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Mr. Michael A. Smerconish
Beasley, Casey, Colleran, Erbstein, Thistle & Kline
1125 Walnut Street
Philadelphia, PA 19107-4997

Dear Michael:

This letter is to present my evaluation and conclusions as to the importance of Philadelphia Electric Company (PECO) complying with regulatory requirements regarding both (1) the negotiation of deferred payment plans taking into consideration ability-to-pay, and (2) the provision of required pre- and post-disconnection notices, as promulgated by the Pennsylvania Public Utilities Commission.

THE CONTEXT OF PUC REGULATION

Several different observations should be made about the context within which PUC regulation of PECO occurs. First, there is no question but that PECO deals in a service which is a practical necessity of modern life, a commodity essential to the life, health and safety of its consumers. The discontinuance or denial of electric service affects a household in all aspects of its physical, economic and social wellbeing.

Essential Services Provided by Monopoly-Supplier

The fact that this essential service is controlled by a monopoly-provider makes the state regulation even more essential. There is no doubt that PECO possesses the kind of power and danger of abuse which has raised a responsibility to clearly define and to use that power fairly and in accord with

the minimum requirements of fundamental fairness. Whenever, because of unequal bargaining relationships, one party has a specific vulnerability to another, the type of regulation inherent in PUC customer service regulations is appropriate. The vulnerability of electric utility consumers such as Gloria Blackwell (hereafter Blackwell) who are dependent on a single supplier (*i.e.*, PECO) for service necessary to life, itself, is evident.

One primary justification for PUC regulation, therefore, is when (1) an entity has power over a vulnerable party; and (2) the stronger party has opportunity to exploit that power. The danger exists that a utility will exploit its customers dependency on the receipt of service to obtain concessions from the consumer. This is, for example, precisely the basis for the requirement that PECO take into consideration Blackwell's ability-to-pay in negotiating deferred payment plans.

Allocation of the "Risk of Being Wrong"

A second purpose of the detailed regulation of PECO, particularly of PECO's customer service practices such as deferred payment plan negotiations and shutoff notices, is to serve as a means of allocating the risk of being wrong. The risk that a customer, in reality, can or cannot afford to pay a proffered payment plan does not rest evenly between the utility and its payment-troubled customer. Moreover, the risk that a customer receives, reads and understands notices explaining the potential termination of service and how such a termination might be avoided does not rest evenly between the utility and its customer. One purpose of the detailed regulation of a utility such as PECO is to place the risk *on the company* that a customer such as Blackwell can *not* pay, or the risk that a customer such as Blackwell does *not* receive and understand the disconnect notices. To allow PECO to ignore these detailed regulations, therefore, is to permit PECO to undo the allocation of risk that the PUC has sought to effect.

The strict PUC regulations define the degree of confidence our society thinks it should have in the correctness of factual conclusions for a particular type of situation. The detailed and strict requirements serve to allocate the risk of error between the utility and the customer such that the customer receives the benefit of the protection. The regulations are used to protect particularly important individual interests in shutoff cases, since there should be a reduced risk to the customer of an erroneous decision (*e.g.*, regarding ability-to-pay).

In deciding the appropriate regulatory requirements, Pennsylvania regulators have weighed the consequences to each party of an erroneous decision. The dictated processes regarding payment plans and disconnect notices

reflect not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the company and the customer. By imposing strict requirements in a utility shutoff case, therefore, Pennsylvania regulators have thus considered the risk of an erroneous deprivation of service and the likelihood that the procedural requirements regarding payment plan negotiation and shutoff notices would reduce that risk. The higher standard is preferable (or at least understandable whether or not one agrees with the PUC decision that it is necessary or preferable) when given the weight of the private interests at stake, the social cost of even occasional error is sizable.

Historically, there has been a high degree of concern expressed about the erroneous deprivation of a household's utility service. In addition to this expressed concern is the higher protection judicially offered to protect against the erroneous deprivation of utility service in other circumstances. Many courts have held public utilities not to a simple duty of care in negligence actions, for example, but rather to the "highest" duty of care. This duty flows from the special dependence that customers have on their local utility, their inability to mitigate the damages from an erroneous deprivation of service from a monopoly supplier, and the risk of serious loss should service be denied or interrupted. The line of inquiry into the significance of the loss and whether there are grounds for determining that the risk of error should not be spread evenly as between customer and utility clearly supports the need for enforcing the detailed and strict regulatory requirements for shutoff cases.

