COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

April 1, 2010

Secretary James J. McNulty
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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 please find an original and nine (9) copies of the Office of Trial Staff's (OTS) **Reply Brief** in the above-captioned proceeding.

Copies are being served on all active parties of record.

Sincerely,

Richard A. Kanaskie
Senior Prosecutor
Office of Trial Staff
PA Attorney I.D. No. 80409

RAK/edc
cc: Parties of Record

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF
OF THE
OFFICE OF TRIAL STAFF

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Dated April 1, 2010

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I. INTRODUCTION

On November 20, 2009 PECO Energy Company ("PECO" or "Company") filed its *Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program* ("Petition") with the Pennsylvania Public Utility Commission ("Commission"). In this Petition PECO seeks approval to revise its current Purchase of Receivables ("POR") program. The Office of Trial Staff ("OTS") presented a detailed procedural history in its Main Brief[1] and offers the following information as a supplement.

Pursuant to Your Honor's permission, the submission date for Main Briefs was extended to March 22, 2009. Timely Main Briefs were submitted by OTS, Dominion Retail, Inc. ("Dominion"), Retail Energy Supply Association ("RESA"), the Office of Consumer Advocate ("OCA"), PECO Energy Company ("PECO" or "Company") and the Office of Small Business Advocate ("OSBA"). In addition, a *Joint Petition for Partial Settlement* ("Joint Petition") was submitted later that same evening. Signatories to the Joint Petition include the Company, OSBA, OCA, Constellation NewEnergy, Inc., Dominion, RESA and Direct Energy Services, LLC.[2]

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1 OTS Main Brief, pp. 1-3.

2 RESA and Direct Energy Services LLC are represented by the same counsel and the agreement was signed in that representative capacity.

II. SUMMARY OF ARGUMENT

A properly designed POR program includes a Discount Rate that reflects the assignment of costs to the appropriate parties. PECO's proposal, as endorsed by Dominion and RESA contains a provision that is not in the public interest and must be rejected. The issue is not whether PECO collects 100% of its billed revenue. No party has disputed that the Company has an uncollectible accounts expense. The issue in this proceeding is whether the uncollectible accounts expense associated with the non-jurisdictional Electric Generation Supplier ("EGS") should be collected from the jurisdictional Distribution ratepayer. The avoided costs of a non-jurisdictional EGS should not be shifted to jurisdictional ratepayers. "The use of the discount rate OTS is proposing will properly assign the generation related uncollectible expense to the EGS."[3]

The proper assignment of costs is accomplished by unbundling the non-jurisdictional generation rates from the jurisdictional distribution charges.[4] As stated in the OTS testimony of its expert witness "[u] nbundling PECO's generation related uncollectible accounts expense from distribution rates and collecting it from default service customers through a surcharge per kwh is appropriate because it put everyone on a level playing field."[5]

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3 OTS Statement No. 1-R, p. 3.
4 OTS Main Brief, p. 11.
5 OTS Statement No. 1, p. 10.

The Company retains the burden of proving that its proposal is in the public interest. An attempt by RESA in its Main Brief to shift that burden to another party is improper and must be ignored.[6]

III. ARGUMENT

A. *DISCOUNT RATE TO INCLUDE UNCOLLECTIBLE ACCOUNTS EXPENSE*

The Commission has provided guidance on the development of a proper Purchase of Receivables ("POR") Plan. As presented in the OTS Main Brief, the Commission's Order in PPL's POR proceeding[7] properly assigned jurisdictional and non-jurisdictional costs in its Order Adopted and Entered November 19, 2009. The Commission properly recognized that a properly designed POR Plan utilizes a discount rate that includes a factor for uncollectible accounts expense. There is no credible evidence in this proceeding to suggest that the same treatment is not appropriate here. In fact, failing to follow the standards established in the PPL proceeding will create a situation where an Electric Distribution Company ("EDC") in one service territory will have different standards than an EDC in another territory. This is exactly the situation that would occur in this proceeding if the Company's proposal were accepted. PPL would be impacted differently than PECO. In addition, an Electric Generation Supplier ("EGS") in one service territory would be subjected to different standards than an EGS in another service

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6 RESA Main Brief, p. 11.

