

COMMONWEALTH OF PENNSYLVANIA



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July 2, 2010

HAND DELIVERY

Rosemary Chiavetta, 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**

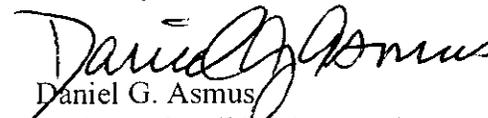
Dear Secretary Chiavetta:

I am delivering for filing today the original plus three copies of the Petition for Relief, 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,


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

Enclosures

cc: Parties of Record

Brian Kalcic

SECRETARY'S BUREAU

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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SECRETARY'S OFFICE

**PETITION FOR RELIEF
ON BEHALF OF THE OFFICE OF SMALL BUSINESS ADVOCATE**

Pursuant to 52 Pa. Code §5.572, the Office of Small Business Advocate (“OSBA”) files this Petition for Relief with regard to the June 18, 2010, Order of the Pennsylvania Public Utility Commission (“Commission”) in the above-captioned proceeding and avers the following in support of the Petition:

I. Introduction-Procedural History

1. On November 20, 2009, PECO Energy Company (“PECO” or “the Company”) filed a petition (“PECO Petition”), seeking the Commission’s approval of a revised purchase of receivables (“POR”) program. PECO proposed that the revised POR program take effect on January 1, 2011.
2. The OSBA filed a Notice of Intervention and Public Statement in the proceeding on December 4, 2009.
3. 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”).

4. 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.

5. 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.

6. 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 submitted their testimony for the record by stipulation.

7. The parties were able to negotiate a Joint Petition for Partial Settlement (“Settlement”), which was filed with the Commission on March 22, 2010. However, the parties were unable to reach an agreement on two issues: (a) 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 (b) the OTS’s 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.

8. The parties addressed the two unresolved issues in Main Briefs that were filed on March 22, 2010, and in Reply Briefs that were filed on April 1, 2010. The OSBA addressed only the termination issue in its Main and Reply Briefs.

9. The Commission issued the ALJ’s Recommended Decision (“RD”) on April 29, 2010. In her RD, the ALJ recommended that PECO’s right to terminate be limited to those

instances in which ratepayers fail to pay charges for EGS service incurred or billed on or after January 1, 2011. She also recommended rejection of the OTS's unbundling proposal.

10. On May 19, 2010, PECO and the OTS filed Exceptions to the RD.

11. On June 1, 2010, the OSBA and the OCA filed Reply Exceptions in response to PECO's Exception. Also on June 1, 2010, PECO, Dominion, and RESA/Direct filed Reply Exceptions to the Exception filed by the OTS.

12. By Order entered June 18, 2010, the Commission denied the OTS's Exception. However, the Commission granted PECO's Exception, thereby empowering the Company to terminate service to ratepayers for unpaid charges for EGS service incurred or billed prior to, on, or after January 1, 2011.

13. By this Petition, the OSBA seeks clarification of the scope of the Commission's Order. Specifically, the OSBA seeks clarification of the following:

a. Whether PECO has the right to terminate for unpaid charges for EGS service billed to a ratepayer by an EGS prior to January 1, 2011, through dual billing;

b. The extent, if any, to which the consumer protections of 52 Pa. Code Ch. 56 will be applicable to a non-residential ratepayer; and

c. If PECO does have the right to terminate for unpaid charges for EGS service billed to a ratepayer by an EGS prior to January 1, 2011, through dual billing, whether those charges will be considered to have been billed when PECO bills the ratepayer on or after January 1, 2011, or whether those charges will be considered to have been billed when the EGS originally billed the ratepayer.

II. Legal Requirements for Granting a Petition Under 52 Pa. Code §5.592.

14. In *Philip Duick et al. v. Pennsylvania Gas and Water Company*, Docket No. C-R0597001 (Order entered December 17, 1982), 1982 Pa. PUC LEXIS 4, 56 Pa. PUC 553 (1982), the Commission explained the basis for rescinding or amending a prior order:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. . . . What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Duick, 1982 Pa. PUC LEXIS 4, at *11-*13.

15. In *Pennsylvania Public Utility Commission v. Jackson Sewer Corporation*, 2001 Pa. PUC LEXIS 44, the Commission also stated:

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

Jackson Sewer, 2001 Pa. PUC LEXIS 44, at *6.

