s Amended Complaint. The Amended Complaint, which addresses RCN’s claims pertaining to make-ready charges imposed by PECO for work performed at PECO’s behest by EIS of PA, a unit of PECO’s affiliate,

³ The only matter addressed by the InfraSource Petition that might properly be deemed a subject for “reconsideration” is the request for clarification that the pole attachment rate rulings in the Phase I Order do not apply to InfraSource, which owns no poles. RCN does not oppose that aspect of the InfraSource Petition, although RCN believes that the clarification InfraSource seeks is unnecessary. It is obvious that the rate rulings in the Phase I Order can apply only to the owner and administrator of the poles at issue, and that the rulings dispose only of the issues raised in RCN’s initial Complaint, which did not name InfraSource as a party. RCN also believes it is obvious that InfraSource’s arguments with respect to the make-ready issues remain pending, since those issues were expressly deferred by the Phase I Order. Accordingly, while clarification seems unnecessary, RCN does not oppose InfraSource’s request to the Bureau that it stipulate that InfraSource’s pending arguments have not been decided.

⁴ In the Matter of RCN Telecom Services of Philadelphia, Inc., v. PECO Energy Company and Exelon Infrastructure Services, Inc., *Reply of RCN Telecom Services of Philadelphia, Inc.*, dated July 9, 2001, at 10-20 (“RCN’s Reply”).

InfraSource (f/k/a Exelon Infrastructure Services), has not yet been considered. The Petition for Reconsideration, therefore, is not a proper forum for InfraSource to reargue the question of jurisdiction, which remains pending.

The merits of the jurisdictional argument were addressed by RCN in its Reply to the Response of PECO and Exelon Infrastructure Services, Inc. (now InfraSource), in Section I.B. of RCN's Reply, at pages 10-12. As RCN explained there: "It is simply absurd to suggest that because PECO's affiliate [InfraSource] is 5% owned by interests other than Exelon [the corporate parent of both PECO and InfraSource] and is not directly owned by, or the owner of PECO, it is beyond the Commission's reach as an integral part of a utility enterprise."

As InfraSource contends in its Petition, its subsidiary, EIS of PA, which performed the make-ready work billed by PECO to RCN, does not have a direct contractual relationship with RCN. Rather, EIS performs the make-ready work in coordination with PECO, PECO then applies a substantial mark-up to the work billed by EIS, and RCN pays the make-ready charges as invoiced by PECO – charges that totaled \$9.7 million through the date of the Amended Complaint.⁵ A central element of RCN's Amended Complaint is its request that EIS/InfraSource and PECO account for, and justify, the make-ready charges billed to RCN. These charges, as set forth fully in RCN's prior pleadings, significantly exceed industry norms and are invoiced without any supporting cost data or explanation. Because EIS generates the initial charges,

⁵ See generally, *In the Matter of RCN Telecom Services of Philadelphia, Inc., v. PECO Energy Company and Exelon Infrastructure Services, Inc., Amended Pole Attachment Complaint*, dated May 4, 2001 ("Amended Complaint"); see also *In the Matter of RCN Telecom Services of Philadelphia, Inc., v. PECO Energy Company and Exelon Infrastructure Services, Inc., Response to Amended Complaint of PECO Energy Company*, dated June 18, 2001, Exh. C: Declaration of Michael A. Williams, at 2, ¶ 6 ("PECO's make-ready fees are designed to recover its and EIS's costs and provide PECO with appropriate levels of profitability for these services.").

which PECO then marks-up and passes through to RCN, InfraSource is an appropriate and necessary party to the resolution of RCN's Amended Complaint.⁶

2. RCN's Amended Complaint Is Procedurally Proper; InfraSource's Untimely Petition for Reconsideration of That Issue Is Not.

InfraSource complains in its Petition that the Bureau did not reach or acknowledge in the Phase I Order its argument that the Amended Complaint is procedurally deficient. Because the Bureau did not consider those arguments in the Phase I Order, the Petition for Reconsideration, by definition, is itself procedurally deficient on this point, and should be disregarded.

