

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for	:	
Approval of Its Default Service Program for	:	P-2024-3046008
the Period From June 1, 2025, Through	:	
May 31, 2029	:	

**ORDER ON THE MOTION OF THE OFFICE OF CONSUMER ADVOCATE TO  
DISMISS OBJECTIONS AND TO COMPEL PECO ENERGY COMPANY TO ANSWER  
INTERROGATORIES**

On February 2, 2024, PECO Energy Company (“PECO” or the “Company”) filed its Petition for Approval of its proposed Default Service Program for the period of June 1, 2025, through May 31, 2029 (PECO DSP VI). On March 1, 2024, the Office of Consumer Advocate (“OCA”) filed an Answer to PECO’s Petition.

On March 14, 2024, the undersigned presiding officers issued a Protective Order.

On March 26, 2024, the OCA issued its Set 2 Interrogatories (Set 2) to PECO.

On April 10, 2024, PECO filed its written objections to OCA Set 2, Question No.23, subparts c and e, and Question No. 38.

On April 15, 2024, the OCA filed a Motion to Dismiss PECO’s Objections and Compel Responses to its Second Set of Interrogatories Nos. 23, subparts (c) and (e), and 38 (the “Motion”).

On April 18, 2024, PECO filed its Answer in opposition to the Motion (“Answer”).

The Motion is ready for disposition.

Section 5.321(c) of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Section 5.321(c), specifically provides that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Discovery is permitted regardless of whether the information sought "relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant." *Id.* Information may be discoverable, even if it would be inadmissible at a hearing. It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* The Commission has held that, "The material sought to be discovered need not be admissible. Rather, it must be reasonably expected to lead to the discovery of admissible evidence." *J3 Energy Group, Inc. v. West Penn Power Co. and UGI Development Co.*, 2014 Pa. PUC LEXIS 406 at \*7 (Order Aug. 21, 2014). The Commission has also held that the relevancy test should be liberally applied when considering data requests. See, *Pa. PUC v. Equitable Gas Co.*, 1986 Pa. PUC LEXIS 110 at \*22 (Order May 16, 1986).

Additionally, the party objecting to discovery bears the burden of establishing that the information requested is not relevant or discoverable. See *Petition of the Borough of Cornwall for a Declaratory Order that the Provision of Water Service to Isolated Customers Adjoining its Boundaries Does Not Constitute Provision of Public Utility Service Under 66 Pa. C.S. § 102*, P- 2015-2476211 at 6 (Order Sept. 11, 2015) citing *Koken v. One Beacon Insurance Co.*, 911 A.2d 1021, 25 (Pa. Cmwlth Ct. 2006). Relevancy depends upon the nature and facts of the individual case, and any doubts are to be resolved in favor of relevancy and permitting discovery. *Id.* For information to be relevant it must either tend to establish a material fact, tend to make a fact at issue more or less probable, or support a reasonable inference or presumptions regarding a material fact. *Id.* at 9-10, citing *Smith v. Morrison*, 47 A.3d 131, 37 (Pa. Super. Ct. 2012).

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**OCA Set 2, Question 23, Subpart (c) and (e)**

OCA Set 2, Question 23 references the Direct Testimony of PECO witness Scott G. Fisher and states (emphasis added):

Referencing page 11, footnote 16. Please provide:

- a. The dates on which the Commission has declined to authorize the bid results for these seven tranches.
- b. The procurement class (e.g., residential, small commercial) for each such tranche.
- c. *The recommendation (whether to approve or not) provided by PECO or its independent evaluator to the Commission.*
- d. The Commission's stated reasons for not approving these tranches (state the relevant reasons separately for each unapproved tranche).
- e. *All public and non-public documentation for (c) and (d) above.*

The Subparts (c) and (e) objected to by PECO are emphasized. According to OCA, these Subparts must be read in conjunction with the Interrogatory's focus on the "seven tranches" for which the Commission declined to authorize the bid results, as identified in Mr. Fisher's testimony, page 11, fn. 16 and framed by OCA Set 2, Question 23, Subpart (a). In its Motion, OCA seeks to compel responses on the grounds that the information sought in this interrogatory and its subparts is relevant and not privileged.

