

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
	:	
v.	:	Docket No. R-2010-2161575
	:	
PECO Energy Company – Electric Division	:	
	:	

**MAIN BRIEF
OF THE
OFFICE OF TRIAL STAFF**

RECEIVED

2010 SEP 10 PM 3:49

PA PUC
SECRETARY'S BUREAU

Adeolu A. Bakare
Prosecutor
PA Attorney ID #208541

Johnnie E. Simms
Chief Prosecutor
PA Attorney ID #33911

Office of Trial Staff
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976

Dated: September 10, 2010

TABLE OF CONTENTS

I. INTRODUCTION 1

 A. History of the Proceeding 1

 B. Burden of Proof..... 6

II. SUMMARY OF ARGUMENT 9

III. ARGUMENT 10

 A. The OTS Position does not conflict with the Commission Order
 Approving PECO’s POR Program..... 10

 B. PECO’s proposal contradicts the unbundling policy adopted
 through the 1997 Restructuring Plan Order 13

 C. The competitive benefits of PECO’s proposal are overstated 16

 D. As a matter of practicality, now is the appropriate time to
 unbundle PECO supply-related uncollectibles expense from
 distribution rates..... 20

 1. The Commission should not predicate unbundling upon the
 terms of PECO’s voluntary POR program 21

 2. The Commission should unbundle PECO uncollectibles
 before the expiration of its rate caps.23

IV. CONCLUSION..... 25

APPENDIX A

TABLE OF CITATIONS

Cases

<i>Berner v. Pennsylvania Public Utility Commission</i> , 382 Pa. 622, 631 A.2d 738, 744 (1955)	8
<i>Burleson v. Pennsylvania Public Utility Commission</i> , 501 Pa. 433, 461 A.2d 1234 (1983)	7
<i>Brockway Glass v. Pennsylvania Public Utility Commission</i> , 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981)	6
<i>Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission</i> , 19 Pa. Cmwlth. 1, 337 A.2d 922 (1975)	7
<i>Lower Frederick Twp. v. Pennsylvania Public Utility Commission</i> , 222, 226-227, 409 A.2d 505, 507 (1980)	6
<i>Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission</i> , 489 Pa. P.U.C. 109, 128 (1980)	7
<i>Pennsylvania Public Utility Commission v. Breezewood Telephone Company</i> , 74 Pa. P.U.C. 431 (1991)	7
<i>Pennsylvania Public Utility Commission v. Equitable Gas Co.</i> , 57 Pa. P.U.C. 423, 444 (fn. 37) (1983)	8
<i>Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program</i> , Docket No. P-2009-2143607	9, 11, 12, 13, 21, 22
<i>Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge</i> , Docket No. P-2009-2129502	22
<i>Re PECO Energy Company</i> , 181 P.U.R. 4th 517, 542-43 (1997), as modified by, <i>Re PECO Energy Company</i> , 186 P.U.R. 4th 105 (1998)	10, 14, 15

Statutes

66 Pa. C.S. § 315(a) 6

66 Pa. C.S. § 1308 1

66 Pa. C.S. § 1308(d) 1, 6

66 Pa. C.S. § 2804(3) 14, 20, 21, 23

Regulations

52 Pa. Code § 53.52 1

I. INTRODUCTION

A. History of the Proceeding

On March 31, 2010, PECO Energy Company – Electric Division (“PECO” or “the Company”) filed Supplement No. 2 to Tariff Electric-Pa. P.U.C. No. 4, containing a proposed increase in annual distribution revenues of \$287.7 million and an increase of annual transmission revenues of \$26.7 million upon the Pennsylvania Public Utility Commission (“Commission”) pursuant to 66 Pa. C.S. § 1308 of the Public Utility Code. Supplement No. 2 was accompanied by the supporting information filed in accordance with 52 Pa. Code § 53.52 and the Company’s direct testimony, consisting of PECO Statements Nos. 1-10 and accompanying exhibits. On June 8, 2010 PECO filed the Supplemental Direct Testimony of Phillip S. Barnett (PECO Statement No. 2-S).

On April 22, 2010 OTS entered a Notice of Appearance in this proceeding for Johnnie E. Simms and Adeolu A. Bakare. By Order issued May 20, 2010, the Commission instituted a formal investigation to determine the lawfulness, justness, and reasonableness of the proposed rates, rules, and regulations. Pursuant to 66 Pa. C.S. § 1308(d), Supplement No. 2 was suspended by operation of law on May 30, 2010 until December 31, 2010, unless permitted by Commission Order to become effective at an earlier date. The Order assigned the case to the Office of Administrative Law Judge for the

prompt scheduling of hearings as may be necessary, culminating in the issuance of a Recommended Decision.

OTS filed a Notice of Appearance on April 22, 2010. The Office of Small Business Advocate (“OSBA”) filed its Notice of Appearance, Formal Complaint, and Public Statement on April 20, 2010. The Office of Consumer Advocate (“OCA”) followed with its Notice of Appearance, Formal Complaint and Public Statement on April 26, 2010.