7 *Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge*, Docket No. P-2009-2129502 (2009)

territory. Or, worse yet, the same EGS would have different standards in different territories. Both RESA and Dominion provide services in PPL's territory as well as PECO's. As stated above, an inconsistent result would allow for different operating parameters in these two service territories. In addition, each of these parties was a signatory to the agreement reached in the PPL proceeding. Clearly, they are cognizant of the impact of inconsistent rulings. What is potentially more egregious is that by failing to provide consistency in POR programs, an EGS would have the opportunity to shop his supply to the most advantageous market. Clearly a market with an artificially low discount rate is more attractive than a service territory that properly assigns costs to the participating entities. Ratepayers are potentially harmed by this practice. OTS maintains that POR programs must have a level of consistency throughout the Commonwealth in order to provide the same level of protections and opportunities to all participants. PECO, RESA and Dominion have failed to provide substantial evidence demonstrating why an EGS in the PECO service territory should be afforded terms that are more advantageous than the terms enforced in the PPL service territory. In fact, despite being raised on page 4 of the OTS Direct Testimony submitted on February 2, 2010 neither PECO, nor Dominion's Main Briefs contain any arguments attempting to distinguish the applicability of the standards set forth in the PPL proceeding. RESA makes a passing attempt to reargue its position from the PPL proceeding, apparently posited prior to signing onto the agreement, but

offers little to no distinguishing characteristics from the instant proceeding.[8] Absent arguments presented during Reply Briefs, the record does not support the differing treatment of uncollectible accounts expense recovery presented in the Commission approved PPL proceeding and PECO's plan which is, not surprisingly, supported by the participating Electric Generation Suppliers.

The ill fated attempt to shift the burden of proof to the Office of Trial Staff is improper and inconsistent with proper utility regulation in the Commonwealth. PECO retains the burden of proving that its plan is in the public interest. In fact, based on the support offered by RESA and Dominion in their respective Answers to PECO's Petition, it is not unreasonable to suggest that as a proponent of PECO's proposal, they bear the same burden of proof. As described in the OTS Main Brief, the burden is satisfied with the submission of substantial evidence. Substantial is described as a preponderance of the evidence that is more likely to be persuasive. That standard has not been met. As such, PECO's proposal must be rejected as filed. The proper cure to the noted defect is to include the appropriate discount rate in its POR Plan. As OTS has presented, and the Commission has approved in PPL, the proper discount rate or a POR includes a factor for uncollectible accounts expense.

The record evidence supports the uncollectible factor presented by OTS as it is based on the Company's own information. The OTS proposed uncollectible accounts expense factor is based solely on PECO's response to an Interrogatory

[8] RESA Main Brief, p. 15.

requesting this information. Arguments that it is incorrect or doesn't reflect the proper calculation are unfounded as they are based on PECO's experience as reported to OTS in its Discovery response. The issue raised in RESA's Brief that the uncollectible accounts expense percentage is inconsistent with Duquesne Light's, PPL's or any other EDC presenting a POR program is irrelevant.[9] The purpose of this proceeding is not to establish the proper standards based on an industry average, the relevant argument is the assignment of costs experienced by PECO. PECO reported the calculations directly to OTS and these percentages represent the level of funds currently recovered from ratepayers by the Company in its rates. The appropriate calculation can be updated in relevant upcoming proceedings, but the basis for the inclusion of an uncollectible accounts factor in a discount rate remains. Diversionary arguments as to the level of uncollectible accounts expense fail to address the underlying regulatory principle that costs must be assigned properly.