The Unique Standing of a Public Utility

The importance of the regulation, and of enforcing the regulation, is supported, as well, by the unique standing of a public utility such as PECO. A corporation or industry, such as PECO, that has been granted the right of eminent domain is the best example of an industry that is accordingly subject to public control. Private land, of course, cannot involuntarily be taken for private use. By definition, therefore, the exercise of the power of eminent domain must be for a "public use." The public thus has a right to ensure that property so taken, or the industry so supported, is not operated strictly for private gain, with "the public good" flowing only as an incident therefrom. The industry, in other words, having been granted a right that can only be exercised for the public use, must subject itself to supervision in enforcement of that responsibility.

Moreover, if an industry is granted the right to acquire property over the objection of the current fee holder, that grant is a delegation of the power of the state itself; only the state may take private property. Being the delegee

of the *power* of the state, an industry carries with it certain *responsibilities* as well. For example, just as the state may not deny the use of streets, the availability of fire and police protection, and the offer of public education on ability to pay, a corporation, whose existence and prosperity depends in large part on the private exercise of the power of the state, may not deny its service based on inability to pay. The delegation of some aspect of the power of the state, itself, carries with it the obligation of regulatory oversight to ensure that the power of the government is wielded for the entire public.

Protections for Particularly Vulnerable Customer Classes

PECO seeks to make much of the fact that Blackwell received public assistance, including a PHA-supplied utility allowances that was not used for utilities. Indeed, Blackwell freely admitted that she did not pay her utility bills. She simply noted the fact of her life: she did not have the resources to pay her utility bills.

It is *precisely* the Gloria Blackwells of the world that the detailed regulations of the Pennsylvania PUC are designed to protect. Regulation often stands as a barrier between an industry and the oppression of particularly vulnerable customer classes. The vulnerability of the class may arise because of attributes of the customers or the services they purchase, or because of attributes of the industry.

The sheer magnitude of public harm should particular industries *not* be subject to governmental control has served as the basis for public regulation. Certain industries are seen to hold a special relationship to the public. Because of their unique public position, should abuses arise in these industries, the public would suffer disproportionate harm.

The U.S. Supreme Court stated it like this in the 1914 case of *German Alliance Insurance Co. v. Lewis*:

> In some degree, the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence which makes the public interest that justifies regulatory legislation.

The "something more" was found to be the power and opportunity for an industry to engage in "imposition and oppression."

Unquestionably, government not only may, but must, regulate to protect the

public's health, safety and comfort. In addition, if an industry is such that the public can be subjected to economic imposition and oppression, that industry is subject to strict and detailed public control through economic regulation. Under this approach, the opportunity and ability of the industry may arise because of the number of people affected, because of the magnitude of the payments made by the public to the industry, because of the high proportion of individual household income devoted to paying the industry, because of the life-sustaining necessity of the industry, or because of some similar factor. Each of these factors is present for the PUC's shutoff regulations directed toward electric utilities.

Given this overview, let me turn to the specific regulations at issue in this case: (1) the requirement that PECO consider ability-to-pay in negotiating payment plans; and (2) the requirement that designated notices be provided both pre-termination and post-termination.

FROM THE PERSPECTIVE OF THE STATE

The Pennsylvania PUC has a specific interest in ensuring that electric service terminations occur so as to minimize the dangers to payment-troubled customers. The concern is well-founded. It is common knowledge that the termination of utility service presents real dangers to the households who have service disconnected but who are unable to pay. Dangerous alternatives are often used. These alternatives foreseeably pose dangers to the health and safety of the disconnected customer.

Health impacts arising from utility service terminations are foreseeable. A study I directed for the state of North Carolina found that many of the households who lost heating service in North Carolina in 1991, for example, lacked any alternative heating source when their primary heating source was out of operation. Nearly four of ten of those households (38%) having lost primary heat said that they had *no* alternative and, as a result, that they went *without* heat for some period of time during the winter because of the loss.

