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DEC 27 2012

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

December 27, 2012

VIA OVERNIGHT DELIVERY

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company for Approval of Its Default Service Program
Docket No. P-2012-2283641

Dear Secretary Chiavetta:

Enclosed for filing is the **Answer of PECO Energy Company to the Retail Energy Supply Association's Petition for Reconsideration *Nunc Pro Tunc* or for Amendment of the Commission's Opinion and Order of October 12, 2012** in the above-captioned proceeding ("the Answer").

As indicated on the attached Certificate of Service, copies of this letter and the Answer are being served on the Administrative Law Judge and all parties of record.

Sincerely,



Thomas P. Gadsden

TPG/tp
Enclosures

c: Per Certificate of Service

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

December 27, 2012

**VIA ELECTRONIC AND
FIRST CLASS MAIL**

Edward Lanza
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
P.O. Box 1248
Harrisburg, PA 17101

**Re: Petition of PECO Energy Company for Approval of Its Default Service Program
Docket No. P-2012-2283641**

Dear Mr. Lanza:

Enclosed please find the **Answer of PECO Energy Company to the Retail Energy Supply Association's Petition for Reconsideration *Nunc Pro Tunc* or for Amendment of the Commission's Opinion and Order of October 12, 2012** in the above-captioned proceeding.

Sincerely,



Thomas P. Gadsden

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF PECO ENERGY COMPANY :
FOR APPROVAL OF ITS DEFAULT : DOCKET NO. P-2012-2283641
SERVICE PROGRAM :

ANSWER OF PECO ENERGY COMPANY TO
THE RETAIL ENERGY SUPPLY ASSOCIATION'S PETITION
FOR RECONSIDERATION *NUNC PRO TUNC* OR FOR AMENDMENT OF THE
COMMISSION'S OPINION AND ORDER OF OCTOBER 12, 2012

I. INTRODUCTION AND OVERVIEW

Pursuant to 52 Pa. Code § 5.572(e), PECO Energy Company ("PECO" or the "Company") hereby answers the above-docketed petition ("Petition") filed on December 17, 2012 by the Retail Energy Supply Association ("RESA") in which RESA seeks "clarification" of the Pennsylvania Public Utility Commission's (the "Commission") October 12, 2012 Opinion and Order approving PECO's Default Service Program for the period June 1, 2013 to May 31, 2015 ("DSP II"), with several revisions ("PECO DSP II Order").¹ By that Order, the Commission also directed PECO to submit new proposals, in collaboration with electric generation suppliers ("EGSs") and other interested parties, addressing several Retail Market Enhancement Program ("RME Program") issues.

PECO's DSP II proposed a variety of retail market enhancements in accordance with the orders of the Commission in its Investigation of Pennsylvania's Retail Electricity Market (the

¹ In response to petitions filed by the Company and CAUSE-PA, the PECO DSP II Order was clarified by a subsequent Commission Order (the "Clarification Order") entered on November 21, 2012 : (1) permitting PECO's default service procurement to proceed; (2) allowing proposals regarding Retail Market Enhancement ("RME") Program form agreements to be filed on December 11, 2012; (3) clarifying that parties should consider the possibility that customers as well as electric generation suppliers ("EGSs") may be responsible for some RME Program costs; and (4) clarifying that EGSs must file the terms and conditions for their eight-month EGS Opt-In Competitive Offer Program product at least forty-five days before the offers for that eight-month product are made to customers. See Clarification Order, pp. 15, 32-33.

