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September 10, 2010

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RE: Pennsylvania Public Utility Commission, *et al.* v. PECO Utility Company --
Electric Division, Docket No. R-2010-2161575; **MAIN BRIEF OF DOMINION
RETAIL, INC. ON RESERVED ISSUE**

Dear Secretary Chiavetta:

Please find enclosed for filing with the Commission an original and nine (9) copies of the Main Brief of Dominion Retail, Inc. on Reserved Issue in the above-captioned matter. As evidenced on the Certificate of Service, all parties of record have been served with two copies of the Brief and all parties have been provided with an electronic copy as well.

If you have any questions pertaining to this filing, please do not hesitate to contact me.

Very truly yours,


Todd S. Stewart
Counsel for Dominion Retail, Inc.

TSS/bks
Enclosure

cc: Honorable Marlane R. Chestnut, Administrative Law Judge (Via Federal Express)
Honorable Christopher P. Pell, Administrative Law Judge (Via Federal Express)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, *et al.* :
 :
 v. : Docket No. R-2010-2161575
 :
 PECO Utility Company – Electric Division :

**MAIN BRIEF OF
DOMINION RETAIL, INC.
ON RESERVED ISSUE**

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Dated: September 10, 2010

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I. STATEMENT OF THE CASE

A. Procedural History

On March 31, 2010 PECO, Energy Company – Electric Division (“PECO”) filed with the Pennsylvania Public Utility Commission (“Commission”) Supplement No. 2 to its Tariff Electric – Pa. P.U.C. No. 4. Through its filing, PECO sought an increase of distribution rate revenues of \$289.7 million and an increase in transmission revenues of \$26.7 million.

On May 20, 2010, the Commission issued an Order suspending the rate increase and instituting a formal investigation as to the justness and reasonableness of the proposed and existing rates. This matter was subsequently assigned to the Honorable Administrative Law Judges Marlene R. Chestnut and Christopher Pell for purposes of conducting evidentiary hearings and issuing a Recommended Decision.

Dominion Retail, Inc. (“Dominion Retail”) filed a Petition to Intervene on April 16, 2010, which was granted by the Presiding Administrative Law Judges in their June 15, 2010 Prehearing Order No. 1.

A prehearing conference was held on June 9, 2010, at which the schedule for hearings and submission testimony was agreed to and approved. Direct, Rebuttal, and Surrebuttal Testimony were filed by a number of parties in accordance with the procedural schedule outlined in the Prehearing Order. Throughout the period prior to the date set for the initial hearing, PECO and the parties conducted extensive negotiations in order to resolve some or all the issues in the case. As a result of those negotiations, the parties were able to achieve a settlement as to all the issues in the case, save one. That single issue concerns the Office of Trial Staff’s (“OTS”) proposal to require PECO to unbundle the uncollectible expense associated with commodity

sales out of base rates and to charge the same to default service customers through the merchant function charge (“MFC”).

A Joint Petition for Partial Settlement of Rate Investigation was filed on August 31, 2010. In accordance with the procedural schedule established in this proceeding, main briefs on the reserved issue were to be filed on September 10, 2010. The purpose of this brief is to comply with that procedural schedule.

B. Factual Background

The issue reserved for briefing in this case is identical to an issue recently considered by the Commission and decided in a manner contrary to that requested by the OTS here. *Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program*; Docket No. P-2009-2143607 (Opinion and Order entered June 18, 2010, Slip Op. at 48). In that case, PECO had proposed revisions to its electric purchase of receivables (“POR”) program. PECO did not propose to unbundle out of base rates its uncollectible expense associated with commodity sales. That expense currently is collected from all customers in base rates. Instead, PECO proposed a zero-discount program, under which it would continue to recover this cost from the same customers in the same manner; namely, through base rates.

In that case, and again in this case, the OTS proposed that PECO be required to unbundle (that is to remove) uncollectible expense out of base rates and instead to recover those expenses from default service customers in the form of an MFC. At the same time, the OTS proposed that PECO be required to charge electric generation suppliers a discount on their purchased receivables at a rate that would be equivalent to the merchant function charge.¹ In its June 18, 2010 Order approving the settlement in that case, the Commission rejected the OTS’ position.

¹ In the POR program that Commission recently approved, there is an additional, temporary discount that is intended to recover the implementation costs of the POR program.

II. STATEMENT OF THE QUESTION

Should the Pennsylvania Public Utility Commission reverse its recent Order approving PECO's POR program and instead require PECO to unbundle its uncollectible expense out of base rates and implement a merchant rate function charge as proposed by the Office of Trial Staff?