The OCA further argues that Question 23, Subparts (c) and (e) could be answered subject to the protections afforded under the Protective Order in this proceeding with redactions that permit the OCA to review the post-solicitation reports specific only to the seven tranches referenced in PECO consultant Fisher's testimony. The OCA clarifies that the focus of this Interrogatory is on determining whether the Commission's determination to not approve the bid results for seven tranches followed or differed from the Independent Evaluator's ("NERA") recommendation for those specific solicitations. The clear focus of OCA-2-23, subparts (c) and (e) is on documentation of the "recommendation" and does not request identification of the bidder or bid price, contrary to the PECO Objection ¶ 2 characterization. Motion ¶ 24(a).

In its Objections and Answer to the Motion, PECO explains that the recommendations sought by OCA-2-23, subparts (c) and (e), were not prepared by PECO, but by

NERA, as part of its post-solicitation report (“Final Report”) provided to the Commission for the seven fixed-price full requirements tranches for which the bid results were not approved during PECO’s second default service program (“DSP II”). PECO further adds that NERA provides the Final Report confidentially to the Commission to evaluate the solicitation and thereafter only in redacted form to PECO. Answer at 1-2.

Requesting the production of the recommendations in the context of the seven tranches, along with all public and non-public information on them, amounts to a request for the release of the Final Report associated with the seven tranches in question and any supporting documentation. PECO’s arguments against the production of this information to the OCA will be addressed below.

### **OCA Set 2, Question 38**

OCA Set 2, Question 38 references the Direct Testimony of PECO witness Katie Orlandi and states:

Referencing page 13, lines 5 through 22.

- a. Please provide copies of each “Market Report” provided by NERA to the Commission since the beginning of DSP VI.
- b. Please provide copies of each “Final Report” provided by NERA to the Commission since the beginning of DSP IV.

The PECO DSP IV period started June 1, 2017. See, *Petition of PECO Energy for Approval of Default Service Program for the Period from June 1, 2017, through May 31, 2021*, Order (Dec. 8, 2016) (*PECO DSP IV*).

According to the OCA, PECO’s objections are meritless and, if granted, would restrict OCA’s right to discover relevant information and impair its ability to evaluate the Company’s proposed DSP VI, including the reserve price change that NERA Managing Director Orlandi states would be an improvement for the Company’s procurement of default service supply for the Residential class. Motion ¶ 34

In its Motion, the OCA explains that it would accept PECO's provision of NERA's post-solicitation reports from June 1, 2017 forward with supplier bid information redacted, in response to the OCA Set 2, Question 38. Similarly, the OCA is willing to accept redacted versions of the Market Report provided by NERA to the Commission. The OCA further clarifies that its interest in OCA Set 2, Question 38 "is to observe *the formats of the Reports over time and variations in the data*, even if the specific supplier name and bid data is redacted. Motion ¶ 35. (*Emphasis added.*)

In response, PECO explains that prior to each solicitation, NERA prepares a Market Report, which is provided solely and confidentially to the Commission. Answer at 2. The Market Report reflects the Independent Evaluator's professional judgment on current market conditions and is intended solely to assist the Commission in evaluating the solicitation results. Answer at 5. In addition, post solicitation, NERA provides a Final Report confidentially to the Commission to evaluate the solicitation, and, thereafter, provides the Final Report to PECO in redacted form only. Answer at 2.

