



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF SMALL BUSINESS ADVOCATE

August 31, 2012

E-FILED

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

**Re: Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of Their Default Service Programs
Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, and P-2011-2273670**

Dear Secretary Chiavetta:

I am delivering for filing today via the e-file system the Petition for Reconsideration, on behalf of the Office of Small Business Advocate, in the above-captioned proceedings.

Two copies have been served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Daniel G. Asmus
Assistant Small Business Advocate
Attorney ID No. 83789

Enclosures

cc: Hon. Elizabeth H. Barnes

Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

JOINT PETITION OF METROPOLITAN	:	
EDISON COMPANY, PENNSYLVANIA	:	Docket Nos. P-2011-2273650
ELECTRIC COMPANY, PENNSYLVANIA	:	P-2011-2273668
POWER COMPANY AND WEST PENN	:	P-2011-2273669
POWER COMPANY FOR APPROVAL OF	:	P-2011-2273670
THEIR DEFAULT SERVICE PROGRAMS	:	

**PETITION FOR RECONSIDERATION
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

Pursuant to 52 Pa. Code §5.572, the Office of Small Business Advocate (“OSBA”) files this Petition for Reconsideration of the August 16, 2011, Order of the Pennsylvania Public Utility Commission (“Commission”) in the above-captioned proceeding and avers the following in support of the Petition:

I. Introduction

1. On November 17, 2011, Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”) and West Penn Power Company (“West Penn”) (collectively, “the Companies”) filed a Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of Their Default Service Programs (“Joint Petition”) with the Pennsylvania Public Utility Commission (“Commission”). The Joint Petition sought Commission approval of the Companies’ programs to supply electricity to default service customers for the period from June 1, 2013, through May 31, 2015.

2. On December 6, 2011, the Office of Small Business Advocate (“OSBA”) filed an Answer in the above-captioned proceeding in opposition to the Joint Petition.

3. Other active parties in this proceeding include the Commission’s Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Anthracite Region Independent Power Producers Association (“ARIPPA”), the York County Solid Waste and Refuse Authority (“YCSWRA”), Constellation NewEnergy, Inc. and Constellation Energy Commodities Group (“Constellation”), Exelon Generation Company, LLC. and Exelon Energy Company (“Exelon”), the Retail Energy Supply Association (“RESA”), Direct Energy Services, LLC (“Direct”), PECO Energy Company (“PECO”), CAUSE PA, First Energy Solutions Corp. (“FES”), Washington Gas Energy Company (“Washington Gas”), Dominion Retail, Inc. (“Dominion”) and the Met-Ed Industrial Users Group (“MEIUG”), the Penelec Industrial Customer Alliance (“PICA”), the Penn Power Users Group (“PPUG”), and the West Penn Power Industrial Intervenors (“WPPII”) (collectively, the “Industrial Intervenors”).

4 The OSBA filed the direct, rebuttal, and surrebuttal testimony of its witness, Robert D. Knecht.

5. After hearings were held on April 11-12, 2012, the parties filed Main Briefs on May 3, 2012, and Reply Briefs on May 16, 2012.

6. The presiding officer, Administrative Law Judge (“ALJ”) Elizabeth H. Barnes wrote a Recommended Decision (“RD”) which was issued by the Commission on June 15, 2012.

7. On August 16, 2012, the Commission entered its Opinion and Order in this matter.

8. By this Petition, the OSBA seeks reconsideration of the Commission's August 16, 2012, Opinion and Order.

II. Legal Requirements for Granting Reconsideration Under 52 Pa. Code §5.592.

9. In *Philip Duick et al. v. Pennsylvania Gas and Water Company*, Docket No. C-R0597001 (Order entered December 17, 1982), 1982 Pa. PUC LEXIS 4, 56 Pa. PUC 553 (1982), the Commission explained the basis for rescinding or amending a prior order:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. . . . What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Duick, 1982 Pa. PUC LEXIS 4, at *11-*13.