“Retail Markets Investigation”).² The RME Programs proposed by PECO included an EGS Opt-In Competitive Offer Program (“Opt-In Program”) and an EGS Standard Offer Program (“Standard Offer Program”). RESA’s Petition seeks “clarification” or “amendment” of one RME Program issue, namely, whether small commercial customers with annual peak loads less than 25 kW (“Small Business Customers”) should be eligible to participate in PECO’s EGS Standard Offer Program.³

Consistent with the Commission’s guidelines as set forth in the *Intermediate Work Plan Order*, PECO proposed to limit customer eligibility for the Standard Offer Program to residential default service customers. To that end, participating EGSs would have the opportunity to submit applications to provide fixed-price electric generation service to residential customers for twelve monthly billing cycle periods, on a month-by-month basis beginning approximately three weeks after the application is submitted. *See id.*, pp. 108-109. The Commission did not grant RESA’s Exception with respect to the inclusion of Small Business Customers in the Standard Offer Program. *See id.*, pp. 85-86, 109.

On November 27, 2012 and December 3, 2012, PECO convened collaborative meetings with interested parties to discuss the RME Program issues assigned by the PECO DSP II Order and held additional collaborative discussions on December 6, 2012. In the course of these collaboratives RESA asserted that the PECO DSP II Order required the Company to include

² These orders include *Investigation of Pennsylvania’s Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952 (Order entered December 16, 2011) (“*Default Service Recommendations Order*”) and *Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan* (Order entered March 2, 2012) (“*Intermediate Work Plan Order*”).

³ Under PECO’s initially proposed Opt-In Program, EGSs would bid in response to a one-time request for proposals (“RFP”), conducted during the first quarter of 2013, to provide competitive retail service to up to 50% of PECO’s residential default service customers at a fixed-price that is at least 5% below the applicable Price-to-Compare (“PTC”) for the quarterly period beginning June 1, 2013. *See* PECO DSP II Order, pp. 78-79. In the PECO DSP II Order, the Commission granted, in part, the Exception of RESA and directed the Company to include Small Business Customers in the Opt-In Program. *Id.*, pp. 85-86.

certain Small Business Customers in its revised proposals for *both* the Opt-In and Standard Offer Programs. On December 11, 2012, PECO filed its Revised Default Service Plan (“Revised Plan”) to incorporate the revisions set forth in the PECO DSP II Order. Consistent with the PECO DSP II Order (p. 109), PECO’s Standard Offer Program will be targeted at residential default service customers, but would be open to residential shopping customers as well. Revised Plan, Exhibit E, ¶¶ 1.1, 4.1. As directed by the Commission, PECO is working with the Office of Competitive Market Oversight regarding the extent to which Customer Assistance Program customers will be permitted to participate in the Standard Offer Program. Revised Plan, p. 2.

RESA’s Petition requests that the Commission reverse its decision approving PECO’s proposed Standard Offer Program eligibility rules and “clarify” the PECO DSP II Order to explicitly direct PECO to extend the Company’s revised Standard Offer Program to Small Business Customers. As set forth herein, RESA’s position is without merit because (1) the Petition is untimely; (2) RESA has pointed to no record evidence that supports extending the Commission’s rationale for including Small Business Customers in the one-time Opt-In Program to the Standard Offer Program; and (3) granting the Petition could delay implementation of the Standard Offer Program for residential customers. For these reasons, PECO respectfully requests that the Commission deny RESA’s Petition.

II. SUMMARY OF POSITION

Throughout this proceeding, PECO’s Standard Offer Program proposal has consistently been limited to residential customers in accordance with the Commission’s directives in the *Intermediate Work Plan Order* (p. 31). Indeed, RESA raised this issue, for the first time, in a passing reference in its Reply Brief (p. 30) discussing the customer eligibility rules for the Opt-In Program. RESA subsequently raised its claim that Small Business Customers should be included

in both the Opt-In and Standard Offer Programs on exception, which PECO opposed. PECO now opposes RESA's Petition on several grounds.