In its Objections, PECO explained that its competitive request for proposals ("RFP") process for the procurement of default service supply is governed by rules (the "RFP Rules") and protocol (the "RFP Protocol") approved by the Commission in the PECO *DSP V Order*. Objections ¶¶ 2- 3. In accordance with the Commission's Policy Statement at 52 Pa. Code § 69.1807(7), the RFP Rules and RFP Protocol contain extensive confidentiality provisions that prevent PECO and NERA from releasing information provided by bidders, including the bidder identity, disaggregated bid pricing, and the amount of awarded supply. Answer at 2. In relevant part, the RFP Rules provide:

Any information provided by an RFP Bidder in its Part 1 Proposal is provided on a confidential basis to the Independent Evaluator and may be provided on a confidential basis to the Commission Staff. PECO representatives will review the information provided to fulfill the requirements of [Part 1 Proposals] and will participate in the evaluation of the creditworthiness of each RFP Bidder.

Any information provided by an RFP Bidder in its Part 2 Proposal is provided on a confidential basis to the Independent Evaluator, and may be provided on a confidential basis to the Commission Staff. PECO representatives will review the Pre-Bid Letter of Credit with

the name of the RFP Bidder and the amount redacted and will participate in the evaluation of this Pre-Bid Letter of Credit.

The Independent Evaluator and representatives from PECO involved in the evaluation of Proposals will consider all data and information provided by RFP Bidders in response to this RFP to be confidential and will attempt to limit its disclosure to the public in accordance with the provisions of this section. PECO will also take reasonable action to ensure that its employees, representatives and agents authorized to consider and evaluate all Proposals protect the confidentiality of such data and information. Each representative of the Independent Evaluator and PECO that has access to any portion of the Proposals is required to sign a Confidentiality Statement in the form of Appendix 12 to these RFP Rules prior to evaluation of any portion of the Proposals.

In addition, the RFP Bidders' data and information filed in response to the RFP will be disclosed if required by any federal, state or local agency (including, without limitation, the Commission) or by a court of competent jurisdiction. PECO or the Independent Evaluator will notify the RFP Bidder in advance of such disclosure and cooperate with such RFP Bidder, to the extent deemed reasonable by PECO, and at the expense of the RFP Bidder, to prevent the disclosure of such materials. In any event, PECO, its employees, and agents including the Independent Evaluator will not be responsible to the RFP Bidders or any other party or liable for any disclosure of such designated materials before, during or subsequent to this RFP.

Answer at 3, *referencing* PECO Exhibit KO-1- (PECO Energy Company Default Service Program Request for Proposals). PECO points out that the Market Report is described in the RFP Protocol, and the Final Report is described in both the RFP Rules and RFP Protocol. See PECO Exhibits KO-1 and KO-3, § VII.3 and Exhibits KO-2 and KO-4, §§ XIII, XV.B & XV.C.

It is PECO's position that the RFP Rules and the Protocol explicitly limit the distribution of these reports. Answer at 6. As an initial matter, PECO argues that the Market Report is furnished "solely and confidentially to the Commission" which seems to imply that it PECO cannot provide information contained in a the Market Report because it has no such report in its possession. Answer at 2. PECO observes that the Market Report reflects the Independent Evaluator's professional judgment on current market conditions and is intended solely to assist the Commission in evaluating the solicitation results. PECO argues that such report contains data that could affect bidding strategy in PECO's procurements, including reasonable bid ranges

and, as proposed for PECO's sixth default service program ("DSP VI"), a reserve price. Answer at 5. Recipients of the information produced could use these ranges in the future to submit bids that they expect the Commission may be willing to accept, instead of submitting their best possible bids which, in turn, could lead to higher default service prices. Answer at 5-6.

In addition, PECO maintains that the Final Report, even in its redacted form provided to the Company, reveals information that could create competitive advantages for certain bidders in PECO's future solicitations, harm a supplier's overall market position, and/or irreparably harm the competitiveness of the solicitations. Answer at 6. Such information includes:

- The number and names of entities that participated at each step of the RFP process or that were contacted by the Independent Evaluator – e.g., registrants to the webcast, participants in the alternate guaranty process, successful and unsuccessful Part 1 and Part 2 proposals, bidders who did and did not participate in the training session, and winning bidders.
- Analysis to support the Independent Evaluator's recommendation to the Commission that presents ranges of estimated bid prices, number and names of entities that have a load cap, and specific competitiveness measures across the products, including those requested by the Commission to assist it in the evaluation of the results of the solicitations.
- Data pertaining to losing bidders and bids, including the number of tranches bid and the average of all bids received by bidder by product.