A 1993 study my firm prepared for Washington state found similar results. That study reported that sixty-two percent (62%) of all respondents losing their service at some time during the preceding twelve months reported using nothing while their heat was off. Of those who lost their heat during the *winter*, 51% reported using nothing while their heat was off. The next most frequent response for all shutoffs (and specifically winter shutoffs) was "other," having been selected by 15% of the respondents. In most cases "extra blankets" and "stayed at a friend's or family's house" were the responses written in. Therefore, not just a majority, but a substantial majority (62% + 15% = 77%), of those who lost their heat had absolutely no heat in

their homes for the duration of time that their heat was off.

The safety impacts are just as foreseeable. In contrast to the households who had absolutely nothing to rely upon when their heat was shutoff as discussed above, the remaining 23 percent in Washington state generated heat by using another fuel source, whether it was a portable heater, the kitchen stove, or a fireplace. Households which experienced loss of home heat between April and November were more likely to use a fireplace or portable electric heater.

Similarly, in North Carolina, even those households who didn't lack heat altogether faced major disruptions in their ability to keep warm. Of those households losing their primary fuel last winter, nearly one in four (24%) used either portable kerosene heaters or portable electric heaters as their (expensive and very dangerous) replacement source of heat. A nearly equal proportion of the households losing their primary source of heat relied upon either their cooking stove or their fireplace (20%) as their primary heating source.

In sum, there are serious safety implications arising from the termination of utility service and those safety implications are well known. While the data quoted above involves heating situations, similar results arise for non-heating electricity.

FROM THE PERSPECTIVE OF THE CUSTOMER

The violation of PUC regulations has specific impacts on Blackwell as well, impacts that might have been avoided, that would have directly resulted in the avoidance of the fire which lies at the heart of this case. These specific impacts arising from the violation of PUC regulations are indicative of why the PUC regulations were adopted in the first instance, and why they should be strictly enforced.

Affects Efficacy of All Shutoff Notices

The refusal of PECO to take Blackwell's ability to pay into consideration in its negotiation of deferred payment plans affects the efficacy of PECO's series of shutoff notices in two ways. On the one hand, from the perspective of the company, PECO has regulatory permission to disconnect service (and hence to serve disconnect notices) *only* in those instances where a customer has failed to comply with a reasonable deferred payment arrangement. PECO, however, having failed to comply with the PUC requirement that payment arrangements consider the delinquent customer's ability-to-pay, had not met this precondition to the termination of service. Hence, the disconnect notices

--not being tied to a lawful termination of service-- were of no force and effect.

On the other hand, from the perspective of the customer, the refusal of PECO to take ability to pay into account in negotiating deferred payment arrangements infected the legitimacy of the disconnect notices as well. One purpose of the disconnect notice is to inform the customer that to avoid service termination, the customer may contact the company to negotiate a reasonable payment plan. However, Blackwell's experience was that no such reasonable negotiations, based on her ability to pay, were forthcoming. Her experience, in other words, counselled that the "notice" of potential means to avoid disconnection, as provided in the Company's shutoff notices, was illusory. Her experience indicated that notwithstanding the Company's shutoff notices, no reasonable remedies existed for her. In sum, to provide notice of non-existent reasonable remedies is to provide no notice of remedies at all.

Failure to Contact

The refusal of PECO to negotiate a payment plan taking into consideration Blackwell's ability to pay also provides a possible explanation for Blackwell's unwillingness to seek to contact the Company again in response to repeated notices of intended disconnections. Blackwell could reasonably have determined that in the two instances in which she had made contact, and had sought a deferred payment arrangement, the Company had refused to take into consideration her ability to pay. As a result, the Company had foisted unaffordable payment plans upon her that she was unable to maintain.

Blackwell could reasonably have thought, in other words, that she had no reason to believe that a third payment plan "negotiation" would result in any more affordable arrangement than the first two. After all, her income was the same, her current bills were the same, and her arrears were higher. Her past experience would have taught her that she had nothing to gain by responding to the notices of termination. Indeed, Blackwell's phone call to PECO on the day after the disconnection, where she offered two-thirds of her welfare payment as a downpayment, which was refused, provides further reinforcement of the legitimacy of her reaction in this regard.