Additional Formal Complaints were filed by the Tenant Union Representative Network and Action Alliance of Senior Citizens of Philadelphia (“TURN, et al.”), on May 14, 2010; the Philadelphia Area Industrial Energy Users Group (“PAIUEG”), on May 20, 2010; the Trustees of the University of Pennsylvania/the Hospital of the University of Pennsylvania (“UPENN”)¹, on May 28, 2010; and Philadelphia Communities Organizing for Change (“PCOC”), on June 29, 2010. Individual Complainants Ryan Miller, Craig Vorwald, Edward W. Leisenring, Cynthia Gallagher, and Rita Griggs also filed Formal Complaints.

Petitions to Intervene were filed by the International Dark Sky Association (“IDA”), the International Brotherhood of Electrical Workers Local 614, AFL-CIO (“IBEW”), Dominion Retail, Inc. (“Dominion Retail”), the City of Philadelphia (“the City”), Citizens for Pennsylvania’s Future, Joy Bergey,

¹ UPENN eventually withdrew its Complaint on June 21, 2010.

Christine Knapp, and Henry Rowan (“PennFuture et al.”), the Philadelphia Housing Authority (“PHA”), C. Stanley Stubbe, and the Commercial Group (“CG”).

Administrative Law Judges Marlane R. Chestnut and Christopher Pell presided over a prehearing conference held on June 9, 2010. OTS attended the prehearing conference and participated in discussions addressing procedural matters such as scheduling and discovery modifications. The ALJs subsequently issued Prehearing Order No. 1 on June 15, 2010 which, *inter alia*, established a litigation schedule, modified the discovery rules, and granted the aforementioned Petitions to Intervene.²

ALJs Chestnut and Pell issued a Protective Order on June 21, 2010, granting PECO’s motion for a Stipulated Protective Agreement to govern documents and information provided to OTS and other parties during the course of this proceeding.

The ALJs also presided over a total of four public input hearings. Two were held in Philadelphia on June 28, 2010. The ALJs conducted the third public input hearing in Worcester Township, Montgomery County, on June 29, 2010. The final public input hearing was held in Ridley Township, Delaware County

2 The IDA filed a Motion to Withdraw on June 30, 2010, which was granted by Commission Order on July 6, 2010.

on June 30, 2010. A collective total of 26 witness presented testimony on the record at the public input hearings.

In accordance with the litigation schedule prescribed in Prehearing Order No. 1, OTS, OCA, OSBA, IBEW, the City, CG, PAIEUG, TURN/PCOC, C. Stanley Stubbe and UPENN served direct testimony and accompanying exhibits upon the parties and the ALJs on July 7, 2010. On August 3, 2010, PECO, OCA, OSBA, PAIEUG, the City, CG and TURN/PCOC served the parties and ALJs with rebuttal testimony and accompanying exhibits. On August 12, 2010, PECO, OCA, OTS, OSBA and PAIEUG served the parties and ALJs with surrebuttal testimony and accompanying exhibits.

Following the submission of direct testimony, the parties engaged in lengthy and extensive settlement discussions. The parties convened for formal settlement discussions on July 27, 2010 and August 5, 2010. Additionally, the parties, collectively and separately, participated in various informal discussions. On August 13, the Company informed the ALJs that the parties had made substantial progress in settlement discussions and requested cancellation of hearings scheduled for August 16 and 17, 2010 in order to continue negotiations. On August 17, 2010, PECO informed the ALJs that the parties had reached a partial settlement of all issues except for the matter addressed in this Main Brief. On the same date, ALJ Chestnut notified the parties that the

remaining hearings would be cancelled in anticipation of forthcoming settlement documents.

On August 31, 2010, PECO served the Joint Petition for Partial Settlement of Rate Investigation (“Joint Petition” or “Settlement”) upon the ALJs. Signatories to the Joint Petition included OTS, PECO, OCA, OSBA, PAIEUG, PCOC, IBEW, Dominion Retail, the City, TURN, et al., PennFuture, and the CG (collectively, the “Joint Petitioners”). The PHA and C. Stanley Stubbe declined to sign the Joint Petition but each has authorized the Joint Petitioners to represent their non-opposition to the Settlement. In addition to the Settlement, the Joint Petitioners executed a Stipulation for Admission of Testimony and Exhibits (“Stipulation”). Each Joint Petitioner also provided a Statement in Support of the Settlement (“Statements”), two copies of any testimony and accompanying exhibits to be admitted into the record, and accompanying witness affidavits.³ The Stipulation, Statements, testimony, exhibits and witness affidavits were collected by the Company and filed concurrently with the Settlement on August 31, 2010.

In accordance with the litigation schedule adopted in Prehearing Order No. 1 and the terms of the Joint Petition submitted on August 31, 2010, OTS

³ OTS submitted the following direct and surrebuttal testimonies for admission into the record by the ALJs: the direct testimony of OTS Witness Amanda Gordon, consisting of OTS Statement No. 1 and OTS Exhibit No. 1; the direct and surrebuttal testimonies of OTS Witness Dorothy Morrissey, consisting of OTS Statement No. 2, OTS Exhibit No. 2, OTS Statement No. 2-SR, and OTS Exhibit No. 2-SR; and the direct testimony of OTS Witness Gary Yocca, consisting of OTS Statement No. 3 and OTS Exhibit No. 3.

submits this Main Brief to address the sole issue reserved for litigation in this rate proceeding.