RESA promotion of the concept that the recovery of expenses related to uncollectible accounts is recovered from all customers is misleading. Attempts to characterize the ratemaking treatment of uncollectible accounts expense "as a socialized cost paid for by all customers (or customers in the same class)"[10] fails to recognize the distinction between jurisdictional and non-jurisdictional costs. Apparently being careful to avoid inter-class subsidies, RESA ignores the subsidy

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9 RESA Main Brief, p. 12.
10 RESA Main Brief, p. 13.

it is suggesting between jurisdictional ratepayers and unregulated Electric Generation Suppliers. Under no circumstances is it in the public interest to "socialize" the costs of operation from a non-jurisdictional EGS and have it recovered from jurisdictional ratepayers. As RESA's own witness has stated, "[t]he risk of non-payment is a cost of doing business....Businesses account of this expense by factoring it into the prices that they charge."[11] This is a perfect example of the proper assignment of costs. It is inconsistent to advocate for the socializing of costs across the boundaries of jurisdictional and non-jurisdictional customers when businesses already understand the concept and account for it in their operations. Ratemaking treatments apply to jurisdictional entities. An attempt to introduce the principles of ratemaking into the activities of unregulated operations is unfounded and cannot form the basis for any level of review in this proceeding.

B. UNBUNDLE NON-JURISDICTIONAL GENERATION CHARGES

Unbundling PECO's generation related uncollectible accounts expense from distribution rates is appropriate in this proceeding. Unbundling will properly assign costs by allowing shopping customers to pay for the associated uncollectible accounts expense through the generation price while default service customers account for uncollectibles through the price to compare from their

[11] RESA Statement No. 1-R, p. 6, OTS Main Brief, p. 10.

distribution company.[12] The unbundling of jurisdictional and non-jurisdictional expenses allows for the proper assignment of costs while providing the necessary protections for interested parties. Unbundling protects both shopping and non-shopping customers by ensuring that there are no cross subsidies. Shopping customers will be protected from the double recovery of uncollectible accounts expense that may potentially be included in their generation rates as well as their distribution rates. "The shopping customers should not be required to subsidize the electric service of default customers who remain with the Company, just as default customers should not be required to subsidize those customers who shop."[13] This principle is supported in the Commission's decision in PPL's POR Program and the record in this proceeding provides no support for different treatment. OTS maintains that this provision should be applied in this, and every POR Program to ensure that ratepayers and companies across the Commonwealth are all treated equally. There is simply no support for the premise that one service territory should have parameters that differ from another service territory. To do so would require unequal treatment for ratepayers and companies in these areas.

C. COMMENTS ON JOINT PETITION FOR PARTIAL SETTLEMENT

The Joint Petition for Partial Settlement ("Joint Petition" or "Settlement Agreement"), as presented, is not in the public interest and must be modified. OTS opines that the Settlement Agreement is based on a level of compromise among the signatories and contains many positive provisions that resolve many of the initially

12 OTS Statement No. 1, p. 10.
13 Id.

disputed issues. However, OTS is not a signatory to the Joint Petition because it still contains averments that are not in the public interest and suffers from a lack of credible evidentiary support. Absent modification of the Joint Petition, it must be rejected as it fails to satisfy the standards allowing for approval of a settlement. Unfortunately, the averment addressing modification of the Settlement Agreement is one of the provisions that OTS finds violates the public interest.

OTS recognizes that "[i]t is the policy of the Commission to encourage settlements."[14] However, a Commission Regulation promoting settlements cannot supersede the legal review necessary when evaluating this agreement. Furthermore, this is a non-unanimous agreement and represents nothing more than a stipulation among the signatories. OTS maintains that the probative value of the document is limited to the agreements expressed among the parties. The stipulation, in and of itself, is not substantial evidence to support its approval. It is well settled that approval of the proposed Settlement Agreement requires the determination that the terms contained therein are in the public interest.[15] OTS maintains that the Joint Petition, as filed, fails to satisfy the standards for approval.