10. In *Pennsylvania Public Utility Commission v. Jackson Sewer Corporation*, 2001 Pa. PUC LEXIS 44, the Commission also stated:

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

Jackson Sewer, 2001 Pa. PUC LEXIS 44, at *6.

11. This Petition satisfies *Duick* and *Jackson Sewer*, in that the Petition raises issues “which appear to have been overlooked or not addressed by the Commission” and “alleges errors of law.”

III. Statement of the Case

12. The Commission has reviewed the state of the retail market for electricity in Pennsylvania and has issued a number of orders as a result of its extensive Investigation of Pennsylvania's Retail Electricity Market ("Retail Investigation").¹ In its Intermediate Work Plan Final Order of March 2, 2012, the Commission addressed the issue of retail opt-in auctions ("ROI Auctions") in which EGSs bid to provide competitive retail service to a group of customers within a specific EDC's service territory.

13. In the section of the Intermediate Work Plan Final Order which discussed the issue of customer eligibility for ROI Auctions, the Commission stated that (in its prior December 16, 2011, Tentative Order):

The Commission also recommended that small C&I customers not be included in the Retail Opt-in Auctions due to a lack of a standard small commercial definition across the state. Although the Commission's Customer Information Regulations provide a definition of "small business customer,"² this standard rarely, if ever, aligned with EDC commercial rate classifications. Additionally, most, if not all, small C&I customers are also residential consumers at their homes and would have the opportunity to participate in the Retail Opt-in Auctions as residential consumers. The Commission believed this would provide such customers a shopping experience that may encourage them to also shop for the generation supply for their business. In making such a recommendation, we requested that those parties who believed that small C&I customers should be eligible provide a proposed statewide definition for "small commercial customer" and provide an explanation as to how an EDC would identify such customers.³

¹ *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952, Order Entered October 14, 2011 ("Tentative Order") at 25-26; *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952, Order Entered December 16, 2011 ("Final Order") at 42-43; *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 Final Order Entered March 2, 2012 ("Intermediate Work Plan Final Order").

² *Small business customer* – The term refers to a person, sole proprietorship, partnership, corporation, association or other business entity that receives electric service under a small commercial, small industrial or small business classification and whose maximum registered peak load was less than 25kW within the last 12 months. See 52 Pa. Code § 54.2 (relating to definitions).

³ Intermediate Work Plan Final Order at 37-38.

14. In its resolution of the eligibility issue, the Commission stated:

The Commission recognizes the lack of shopping in the small C&I segment and, as such, requested comments on the inclusion of these customers in the Retail Opt-in Auctions. Parties were almost equally split between including and excluding small C&I customers. While the Commission agrees that shopping can be improved in this segment, it maintains its original proposal that small C&I customers should not be eligible to participate. Because there is no consistency across the EDCs in defining 'small commercial,' the Commission believes it would be inappropriate to include a segment of customers that may reflect a wide variation in electric load. The definitions vary across EDCs and, as such, do not produce comparable groups of customers when reviewing shopping offers and statistics.⁴

15. However, after the conclusion of the present default service proceeding, the Commission turned 180 degrees on this issue. The Commission's reasoning was not based upon the variable definition of the small commercial class, as was the stated rationale set forth above, but on the basis that over half of the customers with loads under 25kW were not shopping. This new basis for its decision was something that had already been noted and considered, but dismissed by the Commission in the Intermediate Work Plan Final Order.⁵

16. In the Opinion and Order entered on August 16, 2012, in this proceeding, the Commission stated:

Based upon our review and analysis of the evidence of record, we are persuaded by the arguments of RESA that the Companies Market Enhancement Programs should include small commercial customers as defined by RESA [loads up to 25kW]. While we recognize that this decision deviates from our conclusions in the *IWPF Order*, we find that RESA's position with regard to the relatively low levels of current shopping in the Companies service territories is compelling. In particular, the record indicates that over half of the small commercial customers in the Companies' service territories are not participating in the competitive market and the reasons for these customers not shopping are similar to those for residential customers.⁶

⁴ Intermediate Work Plan Final Order at 42.