B. Burden of Proof

The burden of proof to establish the justness and reasonableness of every element of the Company's rate increase rests solely upon the public utility in all proceedings under Section 1308(d) of the Public Utility Code. The standard to be met by PECO is set forth at Section 315(a) of the Public Utility Code, 66 Pa. C.S. § 315(a), as follows:

Reasonableness of rates. In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceeding upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.⁴

The language of the relevant statutory provision, Section 315(a) of the Public Utility Code, 66 Pa. C.S. § 315(a), shows a clear legislative intent demonstrating that the utility carry the burden of proving the justness and reasonableness of proposed and existing rates. The Commonwealth Court, in reviewing Section 315(a), described the utility's burden of proof in rate proceedings, as follows:

Section 315(a) of the Public Utility Code, 66 Pa. C.S. §315(a), places the burden of proving the justness and reasonableness of a proposed rate hike squarely on the public utility. It is well-established that the evidence adduced by a utility to meet this burden must be substantial.⁵

4 66 Pa. C.S. § 315(a).

5 *Lower Frederick Twp. v. Pennsylvania Public Utility Commission*, 48 Pa. Cmwlth. 222, 226-227, 409 A.2d 505, 507 (1980). See also, *Brockway Glass v. Pennsylvania Public Utility Commission*, 63 Pa. Cmwlth. 238, 437 A.2d 1067 (1981).

The legislative intent regarding the extent of a utility's burden of proof is further supported by the pronouncements of the Pennsylvania Supreme Court in *Burleson v. Pennsylvania Public Utility Commission*⁶.

In the *Burleson* case, the Pennsylvania Supreme Court found that establishing a prima facie case does not dispose of the burden of proof. The utility's filing of the proposed tariff and supporting data may establish a prima facie case. However, the provision of data composing a prima facie case does not meet the utility's burden of proving the elements of its proposed tariff with substantial evidence. As noted by the court in *Burleson*, "there is clear distinction between the weight of evidence required to support a prima facie case and the weight necessary to meet a complainant's burden of proof."⁷

Substantial evidence has been defined as "...that quantum of evidence which a reasonable mind might accept as adequate to support a conclusion."⁸

The Commission has continued to affirm the utilities' burden of proof in base rate proceedings. In *Pennsylvania Public Utility Commission v. Breezewood Telephone Company*, the Commission made the following ruling:

Thus, where a party has raised a question concerning an element at issue, the affirmative burden of proving justness and reasonableness of its claim is upon BTC.⁹

6 *Burleson v. Pennsylvania Public Utility Commission*, 501 Pa. 433, 461 A.2d 1234 (1983).

7 *Id.*

8 *Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission*, 19 Pa. Cmwlth. 1, 337 A.2d 922 (1975), as quoted in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 128 (1980).

9 *Pennsylvania Public Utility Commission v. Breezewood Telephone Company*, 74 Pa. P.U.C. 431, 442 (1991).

The Commission and the courts have clearly held that the burden of proof does not shift to the party challenging a requested rate increase. While the burden of going forward may shift, the burden of finally and convincingly establishing the justness and reasonableness of every component of a requested rate increase remains on the utility. The opposing parties have no such burden.

As stated by the Pennsylvania Supreme Court in *Berner v. Pa. P.U.C.*:

[t]he appellants did not have the burden of proving that the plant additions were improper, unnecessary or too costly; on the contrary, that burden is, by statute, on the utility to demonstrate the reasonable necessity and cost of the installations...¹⁰

On this subject, the Commission has ruled as follows:

[t]here is no presumption of reasonableness which attached to a utility's claim, at least none which survives the raising of credible issues regarding a utility's claims. A utility's burden is to affirmatively establish the reasonableness of its claim. It is not the burden of another party to disprove the reasonableness of a utility's claims.¹¹

In the instant proceeding, it is incumbent upon PECO to affirmatively prove the reasonableness of every element of each claim. A review of the record will demonstrate that the Company has failed to prove the reasonableness of its claim to recover the uncollectibles cost attributable to electric supply revenues through distribution rates. As such, this claim should

10 *Berner v. Pennsylvania Public Utility Commission* 382 Pa. 622, 631, 116 A.2d 738, 744 (1955).

11 *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, 57 Pa P.U.C. 423, 444 (fn. 37) (1983).

be rejected based upon the Company's failure to sustain its burden of proof and in recognition of the legitimacy of the OTS alternative proposal.

II. SUMMARY OF ARGUMENT

OTS recommends that revenue for electric supply costs from the residential and small commercial default service rate classes be removed from PECO's FTY revenues when calculating the uncollectibles expense to be recovered in distribution rates. Therefore, for the residential and small commercial default service rate classes, only uncollectibles expenses associated with distribution revenues will be recovered through distribution rates. Under the OTS proposal, the Company will establish a Merchant Function Charge ("MFC") rider to recover the uncollectibles expense associated with electric supply costs for the aforementioned rate classes.