As an opponent of the Joint Petition, OTS does not consider itself bound by the provisions as it represents a stipulation among the signatories; however, the Future Consideration of Program Terms and Conditions contained in Issue H(1) of Averment 9 are not in the public interest and cannot be considered. OTS opines

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14 52 Pa. Code § 5.231(a).

15 *Pennsylvania Public Utility Commission v. Philadelphia Gas Works,* M-00031768 (2004), *Pennsylvania Public Utility Commission v. C S Water and Sewer Assoc.*, 74 Pa. PUC 767 (1991), *Pennsylvania Public Utility Commission v. Philadelphia Electric Co.*, 60 Pa. PUC 1 (1985).

that this clause may be interpreted as precluding any party from evaluating any issues associated with this POR plan in any proceeding outside PECO's next default service plan filing. Specifically, the clause seeks to limit the scope of the investigation of the Company's next base rate case by barring the review of unbundling PECO's non-jurisdictional generation related costs. This provision is not acceptable as it improperly seeks to bar the review of a pertinent issue in PECO's upcoming base rate case. To the extent this provision could be interpreted as barring the review of PECO's generation related costs in its next base rate case by non-signatories, OTS maintains that the provision is unreasonable and not in the public interest. OTS will examine the Company's base rate filing and intends to scrutinize every relevant aspect of the filing. To the extent the provision is submitted a s a means of barring the review of pertinent issues in PECO's base rate filing, the attempt to disrupt the regulatory review process in a preemptive stipulation is not in the public interest and should not be part of the agreement. OTS voices its opposition to this type of provision and intends to discharge its duties through a thorough and complete review of any filing submitted by PECO, including its base rate case filed March 31, 2010 at Docket No. R-2010-2161575.

Although OTS has admittedly not submitted testimony on many of the issues presented in the Joint Petition, the presence of Averment No. 15 contradicts the provisions contained therein by allowing for withdrawal upon the modification of any proposed stipulation. Averment 15 reads:

> [t]his Settlement is conditioned upon the Commission's approval of the terms and conditions contained herein without modification. If the Commission should disapprove the Settlement or modify any terms and conditions herein **(including, without limitation, by ruling that PECO must unbundle its generation-related uncollectible accounts expense)**, [*emphasis added*] this Settlement may be withdrawn upon written notice to the Commission and all active parties within five (5) business days following entry of the Commission's Order by any of the Joint Petitioners and, in such event, shall be of no force and effect. In the event that the Commission disapproves the Settlement or the Company or any other Joint Petitioner elects to withdraw the Settlement as provided above, the Joint Petitioners reserve their respective rights to fully litigate this case, including, but not limited to, presentation of witnesses, cross-examination and legal argument through submission of Briefs, Exceptions and Replies to Exceptions.[16]

Often referred to as boilerplate language, this provision is not in the public interest in this proceeding as the identification of the outcome of an issue reserved for resolution by Your Honor is intentionally included as grounds for revocation of the Settlement Agreement. The use of this provision in a non-unanimous settlement proposal is highly inappropriate. The acceptance of the entire Joint Petition cannot hinge on the resolution of an issue reserved for recommendation by Your Honor through the regulatory process. OTS interprets this provision as an attempt by the signatories to bias the outcome of an issue reserved for litigation. This is simply inconsistent with the practice of carving an issue out for independent resolution and entirely unnecessary in this proceeding. It is understandable that the signatories to the stipulation may have included concessions in their negotiations that would be rendered irrelevant in the event the

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[16] Joint Petition for Partial Settlement, Averment 15, pp. 12-13.

agreement is altered. The provision allowing for withdrawal upon the alteration of an issue may have some merit in those circumstances. However, that is not the case with an issue reserved for litigation. The parties to the Joint Petition clearly did not contemplate resolution of the issue of unbundling PECO's generation related uncollectible accounts expense in the formation of the agreement as it has been carved out for decision through the litigation process.[17] Clearly there has been no level of compromise on the issues remaining for resolution. OTS maintains that the stipulation among the parties is otherwise sound and should not be disturbed based on the outcome of litigated issues.

