

COMMONWEALTH OF PENNSYLVANIA



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April 1, 2010

James J. McNulty  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

RE: Petition of PECO Energy Company for  
Approval of its Revised Electric Purchase of  
Receivables Program  
Docket No. P-2009-2143607

Dear Secretary McNulty:

Enclosed for filing is the Reply Brief of the Office of Consumer, in the above-referenced proceeding.

Copies have been served as indicated on the Certificate of Service.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Barrett C. Sheridan".

Barrett C. Sheridan  
Assistant Consumer Advocate  
PA Attorney I.D. # 61138

Enclosures

cc: Honorable Cynthia W. Fordham

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company for : Docket No. P-2009-2143607  
Approval of its Revised Electric Purchase :  
of Receivables Program :

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REPLY BRIEF OF THE  
OFFICE OF CONSUMER ADVOCATE

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Dated: April 1, 2010

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## I. INTRODUCTION

PECO Energy Company (PECO) currently offers to Electric Generation Suppliers (EGSs) a purchase of receivables (POR) program. PECO implemented its current POR program in 1998 as a result of the Public Utility Commission's (PUC's or Commission's) approval of a Joint Petition for Settlement of PECO Energy Company's Restructuring Plan (Restructuring Settlement) in Docket Nos. R-00973953, P-00971265. See Re PECO Energy Company, 186 PUR4th 105 (May 14, 1998)(PECO Restructuring Order). PECO has filed a Petition requesting approval to revise its POR program, to be effective on or after January 1, 2011. One key change which PECO has proposed is to purchase receivables from the EGSs without recourse and to include those EGS charges which are unpaid in termination notices to customers. The charges eligible for purchase by PECO as receivables without recourse would be limited to EGS charges for basic electricity supply.

The Company, Office of Consumer Advocate (OCA), Office of Small Business Advocate (OSBA), Constellation New Energy, Inc., the Retail Energy Supply Association (RESA), Direct Energy Services, LLC, and Dominion Retail, Inc., (Settling Parties) have entered into a Joint Petition for Partial Settlement of most of the issues. The Philadelphia Area Industrial Energy Users Group does not oppose the Partial Settlement. As explained in the OCA Main Brief and Statement in Support, the proposed Settlement includes an improved definition of basic electricity supply which PECO will include in its tariff and other changes for the betterment of PECO's Revised POR program. The Office of Trial Staff (OTS) has not joined the Partial Settlement and has stated its opposition in the OTS Main Brief.<sup>1</sup> All parties entered into a Joint Stipulation requesting admission of the parties' pre-filed testimonies and exhibits into the evidentiary record.

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<sup>1</sup> The OCA has taken no position on the second issue reserved for litigation, which OTS has briefed.

The Joint Petition for Partial Settlement reserved for litigation two issues. Those issues are:

- a. Whether PECO can terminate electric service to customers after January 1, 2011, based upon costs for EGS service incurred by such customers prior to January 1, 2011; and
- b. Whether PECO should be required to unbundle its generation-related uncollectible accounts expense from its distribution rates for collection from default service customers and also purchase EGS receivables at a discount corresponding to PECO's uncollectible expense, implementation costs and any administrative costs.

Joint Petition for Partial Settlement at ¶ 9.G(1).

The OCA addressed in its Main Brief the first issue, which concerns how consumers who purchased service from EGSs under PECO's existing POR program will be treated if they have outstanding arrears as PECO transitions to its Revised POR program, as modified by the Partial Settlement. As explained in the OCA's Main Brief, pursuant to the 1998 Restructuring Settlement, PECO cannot terminate service for unpaid EGS charges under the existing POR program that was implemented as part of the Restructuring Settlement. OCA M.B. at 5-7. The Restructuring Settlement, and the existing POR program, remain in effect until December 31, 2010. It is the OCA's position that the consumer protections established for charges incurred under the existing program remain, and are not retroactively abrogated by the implementation of a newly revised POR program. As such, the OCA submits that PECO cannot terminate service to customers based on unpaid EGS charges that were incurred for service prior to December 31, 2010. PECO agreed to its current limitation under the Restructuring Settlement and accepted the responsibility to bear uncollectible expense or risk under the structure of the existing POR program as part of that comprehensive settlement.