⁵ *Id.*

⁶ August 16, 2012, Opinion and Order at 103-104.

17. The OSBA files this Petition for Reconsideration on the grounds that the Commission has made an error of law in changing its rationale for including or excluding small C&I customers from the ROI Auction, and that the Commission has overlooked its previously-stated rationale for excluding small C&I customers without giving any explanation, reasoning or analysis to support its change in position. The prior rationale is not even mentioned in the August 16, 2012, Opinion and Order.

IV. Argument

18. The Companies excluded small C&I customers from the opt-in auction when proposing their default service plans on November 17, 2011. Less than four months later, the Commission's Intermediate Work Plan Final Order quoted above affirmed the Companies' choice to exclude small C&I customers.

19. In stakeholders meetings and Comments during the process of the Retail Investigation the OSBA advocated that small C&I customers, the OSBA's constituents, be excluded from the retail opt-in auction.⁷ In the instant proceeding, the two proponents for the inclusion of small C&I customers were Direct Energy LLC ("Direct"), and the Retail Energy Supply Association ("RESA").⁸ The Commission's August 16, 2012, Opinion and Order, only addressed the arguments made by RESA.

20. The Commission accepted RESA's argument that the First Energy Companies had "very low levels of shopping" among small C&I customers.⁹ The Commission, as cited

⁷ See Comments on Behalf of the Office of Small Business Advocate, dated June 3, 2011; and Comments on the Tentative Order, on Behalf of the Office of Small Business Advocate, dated October 28, 2011, filed with the Commission at Docket No. I-2011-2237952.

⁸ See comments filed with the Commission on behalf of RESA and Direct at Docket No. I-2011-2237952.

⁹ August 16, 2012, Opinion and Order at 103; RESA Exceptions at 9.

above, appears to have established the criterion that if “over half” of small commercial customers are not shopping, the class should be included in the Market Enhancement Programs.

21. RESA stated:

Because the very low shopping experience in the First Energy territories combined with the structure of the auction calls into question whether the auctions are likely to be successful, the Commission should consider steps to enhance the chances that this effort will succeed. One way to do this is to expand the available base of customers to include those small business customers who are most like residential and who continue to receive default service in almost as great a number as residential customers.¹⁰

22. RESA goes on to point out that the small C&I “breakpoint” (at least for RESA’s purposes) is contained in the Commission’s regulations.¹¹ However, this argument misses the point.

23. The point is not whether the small C&I “breakpoint” of less than 25kW load is comparable to residential customers, as RESA argues. None of the First Energy Companies have a small business rate class that conforms to the under 25kW designation of the Commission’s regulations. In fact, the smallest of these four rate classes, that of Penn Power, has a maximum customer load size that is *twice* the maximum size for small C&I customers set forth in the Commission’s regulations. Met-Ed’s and Penelec’s small C&I rate classes have an upper bound that is *60 times* the maximum size stated in the Commission’s regulations.

24. Specifically, the four First Energy companies have the following characteristics for their smallest commercial rate classes:

Met-Ed	GS	loads up to 1,500kW
Penelec	GS	loads up to 1,500kW
Penn Power	GS	loads up to 50kW
West Penn	Rate 20	loads up to 100kW

¹⁰ RESA Main Brief at 57-58.

¹¹ RESA Main Brief at 58.

The smallest commercial class for West Penn does not have a specific upper size limit, but customers whose load is over 100kW would move up to Rate 30. These figures are derived from the current tariffs for each company on file with and approved by the Commission.