A. RESA's Petition is Untimely

As a threshold matter, RESA's Petition should be denied as untimely. At Paragraph 10 of its Petition (p. 10), RESA claims that it assumed that Small Business Customers were to be included in the Standard Offer Program, even though the Commission did not direct the Company to expand the program's eligibility rules to target Small Business Customers in the PECO DSP II Order. Simply put, RESA's interpretation is not supported by the PECO DSP II Order. To the contrary, while the Commission acknowledged that RESA's Exception regarding the eligibility of Small Business customers was directed to both the Opt-In and Standard Offer Programs, PECO DSP II Order, p. 83 n. 15, it granted that Exception only with respect to the Opt-In Program:

On review, we shall grant RESA's Exception [No. 8] with respect to the inclusion of small commercial customers in the *Opt-In Program*.

Id., p. 86 (emphasis added).

In support of its Petition, RESA points to the Commission's note on page 83 of the PECO DSP II Order in the summary of the positions regarding Opt-In Program customer eligibility that it would later address RESA's Exception as it applied to the Standard Offer Program. RESA then jumps to the conclusion that the Commission should clarify its decision regarding Standard Offer Program customer eligibility rules because it did not explicitly reject RESA's proposal to include Small Business Customers in the Standard Offer Program. Petition, ¶23 (pp. 8-9). As the Commission recognized, however, it is not required to discuss expressly, or at length, every contention by a non-prevailing party. *See, e.g., UGI Corp. v. Pa. P.U.C.*, 410 A.2d 923, 935 (Pa. Cmwlth. 1980). The Commission's silence on the issue in the PECO DSP II Order demonstrates

the Commission's rejection of RESA's argument that Small Business Customers should also be allowed to participate in the Standard Offer Program. RESA's proper course was to seek reconsideration and clarification of the language it now asserts creates ambiguity regarding the Commission's intended disposition of the Standard Offer Program customer eligibility issue in accordance with the Commission's regulations at 52 Pa. Code § 5.572(c). Instead, it seeks untimely relief after the conclusion of the RME Program collaborative ordered by the Commission.

Similarly, the Commission should deny RESA's request to treat its untimely Petition as a request to amend the PECO DSP II Order under Section 703(g) of the Public Utility Code with a period for "comment" based on the existing record. The truncated process suggested by RESA is not sufficient to fully address the factual issues that RESA chose not to pursue in testimony or hearings. For example, the parties have not had the opportunity to present evidence to rebut RESA's arguments that extending the Standard Offer Program to Small Business Customers would, *inter alia*, improve small commercial customer shopping levels in PECO's service territory, minimize EGS "participation" costs, and avoid customer confusion. See Petition, ¶¶16-25 (pp. 6-9). Accordingly, RESA's erroneous interpretation of the PECO DSP II Order does not provide any valid basis for the Commission to waive its regulations and consider RESA's out-of-time Petition.

B. The Commission's Rationale for Including Small Business Customers In the Opt-In Program Does Not Apply to the Standard Offer Program

At Paragraphs 15-19 of its Petition (pp. 6-8), RESA reviews the Commission's rationale for directing PECO to include Small Business Customers in its revised proposal for the Opt-In Program and the Commission's decision to include small commercial customers in the referral program proposed by the FirstEnergy electric distribution companies ("EDCs") in their default

service proceedings. According to RESA, the Commission based its decision to grant RESA's Exception with respect to inclusion of Small Business Customers in the Opt-In Program entirely on the "relatively low" shopping levels for that customer class. *See* Petition, ¶16 (p. 6). However, the Commission also concluded that the record evidence did not demonstrate the administrative complexity produced by including Small Business Customers was insurmountable for the *one-time* Opt-In Program. PECO DSP II Order, p. 86.

As PECO's testimony in this proceeding made clear, PECO's Small Business Customers are not homogenous. *See* PECO St. No. 2-R, pp. 15-16. Therefore, extending the Standard Offer Program to these customers would add considerable complexity because different offers with different prices would have to be designed, solicited and marketed to different customers each Standard Offer month. Indeed, the Commission agreed with PECO that expanding the scope of customer eligibility for the Opt-In Program would add complexity. PECO DSP II Order, p. 86. While PECO acknowledges that the Commission has permitted these customers to be included in the Opt-In Program and has also directed the inclusion of small commercial customers in the Standard Offer Program of other EDCs, the record in this case does not provide a basis for presuming that the Standard Offer Program is appropriate for the diverse range of PECO's Small Business Customers.