Answer at 6. In PECO's view, all of this information could impact supplier bid strategy, decisions to participate in future PECO solicitations, and ultimately the competitiveness of the Company's procurements of default service supply. *Id.*

In its Answer, PECO also explains that suppliers who choose to participate in the Company's solicitations must assemble their own portfolio of products that will permit the supplier to offer the best, most competitive bids across the products available. Therefore, PECO argues that maintaining strict confidentiality of bid information is necessary for such suppliers to be willing to continue participating in PECO's solicitations, thereby preserving the

competitiveness of PECO's procurements, which are responsible for delivering default service supply to customers at the "least cost over time" in accordance with the Public Utility Code.

Answer at 4.

In its Answer, PECO points out that its suppliers include not only generation owners, but also energy marketers and financial institutions. Notably, several of those types of entities have intervened in this proceeding, including Calpine Retail Holdings, LLC, NRG Energy, Inc., and Constellation NewEnergy, Inc. and Constellation Energy Generation, LLC. Releasing the information requested by the OCA and, thus, not maintaining strict confidentiality of bid information could be detrimental to maintaining the participation levels and competitiveness of the procurements. Answer at 4. By way of example, PECO argues that if information about one supplier ("Supplier A") were known to another supplier ("Supplier B"), but not vice-versa, then Supplier A would have a competitive advantage in PECO's solicitations, which may result in Supplier B not participating in future procurements. *Id.* Similarly, disclosure of information that a supplier believes could harm its position in the market (e.g., that a supplier intends to participate in a PECO solicitation or was a losing bidder in a solicitation) could deter participation. *Id.* Also, releasing the information requested would give competitive intelligence to suppliers that is not currently available to them. Suppliers should bid across the products available based on their individual assessment of the cost to serve default service supply and not because of any other information such as analysis provided by the Independent Evaluator to the Commission to assist in whether to approve the results of a solicitation. Answer at 4-5.

In its Answer, PECO insists that maintaining the confidentiality of information is a necessary measure to preserve the competitiveness of the solicitations, which is responsible for delivering default service prices that are consistent with the market. Answer at 5. In doing so, PECO argues that if suppliers decide not to participate in the solicitations because they believe that sensitive information detailing their participation could be released, this could result in decreased participation, reduced competition in the solicitations, and potentially higher prices for default service customers. *Id.* If sensitive information is released once, suppliers may not trust that it will not be released again and therefore the release of the requested information could cause irreparable harm to PECO's solicitations to the detriment of default service customers. *Id.*



PECO does not agree with the OCA's proposed compromise to produce the requested reports with supplier names redacted. According to PECO, producing the information on this basis would not maintain confidentiality because recipients could determine the identity of the supplier from other information disclosed in the report or other information in the recipient's hands, including the substantial information about PECO's prior solicitation results produced in response to other discovery propounded by the OCA in this case. In addition, PECO warns that recipients of the information could make erroneous assumptions about who the suppliers might be that, if acted upon, could compromise the competitiveness of future solicitations. Objections ¶ 3.

The OCA contends, and PECO does not dispute, that the requested information is relevant to the present case. However, PECO maintains that the requested information is not discoverable because it is privileged and confidential. In support of its position, PECO cites to Administrative Law Judge ("ALJ") Elisabeth Barnes' March 16, 2012 Order in *Joint Petition of Metro. Edison Co., Pa. Elec. Co., Pa. Power Co. and West Penn Power Co. For Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650 et al. (*FE-PA Order*) in which ALJ Barnes granted the utility's objection and dismissed the Retail Energy Supply Association's Motion to Compel with respect to an interrogatory that would have required the utility to produce information about the results of historical default service auctions, including disaggregated bid information with fictitious labels. In that case, the ALJ found that the auction rules (which are similar to the RFP Rules and RFP Protocol in the present matter) impose "a cloak of confidentiality" to prevent disclosure of bid information that would "compromise the integrity of future auction processes." See Order Denying the Retail Energy Supply Association's Motion to Compel entered Mar. 16, 2012, p. 6; see also *id.*, pp. 3-8.