25. The Companies and others have stated that these wide variations in usage patterns would make it difficult to create homogeneous tranches for bidding purposes.¹²

26. In the August 16, 2012, Opinion and Order, the Commission ignores the argument of the Companies and others that the variations in usage patterns would create difficulties, even though the Commission had previously relied on this very argument in the Intermediate Work Plan Final Order and in the Intermediate Work Plan Tentative Order to reasonably exclude small C&I customers from the ROI Auction.¹³

27. Instead, the Commission now accepts RESA's "very low shopping" argument, even though it had previously considered but dismissed the same notion in deciding to exclude small C&I customers on the grounds of variability of load usage.¹⁴

28. Furthermore, nowhere in the August 16, 2012, Opinion and Order does the Commission offer an explanation for the reversal of its conclusion, nor does it explain why low shopping among small C&I customers was not a sufficient rationale to order the inclusion of small C&I in the ROI Auction in one instance (the Intermediate Work Plan Final Order), but is quite sufficient to include small C&I only five months later (the August 16, 2012, Opinion and Order).

¹² Met-Ed/Penelec/Penn Power/West Penn Statement No. 7-R at 19-20.

¹³ Intermediate Work Plan Final Order at 42.

¹⁴ August 16, 2012, Opinion and Order at 103-104.

29. Parties were making the same argument (low shopping) in favor of small C&I inclusion in the auctions throughout the Intermediate Work Plan proceeding, and the argument was not deemed persuasive by the Commission.¹⁵ Now, although nothing has changed, although no relevant events have intervened, although the small C&I shopping statistics indicate that even the smallest C&I customers have much higher shopping rates than residential customers and are generally increasing their shopping with time (*see* OSBA cross-examination Exhibit No. 1, OSBA Reply Brief at 14), the same low shopping argument previously rejected by the Commission is made by RESA and this time it somehow *is* persuasive to the Commission.

30. The Commission has made an error of law in completely reversing its position on inclusion of small C&I customers in the ROI Auction without providing an explanation, reasoning or analysis to support the change. The Commission should be consistent and conclude that small C&I customers should not be included in the ROI Auction, and to that extent, should reconsider its August 16, 2012, Opinion and Order.

31. Furthermore, the Commission has made a mistake in the wording of its Opinion and Order on this matter, when it adopted RESA's Exceptions "by directing the Companies to include commercial customers [this wording does not limit the size of customer] in the Market Enhancement Programs and reject the ALJ's recommendation."¹⁶ Even if the Commission denies the OSBA's Petition for Reconsideration, it should clarify that the inclusion of commercial customers in the Market Enhancement Programs is limited to those specifically identified elsewhere by RESA and the Commission, that is, to those commercial customers with loads under 25kW.

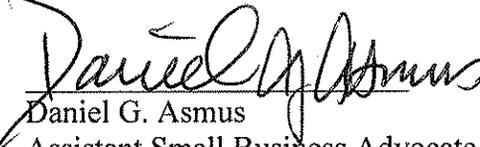
¹⁵ *Id.*

¹⁶ August 16, 2012, Opinion and Order at 104.

WHEREFORE, the OSBA respectfully requests that the Commission:

- a. Reverse its decision that directs the inclusion of small C&I customers in the Retail Opt-in Auction; or, if the Commission declines to reconsider that decision;
- b. Clarify that any inclusion of small commercial and industrial customers in the Market Enhancement Programs is limited to those customers with a load profile under 25kW; and
- c. Provide an explanation, rationale and reasoning for its reversal of position regarding the inclusion of small C&I customers in the ROI Auction.

Respectfully submitted,


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Dated: August 31, 2012

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Petition of Metropolitan Edison Company, :	Docket Nos. P-2011-2273650
Pennsylvania Electric Company, Pennsylvania :	P-2011-2273668
Power Company, and West Penn Power :	P-2011-2273669
Company for Approval of Their Default Service :	P-2011-2273670
Programs :	

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Petition for Reconsideration, on behalf of the Office of Small Business Advocate, by e-filing, e-mail, and/or first-class mail (unless otherwise noted) upon the persons addressed below:

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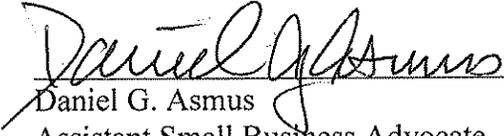
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