C. Extending Standard Offer Program Eligibility to Small Business Customers Could Delay Program Implementation for Residential Customers

Finally, PECO is concerned that inclusion of Small Business Customers in the Standard Offer Program could delay program implementation for residential customers. RESA shares this concern and suggests that it would be reasonable for PECO to implement the program for Small Business Customers after implementation for residential customers. Petition, ¶21 (p. 8). In the event the Commission decides that Small Business Customers should be included in the Standard

Offer Program, PECO believes that the inclusion of these customers should be delayed until after program implementation for residential customers. This is particularly appropriate in light of the continuing dispute regarding cost recovery for this program, and the fact that RESA's introduction of this argument after the close of the record precluded PECO from offering evidence regarding its expectation that inclusion of Small Business Customers could increase Standard Offer Program costs.

III. RESPONSES TO INDIVIDUALLY-NUMBERED PARAGRAPHS

Background

1.-3. Denied as stated. Paragraphs Nos. 1 through 3 of the Petition purport to set forth the history of this proceeding. A complete procedural history and the relevant background information are set forth in PECO's Initial Brief and the Revised Plan, which are incorporated herein by reference.

4.-5. Admitted.

6. Denied. It is denied that RESA "has consistently advocated" for inclusion of Small Business Customers in the RME Programs proposed by PECO and other Pennsylvania EDCs. To the contrary, the earliest occurrence RESA points to for its argument for inclusion of those customers in PECO's Standard Offer Program is its Reply Brief. As a consequence, none of RESA's issues and arguments with respect to PECO's proposed eligibility rules for the Standard Offer Program is in the record either as testimony or any other form of evidence, even though RESA had full opportunity to raise its concerns in these proceedings. By repeating non-record factual assertions improperly presented for the first time in its Reply Brief, RESA has prejudiced PECO and other parties by foreclosing any opportunity to present evidence in response, contrary to Section 504 of Pennsylvania's Administrative Agency Law and the

Commission's regulations at 52 Pa. Code § 5.431(b).⁴ Accordingly, the position and argument advanced by RESA regarding inclusion of Small Business Customers in the Standard Offer Program must be disregarded and cannot provide a basis for reversing the Commission's approval of the Standard Offer Program eligibility rules in the PECO DSP II Order.

7. Denied as stated. To the extent that the allegations contained in Paragraph 7 refer to the contents of the PECO DSP II Order, which is a written document that speaks for itself, PECO denies RESA's characterization of the PECO DSP II Order.

8. Denied as stated. As explained previously, RESA did not introduce any evidence proposing that Small Business Customers be eligible to participate in the Standard Offer Program. In addition, RESA did not advocate for inclusion of those customers in the Standard Offer Program in its Main Brief.

9. Denied as stated. To the extent that the allegations contained in Paragraph 9 refer to the contents of the PECO DSP II Order, which is a written document that speaks for itself, PECO denies RESA's characterization of the PECO DSP II Order.

10. Admitted in part, denied in part. It is admitted only that the Commission directed PECO to include Small Business Customers in its Opt-In Program. It is specifically denied that RESA's interpretation of the PECO DSP II Order is "rational". In deciding this issue, the Commission was well aware of RESA's argument to include Small Business Customers in PECO's RME Programs, yet it only granted RESA's Exception on that issue with respect to the Opt-In Program. PECO also denies RESA's averments concerning the Commission's decision in the FirstEnergy EDCs' default service proceedings to the extent those

⁴ See, e.g., *Kowenhoven v. County of Allegheny*, 901 A.2d 1003, 1010 (Pa. 2006); *Equitable Gas Co. v. Pa. P.U.C.*, 405 A.2d 1055, 1059 (Pa. Cmwlth. 1979); *United Natural Gas Co. v. Pa. P.U.C.*, 33 A.2d 752, 758 (Pa. Super. 1943) ("None of these figures appear in the record . . . No opportunity was afforded appellant to dispute or discuss them or show their inapplicability to the question.").

averments state or suggest that the Commission's decision in that case supports RESA's interpretation of the PECO DSP II Order.