Suggested answer: No.

III. SUMMARY OF THE ARGUMENT

The OTS has chosen to revisit an issue that was just decided against it, on the basis of the same non-existent evidentiary and legal support, and to ask the Commission to reverse itself after only a few short months. The OTS cites to no change in facts or law, no new or undiscovered evidence, and no new significant argument as the basis of the request. Rather, the OTS simply has chosen to attempt one more bite of the apple. The OTS's insistence on having its way, however, creates further uncertainty at a time when markets in PECO's service territory, and elsewhere, will emerge, in only a few short months, from over 12 years of capped rates. Moreover, this uncertainty is likely to carry over to other EDCs on a similar schedule with similar programs on the table.

The most troubling aspect of the OTS's position is that it is not supported by any evidence. There is no evidence that customers will be better or worse off regardless of which program is adopted. There was some speculation in this regard, but speculation, and inaccurate speculation at that, cannot carry the day in light of the evidence showing, in this record and from the prior proceeding, that PECO's proposal is less costly to implement and produces the same net result. In short, there is no basis to adopt the OTS's proposal here and it should be rejected.

IV. ARGUMENT

A. The OTS Position Is Prohibited By The Doctrine Of *Res Judicata*.

PECO did not propose, in this or in any other case, to unbundle its uncollectibles, or bad debt expense out of base rates. Rather, the OTS chose to raise the issue in this case, for the second time, after having been rejected by the Commission only months ago.² The problem with the OTS raising this issue again is that the law generally disfavors the re-litigation of issues that already have been resolved. The doctrine that embodies this notion is known as *res judicata*.

The doctrine of *res judicata* applies when one proceeding shares with a prior proceeding, upon which a final judgment has been rendered, a concurrence of four factors: (1) the identity of the thing sued upon or for; (2) the identity of the cause of action; (3) the identity of persons or parties to the action; and (4) the identity of the quality or capacity of the parties suing or sued.³ Where it applies, as in this case, the doctrine of *res judicata* bars re-litigation not only of matters raised in the earlier action but also any matter that could have been raised.⁴ The Commission has recognized the applicability of the doctrine of *res judicata* in proceedings before it,⁵ and the Pennsylvania courts have affirmed the Commission's application of the doctrine.⁶

In this case, the identity of the thing being sued upon and the cause of action are substantially the same. That is, the OTS, in both cases, sought to require the implementation of a model for purchase of receivables and recovery of uncollectibles expense through unbundling and the creating of an MFC that it alone thought was better than what was agreed to by the other parties. In this case, like the POR case, the OTS was a participant, in the same relative position

² *Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program*; Docket No. P-2009-2143607 (Opinion and Order entered June 18, 2010) ("POR case").

³ *In Re: Estate of Tower*, 463 Pa. 93, 343 A.2d 671 (1975).

⁴ *Nevling v. Commercial Credit Co.*, 39 A.2d 266 (Pa. Super. 1944).

⁵ *O'Toole v. Bell Telephone Co. of Pa.*, 77 Pa. PUC 98 (1992).

⁶ *Philadelphia Elec. Co. v. Pa. Pub. Util. Comm'n*, 433 A.2d 620 (Pa. Commw. 1981).

vis a vie PECO and it chose not to settle the issue but, instead, to litigate. That is, the parties remain in the same relative position⁷. Accordingly, the conditions for application of the doctrine are met and bar the re-litigation of the issue in this case. Accordingly, Dominion Retail submits that the OTS position is barred by the doctrine of *res judicata*.

Dominion understands that the Commission's Order, approving the POR program as proposed by PECO, did suggest that parties who did not agree with PECO's proposal could raise the issue again,⁸ however, that request remains subject to the application of *res judicata*. Otherwise, its Order could not be considered a final Order, because it would not have finally resolved this issue, rendering the order meaningless. In other words, the Commission's off-hand invitation notwithstanding, the parties retain the right to be protected from having to re-litigate the issue in perpetuity.

B. The OTS Has Not Met The Requirements For Reconsideration Or Rehearing.

To the extent that the Commission does not agree that the OTS's position in this case is barred by the doctrine of *res judicata*, it cannot reasonably be argued that what the OTS has requested is for the Commission to reconsider a decision that it made in a final and conclusive manner in a prior case. As such, the OTS request must, at a minimum, meet the requirements for rehearing and/or reconsideration, or this matter risks falling into that category of never-ending litigation.