16. The OSBA's Petition seeks clarification, rather than reconsideration, of the Commission's June 18, 2010, Order. However, if the Commission determines that the issues about which the OSBA is seeking clarification were not adjudicated by the June 18, 2010, Order, the OSBA respectfully requests that the Commission consider the matters set forth in this Petition in making such an adjudication.

17. According to the OCA, the number of "commercial" customers in the PECO service territory purchasing generation service from an EGS was 66,395 as of July 1, 2003. However, the number was only 18,853 as of April 1, 2010.¹ There is no evidence in the record

¹ See Office of Consumer Advocate, Pennsylvania Shopping Statistics, at <http://www.oca.state.pa.us/Industry/Electric/elecstats/ElectricStats.htm>

regarding how many of these commercial customers may have been returned to default service by an EGS because of those ratepayers' failure to pay EGS charges billed to them by an EGS through dual billing. However, the large number of commercial customers returning to default service implies that a significant number of commercial customers may be subject to termination after PECO buys the EGSs' receivables covering unpaid charges for EGS service.

18. Theoretically, it would be possible to address billing and termination disputes for non-residential customers if and when those disputes arise. However, clarifying the scope of the June 18, 2010, Order on a case-by-case basis is not practical for small commercial and industrial ("Small C&I") customers. First, the OSBA is likely to receive numerous inquiries from such customers. The OSBA will be better able to provide answers to those inquiries if the Commission provides the clarification requested by this Petition. Second, unless Small C&I customers are sole proprietorships, they will have to be represented by counsel in order to contest termination in a formal proceeding before the Commission. Because of the OSBA's limited resources, the OSBA will be unable to provide that legal representation. It is likely that some of those formal proceedings will be avoided if the Commission provides the clarification requested by this Petition.

III. PECO's Existing POR Program

19. PECO went through the restructuring process in the late 1990s, as did all large electric utilities, in order to facilitate competition in the provision of electric generation service. As part of its Restructuring Settlement, PECO established a POR program.²

² *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) ("Restructuring Settlement").

20. Under the existing POR program, PECO uses consolidated billing, *i.e.*, all charges (including the EGS's charges for generation service plus PECO's charges for distribution, transmission, and stranded costs) are billed by PECO on one bill to the customer. PECO then pays the EGS, dollar for dollar, all undisputed EGS charges billed by PECO for up to 90 days, regardless of whether or not the customer actually pays PECO. PECO does not consider a customer's claim of inability to pay to be a dispute, and therefore, pays the EGS for the charges related to such a claim.³

21. At the end of 90 days, the delinquent account can be converted by either PECO or the EGS to dual billing, making PECO and the EGS separately responsible for collection of any overdue amounts associated with their separately-billed services.⁴ In many such instances, the EGS presumably stops service to the delinquent customer, who then reverts to default service from PECO.⁵ PECO also presumably attempts to collect from EGS customers for the amounts PECO paid to that EGS for generation service during the 90-day period.

22. Through December 31, 2010, the Company is precluded from terminating electric service to a customer who is delinquent in paying the EGS charges billed to that customer by PECO through consolidated billing.⁶ PECO is also prohibited from terminating electric service to a customer who is delinquent in paying the EGS for charges billed by the EGS through dual billing. Specifically, paragraph 22 of the Restructuring Settlement states in pertinent part, "Only

³ PECO Petition at 4, ¶ 6.

⁴ *Id.*

⁵ There is no record evidence in this proceeding about how quickly each individual EGS has terminated service after customers have reverted back to dual billing. There is also no record evidence in this proceeding regarding the magnitude of the receivables PECO would be purchasing from each individual EGS for service prior to January 1, 2011.

⁶ OSBA Statement No. 1, Direct Testimony of Brian Kalcic at 3; Restructuring Settlement at 17, ¶ 22.

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 or PLR service*.⁷

(emphasis added)

23. Although the Company has been prohibited from terminating service, "PECO's expenses associated with its current POR program, including uncollectible expense, are recovered through its distribution rates."⁸ Therefore, "PECO's expenses" recovered through distribution rates include any portion of the 90 days of payments by PECO to an EGS which PECO has been unable to collect from ratepayers.

