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

IN REPLY PLEASE
REFER TO OUR FILE

September 20, 2010

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission v.
PECO Energy Co. (Electric)

Docket No. R-2010-2161575

Dear Secretary Chiavetta:

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

Copies are being served on all active parties of record. If you have any questions, please contact me at (717) 783-6155.

Sincerely,

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

Enclosure
AAB/edc

cc: Parties of Record

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

REPLY BRIEF OF THE OFFICE OF TRIAL STAFF

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Dated: September 20, 2010

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I. INTRODUCTION

A. History of the Proceeding[1]

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).

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

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1 A History of the Proceeding with additional details was presented in the OTS Main Brief and is hereby incorporated by reference. *See* OTS Main Brief, pp. 1-6.

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")[2], 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,

2 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").

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 submits this Reply Brief to address the issues raised in the Main Briefs filed by Dominion Retail and PECO.

B. Burden of Proof

The well established precedents placing the burden of proof upon PECO were presented in the OTS Main Brief and are hereby incorporated by reference.[3]

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

3 OTS Main Brief, pp. 6-9.

("MFC") rider to recover the uncollectibles expense associated with electric supply costs for the aforementioned rate classes.

In their Main Briefs, Dominion Retail and PECO argue that the OTS proposal is not supported by law or fact. OTS provided such support in the Argument section of its Main Brief and as summarized in this Reply Brief.[4] Additionally, OTS rebuts Dominion Retail's claims that its unbundling proposal is barred by Res Judicata or a failure to meet the standards applicable to a Petition for Rehearing or Reconsideration.

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. Dominion Retail's arguments relying on Res Judicata are irrelevant to this proceeding.

In its Main Brief, Dominion Retail argues that the OTS argument should be rejected under the doctrine of Res Judicata due to previous litigation before the Commission.[5] The standard is inapplicable to this case as the

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4 The Argument section of the OTS Main Brief is hereby incorporated by reference.

5 *See* Dominion Retail Main Brief, p. 6; see also *Petition of PECO Energy Company for Approval of a Voluntary Purchase of Accounts Receivables Program and Merchant Function Charge*, Docket No. P. 2009-2149307, Order entered June 18, 2010, ("POR Order"). Attached as *Appendix A*.

unbundling issue addressed by OTS is a ratemaking adjustment and therefore not subject to Res Judicata. Assuming, *arguendo,* that the unbundling proposal is an issue within the scope of Res Judicata, application of the doctrine would still be improper where the Commission has not issued a final order on the matter.

1. Res Judicata is inapplicable to the subject matter of this proceeding.

Dominion Retail's arguments regarding Res Judicata overstate the applicability of the doctrine to administrative proceedings under the Commisison. As noted by Dominion Retail, the Commission has recognized the applicability of the doctrine of Res Judicata to administrative proceedings. However, in describing the application of the doctrine, Dominion Retail omitted two critical limitations.

First, Dominion Retail neglected to acknowledge that administrative courts generally apply the doctrine of Res Judicata with greater restraint than traditional courts. In *Philadelphia Elec. Co. v. Pennsylvania Public Utility Commission*, which Dominion Retail cited in its Main Brief, the Commission provided the following guidance on the proper application of Res Judicata to administrative proceedings:

> As a matter of principle, it is completely clear that the reasons behind the doctrine of Res Judicata as developed in the court system are fully applicable to *some administrative proceedings*. The reasons against a second litigation between the same parties of the same claims or issues are precisely the same for *some administrative determinations* as they are for most judicial determinations. The sound view is therefore to use the doctrine of Res Judicata when the reasons for it are present in full force, to modify it when modification is needed, and to *reject it when the reasons against it outweigh those in its favor* [Emphasis added].[6]

The Commission further articulated the reasons for applying Res Judicata as follows:

> We believe, therefore, that the reason for Res Judicata the desirability of giving finality to decisions and preventing the relitigation of issues involving precisely the same facts as those *in finished litigation* apply here [Emphasis added].[7]

As detailed below, the Commission clearly confirmed that its discussion on the unbundling issue in PECO's POR Order did not amount to "finished litigation."[8] Therefore, the Commission should reject the use of Res Judicata in this case as contrary to the fulfillment of its administrative functions. There is scarcely an administrative proceeding more inappropriate for Res Judicata than that where a prior Commisison order explicitly and unambiguously preserved an issue for further litigation.

