**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for :

Approval of Its Default Service Program for : P-2020-3019290

the Period From June 1, 2021 Through :

May 31, 2025 :

**ORDER REGARDING PECO ENERGY COMPANY’S MOTION TO COMPEL**

On June 16, 2020, NRG Energy, Inc., Direct Energy Services LLC, Interstate Gas Supply, Inc. d/b/a IGS Energy, Vistra Energy Corp., Shipley Choice LLC, ENGIE Resources LLC and WGL Energy Services, Inc. (collectively, the “Electric Supplier Coalition” or “Coalition” or “ESC”) served the direct testimony of its witness Travis Kavulla, who presented a review of whether PECO’s DSP V Plan is consistent with the development of the competitive retail market.

On June 19, 2020, PECO served Interrogatories, Set I, on ESC. On June 24, ESC served Objections to PECO’s Interrogatories, Set I, Nos. 2, 4, 5 and 6, which read:

PECO-ESC-I-2. Reference ESC Statement No. 1, p. 6, lines 10-12. For the members of the Electric Supplier Coalition in aggregate, please provide the following data for each of the last five full years by customer procurement group (Residential, Small Commercial, Large Commercial and Industrial):

* 1. Total sales in aggregate in MWH in PECO's service area.
  2. Total sales revenues in aggregate in dollars in PECO's service area.

PECO-ESC-I-4. Reference ESC Statement No. 1, p. 8, line 22 to page 9, line 1. For each member of the Electric Supplier Coalition, please provide:

* 1. The number of residential customers in PECO's service area served by that supplier as of June 1, 2020.
  2. The percentage of residential customers in PECO's service area served by that supplier who are paying a price for electric generation service greater than PECO's Price-to-Compare in effect as of June 1, 2020.

PECO-ESC-I-5. Reference ESC Statement No. 1, p. 6, lines 10-12. Please provide a list of any actions filed at the Commission or in court in the past 10 years against members of the Electric Suppliers Coalition, or an EGS owned by or affiliated with a member of the Electric Suppliers Coalition, where the Plaintiff claims that a retail electric and/or natural gas supplier operating in a state with retail access charged more than the local utility default service rates. Please identify the name of the case, jurisdiction, docket number, and its current status.

PECO-ESC-I-6. Reference ESC Statement No. 1, p. 8, lines 14-16, where Mr. Kavulla states, "The Wind Solar Alliance Report focuses on one negative consequence, namely the lack of long-term contracts that are signed to supply customers in Pennsylvania and other states that have a similar, domineering DSP." Have the Electric Suppliers Coalition members signed long-term contracts (10 years or longer) for Alternative Energy Credits with Large Commercial and Industrial Customers in PECO's service territory? If so, provide the total MWH of Alternative Energy Credits supplied in aggregate under those contracts in PECO's service territory for each of the last five full years.

ESC objects to the interrogatories listed above on the grounds that they seek information that is both irrelevant and privileged.

On June 26, 2020, PECO filed a Motion to Dismiss Objections and Compel Answers to Interrogatories, Set I, Nos. 2, 4, 5 and 6 (Motion to Compel or Motion). In its Motion, PECO argues that the information sought through the interrogatories in question is relevant given that Mr. Kavulla’s testimony proposes “structural changes” to the existing statutory default service framework, including removal of PECO as the default service provider. PECO’s Motion to Compel, at 3-4, citing ESC St. No. 1, at. 6-14. PECO points out that Mr. Kavulla avers that the retail electricity market in the Commonwealth is “stagnant”and further asserts that “in the presence of a dominant DSP, the EGS market is designed primarily to consist of shorter-run arrangements that undercut the DSP.” *Id.* In addition, Mr. Kavulla opposes PECO’s procurement of long-term solar contracts, in part because he believes that such contracts will hamper the willingness and ability of EGSs to undertake similar contracts and solar projects. *Id.* PECO argues that the information sough is directly relevant to the Commission’s evaluation of Mr. Kavulla’s testimony and ESC’s position in this case.

With regard to ESC’s claim that the information sought could be “highly sensitive commercial information,” PECO agreed to amend PECO-ESC-I-4 to seek information in aggregate form and points out that the provisions of the Protective Order entered in this proceeding provide special “highly confidential” protection for information among the parties.

On June 29, 2020, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (together, TURN *et al*.) filed a Joint Answer of in Support of PECO’s Motion to Compel.

On June 29, 2020, ESC filed its Answer to PECO’s Motion wherein it reiterated its objections on the grounds of relevancy and privilege. ESC further added that Interrogatories, Set I, Nos. 2, 4, 5 and 6 deprive ESC of its due process rights in this proceeding by asking ESC member to divulge details about their business practices. ESC Answer, at 2 and 5.