As described below, this proposal is procedurally proper, consistent with Commission policy and practically sound. The OTS proposal is procedurally proper as the unbundling of PECO's uncollectibles accounts expense was explicitly reserved for argument in the instant base rate case by the Commission in the proceeding addressing PECO's Petition for Approval of its Revised Purchase of Receivables Program ("POR Petition").¹² Further, the proposal is consistent with Commission policy as unbundling was established as a public

¹² *Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program*, Docket No. P-2009-2143607, Order entered June 18, 2010, paragraph III(h). ("POR Order").

policy through the adoption of PECO's Restructuring Plan.¹³ Finally, the proposal is practically sound due to the fortuitous timing of the instant base rate case.

For the reasons stated above and further substantiated below, the Commission should adopt the OTS proposal to unbundle PECO's uncollectibles expenses associated with electric supply costs for residential and small commercial default service rate classes and recover such expense through a MFC.

III. ARGUMENT

A. The OTS Position does not conflict with the Commission Order Approving PECO's POR Program.

One contention relied upon by the Company in this proceeding, that the OTS proposal to unbundle supply-related uncollectibles expense has already been rejected by the Commission, must fail because it ignores the procedural differences between the POR proceeding and the subject base rate proceeding. In his rebuttal testimony, PECO Witness Alan Cohn referenced the OTS proposal as presented by OTS Witness Dorothy Morrissey. Mr. Cohn stated that "the proposal being advanced by Ms. Morrissey in this case has already been rejected by the Commission in PECO's POR proceeding."¹⁴ Mr. Cohn appears to be suggesting the rejection of the OTS proposal in the POR Order

13 *Re PECO Energy Company*, 181 P.U.R. 4th 517, 542-43 (1997), as modified by, *Re PECO Energy Company*, 186 P.U.R. 4th 105 (1998). ("Restructuring Order").

14 PECO Statement No. 9-R, p. 6.

should foreclose further consideration in the base rate proceeding. A review of the proceeding will show that this issue was not definitely resolved in the POR Order and is now ripe for resolution in this base rate case.

PECO filed the POR Petition on November 20, 2009.¹⁵ Several additional parties participated in the ensuing proceeding, including the OTS, OCA, OSBA, Constellation New Energy (“Constellation”), Dominion Retail, Inc. (“Dominion”), the Retail Energy Supply Association (“RESA”), and Direct Energy Services (“Direct Energy”) (collectively, the “POR Parties”). All of the POR Parties except for OTS eventually agreed to and filed a Joint Petition for Partial Settlement (“POR Partial Settlement”) on March 22, 2010.¹⁶ The POR Partial Settlement reserved two issues for briefing and adjudication through the Commission, one of which was the unbundling of supply-related uncollectibles accounts expenses from distribution rates.¹⁷

OTS also filed Main and Reply Briefs in support of unbundling supply-related uncollectibles expenses while PECO, Dominion Retail and Direct/RESA filed Main and Reply Briefs to the contrary.¹⁸ OTS protested language in the POR Petition that potentially barred a non-signatory from addressing unbundling issues affecting the POR program in a subsequent base

15 POR Order, p. 2.

16 *Id.* at 5.

17 The other issue reserved for litigation in the POR Partial Settlement bears no relevance to this Main Brief.

18 RESA and Direct Energy retained the same counsel in PECO’s POR proceeding and filed joint Briefs and Exceptions.

rate case.¹⁹ Additionally, OTS argued against the Company's proposal to exclude uncollectibles from the discount rate charged to EGSs through the POR program.²⁰ By removing such costs from the discount rate, the Company would recover uncollectibles expenses solely through distribution rates, regardless of the revenue source associated with the expense, an outcome which OTS found to be improper.²¹

The ALJ issued a Recommended Decision adopting the POR Partial Settlement and the Company's proposal to recover supply-related uncollectibles expenses through distribution rates on April 19, 2010.²² OTS filed Exceptions continuing to advocate for unbundling on May 19, 2010.²³ PECO, Dominion, and Direct/RESA filed Reply Exceptions objecting to the OTS proposal on June 1, 2010.²⁴

In the POR Order, the Commission clearly invited non-signatories to the POR Partial Settlement to advocate for the unbundling of PECO's supply-related expenses in the Company's next distribution rate case. In the June 18, 2010 Order, the Commission adopted the POR Partial Settlement and denied the OTS Exceptions, but further clarified that the Settlement language did not restrict the right of a non-signatory, i.e. OTS, to pursue unbundling in PECO's

19 POR Order, pp. 21-23.

20 *Id.* at 38.

21 *Id.*

22 *Id.* at 5.

