

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

William R. Lloyd, Jr.
Small Business Advocate

(717) 783-2525
(717) 783-2831 (FAX)

April 1, 2010

HAND DELIVERED

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:

I am delivering for filing today the original plus nine copies of the Reply Brief, on behalf of the Office of Small Business Advocate, in the above-captioned proceeding.

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,

A handwritten signature in cursive script that reads "Daniel G. Asmus".

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

Enclosures

cc: Parties of Record

Brian Kalcic

SECRETARY'S BUREAU
2010 APR -1 PM 3:13
RECEIVED

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PETITION OF PECO ENERGY :
COMPANY FOR APPROVAL OF ITS : DOCKET NO. P-2009-2143607
REVISED ELECTRIC PURCHASE OF :
RECEIVABLES PROGRAM :

REPLY BRIEF
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE

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

For: William R. Lloyd, Jr.
Small Business Advocate
Attorney ID No. 16452

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Dated: April 1, 2010

SECRETARY'S BUREAU
PA PUC

2010 APR -1 PM 3:13

RECEIVED

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	SUMMARY OF ARGUMENT.....	3
	A. Prior Settlements.....	3
	B. Implementation Costs	4
	C. Burden of Proof.....	4
III.	ARGUMENT	6
	A. Prior Settlements.....	6
	B. Implementation Costs	8
	C. Burden of Proof.....	9
IV.	CONCLUSION.....	11

I. INTRODUCTION

On November 20, 2009, PECO Energy Company (“PECO” or “the Company”) filed the Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program (“Petition”) with the Pennsylvania Public Utility Commission (“Commission”). PECO proposed that the revised purchase of receivables (“POR”) program take effect on January 1, 2011, and requested that the Commission approve its Petition no later than March 31, 2010.

The Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention and Public Statement in the proceeding on December 4, 2009.

Other parties to this proceeding include the Commission’s Office of Trial Staff (“OTS”); the Office of Consumer Advocate (“OCA”); the Philadelphia Area Industrial Energy Users Group (“PAIEUG”); Constellation New Energy, Inc. (“Constellation”); Dominion Retail, Inc. (“Dominion”); Direct Energy Services, LLC (“Direct”); and the Retail Energy Supply Association (“RESA”).

The OSBA filed a pre-hearing memorandum and participated in the pre-hearing conference on January 5, 2010, before Administrative Law Judge (“ALJ”) Cynthia Williams Fordham.

The OSBA filed the Direct Testimony of its witness, Brian Kalcic, on February 2, 2010, and the Surrebuttal Testimony of Mr. Kalcic on March 3, 2010.

Evidentiary hearings scheduled for March 4 and 5, 2010, were cancelled by ALJ Fordham at the request of the parties. As the ALJ agreed, the parties have submitted their testimony for the record by stipulation.

The parties were able to negotiate a Joint Petition for Partial Settlement (“Settlement”), which was filed with the Commission on March 22, 2010. Although the Settlement resolved many matters in dispute, the parties were unable to reach an agreement on two issues: (1) the concern of the OSBA and the OCA over PECO’s proposal to have the right to terminate customers for unpaid electric generation supplier (“EGS”) charges for basic electricity supply, which are incurred or billed before the revised POR program is implemented on January 1, 2011; and (2) OTS’ proposal to require PECO to unbundle generation-related uncollectible accounts expense from distribution rates for collection from default service customers and to purchase EGS receivables at a discount rate corresponding to PECO’s uncollectible expense, plus POR implementation costs and any related administrative costs.

These two unresolved issues were addressed in the Main Briefs that were filed on March 22, 2010. The OSBA addressed only the termination issue in its Main Brief.

This Reply Brief is being filed in accordance with Prehearing Order #2 (as modified) and to respond to arguments raised in the Main Briefs of PECO and RESA/Direct.

II. SUMMARY OF ARGUMENT

A. Prior Settlements

PECO argues in its Main Brief that its proposal to terminate customers for unpaid EGS charges that accrued prior to January 1, 2011, is consistent with the Restructuring Settlement and the Default Service Settlement.¹ The OSBA disagrees with this position. The terms of the Restructuring Settlement protect PECO customers from termination for unpaid EGS charges through December 31, 2010, while the terms of PECO's proposed POR program would permit the Company to terminate those very same customers for the same EGS charges that were incurred through December 31, 2010.² The two scenarios are not only inconsistent, but are exactly opposite to one another.