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6 *Philadelphia Elec. Co. v. Pennsylvania Public Utility Commission*, 433 A.2d 620, 625 (1981) ("Philadelphia Elec. Co.").

7 *Id.* at 625.

8 *See infra* pp. 8-10, *see also POR Order*, p. 48.

Secondly, Dominion Retail failed to address the principle that Res Judicata applies only to the re-litigation of immutable facts and circumstances.[9] The cases cited in Dominion Retail's Main Brief involved immutable facts such as whether construction of a generation facility was mismanaged[10] or whether a customer's bills were received late.[11]

Contrarily, Dominion Retail now argues that OTS is barred by Res Judicata from further arguing that PECO's proposal to recover its uncollectible expenses is unjust and unreasonable. This argument must fail as a Commission determination of the justness and reasonableness of any rate is not an immutable fact. It is a foundational tenet of ratemaking that the justness and reasonable off all rates, current and proposed, are at issue in a base rate filing under Section 1308 of the Public Utility Code.[12] The fact that the POR Order addressed issues that may be affected by base rate adjustments does not render arguments supporting such base rate adjustments susceptible to Res Judicata. Any other result would impede the investigation of rate case filings under Section 1308 of the Public Utility Code.

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9 *Philadelphia Elec. Co.*, 433 A.2d at 626.
10 *Id.* at 625.
11 Thomas P. O'Toole v. Bell Telephone Company of Pennsylvania, 71 Pa. P.U.C. 98, 105 (1992).
12 City of Johnstown v. Pennsylvania Public Utility Commission, 133 A.2d 246, 251 (1957).

2. The PECO POR Order did not constitute a final order on the unbundling issue.

Even if it is assumed that the unbundling adjustment is potentially subject to Res Judicata, such application in this case is inappropriate as the Commission has not issued a final order on the unbundling of PECO's uncollectibles expenses. Dominion Retail readily acknowledges that Res Judicata is only relevant where the Commission has issued a final order. However, Dominion Retail attempts to masquerade the POR Order as such a final order on the issue of unbundling. A review of the order demonstrates otherwise.

The Commission did not promulgate a definitive resolution of the unbundling issue in the POR Order. In the POR Order, the Commission adopted PECO's proposal which included the settlement condition whereby the POR Parties, including Dominion Retail, agreed that the "unbundling of generation-related uncollectible accounts expense should be deferred until PECO's Default Service proceeding."[13] In approving the POR Settlement, the Commission cited to PECO's contention that the "OTS' position would require changes in rates that more appropriately should be considered in a base rate proceeding."[14] The Commission apparently agreed and followed PECO's reasoning, stating that "[a]ny non-signatory to the [POR] Settlement is free to

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13 *POR Order*, p. 11.

14 *Id.* at 47 *citing* PECO Reply Exceptions, p. 3.

argue in favor of further unbundling of PECO's generation-related service costs (e.g., *uncollectible accounts expense*, call center charges, etc.) in *PECO's next distribution rate case* [Emphasis added]."[15]

Therefore, the POR Order was final only as to the approval of the POR Settlement which, by its terms, requested a deferral of the unbundling issue on behalf of the settling parties. OTS litigated the issue as the sole opponent to the POR Settlement but the litigation did not elicit a final determination from the Commission.[16] Rather, the Commission adopted the Settlement terms and appropriately interpreted the language as non-binding upon a non-settling party in any subsequent proceeding.[17] Dominion Retail characterized the Commission's finding as a "suggestion" but in truth, the Commission unequivocally granted found that parties opposing the POR Settlement have a right to argue the unbundling issue in PECO's base rate case.[18] Indeed it would be difficult to imagine what further language the Commission could have inserted to crystallize its position that the POR Settlement in no way restricts a non-settling party's right to raise the unbundling issue in subsequent proceedings.

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15 *Id.* at 48.

16 In PECO's POR proceeding, OTS argued for a properly designed POR program with a discount rate for PECO's purchased receivables incorporating the supply-related uncollectibles expenses. Such a properly designed POR program would indirectly accomplish unbundling but is distinct from the instant argument where OTS now advocates for unbundling of supply-related uncollectibles expenses through a direct adjustment to PECO's base rates.

17 *Id.* at 23-24.

18 *See* Dominion Retail Main Brief, p. 7, contra *POR Order*, p. 48.