Allowed Arrears to Build Up

Unfortunately, the failure to take into account Blackwell's ability to pay becomes, over time, a self-defeating proposition for both the company and the customer. It seems clear that a smaller arrears is easier to retire than a larger arrears. Had PECO negotiated a reasonable payment plan taking

ability to pay into consideration when arrears were smaller (*i.e.*, at the time of the *first* payment plan), perhaps there would have been no need for the (failed) second plan. And, even at the time of the second plan, if PECO had negotiated a reasonable deferred payment plan taking ability to pay into consideration, perhaps the arrears would have been paid then, thus alleviating the need for the ultimate disconnection of service leading to the fire.

Each time PECO refused to enter into a reasonable payment plan, the arrears that were required to be repaid (in addition to Blackwell's current bill) got that much higher and made it that much *less* likely that *any* payment plan would ultimately be successful. PECO's refusal to negotiate a reasonable plan, as defined by the PUC regulations, from the beginning contributed to the ultimate failure of the process in this case.

Explains Two-Time Payment Plan Failure

In a related vein, PECO relies on the observation that it offered two payment plans to Blackwell, neither of which she successfully maintained, to support the proposition that the Company had acted reasonably toward Blackwell. Of course, as is now obvious, PECO's obligation was not simply to offer "a" payment plan to Blackwell. PECO's obligation was to offer a *reasonable* payment plan. The PUC has defined a reasonable plan to be a deferred payment arrangement that takes into account ability to pay.

Having "negotiated" two payment plans, *neither* of which took into account ability to pay, it is thus not surprising, and indeed to be expected, that the plans were not maintained. To make deferred payment arrangements affordable is the purpose of the ability to pay requirement in the first place. That a low-income household failed to maintain an unaffordable payment plan is not a surprising proposition.

Inability to Calculate

PECO makes much of the fact that Blackwell received a series of shutoff notices from the Company, and that she has the ability to read. Blackwell's ability to read does *not* address the failure of PECO to negotiate a reasonable payment plan, taking into account ability to pay.

Moreover, there is no evidence of Blackwell's independent ability to do the necessary arithmetic or mathematical calculations necessary to adequately represent her own interests in defining and advocating what her "ability to pay" was. Moreover, there is no indication that Blackwell had the ability to assess her long or short-term ability to maintain the payment plan offered to

her by PECO (either the first or the second time).

In contrast, PECO had ample ability to do so. And, it had ample ability to determine what PUC regulations required of it as far as taking into consideration Blackwell's ability to pay.

This is the reason, of course, that the obligation is placed *on the utility* to calculate and offer reasonable payment plans based on ability to pay. The negotiation of deferred payment plans in Pennsylvania, in other words, is not a "buyer beware" situation. PECO should not have been permitted to exploit Blackwell's own inadequacies in consumer math. And, under PUC regulations, PECO had a legal obligation to make a determination of ability to pay in *its* calculation of a reasonable payment plan. Indeed, it is unclear what "negotiations" occurred at all.

Monopoly Power to Extort "Agreement" to a Payment Plan

Making worse the problem of Blackwell's inability to challenge PECO's calculation of a payment plan payment is the inherently coercive nature of the payment plan negotiation process. On the one hand, there is a disenfranchised, historically powerless, member of society who admittedly owes a company providing an essential service substantial sums of money with a limited ability to pay. On the other hand, there is a large, powerful local corporation with monopoly control over the essential resource demanding payment for a bill which the customer *knows* is past due. This situation involves precisely the "disparity in bargaining power" which the PUC regulations are intended to address.

That, of course, is why the obligation is placed *on the company* to take into account ability to pay. In a related, but somewhat different context, this disparity in bargaining power between utility and consumers was noted in what has become classic language. In *Wood v. City of Auburn*,[1] the court crafted one of the most eloquent, firm and judicious statements regarding the imbalance of power between a consumer and utility. In *Wood*, the consumer had disputed a bill, which bill and dispute lapsed into apparent inertia on both sides. When the utility was sold to the city, however, the city resurrected the old debt and threatened to terminate service unless the old debt was paid. The consumer successfully enjoined the threat of termination in the court below.