This Commission established the requirements for rehearing or reconsideration in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553, 558, 51 PUR4th 284, 288 (1982).

⁷ While it is true that at least one major supplier that participated in the POR case, is not a party to the instant rate case, and its rights may be affected, the "unity of parties" factor of the test is met because the parties of concern: OTS, PECO, and Dominion Retail, are in the same relative positions.

⁸ POR case, slip op. at 48.

In order to meet the threshold requirements, petitions for rehearing and reconsideration must: allege newly discovered evidence not discoverable through the exercise of due diligence prior to the close of the record in the prior proceeding; and must contain new and novel arguments not previously heard for consideration or which appear to have been overlooked or not addressed by the Commission in the prior proceeding. The OTS presentation in this case fails to meet this standard.

The OTS presentation here instead relies on the same legal argument that it raised in its prior presentation. Moreover, in neither case did the OTS put on any actual evidence to support its position. This point is illustrated in the testimony of OTS witness Ms. Morrissey, who renders the opinion that there “may” be harm to customers if PECO’s proposal were implemented, but offers no evidence to support her view. OTS Statement No. 2-SR, 5:17-18. In fairness, the OTS did, in the context of this proceeding, put a finer point on the specific recommended percentages for imposition of a merchant function charge, but the legal argument that is the basis upon which it proposes to charge the discount remains the same. In short, the OTS has raised no new evidence and has presented no new or novel legal argument that could possibly justify changing the course that was laid down only a few months ago, and which the parties must follow now, if competition is to be enabled as of the end of this year. Mr. Cohen’s testimony makes it clear that Ms. Morrissey’s proposal would be difficult to implement (PECO St. No 9-R, 8:3-7), and with rate caps set to expire in only a few months, such uncertainty would not be in customers’ best interest.

C. The OTS Position Fails On The Merits.

The OTS has asked this Commission to revisit the issue of the proper methodology for recovery of bad debt expense related to commodity sales. The OTS position assumes, at the threshold, that there is a “proper” or accepted methodology and that all others must be rejected. There is no legal basis for this view. The OTS points to no statutory mandate for recovery of bad debt in a surcharge rather than in base rates, as PECO has done under its existing POR program for many years. Rather, the Commission has approved two different methodologies – the one the OTS proposed here, and the one PECO proposed in its POR case. In doing so, the Commission recognized that both methods achieve a reasonable and similar, if not identical, result.⁹ In short, there is no basis for the OTS contention that there is only one acceptable method of recovery of uncollectibles expense.

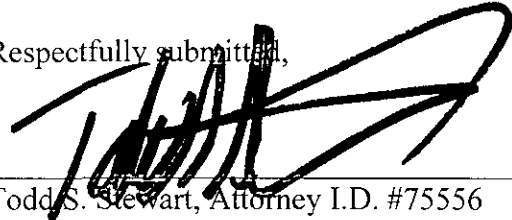
The OTS makes what is essentially a policy argument that its way is better than what the Commission approved, yet it fails to state any meaningful rationale or evidence for doing things its way that overcome the opposite position – that the manner proposed by PECO and approved by the Commission was easier to implement, less costly to implement, and, as far as customers are concerned, produces the same result without the negative consequences of the OTS proposal. PECO St. No. 9-R, 5:3-8:7. In short, there simply is no basis on this record to overturn the Commission’s previous decision on this issue and the OTS position must be rejected.

⁹ POR case, slip op. at 46-48.

V. CONCLUSION

The OTS seeks to re-litigate an issue that the Commission just decided a few months ago, and which will negatively impact the implementation of a POR program that must be in place by the end of this year. The OTS has provided no new or novel arguments, nor has it presented any new evidence that supports this diversion from the ordinary principles that, once a matter is settled, the parties may rely upon their settlements. Accordingly, the OTS position must be rejected, and Dominion Retail urges the Presiding Administrative Law Judges to do so.

Respectfully submitted,



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Counsel for Dominion Retail, Inc.

Dated: September 10, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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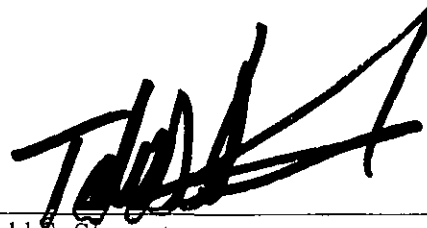
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Todd S. Stewart

Dated this 10th day of September 2010