Dominion Retail's final claim, that the Commission's language in the POR preserving the unbundling issue for argument in a base rate case is itself subject to Res Judicata, turns the doctrine on its head and is particularly inappropriate in the context of an administrative proceeding. Again, Res Judicata is applicable when an adjudicative body issues a final order. When the Commission plainly states that an issue shall be preserved for further argument in subsequent proceedings, Res Judicata is inapplicable. This reasoning applies to any adjudicative proceeding but is especially forceful in the administrative context where Res Judicata is subject to modification as necessary to carry out the functions of the agency.

OTS submits that the Commission's declaration of its intention to preserve the unbundling issue for argument in the PECO's base rate case clearly invalidates any suggestion that the issue was conclusively litigated and weighs strongly in favor of rejecting any application of Res Judicata.

B. Dominion Retail's arguments regarding Rehearing/Reconsideration are also irrelevant to this proceeding.

Dominion Retail argues, without a modicum of support, that OTS should be required to meet the requirements for rehearing and/or reconsideration to avoid a risk of never-ending litigation.[19] OTS is requesting neither a rehearing of the POR Order nor a reconsideration of the POR Order. Contrarily, it is

19 Dominion Retail Main Brief, p. 8.

Dominion Retail that apparently seeks a rehearing or reconsideration of the POR Order through its effort to impose terms not provided in the POR Order. The POR Order provides that non-settling parties may address the unbundling issue in the Company's base rate case without attaching further conditions.[20] Accordingly, Dominion Retail's argument for applying the standards for rehearing and/or reconsideration should be rejected.

Although OTS maintains that this argument is inapplicable, inappropriate, and wholly unsupported by statute, regulation or case law, it is worthwhile to note that OTS has provided new evidence and therefore would meet the standards for rehearing and reconsideration. The OTS Main Brief introduces evidence provided in the base rate case filing that was not discoverable through the exercise of due diligence in the POR proceeding.[21] Therefore, OTS submits that the standards for rehearing and reconsideration, although inapplicable, have been met.

C. The OTS provided strong evidentiary support for its proposal to unbundle PECO's uncollectibles expenses.

Both PECO and Dominion Retail argue that the OTS proposal is unsupported. However OTS provided statutory and practical support for its unbundling proposal, the Argument section of the OTS Main Brief which is hereby incorporated by reference. Additionally, key points from the OTS Main

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20 *POR Order*, p. 48.

21 *See* OTS Main Brief, pp. 13-16. The OTS position is supported by data obtained through PECO Ex. RLO-1, Schedule D-10, which was filed in support of the instant base rate case.

Brief are summarized below in response to arguments raised in the PECO and Dominion Retail Main Briefs.

1. The OTS provided statutory support for its unbundling proposal.

Dominion Retail's argument, that the OTS provided no statutory support for its proposal, was thoroughly addressed in the OTS Main Brief. Dominion Retail claims that the there is no legal basis for the OTS position and notes that "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."[22]

The legal basis for the OTS position, as stated in its Main Brief, arises from the Commission's statutory duty to unbundle generation and transmission expenses from distribution rates pursuant to Section 2804(3) of the Public Utility Code.[23] Further, the fact that PECO has traditionally recovered supply-related uncollectibles expenses cannot credibly support continuing the practice in violation of a statutory objective. Particularly when, as adduced in the OTS Main Brief, the Commission has acknowledged the statutory objective but declined its implementation for fear of disrupting the recovery of preprogram

22 Dominion Retail Main Brief, p. 9.
23 66 Pa. C.S. § 2804(3).

arrearage expenses incurred through the Company's Universal Services Program.[24]

Documentation provided in the base rate filing identified a $15,779,000 uncollectibles expense account funds attributable to CAP preprogram arrearages. To eliminate any effect upon the recovery of CAP expenses, the OTS unbundling proposal retains such funds in base rates.[25] Essentially, OTS has identified the statutory support for its proposal and eliminated the practical impediment that had previously deterred the Commission from unbundling PECO's supply-related uncollectibles expense. OTS has clearly provided legal support for its unbundling proposal.

2. The practical justifications for the OTS proposal were identified in the OTS Main Brief and are now further evidenced by conflicting arguments in the Dominion Retail and PECO Main Briefs.

Both Dominion Retail and PECO argue that the PECO proposal to continue recovering supply-related uncollectibles expenses through distribution rates is practically superior to the OTS unbundling proposal. However, each argument raised in their respective Main Briefs was addressed in the OTS Main Brief. Further, their conflicting understandings of the effects of the POR Order and this base rate case upon further litigation on the unbundling issue illustrates

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24 *See* OTS Main Brief, p. 15. The Commission's reluctance to unbundle PECO's uncollectibles expenses in its 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. *Id.*

25 *Id.* at 15-16.

the forestalling that will follow unless the Commission unbundles PECO's uncollectibles expenses before the expiration of its rate caps.