In holding that the injunction against termination of service would become

[1] 87 Me. 287, 32 A. 906 (1895).

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permanent, the Maine Supreme Court was compelled to observe:

> The parties are not on equal ground. The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer, once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender, and swallow his choking sense of injustice.

The court reasoned further:

> Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money, yet the consumer must pay it again, and perhaps still again. He cannot resist, lest he lose the water.[2]

The same reasoning applies with equal force to the negotiation of deferred payment arrangements. If the utility, in contravention of PUC regulations, asserts that a payment plan is "reasonable," notwithstanding the fact that the plan does not consider the customer's ability to pay, what bargaining power does the customer to bring to refuse to accept such a plan? The power to terminate service in the event a payment plan is not agreed to "places the customer at its mercy."

Clear and Believable Warnings

In order to assess the notice provided by PECO to Blackwell, one should consider the purposes and functions of a notice. Through a shutoff notice, a consumer should be provided with the information she needs to quickly and intelligently take available steps to prevent the threatened termination of service. The notice should meet sufficiently stringent standards so as to protect all customers, given that customers are of various levels of education, experience and resources. The notice should be made at a meaningful time and in a meaningful manner. It should present truthful information.

\2\ ***Wood***, *supra*, 32 A. at 908.

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To meet these standards, the notice should contain specific information and meet specific standards. In providing information regarding the pending disconnection, the notice should state the reasons for having the utility seek the termination of service. In addition, to fulfill the notion that the notice be "meaningful," it should give a clear and believable warning that termination is about to occur.

The notice must inform the consumer of the required procedure by which the proposed termination can be avoided. It should, for example, mention the available procedure by which a dispute termination can be challenged. In sum, through a shutoff notice, the customer be informed clearly of the pending shutoff along with the means to avoid it. For all the reasons I discuss below, PECO did not meet these standards.

Repeated notices destructive of notice purpose: The issuance of notices must be read in light of the purpose of a notice. Under constitutional restrictions (which, granted, do not directly apply in this case, but which are nonetheless instructive), to meet the requirement that the notice be "meaningful," it must give a clear and believable warning that termination is about to occur. The key word in this formulation is that the notice be "believable." Note, for example, the case of *Palmer v. Columbia Gas Co.*, where the utility's notice was invalidated when utility sent out 120,000 to 140,000 shutoff notices each year while actually disconnecting only 6,000 households.[3]

By sending repeated disconnect notices, with no collection follow-up, PECO has destroyed the message contained by the notice. As a result, the entire basis for its claimed compliance with notice requirements collapses. The PECO situation with Blackwell is on an individualized basis *exactly* what the Columbia Gas situation was on a systemwide basis.

Waiver: What the PECO action looks like is a course of performance that is inconsistent with the specific terms of the PECO/Blackwell contract, as well as a course of performance that is inconsistent with the terms of the various shutoff notices provided by PECO. I obviously do not assert that PECO has acted inconsistently with its right to receive payment for the electric service it has provided. What PECO *has* acted inconsistently with is its right to receive payment within a time certain after its bill, as well as inconsistently with its right to receive payment within a time certain after the Company sends a "10-day"

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[3] 342 F.Supp. 241, 242 - 243 (N.D.Ohio 1972)

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disconnect notice. Indeed, one could reasonably conclude that the failure of PECO to follow-up its April 10-day notice with the required 48-hour notice simply gave Blackwell *more* reason to believe that the April notice was no more subject to enforcement than the previous ones.

From the perspective of PECO's claim that it has provided more than sufficient "notice," is the concept of retracting the waiver implied within its inconsistent course of performance. By failing to provide a 48-hour notice, PECO provided *no* notification (let alone *reasonable* notification) to Blackwell that strict performance in accord with the 10-day disconnect notices would be required in the future.

Blackwell had no notice, in other words, of PECO's intent to enforce the actual terms of the contract *in the future*. Blackwell was never informed in any fashion that despite PECO's habitually ignoring the shutoff warnings presented in the Company's 10-day notices, and despite habitually issuing disconnect notices without really meaning it, *henceforth*, the company really *did* mean it and Blackwell must respond in a specified manner to avoid the disconnection of service.