23 *Id.*

24 *Id.*

next distribution base rate case.²⁵ This is an important distinction as the discussion of unbundling supply-related uncollectibles expenses in the context of a base rate case incorporates policy and rate considerations that are beyond the scope of a purchase of receivables proceeding. The fact that a proposal was deemed to be in the public interest in a more limited proceeding does not insulate such proposal from further scrutiny and modification through a base rate case, where the Commission and parties benefit from a comprehensive evidentiary record and the Commission in particular enjoys clearly defined authority to enforce the Public Utility Code, its regulations, and its Orders. Therefore, any suggestion that the POR Order disposed of the issue at hand is simply not credible. As acknowledged by the Commission in the POR Order, the question as to whether PECO should unbundle supply-related uncollectibles expenses from distribution rates is properly raised in this base rate case.

B. PECO's proposal contradicts the unbundling policy adopted through the 1997 Restructuring Plan Order.

The Commission fully endorsed the unbundling of supply-related expenses from distribution rates in PECO's 1997 Restructuring Order and should continue to recognize unbundling as a necessary building block for a transparent competitive market. PECO's 1997 Restructuring Order clearly established that generation and transmission costs should be unbundled from distribution rates. Despite this clear pronouncement, the Commission neglected

²⁵ *Id.* at 48.

to unbundle PECO's supply-related uncollectible expenses in the same Order. However, the rationale underlying the Commission's decision to allow recovery of supply-related uncollectibles expenses through distribution rates can no longer be considered obstructive to unbundling. At this time, particularly in the context of an ongoing base rate case, there remains little justification to again delay unbundling.

The unbundling of PECO's supply-related expenses from distribution expenses is a statutorily mandated Commission objective. In 1997, the Commission directed PECO to file its Restructuring Plan pursuant to 66 Pa. C.S. § 2804, which, *inter alia*, required "the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation, transmission and distribution."²⁶ In the 1997 Restructuring Order approving PECO's Restructuring Plan, the Commission acknowledged the statutory mandate noting that it is "directed to unbundle electric utility services, tariffs, and customer bills to separate the charges for generation, transmission and distribution."²⁷

However, in the same Order, the Commission specifically declined to unbundle PECO's uncollectibles expenses from distribution rates. This

26 66 Pa. C.S. § 2804(3).

27 Restructuring Order, 542-43.

paradoxical outcome resulted from public policy considerations specific to PECO's accounting practices. In approving PECO's Restructuring Plan without unbundling the Company's uncollectibles expenses, the Commission cited a concern that unbundling would divert funding from PECO's Universal Services Program.²⁸ As discussed below, this concern is longer valid and should not further delay the unbundling of PECO's supply-related uncollectibles expenses.

The OTS proposal to unbundle PECO's supply-related uncollectibles expenses preserves the funding of the Universal Service Program and should be adopted. The Commission's reluctance to unbundle PECO's uncollectibles expenses in the Restructuring Proceeding was not without merit as PECO's uncollectibles expense account includes preprogram arrearage expenses incurred in administering the Customer Assistance Program ("CAP") services through its Universal Service Program.²⁹ However, the instant base rate case filing alleviates this concern because the Company provided a schedule breaking the uncollectibles expense account into its component parts.³⁰ In calculating the appropriate expense amount to be unbundled and recovered through the MFC, OTS Witness Dorothy Morrissey excluded the \$15,779,000 attributable to CAP preprogram arrearages, and apportioned only the

28 Restructuring Order, 547-48.

29 PECO Ex. RLO-1, Schedule D-10.

30 *Id.*

\$38,446,000 attributable to supply-related uncollectibles.³¹ Accordingly, PECO's uncollectibles expense can now be unbundled without jeopardizing the funding of its Universal Service Program and there is no basis for further delaying such action.

C. The competitive benefits of PECO's proposal are overstated.

PECO has not provided credible evidence supporting its proposal to continue recovering supply-related uncollectibles expenses through distribution rates. PECO acknowledges that both its proposal and the OTS proposal ultimately arrive at the same overall uncollectibles expense amount to be collectively recovered from default service customers and purchased receivables.³² To support its proposal, PECO relies only upon unquantified administrative expenses arising from the OTS proposal and supposedly pro-competitive benefits associated with its proposal. Both claims are unsupported and should not bar the Commission from adopting the OTS proposal and unbundling PECO's supply-related uncollectibles expense.

PECO has not demonstrated that the administrative costs associated with implementing the OTS proposal are material. Additionally, even material implementation costs would not override the Commission's duty to fulfill its statutory directive to unbundle supply-related expenses. In his rebuttal

31 OTS Statement No. 2-SR.

32 PECO Statement No. 9-R, p. 3.

testimony, PECO Witness Alan Cohn stated that the OTS proposal would require “needless administrative, time, resources and cost associated with establishing, changing and reconciling the MFC...”³³ Although these costs are unidentified, OTS submits that the actual implementation costs of the program would be substantially lower than that implied by Mr. Cohn as the MFC would not be reconcilable under the OTS proposal.³⁴ Further, even assuming that the OTS proposal would impose material implementation costs, such costs would be just and reasonable in consideration of the Commission’s statutory duty to unbundle supply-related expenses from distribution rates.