In its Main Brief, PECO argues that it need not adhere to the commitments in the Restructuring Settlement since in the more recent Default Service Settlement it agreed to revise its existing POR program for implementation on January 1, 2011. Petition for Approval of PECO's Default Service Program and Rate Mitigation Plan, Docket No. P-2009-2062739, Order (June 2, 2009)(Default Service Settlement). PECO also argues, and RESA joins in this argument, that it would be inconvenient and increase implementation costs if it were required to continue to meet the Restructuring Settlement commitment. As discussed more fully below, the OCA submits that these arguments are without merit and provide no support for abrogating the provision of the Restructuring Settlement that governs PECO's existing POR program until December 31, 2010. The new Default Service Settlement required PECO to design and implement a revised POR program that is to take effect on January 1, 2011. It in no way altered, or can be read to alter, PECO's pre-existing obligations in 2010. Further, a claim of inconvenience cannot undo negotiated settlement terms that have been relied upon for many years by customers who are, and continue, to shop for alternative generation supply under the rules established for the existing POR.

As set forth in this Reply Brief, the OCA submits that in accordance with the original Restructuring Settlement PECO is not permitted to terminate service to customers based on EGS charges that were incurred prior to January 1, 2011.<sup>2</sup> PECO's proposal to do otherwise must be rejected.

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<sup>2</sup> Resolution of this issue will also impact the amount that EGS customers are asked to pay to reconnect service, under PECO's Revised POR program. See OCA St. 1-S at 4-5.

## II. ARGUMENT

### A. Introduction

In its Main Brief, PECO looks to the language of the original Restructuring Settlement and the more recent Default Service Settlement as support for its proposal to include EGS charges for service provided under PECO's existing POR program as a basis for termination of utility service once PECO's Revised POR program is implemented on January 1, 2011. PECO M.B. at 3-5. PECO cites the benefit of avoiding "approximately \$500,000 in implementation costs" as further reason to approve its position. Id. at 4. RESA joins PECO in citing implementation costs as a basis to approve PECO's position. RESA M.B. at 3-4, 16-17. Additionally, PECO suggests that customer notices directed at advising customers of the prospective change in PECO's termination policy should suffice to warn current shopping customers. Id. at 5. The OCA will address each of these points. However, singly or collectively, none of PECO's and RESA's arguments support approval of PECO's request to include EGS charges for service provided under PECO's existing POR program as a basis for termination of PECO service after PECO's Revised POR program takes effect. OCA M.B. 3-9.

### B. Customers Should Receive the Full Protections of the Restructuring Settlement and Default Service Settlement.

PECO's first argument wrongly suggests that the 1998 Restructuring Settlement commitment can simply be abrogated. PECO M.B. at 3-5. The limitation contained in Paragraph 22 of the Restructuring Settlement is clear where it states:

Only PECO EDC can physically disconnect or reconnect a customer's distribution service. Physical termination of service may only be permitted for failure to pay for EDC [electric distribution company] or PLR [provider of last resort] service.

Restructuring Settlement ¶ 22; see OCA M.B. at 5-7. The 1998 Restructuring Settlement, and all of its terms and conditions, is to remain in effect until December 31, 2010. Restructuring Settlement, ¶43. The Restructuring Settlement draws a clear line – only unpaid PECO charges for distribution or PLR service may be the basis for termination of PECO service. See OCA M.B. at 5-7. PECO witness McCawley confirmed that PECO cannot terminate service based on unpaid EGS charges under PECO’s existing POR program implemented pursuant to the Restructuring Settlement. Id. at 6, citing PECO St. 1 at 5. However, according to PECO, tracking EGS charges for service provided under the protections of the Restructuring Settlement would be inconvenient and at some cost. PECO M.B. at 3-5. Thus PECO proposes to abrogate those commitments so that PECO may implement the Revised POR program of PECO’s choosing. PECO cites to the Default Service Settlement as support. Id.

The OCA submits that neither PECO’s convenience nor a reading of the Default Service Settlement can abrogate the protections of the Restructuring Settlement before the expiration of the Restructuring Settlement. As described in the OCA Main Brief, under its existing POR program, PECO cannot terminate customers for unpaid EGS charges. OCA M.B. at 3, 6. If a customer has unpaid EGS charges, after 90 days PECO can convert the customer to dual billing where the EGS then becomes responsible for billing and collection of its own charges. If the EGS does not want to perform this service, the EGS can have the customer returned to PECO’s default service. Id. at 3, 6-7. It is only after the customer is returned to default service and accrues an arrearage of default service charges that PECO is authorized to terminate the customer’s service.<sup>3</sup>

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<sup>3</sup> As part of the comprehensive Restructuring Settlement, PECO assumed the risk and cost of uncollected or unpaid EGS charges for this 90 day period. Since the Restructuring Settlement is in effect until December 31, 2010, PECO is to bear this risk for all charges associated with service up to that date. Under PECO’s proposal here, it would no longer bear this risk as it agreed to do in the Restructuring Settlement.