IV. PECO's Revised POR Program

24. The PECO Petition is the Company's response to its commitment in its most recent default service case to propose revisions in the existing POR program.⁹

25. The terms of PECO's Restructuring Settlement expire on December 31, 2010.¹⁰ As proposed by PECO, the protections against termination under the Restructuring Settlement will also end at midnight on December 31, 2010, with the implementation of the revised POR program.¹¹ As explained by PECO witness John J. McCawley, "Under PECO's Revised POR Program, customers may be terminated for unpaid EGS charges for basic electric supply that were incurred or billed on or before January 1, 2011."¹²

⁷ Restructuring Settlement at 17, ¶ 22.

⁸ PECO Petition at 5, ¶ 7.

⁹ PECO Petition at 5-8, ¶¶ 8-11, citing the Joint Petition for Settlement in *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).

¹⁰ Restructuring Settlement at 44, ¶ 43, which states, "This settlement, including all of the terms and conditions set forth above, shall expire on December 31, 2010."

¹¹ PECO Petition at 4-5, ¶ 6.

¹² PECO Statement No. 1-R, Rebuttal Testimony of John J. McCawley at 5.

26. The Commission's June 18, 2010, Order approved PECO's use of termination as part of the Company's revised POR program. However, the circumstances under which termination may be used and the consumer protections available to non-residential customers would benefit from clarification.

V. Termination for EGS Charges through Dual Billing

27. There are three types of receivables for EGS generation service which PECO seeks to use as the basis for termination if the customer fails to pay PECO.

a. "Post-2010 Receivables": These are the receivables related to generation service provided by an EGS on or after January 1, 2011, and billed to the customer by PECO through consolidated billing. PECO is proposing to purchase these receivables under the Revised POR Program.

b. "90-day Receivables": These are the receivables related to generation service provided by an EGS prior to January 1, 2011, and billed to the customer by PECO through consolidated billing. Under its existing POR program, PECO already owns these receivables.

c. "Dual Billing Receivables": These are the receivables related to generation service provided by an EGS prior to January 1, 2011, and billed to the customer by the EGS through dual billing. These receivables either arise out of generation service provided prior to the EGS's participation in consolidated billing under the existing POR program or arise out of generation service provided after the customer's reversion to dual billing but before the customer's reversion to default service. Although these receivables currently belong to the EGS, PECO is proposing to purchase them under the Revised POR Program.

28. The OSBA did not oppose the use of termination with regard to the “Post-2010 Receivables.” However, the OSBA did oppose the use of termination with regard to the “90-Day Receivables” and the “Dual Billing Receivables.”¹³

29. In her RD, the ALJ recommended that PECO be permitted to use termination if a customer fails to pay PECO for the EGS generation service giving rise to the “Post-2010 Receivables.”¹⁴ In its June 18, 2010, Order, the Commission agreed with the ALJ.¹⁵

30. In her RD, the ALJ recommended rejection of the use of termination if a customer fails to pay PECO for the EGS generation service giving rise to the “90-Day Receivables.”¹⁶ However, in its Order, the Commission rejected the ALJ’s recommendation and approved PECO’s use of termination if a customer fails to pay PECO for the EGS generation service underlying the “90-Day Receivables.”¹⁷ Although the OSBA disagrees with the Commission’s decision with regard to the “90-Day Receivables,” this Petition for Relief does not seek reconsideration of that decision.

31. In her RD, the ALJ recommended rejection of the use of termination if a customer fails to pay to pay PECO for the EGS generation service giving rise to the “Dual Billing Receivables.”¹⁸ Because of ambiguous language in the June 18, 2010, Order, it is unclear whether the Commission approved the use of termination if a customer fails to pay PECO for the

¹³ OSBA Reply Exception at 5-7.

¹⁴ RD at 35-37.

¹⁵ Order at 36-37.

¹⁶ RD at 35-37.

¹⁷ Order at 36-37.

¹⁸ RD at 35-37.

EGS generation service giving rise to “Dual Billing Receivables.” By this Petition for Relief, the OSBA is seeking clarification with regard to “Dual Billing Receivables.”

32. PECO proposed to purchase an EGS’s receivables which exist on December 31, 2010.¹⁹ Those receivables presumably are the amounts the EGS has been unable to collect through dual billing. PECO has submitted no evidence of the magnitude of the “Dual Billing Receivables” and no evidence of how much, if anything, PECO will pay for the “Dual Billing Receivables.”