OTS opposes the Joint Petition in its present form and maintains that the provisions are not supported by substantial evidence in the record allowing for a recommendation that it be approved. Any agreement that attempts to limit the rights of parties cannot be considered in the public interest.

IV. CONCLUSION

The Purchase of Receivables Program proposed by PECO in this proceeding must be amended to include the proper factors in its discount rate. As identified throughout the OTS testimony and as defined in the Commission's Order in PPL's POR proceeding, a properly designed POR program includes a discount factor that recognizes administrative costs associated with the program as well as the Company's uncollectible accounts expenses. The record evidence shows that PECO's discount rate associated with its POR must be 2.27% for residential customers and 0.34% for small commercial and industrial customers.

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[17] Id., Averment 9G, pp. 9-10.

In addition, PECO should unbundle its generation related uncollectible account expenses from its distribution rates and collect it from default service customers through a surcharge per kwh. This recommendation will result in shopping customers paying for uncollectible accounts through the price for generation while non-shopping customers are responsible for the appropriate uncollectible accounts through their distribution rates as reflected in the price to compare.

As argued above, the settlement approved by the Commission in the PPL POR proceeding included unbundled rates and the inclusion of uncollectible accounts in the discount rate. As settlements approved by the Commission must be in the public interest, it is inconceivable that a program that includes unbundling of rates and the inclusion of uncollectible accounts in the discount rate could be found to be in the public interest in one proceeding while the omission of the same elements in a similar proceeding could yield the same result.[18] Sound regulation requires the same treatment of these elements in order to protect ratepayers, jurisdictional utilities and Electric Generation Suppliers.

The Joint Petition for Partial Settlement, as filed, must be rejected as it contains provisions that are not in the public interest. The non-unanimous stipulation among the signatories cannot contain provisions that preclude the necessary review of the provisions of PECO's POR in the Company's upcoming base rate case. Although not a signatory to the stipulation, OTS maintains that the language contained in Averment H1 barring review of the issue of unbundling in PECO's next distribution rate case must not

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[18] Id.

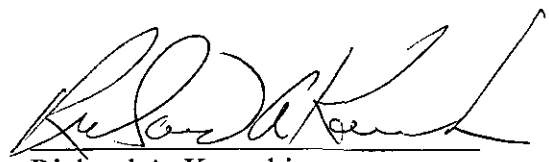
be interpreted as limiting the complete review of all issues in PECO's planned filing. In addition, the Joint Petition contains an inappropriate, and unnecessary, provision that attempts to influence the resolution of an issue reserved for Briefing. Allowing for withdrawal of the Settlement based on the outcome of a litigated issue is improper and must not be considered.

The Office of Trial Staff, in its charge to intervene in matters before the Commission on behalf of the public interest, maintains that the crux of the instant proceeding is whether different service territories should have different standards in the development of a Purchase of Receivables Program. OTS has reviewed every POR Program submitted to the Commission and is an active participant in every proceeding. As the OTS charge involves "balancing the interests of the ratepayers and the company"[19] its recommendations must consider the impact to all affected parties. OTS maintains that POR programs across the state should contain the same provisions so that ratepayers, companies and any other interested entities receive the same level of protection and opportunity no matter which service territory is involved.

[19] OTS Statement No. 1, p. 1.

WHEREFORE, for the reasons set forth above, and as supported by the testimony and Main Brief submitted in this proceeding, the Office of Trial Staff respectfully submits that PECO's proposed Purchase of Receivables Program must include unbundling of generation related costs from distribution rates as well as the inclusion of a factor to account for uncollectible accounts expense in its discount rate. Furthermore, PECO's proposal must not limit the rights of any Intervenor.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Reply Brief** dated April 1, 2010, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

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