The OCA submits that these are important consumer protections which were bargained for as part of the Restructuring Settlement and are part of PECO's existing POR program implemented under the Restructuring Settlement. The Default Service Settlement does not disturb, nor was it intended to disturb, the Restructuring Settlement. The Default Service Settlement specifically calls for the revised POR program to be implemented on January 1, 2011.

The Default Service Settlement provides:

PECO will file a revised purchase of receivables ("POR") program as part of its next general electric distribution base rate case under Section 1308(d) of the Public Utility Code ("Electric Distribution Base Rate CASE"). If PECO does not file an Electric Distribution Base Rate Case proposing new base rates to become effective, after full suspension, on or before January 1, 2011, then it will file a stand-alone POR program no later than July 1, 2010 and will request that the Commission decide that case in sufficient time to implement the revised POR program on January 1, 2011.

Default Service Settlement ¶ 65.

The Default Service Settlement does *not* provide PECO with the ability to terminate service based on unpaid EGS charges for service incurred *before* PECO's Revised POR program is implemented. PECO's proposal to terminate service to customers based on EGS charges incurred before the Revised POR Program takes effect would alter the protections bargained for under the Restructuring Settlement, protections that are reflective of the design of the existing POR program. See OCA M.B. at 3-9; see OCA St. 1 at 6-7, 18.

Of particular importance, there are significant differences between the design of the existing POR and the revised POR. As identified by OCA witness Alexander and discussed in the OCA Main Brief, EGS charges for service provided under PECO's existing POR program are qualitatively different than those charges which PECO would accept for purchase as receivables under PECO's Revised POR program. OCA M.B. at 8-9; see OCA St. 1 at 8-9.

Under PECO's Revised POR program, PECO will accept for consolidated billing and purchase without recourse only those EGS charges which the EGS certifies comply with the tariffed definition of basic electricity supply. OCA M.B. at 8-9; see Joint Petition for Partial Settlement, ¶ 9.A. That tariff definition has been agreed to by the parties to the Partial Settlement and will only take effect, after Commission approval, on January 1, 2011. The definition of basic electric supply specifically ensures only charges associated with the delivered electric supply, and not charges for such things as early cancellation fees, deposits or other unregulated charges, could lead to the termination of essential utility service. In contrast, EGS charges for service which PECO might bill for under its existing POR program are not subject to such screening and limitation. OCA M.B. at 8-9; see OCA St. 1 at 8-9.

The Default Service Settlement limits PECO's exercise of the ability to terminate service for unpaid EGS charges to EGS service which complies with consumer protections implemented as part of the Revised POR program. The Default Service Settlement states:

PECO will have the ability to terminate service to a customer for the customer's non-payment of supplier charges in the same manner and to the same extent that PECO could terminate service to such a customer for non-payment of EDC charges, *subject to appropriate consumer protections to be developed in consultation with other parties.*

Id., 1<sup>st</sup> bullet (emphasis added). One of the key protections that was negotiated as part of the Revised POR is that termination provisions only apply to those service specifically defined as basic electric supply services. Thus, PECO's position that it may terminate service, once its Revised POR program is approved and implemented, based solely on whether the EGS charges are paid or unpaid is fundamentally flawed and contrary to the Default Service Settlement and provisions of the Joint Petition for Partial Settlement.

PECO's argument that the Default Service Settlement allows it to abrogate the protections contained in the Restructuring Settlement before the end of the term of the Restructuring Settlement cannot withstand scrutiny. PECO's argument must be rejected.

C. The Costs of Protecting Consumers Are a Necessary Element of the Transition from the Restructuring Settlement Phase to PECO's Revised POR Program.

Both PECO and RESA ask the Commission to find that avoidance of implementation costs justifies denying EGS customers receiving service under PECO's current POR program the protection against termination that is contained in the Restructuring Settlement, in the event that the customer is in arrears after PECO's Revised POR takes effect. PECO M.B. at 4; RESA M.B. at 3-4, 16-17. In its direct case, PECO suggested that approval would reduce program implementation costs and simplify program procedures. PECO St. 1 at 13-14. PECO only quantified the implementation costs in rebuttal as \$500,000. PECO St. 1-R at 6. In its Main Brief, RESA suggests that these costs may potentially deter EGSs from participating in PECO's electric supply market. RESA M.B. at 4.

The OCA submits that the arguments of PECO and RESA are unconvincing. First, cost and convenience cannot be used as an excuse to abrogate consumer protection commitments made in the Restructuring Settlement. PECO had several choices as to how to structure its revised POR program. In making its choice as to program design, it was PECO that selected a design that results in a short term transition from one program design to the next that must be addressed. PECO should not be heard to complain about the cost of meeting its prior obligations through this transition when it selected the revised POR design. Second, as OCA witness Alexander testified, the Company's estimates of implementation costs are just that,

estimates that did not reflect detailed support.<sup>4</sup> OCA St. 1 at 14. PECO's estimate of the cost to resolve the transition issue should not be given weight when considering the need for PECO to meet its existing obligation.