Additionally, PECO alleges that its proposal provides pro-competitive benefits but fails to provide credible evidence to support such allegations. Throughout his testimony, PECO Witness Alan Cohn references the pro-competitive benefits of the Company’s proposal to recover all uncollectibles expenses through distribution rates and charge the EGSs a zero discount for purchased receivables. Mr. Cohn repeatedly touts the “competitive neutrality” of such an approach, claiming that the “EGSs will not be placed at a competitive disadvantage under the Company’s approach.”³⁵ Mr. Cohn further states that the OTS proposal to recover supply-related uncollectibles expenses

33 PECO Statement No. 9-R, pp. 7-8.

34 OTS Statement No. 2-SR, p. 3. “The proposed MFC adjustment clause is not reconcilable since the reconciliation of uncollectibles accounts expense in a surcharge is prohibited under 52 Pa. Code § 1408.” *Id.*

35 PECO Statement No. 9-R, p. 5.

through a discount on the EGS purchased receivables “would eliminate much of the pro-competitive effect of the Company’s Electric POR program...”³⁶

From Mr. Cohn’s testimony, the singular pro-competitive benefit appears to be the competitive neutrality established by the PECO proposal, which OTS submits is equally realized through its own unbundling proposal. Mr. Cohn never attempts to explain how the OTS unbundling proposal is any less effective in providing a competitively neutral playing field. In fact, by requiring all EGSs to account for the same discount rate percentages and reflecting the same uncollectibles charge percentages in PECO’s price to compare, the OTS proposal clearly provides EGSs with competitive neutrality. Neither PECO nor the EGSs would be able to advertise supply prices without incorporating the same uncollectibles expense percentages. Not surprisingly, Mr. Cohn attempts to detract from the competitive neutrality of the OTS proposal by emphasizing the fact that EGSs universally supported the PECO POR proposal.³⁷ However, the EGS support flows not from an appreciation of competitive neutrality, but from their recognition of a competitive advantage.

OTS Witness Dorothy Morrissey discussed the competitive advantage inuring to the EGS as a result of the PECO proposal. Ms. Morrissey described the competitive advantage as follows:

36 *Id* at 7.

37 *Id.* at 4, 7.

By not including uncollectibles in the discount rate, EGSs will increase the amount of revenue they receive from PECO.” In the advertised price of electric supply, EGSs recover their cost of service (including uncollectibles) plus a profit margin. That realized profit margin will increase if PECO’s customers assume the uncollectible risk since such costs were included in the EGS pricing.³⁸

The validity of the PECO proposal hinges on the implication that market forces will incentivize the EGSs to lower their advertised prices commensurate with the avoided costs of the uncollectibles expense. However, as noted by Ms. Morrissey, this is an uncertain proposition.³⁹ An EGS may lower its advertised price or it may simply maintain the price previously calculated to include uncollectibles expenses and retain the added profit. Assuming that the EGS will adopt the former proposal reflects a degree of naiveté as there are logical reasons why an EGS would not do so. For example, Ms. Morrissey observes that many of the EGSs preparing to enter PECO’s service territory have already entered other service territories where they have included uncollectibles expenses within their advertised rates.⁴⁰ It is not unreasonable to conclude that the EGSs would not lower the advertised price in PECO’s territory in order to avoid customer pressure to lower their advertised prices in neighboring service territories.

38 OTS Statement No. 2-SR, p. 3.

39 *Id.* at 6.

40 OTS Statement No. 2-SR, p. 4; OTS Ex. No. 2-SR, Sch. 2.

Simply put, in the best case scenario under PECO's proposal, the EGSs would lower their advertised prices in PECO's service territory commensurate with the avoided uncollectibles expense, but alternatively, each EGS would retain broad latitude to do otherwise. There is no clear evidence that the zero discount rate will increase competition but there is clear evidence that it offers an opportunity for increased profits. Accordingly, the EGSs' support for PECO's proposal should be given little weight as an indication of any pro-competitive effects.

Rather, the Commission should conclude that both the PECO and the OTS proposals establish the same competitively neutral market and adopt the OTS proposal pursuant to the statutory mandate to unbundle supply-related expenses from distribution rates.

D. As a matter of practicality, now is the appropriate time to unbundle PECO's supply-related uncollectibles expense from distribution rates.

The Commission must take advantage of the present opportunity to unbundle PECO's supply-related uncollectibles expenses in advance of the expiring rate caps. PECO attempts to leverage the POR Order as an impediment to unbundling through a base rate case. Any inconveniences resulting from the immediate unbundling of PECO's uncollectible expense cannot override the Commission's statutory directive under 66 Pa. C.S. § 2804(3) and the practical necessity to unbundle PECO's uncollectible expense

before the expiration of its rate caps. Further, the Commission has no authority to implement unbundling through a voluntary purchase of receivables program and risks entrenching all stakeholders in the “bundled” rate structure with a protracted delay. Therefore, the Commission should exercise its authority in this base rate proceeding, immediately unbundle PECO’s supply-related uncollectibles expense and take any additional action deemed necessary to ensure the continued efficacy of PECO’s POR program.