33. According to PECO, the RD would have obligated the Company “to purchase accounts receivable that already exist at January 1, 2011 and, therefore, necessarily arise from service furnished before that date,” but the RD would have denied PECO the authority to use termination if the Company is unable to collect the debts underlying those receivables.²⁰ The only EGS receivables that will *already exist* on January 1, 2011, will be the “Dual Billing Receivables.”

34. Based on its reading of PECO’s Exception, the Commission stated that “[a]s consolidated billing is a condition precedent to the creation of EGS receivables that are eligible for purchase, the existing safeguards provide reasonable assurance that pre-2011 arrearages exclude non-basic charges.”²¹ This part of the Order focuses on whether termination will be available if a customer fails to pay for non-basic service provided by an EGS. However, the Commission’s apparent understanding that “consolidated billing is a condition precedent to the creation of EGS receivables [for pre-2011 EGS service] that are eligible for purchase” implies that the Commission did not intend to approve the use of termination if a customer fails to pay

¹⁹ PECO Petition at 12, ¶ 23.

²⁰ PECO Exception at 5.

²¹ Order at 35 (emphasis added).

PECO for service giving rise to “Dual Billing Receivables,” *i.e.*, for EGS service originally billed to the customer by the EGS through dual billing (rather than by PECO through consolidated billing).

35. In its Reply Exception, the OSBA set forth the argument against allowing PECO to terminate for unpaid EGS charges underlying “Dual Billing Receivables.” Specifically, “Dual Billing Receivables” are not eligible for purchase by PECO under the existing POR program. Therefore, an EGS has had no reasonable expectation that it would eventually be made whole by PECO for *uncollectibles arising from generation service billed to a customer through dual billing*. PECO’s willingness to purchase the “Dual Billing Receivables” constitutes a windfall to the EGS. Furthermore, PECO has identified no language in the Restructuring Settlement or in the Default Service Settlement that obligates the Company to purchase the “Dual Billing Receivables” and to assume the risk of being unable to collect for the EGS charges giving rise to these receivables.²² The Commission’s failure to address the OSBA’s argument contributes to the uncertainty over the Commission’s intent regarding “Dual Billing Receivables.”

36. Termination proceedings with regard to “Dual Billing Receivables” could involve disputes over the legitimacy and accuracy of the underlying EGS charges. Presumably, the records needed to resolve such disputes are not records compiled and maintained by PECO. Therefore, resolving such disputes could require PECO to incur administrative expenses the Company could have avoided if it had not agreed to purchase the “Dual Billing Receivables.”

37. In view of the potential administrative difficulties and costs and in view of the Commission’s apparent understanding that PECO will be purchasing only receivables for service billed through consolidated billing, the Commission should clarify its intent regarding “Dual Billing Receivables.” Specifically, the Commission should make clear if PECO is authorized to

²² OSBA Reply Exception at 5-7 and 11.

use termination if a customer fails to pay PECO for the EGS generation service underlying the “Dual Billing Receivables” that will already exist on January 1, 2011.

VI. Applicability of Chapter 56

38. In its Petition, PECO indicated that the termination rules in the revised POR program would be subject to the consumer protection provisions contained in Chapter 14 of the Public Utility Code, 66 Pa. C.S. § 1401 *et seq.*, and Chapter 56 of the Commission’s regulations, 52 Pa. Code § 56.1 *et seq.*²³ However, Chapter 14 applies only to residential customers.²⁴ Furthermore, it is not clear which, if any, of the consumer protections in Chapter 56 apply to non-residential customers.

39. In its petition and testimony, PECO did not explicitly state its intent regarding which, if any, of the consumer protections in Chapter 56 would apply to non-residential customers. In its Reply Brief, the Company represented that “PECO has previously stated, and reaffirms, that its exercise of termination authority will adhere to all applicable customer protections, including the [four-year] statute of limitations cited by the OSBA.”²⁵ That representation *may* indicate a willingness by PECO to adhere to a four-year statute of limitations in collecting from, and terminating, non-residential customers. However, equating adherence to that statute of limitations to “[adherence] to all *applicable* customer protections” creates an ambiguity.

40. In its June 18, 2008, Order, the Commission pointed to the consumer protections afforded by Chapter 14 and Chapter 56 as part of its rationale for approving the use of

²³ PECO Petition at 12, ¶ 23.