In brief, the repeated sending of shutoff notices to Blackwell by PECO is totally irrelevant to whether Blackwell had appropriate or reasonable notice of the pending disconnection since the actual prior conduct of PECO was contrary to what the shutoff notices had been telling Blackwell for months.

<u>Truthfulness of shutoff notice</u>: In light of each of the above discussions, consider the truthfulness of the language that appeared in the shutoff notices provided to Blackwell by PECO: "your delinquent balance from previous billing must be paid now to avoid a shut off of your service." Look at the component parts of that notice.

- What must be paid? "Your delinquent balance." That's not true. Some portion of the balance could be paid, with a payment plan for the rest.

- When must it be paid? "now." That's not true. Deferred payment plans were available.

- What discretion to pay exists? None. "must be paid." That's not true. A whole host of alternatives to paying the entire bill existed.

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- o What is the consequence of nonpayment? "to avoid a shut off of your service." That's not true. For months on end, there was *no* consequence for nonpayment.

Even the notices that were allegedly provided to Blackwell did not contain a truthful statement of the reasons for the disconnection of service and the means by which Blackwell could avoid that disconnection. Providing an untruthful notice is providing no notice at all.

Functions of Notice

Distinctions arise between the actual notices provided to Ms. Blackwell and the functions notices serve. Consider the notices discussed in paragraph 21 of the motion for summary judgment. They state: "your delinquent balance from previous billing must be paid now to *avoid a shut off* of your service." (emphasis added). The purpose of the post-disconnection notice, however, was not to inform Blackwell how to avoid the shutoff, but rather to inform Blackwell how to have her service *restored* having already been disconnected. Those two functions seem really different. It seems not unreasonable for a customer to conclude: "well, that's it. The service is off and I have no further recourse."

Finally, a distinction arises in the function of a notice issued in March and April versus a notice issued earlier in the winter heating season. PECO may not disconnect service during the winter heating season. Accordingly, whatever function the disconnect notice serves during the winter moratorium months, the purpose of a shutoff notice in March and April is distinctly different. After the moratorium, the company "really means" its warning in the shutoff notice, while during the winter moratorium, it does not. Accordingly, the prior disconnect notices provided by PECO to Blackwell are irrelevant. Their purpose and impact is entirely different than the one required, but not provided, at the time of the actual spring disconnection of service.

PECO'S OBLIGATION TO SERVE BLACKWELL

Based on my discussions above, I conclude that PECO's unlawful and unreasonable "failure to provide" service to Blackwell on each day up to the day of the fire. The unlawful disconnection of service, without notice, was one violation, in other words, but not the only violation of PECO's legal duty to Blackwell. The refusal to negotiate a payment plan without taking into consideration Blackwell's ability-to-pay was a second violation. Looking at each of these violations standing alone, however, ignores the ultimate import of the regulations.

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PECO had a continuing obligation to provide electric service to Blackwell unless it had a legal reason *not* to do so. The failure to provide notice fatally infected the lawfulness of the service termination. The disconnection, in other words, did not *become* "lawful" by the passage of time. Moreover, the failure to negotiate a reasonable payment plan taking into consideration ability-to-pay fatally infected the service termination.

As a result, PECO violated its obligation to provide electricity each day that went by with Blackwell's home being without power. *That* unlawful act occurred every day, every minute, Blackwell's electricity was off without lawful justification. If service can be lawfully denied to a customer, without having complied with the prerequisites imposed by the Pennsylvania PUC, the PUC's regulations have no impact at all. Moreover, if an otherwise unlawful denial of service can "become lawful" simply by the passage of time, the PUC regulations have little meaning as well.

In sum, PECO had a continuing legal obligation to supply electricity to Blackwell unless it had legal justification not to do so. Since the disconnection was fatally flawed by lack of notice, and by the lack of the negotiation of a reasonable payment plan taking into consideration ability to pay, PECO's failure to supply electricity placed it in continuing violation of this legal obligation to Blackwell. That continuing violation is separate and apart from the unlawful disconnection itself.

Sincerely,

Roger D. Colton

RDC/lb

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