1. The Commission should not predicate unbundling upon the terms of PECO’s voluntary POR program.

PECO’s claim that the OTS proposal should be rejected because of potential implementational difficulties with the existing POR program should not be considered by the Commission as such difficulties can be cured and surely cannot take precedence over the requirements of 66 Pa. C.S. § 2804(3). PECO proposed its voluntary POR program and the Commission deemed it just and reasonable based on the circumstances existing at that time.⁴¹ At the program was voluntary filed, the Commission lacked authority to impose terms onto the program, including any requirement that PECO modify its tariff provisions and unbundle supply-related uncollectibles. The voluntary nature of POR programs was acknowledged by the Commission in the following excerpt from its Order approving PPL’s POR:

41 See generally POR Order.

Specifically, PPL contends that it voluntarily filed its POR Program with the Commission in response to the Retail Markets Order, and does not believe that the Commission has the authority to require it to purchase an EGS' receivables. We agree. In *PECO Energy Co. v. Pa. PUC*, 568 Pa. 39, 791 A.2d 1155 (2002), the Supreme Court of Pennsylvania stated as follows:

The power of the Commission is statutory, arising either from words contained in the enabling statutes or by a strong and necessary implication from those words, and the legislative grant of power in any particular case must be clear.

No provision of the Code either expressly or by "strong and necessary implication" provides the Commission with the authority to require EDCs to purchase accounts receivable from EGSs. On the contrary, the Code specifically provides that the Commission cannot require EDCs to purchase EGS' accounts receivables.⁴²

As it had no authority to act upon unbundling in a POR proceeding, the Commission rightly informed the parties that any non-signatory to the POR Partial Settlement could advocate for unbundling of PECO's supply-related uncollectibles expenses in the Company's next base rate case.⁴³ The instant base rate case is the forum under which the Commission retains the authority to impose tariff modifications upon the Company and therefore the proper forum for unbundling PECO's supply-related uncollectibles. If the Commission were

42 *Petition of PPL Utilities Corporation Requesting Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge*, Docket No. P-2009-2129502, Opinion and Order entered November 19, 2009, pp. 9-10.

43 POR Order at 48.

to delay the unbundling of PECO's uncollectibles pending the implementation of a discount rate through the voluntary POR program, it would essentially place the fulfillment of a statutory directive within the control of the Company and other intervenors.

PECO's POR program is an important vehicle for the transition to a competitive marketplace but the Commission, PECO, and other stakeholders are fully capable of resolving any resulting conflicts arising from the Commission's actions in this base rate case. The Commission should base its decision regarding this matter on the provisions of 66 Pa. C.S. § 2804(3) and adopt the OTS proposal to unbundle PECO's uncollectibles.

2. The Commission should unbundle PECO uncollectibles before the expiration of its rate caps.

Assuming that the Commission and all parties recognize that unbundling must occur at some point, OTS submits that delaying unbundling beyond the expiration of PECO's rate caps may engender market and customer confusion as all participants will become entrenched in the "bundled" rate structure. The Commission now faces a one time opportunity where PECO has submitted a base rate case filing and competitive generation suppliers have not yet entered its service territory. The Commission cannot predict when PECO will voluntarily file its next base rate case and therefore cannot anticipate an opportunity to implement unbundling with current and accurate data from a cost of service study.

The urgency to unbundle PECO's uncollectibles is evidenced by both OTS and Company testimony. As stated by Ms. Morrissey in her testimony, "The PUC and PECO will face strong opposition from the EGSs and risk customer confusion if unbundling is delayed now and attempted later. If postponed, uncollectibles will have to be estimated and with increased shopping, unbundling will be uneconomical and PECO will never be unbundled."⁴⁴ PECO Witness Alan Cohn also notes that implementing unbundling at this juncture would create difficulties as the OTS proposal would "substantially depart from the terms of the program approved by the Commission in June of this year."⁴⁵ If the Company so forthrightly claims *difficulty unbundling after only three preliminary months under the current POR program*, it must logically follow that such difficulties will only increase once the EGSs and customers enter into active transactions following the expiration of PECO's rate caps next year.

It is well documented that the shift from rate caps to a competitive generation market has been a source of confusion for ratepayers across the Commonwealth. OTS opines that the Commission should add as much certainty as possible to the process and implement unbundling immediately to provide customers with a stable competitive market structure.

44 OTS Statement No. 2-SR, p. 7.

45 See PECO Statement No. 9-R, pp. 7-8.

IV. CONCLUSION

For the reasons set forth above, the Office of Trial Staff respectfully submits that PECO Energy Company – Electric Division’s proposal to recover supply-related expenses through distribution rates should be rejected. The proposal is not just and reasonable or otherwise in accordance with the Public Utility Code. OTS respectfully submits that Administrative Law Judges Marlane R. Chestnut and Christopher Pell should issue a Recommended Decision and the Commission should issue an Opinion and Order rejecting PECO’s proposal and adopting the OTS proposal to unbundle supply-related expenses from distribution rates for recovery through a Merchant Function Charge rider.