For its part, the OCA counters PECO's "cloak of confidentiality" argument with regard to bid information by pointing out that in the *DSP II Order*, the Commission approved PECO's plan to provide the OCA with a redacted copy of the NERA Final Reports during the DSP II term. Motion ¶ 34(c), referencing *Petition of PECO Energy for Approval of Its Default Service Program II*, Docket No. P-2012-2283641, Order (Oct. 12, 2012) ("*DPS II Order*"), at

44. According to the OCA, Section 69.1807(7) of the Commission’s guidelines for competitive bid solicitation processes and balancing of confidentiality with the public’s need to know did not prevent PECO from agreeing to provide the OCA with redacted copies of future NERA post-solicitation reports, nor prevent the Commission from approving in the *PECO DSP II Order* that sharing of information with the OCA.

In turn, PECO attempts to distinguish the *PECO DSP II Order* from the *FE-PA Order* by pointing out that in the former Order the sharing of the redacted Final Reports for a two-year period was for the limited purpose of addressing the OCA’s concerns raised in that case about the impact the merger between PECO’s parent Exelon Corporation (“Exelon”) and Constellation Energy Corporation (“Constellation”) could have on the supply of default service due to the subsequent affiliation of PECO and Constellation. That is no longer the case. Answer 7-8.

It is undisputed that the RFP confidentiality protections give notice that protection of bidder specific information is not absolute but may be disclosed “if required by a federal, state, or local agency (including the Commission) or a court of competent jurisdiction.” Motion ¶ 24; PECO Objection, ¶ 4, *citing* PECO Exhibit KO-1, § VII.4.5. However, as shown by the two precedent cases brought forth by the parties, the determination of whether or not to pierce “the cloak of confidentiality” is made on a case-by-case basis and is based on the outcome of balancing the need for the information requested versus the need to protect the confidentiality of the process. In the case of OCA Set 2, Question 38, the determination depends on balancing OCA’s stated interest in “observing *the formats of the Reports over time and variations in the data*” versus the interest of the stakeholders (PECO, PECO DSP customers and bidders) in the uncompromised integrity of the auction process. See Motion ¶ 35. (*Emphasis added.*) Upon review of PECO’s Objection, OCA’s Motion to Compel, and PECO’s Answer to the Motion, we find that PECO has successfully carried its burden of showing that the latter interest outweighs the former and that the information requested in OCA Set 2, Question 38 is not discoverable.

With regard to that OCA Set 2, Question 23, Subpart (c), the OCA avers that its “focus is on determining whether the Commission’s determination to not approve the bid results

for seven tranches followed or differed from NERA’s recommendation as the Independent Evaluator for those specific solicitations.” See Motion ¶ 24 (a). As such, we find that PECO can satisfy its discovery obligations by providing that very information to OCA, i.e., by stating “whether the Commission’s determination to not approve the bid results for seven tranches followed or differed from NERA’s recommendation for those specific solicitations.” As for the documentation requested in OCA Set 2, Question 23, Subpart (d), the analysis provided in paragraph above regarding the balancing of interests dictates that only the public documentations are discoverable and should be produced by PECO to OCA.

THEREFORE,

IT IS ORDERED:

1. That the Objections of PECO Energy Company to OCA Set 2, Question 38 are sustained.
2. That the Office of Consumer Advocate’s Motion to Compel Responses to OCA Set 2, Question 38 is denied.
3. That the Objections of PECO Energy Company to OCA Set 2, Question 23, Subparts (c), and (e) are sustained, in part, and overruled, in part, consistent with the discussion above.
4. That the Office of Consumer Advocate’s Motion to Compel Responses to OCA Set 2, Question 23, Subparts (c), and (e) are sustained, in part, and overruled, in part, consistent with the discussion above.