Moreover, as a procedural matter, the opportunity for InfraSource to petition for reconsideration of the question whether the Amended Complaint was properly filed passed thirty (30) days after the Cable Bureau approved the filing, in June of 2001. The Cable Bureau, noting that RCN could have elected to file its claims with respect to make-ready charges as a separate complaint, held that the claims would be allowed as an amendment to the initial Complaint, because "[w]e find that Respondent has not been prejudiced by the filings."⁷ InfraSource never appealed that ruling, presumably because it could not show that any prejudice had occurred. RCN, in contrast, would be severely prejudiced if it were required to initiate a separate complaint to address the make-ready charges – particularly at this late date, more than a year after the matter has been fully briefed.

InfraSource's additional argument for dismissal also is procedurally improper and without substantive weight. InfraSource argues that RCN's Amended Complaint should be

⁶ If PECO were willing to enter a binding stipulation that it will fully account for the EIS charges billed through to RCN, and will reimburse RCN for all EIS overcharges, RCN would certainly consider voluntarily dismissing its complaint against InfraSource. To date, however, PECO has taken no such responsibility.

⁷ In the Matter of RCN Telecom Services of Philadelphia, Inc., v. PECO Energy Company and Excelon [sic] Infrastructure Services, Inc., *Order*, DA 01-1339, rel. June 1, 2001, at ¶ 5.

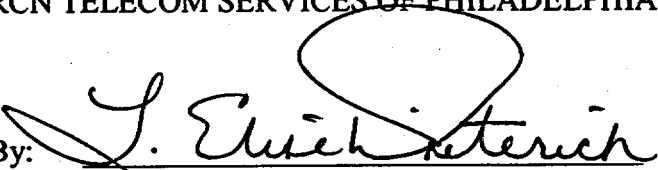
dismissed because RCN did not document to InfraSource's satisfaction its pre-complaint discussions with EIS, wherein RCN attempted to resolve the make-ready issues (discussions about which EIS/InfraSource, as a participant, was of course fully aware). Again, this argument was not considered or ruled upon in the Phase I Order and, accordingly, is not a proper subject for "reconsideration." More importantly, dismissal of the Amended Complaint on the grounds argued by InfraSource would not resolve the matter on the merits, but merely would force RCN to refile its claims in a new complaint. This would be severely prejudicial to RCN, would require the filing of duplicative pleadings by all parties involved, and would waste valuable Enforcement Bureau resources, all without any affect on the ultimate outcome of the matter, except to cause unnecessary additional expense and delay. InfraSource's nit-picking procedural arguments regarding the Amended Complaint are irrelevant to the Phase I Order and, therefore, not a proper topic for the Petition for Reconsideration, so should be disregarded. When addressed at the proper juncture, InfraSource's procedural arguments should be rejected as without substantive merit.

WHEREFORE, RCN respectfully requests the Petition for Reconsideration of InfraSource, Inc., be DENIED, or granted only with the respect to the request to clarify the inapplicability of the Phase I Order to InfraSource and to InfraSource's pending arguments.

Respectfully submitted,

RCN TELECOM SERVICES OF PHILADELPHIA, INC.

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Dated: January 27, 2003

CERTIFICATE OF SERVICE

I, L. Elise Dieterich hereby certify that on this 27th day of January 2003, a copy of the foregoing Opposition of RCN Telecom Services of Philadelphia, Inc., to Petition for Reconsideration of InfraSource, Inc. was mailed via U.S. mail, first-class, postage prepaid, except as noted for hand delivery, to each of the following:

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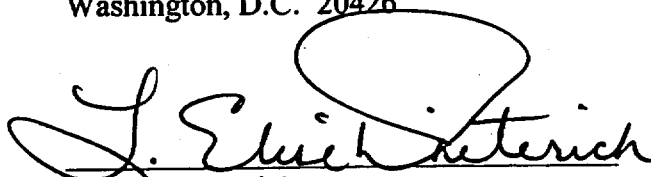
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