Furthermore, the language of the Default Service Settlement provides that PECO's revised POR program will permit PECO to terminate a customer for non-payment of an EGS's charges "subject to appropriate consumer protections to be developed in consultation with the parties to this Settlement."³ The Default Service Settlement says nothing about PECO's being permitted to terminate a previously protected customer for non-payment of EGS charges incurred prior to January 1, 2011.

PECO also argues that the Restructuring Settlement does not differentiate between EGS charges incurred before January 1, 2011, and those incurred after that date,

¹ PECO Main Brief at 4.

² See *Joint Petition for Full Settlement of PECO Energy Company's Restructuring Plan and Related Appeals and Application for a Qualified Rate Order and Application for Transfer of Generation Assets*, Docket Nos. P-00973953 and P-00971265 (Order entered May 14, 1998) at 17, ¶ 22.

³ PECO Main Brief at 4; *Petition of PECO Energy Company for Approval of its Default Service Program and Rate Mitigation Plan*, Docket No. P-2008-2062739 (Order entered June 2, 2009) at ¶ 66.

“let alone mandate different treatment of those charges for termination purposes.”⁴

However, PECO cites nothing in the Restructuring Settlement which explicitly or implicitly authorizes termination of customers on account of unpaid EGS charges incurred during the pre-2011 period when termination was explicitly prohibited.

B. Implementation Costs

PECO states in its Main Brief that it estimates a potential savings of \$500,000 in implementation costs if it has the ability to terminate service for pre-January 1, 2011, unpaid EGS charges.⁵

RESA/ Direct note in their Main Brief that EGSs would bear the burden of paying the \$500,000 if PECO is not permitted to terminate for pre-2011 unpaid EGS charges.⁶ However, what RESA/Direct do not acknowledge is that the PECO POR program gives EGSs a windfall from the outset. Specifically, PECO is buying EGS receivables as of December 31, 2010, even though the debts reflected in those receivables were never owed to PECO.

C. Burden of Proof

RESA/Direct have set forth a proposed Conclusion of Law #6, which states:

OCA did not sustain its burden of showing that its proposal to restrict PECO’s ability to terminate service for customers after January 1, 2011, based upon costs for EGS service incurred by such customers prior to January 1, 2011, is necessary or appropriate and, therefore, this proposal is rejected.⁷

⁴ PECO Main Brief at 5.

⁵ PECO Main Brief at 4; *see also* PECO Statement No. 1-R, Rebuttal Testimony of John J. McCawley at 6.

⁶ RESA/Direct Main Brief at 17.

⁷ RESA/Direct Main Brief at B-1, Proposed Conclusion of Law #6.

However, as RESA/Direct acknowledge, “Section 332(a) of the Public Utility Code (‘Code’) provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.”⁸ PECO is the party seeking affirmative relief from the Commission in this proceeding, not the OCA or any other party. Therefore, PECO has the burden of proof with respect to the termination procedures in its revised POR program, not the OCA or the OSBA.

⁸ RESA/Direct Main Brief at 6. *See* 66 Pa. C.S. § 332(a).

III. ARGUMENT

A. **Prior Settlements**

PECO argues in its Main Brief that its proposal to terminate customers for unpaid EGS charges that were incurred prior to January 1, 2011, is consistent with the Restructuring Settlement and the Default Service Settlement.⁹ PECO is in error.

It is undisputed that the terms of the Restructuring Settlement protect PECO customers from termination for unpaid EGS charges through December 31, 2010.¹⁰ However, the terms of PECO's proposed POR program would permit the Company to terminate those very same customers for the same EGS charges that were incurred prior to January 1, 2011.¹¹ The two scenarios are not only inconsistent, but are exactly opposite to one another.

PECO also argues that the Restructuring Settlement does not differentiate between EGS charges incurred before January 1, 2011, and those incurred after that date, "let alone mandate different treatment of those charges for termination purposes."¹² However, the question is not whether the Restructuring Settlement mandates different treatment for EGS charges incurred before January 1, 2011, and EGS charges incurred on or after that date. Rather, the question is whether the Restructuring Settlement authorizes termination on or after January 1, 2011, for EGS charges incurred prior to 2011.

Despite arguments based on the interpretation of a document, PECO cites nothing in the Restructuring Settlement which explicitly or implicitly authorizes termination after

⁹ PECO Main Brief at 4.

¹⁰ PECO Main Brief at 3-4; OCA Main Brief at 3; OSBA Main Brief at 8.