11. Admitted in part, denied in part. It is admitted only that PECO's proposal for the Standard Offer Program included in the Revised Plan is limited to targeting residential default service customers consistent with the Commission's guidance in the *Intermediate Work Plan Order*. RESA's characterization of other parties' interpretations of the PECO DSP II Order is denied. As explained above, the Commission did not direct the Company to expand the Standard Offer Program's customer eligibility rules to target Small Business Customers in the PECO DSP II Order or grant RESA's Exception on this issue.

12. Denied. It is denied that the Commission's "stated position" is that Small Business Customers must be eligible for all EDCs' RME Programs, including PECO's Standard Offer Program and New/Moving Customer Referral Program. To the contrary, the Commission only held that PECO's Opt-In Program eligibility rules should be expanded to Small Business Customers. The Commission made no similar finding that those customers should be included in the Standard Offer Program or any other RME Program proposed by PECO. The remaining averments of Paragraph 12 state a conclusion of law to which no response is required.

Basis for Petition

13. Admitted in part, denied in part. RESA's acknowledgement of the lateness of its Petition is admitted. RESA cites portions of the Commission's regulations at 52 Pa. Code § 1.2(c) that permit the Commission to waive its regulations under specified circumstances. It is denied that RESA's erroneous interpretation of the PECO DSP II Order and assumptions regarding the positions of other parties regarding eligibility for PECO's Standard Offer Program justify waiver of the requirements of the Commission's regulations at 52 Pa. Code § 5.572(c). Moreover, RESA's contrary interpretation of the PECO DSP II Order cannot allay or mitigate

the potentially prejudicial effect of permitting it to seek reconsideration of the Commission's approval of the Standard Offer Program's eligibility rules for the reasons explained in Paragraph 6, *supra*.

14. Admitted in part, denied in part. It is admitted that all parties, including RESA, have had an opportunity to advocate their respective positions in this proceeding. However, RESA chose not to avail itself of that opportunity to argue for inclusion of Small Business Customers in the Standard Offer Program in addition to the Opt-In Program. PECO denies RESA's averments concerning other parties' interpretations of the PECO DSP II Order to the extent those averments suggest that the Commission's approval of PECO's proposal to target residential default service customers should be reconsidered, clarified or revised.

15. Denied. It is denied that granting RESA's Petition would be consistent with the Commission's decision to expand the eligibility rules for PECO's Opt-In Program to include Small Business Customers. As explained in Section II and Paragraph 6 above, this holding was supported by record evidence. By contrast, RESA chose not to present any testimony or other evidence regarding Small Business Customer participation in the Standard Offer Program.

16. Denied as stated. RESA's characterization of the Commission's rationale for including Small Business Customers in the Opt-In Program is denied because the PECO DSP II Order is a written document that speaks for itself. It is denied that the Commission's rationale as stated in the PECO DSP II Order "applies relative to Small Business Customers" in connection with the Standard Offer Program. As explained in Section II and Paragraph 6 above, the record in this case does not provide a basis for presuming that the Standard Offer Program is appropriate for PECO's Small Business Customers.