5. That PECO Energy Company shall answer OCA Set 2, Question 23, Subpart (c), by providing its own statement as to whether the Commission’s determination to not approve the bid results for seven tranches followed or differed from NERA’s recommendation for those specific solicitations.

6. That PECO Energy Company shall answer OCA Set 2, Question 23, Subpart (e) by providing only the public documentation requested.

7. That PECO Energy Company shall answer OCA Set 2, Question 23, Subparts (c) and (e) no later than Tuesday, April 30, 2024.

Dated: April 26, 2024

\_\_\_\_\_/s/  
Eranda Vero  
Administrative Law Judge

\_\_\_\_\_/s/  
Arlene Ashton  
Administrative Law Judge

**P-2024-3046008 - PETITION OF PECO ENERGY COMPANY  
FOR APPROVAL OF IT'S DEFAULT SERVICE PROGRAM FOR THE PERIOD OF  
JUNE 1, 2025, THROUGH MAY 31, 2029**

*Revised 3.15.2024*

KENNETH M KULAK ESQUIRE  
BROOKE E MCGLINN ESQUIRE  
MAGGIE CURRAN ESQUIRE  
MORGAN LEWIS & BOCKIUS LLP  
1701 MARKET STREET  
PHILADELPHIA PA 19103-2921  
**215.963.5404**  
**215.963.5384**  
[bmcglinn@morganlewis.com](mailto:bmcglinn@morganlewis.com)  
[kkulak@morganlewis.com](mailto:kkulak@morganlewis.com)  
[maggie.curran@morganlewis.com](mailto:maggie.curran@morganlewis.com) Accepts eService  
*(Counsel for PECO)*

BRANDON PIERCE ESQUIRE  
ADESOLA ADEGBESAN ESQUIRE  
JACK GARFINKLE ESQUIRE  
PECO ENERGY COMPANY  
2301 MARKET STREET S23-1  
PHILADELPHIA PA 19103  
**267.533.0387**  
**267.533.2126**  
[adesola.adegbesan@exeloncorp.com](mailto:adesola.adegbesan@exeloncorp.com)  
[Brandon.Pierce@exeloncorp.com](mailto:Brandon.Pierce@exeloncorp.com)  
[Jack.Garfinkle@exeloncorp.com](mailto:Jack.Garfinkle@exeloncorp.com)  
Accepts eService  
*(Counsel for PECO)*

CHARIS MINCAVAGE ESQUIRE  
ADEOLU A BAKARE ESQUIRE  
MCNEES WALLACE & NURICK  
100 PINE STREET  
PO BOX 1166  
HARRISBURG PA 17108  
**717.237.5437**  
**717.232.8000**  
**717.260.1744**  
[cmincavage@mwn.com](mailto:cmincavage@mwn.com)  
[abakare@mcneeslaw.com](mailto:abakare@mcneeslaw.com)  
Accepts eService  
(*Counsel for PAIEUG*)

REBECCA LYTTLE ESQUIRE  
STEVEN C GRAY ESQUIRE  
OFFICE OF SMALL BUSINESS ADVOCATE  
555 WALNUT STREET  
1ST FLOOR  
HARRISBURG PA 17101  
**717.783.2525**  
[relyttle@pa.gov](mailto:relyttle@pa.gov)  
[sgray@pa.gov](mailto:sgray@pa.gov)  
*Served via email and first class mail*

BARRETT SHERIDAN ESQUIRE  
ANDREW J ZERBY  
OFFICE OF CONSUMER ADVOCATE  
555 WALNUT STREET  
5TH FLOOR FORUM PLACE  
HARRISBURG PA 17101  
**717.783.5048**