¹¹ PECO Main Brief at 4.

¹² PECO Main Brief at 5.

December 31, 2010, for EGS charges which were not paid by that date. Therefore, the Restructuring Settlement does not authorize such terminations.

PECO also points to its Default Service Settlement, which states that in a revised POR program, “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 the parties to this Settlement.”¹³

The Company cites this language in an effort to show how its proposed POR program is consistent with the Default Service Settlement. However, there is no language in the Default Service Settlement that contemplates the termination of a customer for non-payment of EGS charges incurred prior to January 1, 2011. The quoted language is *prospective*, not *retrospective*. None of the parties to this proceeding has objected to PECO’s terminating a customer for unpaid EGS charges incurred on or after January 1, 2011. However, it is the retrospective application of termination procedures to previously protected customers that is the problem.

Furthermore, the quoted language from the Default Service Settlement conditions PECO’s right to terminate on the development of “appropriate consumer protections.” Given the opposition of the OCA and the OSBA to PECO’s proposal to terminate for pre-2011 EGS charges, there is no basis for concluding that the parties to the Default Service Settlement agreed that “appropriate consumer protections” include an opportunity for PECO to carry out such terminations. There is also no basis for concluding that the parties to the Default Service Settlement agreed that it would be consistent with

¹³ PECO Main Brief at 4, *citing* Default Service Settlement at ¶ 66.

“appropriate consumer protections” for PECO to terminate customers who owed money to an EGS - but not to PECO - on December 31, 2010.

There is something fundamentally wrong with the notion of PECO’s agreeing in writing to protect customers from termination due to unpaid EGS charges incurred up to the last day of the Restructuring Settlement, and then having the Company turn 180 degrees the very next day to say to the customer, “It is January 1st”, and PECO is now going to terminate you for those very same unpaid EGS charges which the Company previously agreed would not subject you to termination.”

B. Implementation Costs

PECO states in its Main Brief that it estimates a potential savings of \$500,000 in implementation costs if it has the ability to terminate service for pre-January 1, 2011, unpaid EGS charges.¹⁴ Allegedly, PECO would avoid modifications to its system, including “the overhaul of processes for arrearage calculations, collections and terminations in order to create and maintain separately parallel paths for handling supplier accounts receivable based on the dates those receivables were incurred.”¹⁵

RESA/ Direct note in their Main Brief that EGSs would bear the burden of paying the \$500,000 if PECO is not permitted to terminate for pre-2011 unpaid EGS charges.¹⁶ However, what RESA/Direct do not acknowledge is that the PECO POR program gives them a windfall from the outset. PECO will be purchasing EGS receivables as of December 31, 2010, that were never owed to PECO, and presumably would have been losses that the EGSs would never have recovered. This is found money, which could

¹⁴ PECO Main Brief at 4; *see also* PECO Statement No. 1-R, Rebuttal Testimony of John J. McCawley at 6.

¹⁵ PECO Main Brief at 4-5.

¹⁶ RESA/Direct Main Brief at 17.

well offset any additional implementation costs that PECO would impose on the EGSs if the Commission rejects PECO's request to terminate for pre-2011 unpaid EGS charges.

Interestingly, PECO's Main Brief provides no argument regarding why the Company should purchase debts owed to EGSs. PECO's Main Brief also provides no argument regarding why the Commission should permit PECO to terminate customers for debts which were not owed to PECO prior to the Company's purchase of receivables as of December 31, 2010.

C. Burden of Proof

RESA/Direct have set forth a proposed Conclusion of Law #6, which states:

OCA did not sustain its burden of showing that its proposal to restrict PECO's ability to terminate service for customers after January 1, 2011, based upon costs for EGS service incurred by such customers prior to January 1, 2011, is necessary or appropriate and, therefore, this proposal is rejected.¹⁷

However, as RESA/Direct acknowledge, "Section 332(a) of the Public Utility Code ('Code') provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding."¹⁸ PECO is the party seeking affirmative relief from the Commission in this proceeding, not the OCA, the OSBA, or any other party.

Termination for pre-2011 EGS charges is not authorized by the Restructuring Settlement or the Default Service Settlement. At most, it can be argued that neither document prohibits such termination. However, to make that argument, PECO must assume the burden of proving that it should be authorized in the instant proceeding to

¹⁷ RESA/Direct Main Brief at B-1, Proposed Conclusion of Law #6.