²⁴ See Section 1401 and the definition of “customer” in Section 1403.

²⁵ PECO Reply Brief at 6.

termination for EGS service provided prior to January 1, 2011.²⁶ Despite that reference, the Order did not explicitly address whether the Commission intends that the four-year statute of limitations apply to non-residential customers.

41. The Commission's regulation at 52 Pa. Code § 56.35 prohibits a utility from requiring payment of a bill which is more than four years old as a condition for furnishing service. Similarly, 52 Pa. Code § 56.83(7) prohibits a utility from terminating service for non-payment of a bill which is more than four years old.

42. On their face, the provisions of Section 56.35 and Section 56.83(7) seem to apply only to residential customers. However, there is Commission precedent for applying the four-year limitation to non-residential customers. In *Angie's Bar v. Duquesne Light Company*, 72 Pa. PUC 213, 217 (1990), the Commission noted (in reference to the four-year limit for seeking refunds found in 66 Pa. C.S. §1312) that "while expressly applying only to residential customers, an analogy can be drawn from the four-year limitations contained in the Commission's regulations at Sections 56.35 and 56.83(7). We can find no distinguishing factor which would suggest that a different time limitation for commercial customers should be applied."

43. Because the Commission has decided to permit PECO to terminate service for EGS charges incurred prior to January 1, 2011, *i.e.*, at least the "90-Day Receivables" and possibly also the "Dual Billing Receivables," the Commission should follow *Angie's Bar* and explicitly prohibit the Company from using termination with regard to non-residential customers if the EGS charges are more than four years old. However, if the Commission does not intend to afford the protection of the four-year statute of limitations to non-residential customers, the Commission could eliminate an issue from future litigation by explicitly stating that intent.

²⁶ Order at 36.

VII. Billing Date for EGS Charges through Dual Billing

44. If the Commission intends to authorize the use of termination if a customer fails to pay PECO for the EGS generation service underlying the “Dual Billing Receivables,” the Commission should provide guidance for calculating the date on which the customer will be subject to potential termination.

45. One possible approach is to consider the initial billing date to be the date on which PECO first bills the customer for an EGS charge underlying a “Dual Billing Receivable.” Under this approach, the obligation to pay PECO for the EGS charges would not arise until after January 1, 2011. Consequently, even if the Commission decides that the four-year statute of limitations will apply, pre-2007 EGS charges could give rise to termination. In addition to possible “proof problems,” this approach could, in effect, revive debts which the EGS itself is no longer able to collect through a legal proceeding.

46. Another possible approach is to consider the initial billing date to be the date on which the EGS first billed the customer for the service for which the customer did not pay. If the four-year statute of limitations will apply, this approach would have the effect of prohibiting PECO from using termination with regard to pre-2007 EGS charges.

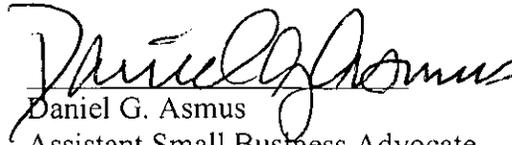
47. Regardless of the approach the Commission chooses, future litigation could be avoided if the Commission were to make its intention clear.

VIII. Conclusion

48. For the reasons set forth above, the OSBA respectfully requests clarification of the following issues with regard to the Commission’s June 18, 2010, Order in the above-captioned proceeding:

- a. Whether PECO has the right to terminate for unpaid charges for EGS service billed to a ratepayer by an EGS prior to January 1, 2011, through dual billing;
- b. The extent, if any, to which the consumer protections of 52 Pa. Code Ch. 56 will be applicable to a non-residential ratepayer; and
- c. If PECO does have the right to terminate for unpaid charges for EGS service billed to a ratepayer by an EGS prior to January 1, 2011, through dual billing, whether those charges will be considered to have been billed when PECO billed the ratepayer on or after January 1, 2011, or whether those charges will be considered to have been billed when the EGS originally billed the ratepayer.

Respectfully submitted,


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Dated: July 2, 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 Petition for Relief, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted), upon the persons addressed below:

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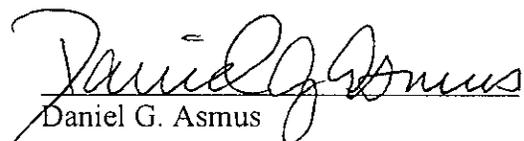
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