Respectfully submitted,



Adeolu Bakare
Prosecutor
PA Attorney ID #208541

Office of Trial Staff
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976

Dated September 10, 2010

APPENDIX A

PROPOSED FINDINGS OF FACT

1. In the June 18, 2010 Order approving PECO's Joint Petition for Approval of its Revised Purchase of Receivables Program, the Commission invited non-signatories of the Joint Petition to raise arguments supporting the unbundling of PECO's supply-related uncollectibles expenses for resolution in the instant base rate case. *POR Order*, p. 2.
2. Unbundling uncollectibles from distribution rates is not an impediment to the developments of competitive retail electric supply markets. *OTS Statement No. 2-SR*, p. 4; *OTS Exhibit No. 2-SR*, Sch. 1.
3. There is insufficient experience to determine whether excluding uncollectibles from distribution rates will serve to lower prices offered to customers. *OTS Statement No. 1*, p. 6.

PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding by virtue of Chapter 13 of the Public Utility Code, 66 Pa. C.S. §§ 1301, et seq.
2. Chapter 28 of the Public Utility Code directs the Commission to require the unbundling of electric utility services, tariffs and customers bills to separate the charges for generation, transmission and distribution. 66 Pa. C.S. § 2804(3).
3. PECO Energy Company – Electric Division, has not met its burden of proving that its proposal to recover supply-related uncollectibles expenses through distribution rates is just and reasonable or otherwise in accordance with the Public Utility Code. 66 Pa. C.S. § 1301.
4. The proposal of the Office of Trial Staff, to disallow recovery of the Company's supply-related uncollectibles expenses through distribution rates and implement a Merchant Function Charge to recover such expenses incurred on behalf of the Company's residential and small commercial default service rate classes is just and reasonable. 66 Pa. C.S. § 1301.

PROPOSED ORDERING PARAGRAPHS

THEREFORE,

IT IS RECOMMENDED,

1. That the proposal within Supplement No. 2 to Tariff Electric-Pa. P.U.C. No. 4 of PECO Energy Company – Electric Division to recover supply-related uncollectibles expenses through distribution rates, is denied.
2. The proposal of the Office of Trial Staff, to disallow recovery of the PECO Energy Company – Electric Division’s supply-related uncollectibles expenses through distribution rates and implement a Merchant Function Charge to recover such expenses incurred on behalf of the Company’s residential and small commercial default service rate classes, is approved.
3. That the Commission initiate any proceedings necessary or appropriate to ensure the continued efficacy of the PECO Energy Company – Electric Division’s Purchase of Receivables Program approved in the June 18, 2010 Order at Docket No. P-2009-2143607.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission :
 :
 v. : Docket No. R-2010-2161575
 :
 PECO Energy Co. (Electric) :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** dated September 10, 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):

Anthony E. Gay, Esquire
Jack R. Garfinkle, Esquire
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101-8699

Charles T. Joyce, Esquire
Spear Wilderman PC
230 S. Broad Street
Suite 1400
Philadelphia, PA 19102

Todd S. Stewart, Esquire
Hawke McKeon & Sniscak LLP
P.O. Box 1778
1000 N. Tenth Street
Harrisburg, PA 17105

Charis Mincavage, Esquire
Vasiliki Karandrikas, Esquire
Carl J. Zwick, Esquire
McNees Wallace & Nurick
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17108-1166

Tanya J. McCloskey, Esquire
Candis A. Tunilo, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Forum Place
Harrisburg, PA 17101-1921

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

J. Barry Davis, Esquire
Scott J. Schwarz, Esquire
City of Philadelphia Law Department
1515 Arch Street, 16th Floor
Philadelphia, PA 19102

Philip L. Hinerman, Esquire
Jill A. Guldin, Esquire
Fox Rothschild LLP
2000 Market Street, 20th Floor
Philadelphia, PA 19103-3222

Stanley Stubbe, Esquire
1438 Shaner Drive
Pottstown, PA 19465

Cynthia Gallagher
1130 Fanshawe Street
Philadelphia, PA 19111

Ryan Miller
9912 Medway Road
Philadelphia, PA 19115

Arthur Z. Schwartz, Esquire
Schwartz, Lichten, & Bright
275 Seventh Avenue, 17th Floor
New York, NY 10001

Thu B. Tran, Esquire
Philip A. Bertocci, Esquire
Community Legal Services of
Philadelphia
1424 Chestnut Street
Philadelphia, PA 19102-2505

Charles McPhedran, Esquire
John Baillie, Esquire
PennFuture
1500 Walnut Street, Suite 502
Philadelphia, PA 19102

Holly Rachel Smith, Esquire
Holly Rachel Smith PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, VA 20115

Rita Griggs
202 E. Sharpnack Street
Philadelphia, PA 19119-2261

Brian Kalcic
Excel Consulting
Suite 720-T
225 S. Meramec Avenue
St. Louis, MO 63105



Adeolu A. Bakare
Prosecutor
Office of Trial Staff
PA Attorney I.D. #208541