Dominion Retail argues that the PECO proposal produces the same result as the OTS proposal without the negative consequences.[26] This issue was addressed in considerable detail in the OTS Main Brief. As stated therein, the negative consequences that PECO attaches to the OTS proposal are largely unsupported. The OTS Main Brief shows that the OTS unbundling proposal provides the same competitively neutral market with lower administrative expenses than originally projected by the Company.[27] Further, as argued in the OTS Main Brief, the PECO proposal carries a negative consequence of potentially conferring a competitive advantage upon EGSs and thereby disrupting the competitively neutral playing field.[28]

The OTS Main Brief addressed the arguments advanced by PECO regarding the effects of its proposal upon EGS pricing. OTS observed that PECO's proposal provides the EGSs with an opportunity to include a premium commensurate with the uncollectible expense amount assumed by PECO. PECO now argues that there is no evidence that an EGS would do so and that the market forces would constrain such activity as EGS are incentivized to beat

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26 Dominion Retail Main Brief, p. 9.

27 *Id.* at 17-20. PECO Witness Alan Cohn originally supposed that the OTS unbundling proposal contemplated annual reconciliation of the MFC which would add administrative costs to the proposal. PECO Statement No. 9-R, pp. 7-8. However, the OTS subsequently clarified that the MFC would not be reconcilable under the OTS proposal. *Id.* at 17 *citing* OTS Statement No. 2-SR, p. 3.

28 *Id.* at 18-20.

competitor prices.[29] Admittedly, if every EGS lowered it advertised price in proportion to the saved uncollectibles expenses, then the competitively neutral market would be preserved. However, this argument ignores the real issue. Whether the EGSs do or do not include a premium is speculation. Financial markets are complex and as stated in the OTS Main Brief, there are legitimate and credible reasons why an EGS would take either course.[30] The true question before the Commission is which proposal reduces the risk of unjust rates. OTS submits that its proposal ensures that EGS account for their incurred uncollectibles expenses best preserves a competitively neutral market.

Finally, OTS argued that by not unbundling PECO's uncollectibles expense, the Commission runs a risk of placing the fulfillment of a statutory objective at the option of the parties structuring PECO's POR program. As demonstrated in the OTS Main Brief, the Commission cannot compel unbundling in a POR proceeding.[31] However, the Commission enjoys broad authority in a base rate case and should exercise its authority to compel unbundling and definitely fulfill the statutory mandated of Section 2804(3) of the Public Utility Code.

Now is the opportune time to unbundle PECO's supply-related

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29 PECO Main Brief, p. 6.

30 OTS Main Brief, pp. 19-20. "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." *Id.* at 19.

31 *Id.* at 22.

uncollectibles expenses. In its Main Brief, the OTS suggested that any delay in unbundling will lead to a contested and protracted process where the "PUC and PECO will face strong opposition from the EGSs and risk customer confusion if unbundling is delayed now and attempted later."[32] The Main Briefs filed by PECO and Dominion Retail support this reasoning by portending exactly the conflict anticipated by the OTS. PECO by its own admission, "does not agree that this rate proceeding presents a "now or never" decision point with respect to this unbundling issue."[33] Conversely, Dominion Retail believes that "parties retain the right to be protected from having to re-litigate this issue [unbundling] in perpetuity."[34]

OTS submits that the same conflict will arise in the context of the next default service proceeding if PECO attempts to unbundle its uncollectibles expenses at that time. This issue is properly before the Commission in this base rate case and should not be deferred to a more limited proceeding. Therefore, the ALJ and the Commission should approve the OTS proposal to unbundle PECO's supply-related uncollectibles expense and recover such costs through a MFC.

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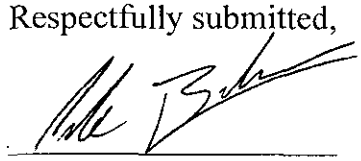
32 OTS Main Brief, p. 24.
33 PECO Main Brief, p. 7.
34 Dominion Retail Main Brief, p. 7.