¹⁸ RESA/Direct Main Brief at 6. See 66 Pa. C.S. § 332(a).

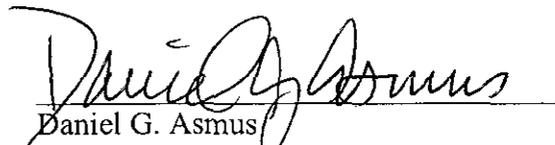
carry out such terminations. Therefore, PECO has the burden of proof with respect to the termination procedures in its revised POR program, not the OCA or the OSBA.

Of major significance, PECO's Main Brief fails to address the degree to which PECO has already recovered unpaid EGS charges through its distribution rates. Even assuming that the Commission is willing to permit PECO to terminate customers for unpaid pre-2011 EGS charges, PECO is not entitled to that relief without evidence that it actually has failed to collect those unpaid EGS charges through the uncollectibles expense in its distribution rates. PECO has presented no such evidence.

IV. CONCLUSION

For the reasons set forth above and in its Main Brief, the OSBA respectfully requests that the Commission reject PECO's proposed termination procedures as set forth in its revised POR program. PECO should be directed that it can only terminate customers for unpaid EGS charges on a going forward basis, *i.e.*, for EGS charges incurred on or after January 1, 2011.

Respectfully submitted,


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

For:

William R. Lloyd, Jr.
Small Business Advocate
Attorney ID No. 16452

Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101
(717) 783-2525

Date: April 1, 2010

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

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

Hon. Cynthia W. Fordham
Administrative Law Judge
Pa. Public Utility Commission
801 Market Street - #4063
Philadelphia, PA 19107
(215) 560-2105
(215) 560-3133 (fax)
cfordham@state.pa.us

Charis Mincavage, Esquire
Barry A. Naum, Esquire
Carl J. Zwick, Esquire
McNees, Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(717) 236-2665 (fax)
cmincavage@mwn.com
bnaum@mwn.com
czwick@mwn.com

Thomas P. Gadsden, Esquire
Kenneth M. Kulak, Esquire
Catherine G. Vasudevan, Esquire
Morgan Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5234
(215) 963-5001 (fax)
tgadsden@morganlewis.com
kkulak@morganlewis.com
cvasudevan@morganlewis.com

Barrett C. Sheridan, Esquire
Tanya J. McCloskey, Esquire
Office of Consumer Advocate
555 Walnut Street - Fifth Floor
Harrisburg, PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)
bsheridan@paoca.org
tmccloskey@paoca.org
(E-mail and Hand Delivery)

Richard A. Kanaskie, Esquire
Office of Trial Staff
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-1976
(717) 772-2677 (fax)
rkanaskie@state.pa.us
(E-mail and Hand Delivery)

Romulo L. Diaz, Jr., Esquire
Anthony E. Gay, Esquire
Exelon Business Services Company
2301 Market Street
Philadelphia, PA 19101
(215) 841-4941
(215) 568-3389 (fax)
romulo.diaz@exeloncorp.com
anthony.gay@exeloncorp.com

RECEIVED
2010 APR -1 PM 3:13
PA PUBLIC UTILITY COMMISSION
SECRETARIAT'S BUSINESS

Richard G. Webster, Jr.
PECO Energy Company
2301 Market Street - S15
Philadelphia, PA 19103
(215) 841-4000
(215) 841-6208 (fax)
dick.webster@exeloncorp.com

Christopher A. Lewis, Esquire
Christopher R. Sharp, Esquire
Melanie J. Tambolas, Esquire
Blank Rome, LLP
One Logan Square
Philadelphia, PA 19103-6998
lewis@blankrome.com
sharp@blankrome.com
tambolas@blankrome.com

J. Barry Davis, Esquire
Law Department
City of Philadelphia
1515 Arch Street - 16th Floor
Philadelphia, PA 19102
(First-class Mail only)

Paul F. Mapelli, Esquire
Consolidated Edison Solutions, Inc.
701 Westchester Avenue - #300 East
White Plains, NY 10604
(First-class Mail only)

Brian R. Greene, Esquire
SeltzerGreene, PLC
707 East Main Street - #1025
Richmond, VA 23219
(First-class Mail only)

Thu B. Tran, Esquire
Philip A. Bertocci, Esquire
Jonathan M. Stein, Esquire
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
(First-class Mail only)

PPL EnergyPlus, LLC
P. O. Box 25225
Lehigh Valley, PA 18002
(First-class Mail only)