The Commission’s Rules of Administrative Practice and Procedure at 52 Pa. Code §5.321 permit a broad scope of discovery:

(c) Scope. Subject to this subchapter, **a party may obtain discovery regarding any mater, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party**, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter It is not ground for objection that the information sought will be inadmissible at hearing if the information sought is reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c). (Emphasis added).

Upon careful review of the Objections, Motion to Compel and Answers, I find ESC’s objections to PECO Interrogatories, Set I, Nos. 2, 4, 5 and 6 without merit. PECO-ESC-1-2 seeks aggregated data for ESC members regarding their total sales (in MWh) and sales revenue in PECO’s service territory over the last five years for the same customer groups for which PECO proposes to procure default generation service in DSP V. This information is relevant in assessing the extent to which ESC members can expand their business under the DSP program components that PECO is proposing to continue in DSP V.

Next, PECO ESC-I-4 requests that ESC provide aggregate information as to the total number of customers that ESC members serve in PECO’s service territory, and the aggregate percentage of those customers who are charged more than PECO’s PTC for generation service by ESC members. This data will permit PECO to assess whether Mr. Kavulla’s assertion that EGSs must primarily “undercut” PECO’s PTC under DSP IV, or whether EGSs are able to charge higher prices. Because the price that suppliers charge above or below the PTC may also be at issue in other proceedings, PECO ESC-I-5 requests ESC to list any proceedings in which ESC member pricing above the price charged by a local utility has been asserted.

Lastly, the information requested in PECO-ESC-I-6 is relevant to Mr. Kavulla’s opposition to PECO’s proposed solar proposal on the grounds that EGSs are unwilling to enter into long-term renewable energy contracts if an EDC is entering into such contracts to meet a portion of AEPS requirements[[1]](#footnote-1) as default service provider.

In its discovery request, PECO properly linked the information sought in each interrogatory to the corresponding portion of ESC’S testimony. Arguing, as ESC does, that the information sought in these four interrogatories is irrelevant to the subject matter of this case is tantamount to claiming that specific portions of Mr. Kavulla’s direct testimony on behalf of ESC are irrelevant to the matter at hand. Similarly, Mr. Kavulla is ESC’s witness in this matter (potentially, its sole witness in this case). See ESC Prehearing Memorandum at 2. He was selected by ESC to clarify and support its position in this case through his testimony. Consequently, ESC’s arguments for the separation of his statements and conclusions from the reality of ESC’s business practices are counterintuitive and faulty at best. See ESC’s Answer at 7.

Furthermore, ESC’s argument that PECO’s discovery request amounts to a violation of due process rights is without merit. See ESC’s Answer at 9-10. ESC and any other EGSs that participate in proceedings before the Commission have the same rights and obligations as any other party in terms of discovery and due process. Just as the ESC has the fundamental due process right to present its views on how PECO’s DSP V Plan stacks up against the requirements of the Competition Act, so does PECO have a due process right to seek information from ESC to assess the validity of Mr. Kavulla’s assertions.

With regard to ESC’s objections to PECO Interrogatories, Set I, Nos. 2, 4, 5 and 6 on the basis of privilege, I find that PECO ESC-I-5 seeks information that is already in the public domain, whereas PECO ESC-I-2, 4 (as later modified by PECO) and 6 seek information in aggregate form. ESC is concerned that aggregation will be insufficient in masking commercially sensitive data, the divulging of which could be harmful to its members’ existing and future businesses. See ESC’s Answer at 10. While I understand its concern, I find that aggregation of data from seven electric suppliers, in addition to the terms of the Protective Order issued on May 7, 2020, will provide sufficient protection to information sought by PECO Interrogatories, Set I, Nos. 2, 4, and 6 that ESC deems to be of highly commercially sensitive nature.

THEREFORE,

IT IS ORDERED:

1. That the Objections of the Electric Supplier Coalition to PECO’s Set I Interrogatories Nos. 2, 4, 5 and 6 are overruled.
2. That PECO Energy Company’s Motion to Compel Responses to PECO’s Set I Interrogatories Nos. 2, 4, 5 and 6 is granted.
3. That Electric Supplier Coalition shall answer PECO’s Set I Interrogatories Nos. 2, 4, 5 and 6 no later than 12:00 p.m on Tuesday, July 7, 2020, in light of the deadline for service of PECO’s rebuttal testimony on July 9, 2020.

Dated: July 2, 2020

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Eranda Vero

Administrative Law Judge

**P-2020-3019290 - PETITION OF PECO ENERGY COMPANY FOR APPROVAL OF ITS DEFAULT SERVICE PLAN FOR THE PERIOD FROM JUNE 1, 2021 THROUGH MAY 31, 2025**

*Revised 05/19/20*

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1. PECO’s requirement under Pennsylvania’s Alternative Energy Portfolio Standards Act, 73 P.S. §§ 1643.1 *et seq.* (the “AEPS Act”). [↑](#footnote-ref-1)