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,



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Dated September 20, 2010

APPENDIX A

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting Held June 16, 2010

Commissioners Present:

James H. Cawley, Chairman
Tyrone J. Christy, Vice Chairman, Dissenting
Wayne E. Gardner
Robert F. Powelson

Petition of PECO Energy Company for Approval of its Revised Electric Purchase of Receivables Program — P-2009-2143607

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Joint Petition for Partial Settlement (Joint Petition or Settlement) submitted by PECO Energy Company (PECO), the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), Constellation NewEnergy (Constellation), Dominion Retail, Inc. (Dominion), the Retail Energy Supply Association (RESA) and Direct Energy Services, LLC (Direct Energy), "the Parties," in the above-captioned proceeding. Also submitted for consideration and resolution are two issues reserved by PECO and the Parties for litigation.

I. HISTORY OF THE PROCEEDING

On November 20, 2009, PECO filed its Revised Electric Purchase of Receivables Program (Revised POR Program). In its Petition, PECO requested that the Commission approve the Revised Electric POR Program permitting PECO to:

> (1) purchase the customer receivables of electric generation suppliers ("EGSs") participating in PECO's consolidated billing option for basic retail electricity supply services in PECO's service territory, without recourse by PECO to those suppliers for receivables that PECO cannot collect;
>
> (2) discount temporarily the purchase of those receivables to recover PECO's initial implementation costs for the Revised Electric POR Program; and
>
> (3) conduct collection activities with respect to all purchased EGS receivables and, if necessary, terminate electric service to any customer whose account (including the EGS receivable purchased by PECO) remains unpaid, in whole or in part, with all such collection and termination activity to be conducted in accordance with Chapter 14 of the Pennsylvania Public Utility Code and Chapter 56 of the Commission's regulations (52 Pa. Code Chapter 56).

In addition, PECO has requested Commission approval of related tariff supplements to its current Electric Generation Supplier Coordination (EGS) Tariff and to the Electric Tariff which the Commission has approved for use beginning January 1, 2011.[1] As required by the *Default Service Settlement*, PECO conducted three stakeholder meetings to discuss ideas for revising its POR program in preparation for filing the instant Petition.

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[1] *See 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) (*Default Service Settlement*).

The matter was assigned to the Office of Administrative Law Judge (OALJ) for hearing and Recommendation.

The OSBA and the OCA, through their respective counsel, separately filed a Notice of Intervention, Public Statement and an Answer on December 4, 2009.

On December 10, 2009, the OTS, through its counsel, filed an Answer to the Petition. The Philadelphia Area Industrial Energy Users Group (PAIEUG), through its counsel, filed a Petition to Intervene on December 14, 2009. The RESA, through its counsel, filed a Petition to Intervene on December 14, 2009.

Direct Energy through its counsel, filed a Petition to Intervene on December 14, 2009, and Constellation, through its counsel, filed a Petition to Intervene on December 16, 2009.

When Dominion, through its counsel, filed a Petition to Intervene on December 3, 2009, an incorrect docket number was included. After the docket number was corrected, the petition was filed with the instant matter.

A prehearing conference was held on Tuesday, January 5, 2010. Counsel for PECO, the OCA, the OTS, the OSBA, PAIEUG, RESA, Direct Energy, Constellation and Dominion participated. Since there were no objections to the Petitions to Intervene, the petitions filed by the following entities were granted: PAIEUG, RESA, Direct Energy, Constellation and Dominion Retail. During the prehearing conference a schedule was established for the submission of testimony and the conduct of hearings. Specifically, a schedule was adopted for all testimony to be submitted in writing in advance of hearings. Evidentiary hearings were scheduled for March 4 and 5, 2010.

On February 2, 2010, the OTS, the OCA, the OSBA, RESA and Dominion Retail submitted direct testimony and accompanying exhibits. On February 5, 2010, the OTS submitted supplemental direct testimony and the accompanying exhibit. On February 22, 2010, PECO, the OTS, the OCA, RESA and Dominion Retail submitted rebuttal testimony. Dominion Retail and the OTS submitted surrebuttal testimony and the accompanying exhibits on March 1, 2010. PECO, the OSBA and the OCA submitted surrebuttal testimony and the accompanying exhibits on March 3, 2010.

Subsequent to the Prehearing Conference, the Parties to the proceeding engaged in extensive discussions to try to achieve a settlement of some or all of the issues in this case. Before the hearings scheduled for March 4 and 5, 2010, the Parties advised the ALJ that: (1) the Parties settled on all but two issues; (2) the Parties would like to reserve the outstanding two issues for briefing; and (3) that cross-examination of the witnesses on the remaining issues had been waived. At the request of the Parties, the hearings were cancelled. The ALJ approved the Parties' request to file a Stipulation to admit all of the Parties' written testimony and exhibits. In addition, the date for the submission of the main briefs was extended to allow the signatories adequate time to complete the settlement document.