Gary A. Jeffries, Esquire
Dominion Retail, Inc.
501 Martindale Street - #400
Pittsburgh, PA 15212-5817
(First-class Mail only)

Todd S. Stewart, Esquire
Hawke McKeon & Sniscak, LLP
Harrisburg Energy Center
P. O. Box 1778
Harrisburg, PA 17105-1778
(717) 236-1300
(717) 236-4841 (fax)
tsstewart@hmslegal.com

Divesh Gupta, Esquire
Constellation Energy Resources, LLC
111 Market Place - #500
Baltimore, MD 21202
(410) 470-3158
(443) 213-3556 (fax)
divesh.gupta@constellation.com

Daniel Clearfield, Esquire
Deanne M. O'Dell, Esquire
Eckert Seamans Cherin & Mellott, LLC
P. O. Box 1248
Harrisburg, PA 17108-1248
(717) 237-7160
(717) 237-6019 (fax)
dclearfield@eckertseamans.com
dodell@eckertseamans.com

Thomas T. Niesen, Esquire
Charles E. Thomas, III, Esquire
Norman J. Kennard, Esquire
Thomas Long Niesen & Kennard
P. O. Box 9500
Harrisburg, PA 17108-9500
(First-class Mail only)

Commerce Energy, Inc.
575 Anton Boulevard - #650
Costa Mesa, CA 92626
(First-class Mail only)

Select Energy, Inc.
107 Selden Street
Berlin, CT 06037
(First-class Mail only)

Community Energy, Inc.
201 King of Prussia Road, Suite 550
Radnor, PA 19087
(First-class Mail only)

Affiliated Power Purchasers, Inc.
224 Phillip Morris Drive - #402
Salisbury, MD 21804
(First-class Mail only)

Allegheny Energy Supply Company, LLC
800 Cabin Hill Drive
Greensburg, PA 15601
(First-class Mail only)

Dominion Retail, Inc.
P. O. Box 298
Pittsburgh, PA 15230-0298
(First-class Mail only)

FirstEnergy Solutions
341 White Pond Drive - #B3
Akron, OH 44320
(First-class Mail only)

Pepco Energy Services
1300 North 17th Street - #1600
Arlington, VA 22209
(First-class Mail only)

Taylor Consulting and Contracting, LLC
625 Main Street
Avoca, PA 18641
(First-class Mail only)

Champion Energy Services, LLC
13831 N.W. Freeway - #250
Houston, TX 77040
(First-class Mail only)

Usource, LLC
348 Indian Ridge Drive
Moon Township, PA 15108
(First-class Mail only)

Constellation NewEnergy, Inc.
100 Constellation Way - #1200C
Baltimore, MD 21202
(First-class Mail only)

OnDemand Energy Solutions
300 Corporate Drive - #130
P. O. Box 869
Moon Township, PA 15108
(First-class Mail only)

The Energy Cooperative Association of PA
1528 Walnut Street - #2100
Philadelphia, PA 19102
(First-class Mail only)

UGI Energy Services, Inc.
1 Meridian Boulevard - #2C01
Wyomissing, PA 19610
(First-class Mail only)

Reliant Energy Solutions East, LLC
121 Champion Way - #200
Canonsburg, PA 15317
(First-class Mail only)

Sempra Energy Solutions, LLC
401 West A Street - #500
San Diego, CA 92101
(First-class Mail only)

Richards Energy Group
3901 Nolt Road - Bldg. 1
Landisville, PA 17538
(First-class Mail only)

Direct Energy
1001 Liberty Avenue
Pittsburgh, PA 15222
(First-class Mail only)

GDF SUEZ Energy Resources NA, Inc.
1990 Post Oak Boulevard - #1900
Houston, TX 77056
(First-class Mail only)

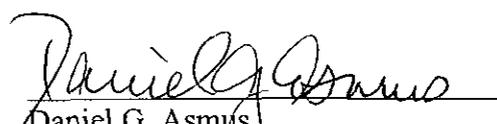
Hess Corporation
One Hess Plaza
Woodbridge, NJ 07095
(First-class Mail only)

David I. Fein
Constellation Energy
550 W. Washington Blvd. - #300
Chicago, IL 60661
(312) 704-8499
david.fein@constellation.com

Exelon Energy Company
300 Exelon Way
Kennett Square, PA 19348
(First-class Mail only)

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, ME 04364
(207) 395-4143
barbalex@ctel.net

Date: April 1, 2010


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