The OCA submits that the provisions of the Joint Petition for Partial Settlement regarding the revised POR in this case also undermine both PECO's and RESA's positions. The Partial Settlement, which RESA signed, expressly allows PECO to recover these implementation costs from EGSs through the temporary discount. See Joint Petition for Partial Settlement ¶ 9. In other words, PECO would not have to bear the costs of assuring that EGS customers receive all appropriate protections during the transition from PECO's existing POR program under the Restructuring Settlement to PECO's Revised POR program. The Partial Settlement provides that the temporary discount would not increase from 0.2% if these additional costs were incurred; rather the 0.2% temporary discount would continue in effect until PECO has recouped the costs of protecting these EGS customers. *Id.* at ¶ 9.H.(2). Thus, RESA's argument that the costs could potentially deter EGSs is wholly without merit as the discount will not increase at all under the settlement.<sup>5</sup>

The Commission should reject both PECO's and RESA's positions that the costs of this transition period justify including unpaid EGS charges incurred under PECO's existing POR program as a basis for termination of PECO service under the revised POR program.

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<sup>4</sup> Ms. Alexander's criticism was directed at PECO's estimate of \$1 million as the cost to implement certain protections which Duquesne Power Light Company's POR program provides. OCA St. 1 at 14. Nonetheless, PECO witness McCawley's rebuttal set forth only the bare assertion that PECO could "avoid approximately \$500,000 in implementation costs if it had the ability to terminate service based on EGS charges incurred prior to January 1, 2011." PECO St. 1-R at 6. The Company provided no better support for the validity of this estimate than the other estimate challenged by Ms. Alexander.

<sup>5</sup> RESA also included a proposed conclusion of law to the effect that the OCA has not met its burden of proof as to this issue. RESA M.B., App. B, Proposed Conclusion of Law 6. The burden of proof in this proceeding is on PECO, not the OCA. PECO's direct case expressly proposes that as part of implementation of its Revised POR Program, PECO would "terminate customers based upon past EGS service provided and EGS charges outstanding as of January 1, 2011..." See PECO St. 1 at 13-14. PECO must carry the burden of proof, as the proponent of a rule or order. 66 Pa.C.S. § 332(a). RESA's conclusion of law must be rejected.

D. PECO's Reliance on Customer Notice Does Not Cure the Harm of PECO's Proposal.

PECO's final argument is that EGS customers will receive "advance notice," pursuant to the Partial Settlement, of PECO's change in termination policy. PECO M.B. at 5. The OCA does not dispute that the Paragraph 9.F of the Partial Settlement provides for a broader approach to customer notice and education than what PECO had originally proposed and OCA witness Alexander had criticized. See OCA St. 1 at 17. The Partial Settlement provides that PECO will provide current EGS customers with a one-time notice of PECO's change in policy for the Revised POR. Joint Petition for Partial Settlement, ¶ 9.F.(1)(a). The timing of this one-time notice to current EGS customers will depend on when price to compare information is available from PECO. *Id.* PECO's argument, however, ignores the fact that some customers may have been shopping for some time prior to the receipt of any notice from PECO, and may have already entered contracts with EGSs that do not contain this fundamental change in terms and conditions. See, OCA M.B. at 6; OCA St. 1 at 16.

PECO's theory that a one-time customer notice and other outreach can offset the harm of reaching back and treating EGS charges incurred under PECO's existing POR program as subject to PECO's future right to terminate service for non-payment is unreasonable and flawed. The Commission should find that PECO's ability to terminate service for unpaid EGS charges attaches only to those EGS charges for service incurred on and after PECO's Revised POR is implemented and only for those EGS charges for basic electricity supply as certified by EGSs eligible to participate in PECO's Revised POR program.

III. CONCLUSION

WHEREFORE, the Office of Consumer Advocate requests that the Public Utility Commission deny PECO's proposal to treat unpaid EGS charges for service incurred before the effective date of PECO's Revised POR Program as a basis for termination of electricity service, for the reasons set forth in the OCA Main Brief and this Reply Brief.

Respectfully submitted,



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Dated: April 1, 2010  
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CERTIFICATE OF SERVICE

Petition of PECO Energy Company for : Docket No. P-2009-2143607  
Approval of its Revised Electric Purchase :  
of Receivables Program :

I hereby certify that I have this day served a true copy of the foregoing document, the Reply Brief of the Office of Consumer, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 1<sup>st</sup> day of April 2010.

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