17. Denied. RESA quotes portions of two orders in the FirstEnergy EDCs' default service proceedings that directed those EDCs to include Small Business Customers in their proposed customer referral programs.⁵ It is denied that the holding in the FirstEnergy case is applicable here, as RESA contends. There, RESA offered testimony, prior to the close of the record, supporting inclusion of Small Business Customers in the FirstEnergy EDCs' proposed customer referral programs. In contrast, RESA chose not to do so here. The FirstEnergy proceedings are also distinguishable since the Commission expressly directed the FirstEnergy EDCs to include Small Business Customers in their proposed RME Programs, which included customer referral programs similar to the Standard Offer Program. Order and Opinion, *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-2011-2273659, *et al.* (entered Aug. 16, 2012), p. 103. PECO also denies RESA's averment that granting its Petition would be consistent with the Commission's guidance in the *Intermediate Work Plan Order*. To the contrary, RESA's Petition directly conflicts with the Commission's recommendation that standard offer customer referral programs target and market to residential default service customers. *Intermediate Work Plan Order*, p. 31.

18. Denied. It is denied that allowing Small Business Customers to participate in all RME Programs for all Pennsylvania EDCs "should be less confusing" for customers because they will not need to evaluate their eligibility on a "territory-by-territory" basis. RESA has presented no record evidence supporting this conclusion.

19. Denied. It is denied that including Small Business Customers in all of PECO's proposed RME Programs "is more likely to lead to greater levels of shopping within this

⁵ (Add cite.)

customer segment” than limiting eligibility exclusively to the Opt-In Program. RESA has presented no record evidence supporting this conclusion.

20-21. Denied. As an alternative to reconsidering and/or clarifying the PECO DSP II Order to direct PECO to include Small Business Customers in the Standard Offer Program, RESA requests that the Commission amend the PECO DSP II Order, after a notice and comment process, pursuant to Section 703(g) of the Public Utility Code. RESA’s alternative request should also be denied for the reasons set forth in Sections I.A and Paragraph No. 6, *supra*.

22. Paragraph 22 of the Petition states a conclusion of law to which no response is required.

23. Denied. For the reasons discussed in Section II.A, *supra*, it is denied that the Commission’s failure to include language directing PECO to extend the Standard Offer Program to Small Business Customers was an “apparent oversight” that justifies amendment or revision of the PECO DSP II Order.

24. Admitted in part, denied in part. It is admitted that the Petition is limited to the issue of participation of Small Business Customers in the Standard Offer Program. For the reasons set forth in Section II.B and paragraph 17, *supra*, it is denied that “clarity regarding this limited issue” is appropriate. By way of further answer, RESA has presented no record evidence supporting this conclusion.

25. Denied. It is denied that amending the PECO DSP II Order to include Small Business Customers “will serve to minimize EGS[] participation costs and confusion.” RESA has presented no record evidence supporting this conclusion. PECO also denies the averment that the Commission intended to extend RME Programs to residential and small commercial customers on a statewide basis. To the contrary, in the *Intermediate Work Plan Order* (p. 31),

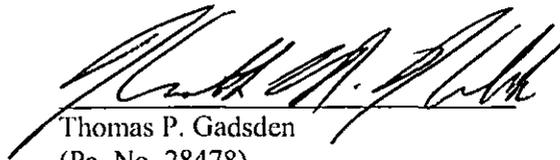
the Commission directed EDCs to design standard offer customer referral programs to target residential default service customers.

26. Admitted in part, denied in part. It is admitted that PECO requested approval of its Revised Plan no later than January 24, 2013. It is denied that this request compels the Commission “to act quickly to amend” the PECO DSP II Order.

27. Denied for the reasons set forth in Section II and Paragraphs 6 and 17, *supra*.

For all of the reasons set forth above, the Commission should deny RESA’s Petition for Reconsideration *Nunc Pro Tunc* or for Amendment of the Commission’s Opinion and Order of October 12, 2012.

Respectfully submitted,



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Dated: December 27, 2012

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITION OF PECO ENERGY COMPANY :
FOR APPROVAL OF ITS DEFAULT : **DOCKET NO. P-2012-2283641**
SERVICE PROGRAM :

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served copies of the **Answer of PECO Energy Company to the Retail Energy Supply Association's Petition for Reconsideration Nunc Pro Tunc** or for Amendment of the Commission's Opinion and Order of October 12, 2012 on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54.

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

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