Main briefs were filed by PECO, the OCA, the OSBA, the OTS, RESA/Direct Energy[2], and Dominion Retail on March 22, 2010. Reply briefs were timely filed by PECO, the OCA, the OSBA, the OTS, RESA/Direct Energy, and Dominion Retail[3].

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[2] RESA and Direct Energy are represented by the same counsel. A Joint Statement in Support and joint main and reply briefs were filed on behalf of RESA and Direct Energy.

[3] Constellation and PAIEUG did not file a main or reply brief.

The Joint Petition was filed on March 22, 2010. It was executed by counsel for PECO, the OCA, the OSBA, Constellation, RESA, Direct Energy, and Dominion Retail. The Joint Petition contained Statements in Support of the Joint Petition from the signatory parties. Although PAIEUG did not sign the Joint Petition, it did not oppose the Joint Petition. Joint Petition at 1, PECO's Statement in Support at 1. The OTS opposed the Joint. *See* OTS R.B. at p. 8 – 14.

A Stipulation for Admission of Testimony and Exhibits was filed by counsel for PECO, OSBA, OCA, OTS, RESA, Direct Energy, Dominion Retail, Constellation and PAIEUG on March 23, 2010. The Parties stipulated to the authenticity of their respective statements, waived cross-examination of the witnesses sponsoring the statements and exhibits and moved for admission into the evidentiary record the statements and exhibits identified in the Stipulation for Admission of Testimony and Exhibits. The request to admit the statements and exhibits was granted by the ALJ.

The record consists of a 13 page prehearing transcript, PECO's Revised Petition, the statements and exhibits of the Parties, the Joint Petition for Partial Settlement with attachments, and the main and reply briefs of PECO, the OCA, the OTS, the OSBA, RESA/Direct Energy, and Dominion.

The ALJ's Recommended Decision was issued by the Commission on April 29, 2010. On May 19, 2010, PECO and the OTS filed Exceptions to the ALJ's Recommended Decision. On June 1, 2010 the OCA, the OSBA, Dominion, RESA/Direct and PECO filed Reply Exceptions.

II. TERMS AND CONDITIONS OF THE JOINT PETITION FOR PARTIAL SETTLEMENT

The essential terms of the Joint Petition for Partial Settlement are set forth in paragraph 9 of the document. The Parties state that the Joint Settlement is in the public interest in paragraph 10. Paragraph 11 contains additional terms and conditions. Paragraphs 9 through 16 of the Joint Settlement are reproduced below:

> 9. Except as provided below, PECO's Revised Electric POR filing is approved as filed, including the tariff revisions which are shown in Exhibits 1 and 2 to this Joint Petition, and all costs of implementing the Revised Electric POR Program (including modifications and additions set forth below) will be recovered through the Program's temporary discount on purchased EGS receivables.
>
> **A. Basic Electricity Supply**
>
> (1) Only receivables associated with basic electricity supply will be eligible for purchase by PECO. Basic electricity supply shall be defined as follows: energy (including renewable energy) and renewable energy or alternative energy credits (RECs/AECs) procured by an EGS, provided that the RECs/AECs are bundled with the associated delivered energy. Basic electricity supply does not include a non-generation product (e.g., service contract for appliances, or payment for energy reductions such as demand response products), or renewable or alternative energy credits that are not associated with delivered energy. For residential customers, basic electricity supply shall not include early contract cancellation fees, late fees or security deposits assessed by an EGS. Joint Petition at 4, 5.
>
> **B. Bill Disputes**
>
> (1) PECO will manage bill disputes related to purchased EGS receivables in the same manner as bill disputes related to default service, except that PECO will be permitted to suspend payment of the portion of an EGS receivable that is

the subject of a formal or informal dispute proceeding before the Commission or an allegation made to PECO by a customer: (i) that the customer was placed on EGS service without customer permission; or (ii) that the customer's EGS rate is incorrect. A customer allegation that a bill does not reflect the correct amount of energy delivered to the customer, or a customer's claim of an inability to pay, shall not constitute a dispute for purposes of PECO's obligation to pay the EGS its undisputed charges if such allegation or claim is not the subject of a formal or informal complaint before the Commission. If a formal or informal complaint is resolved by the Commission in favor of the EGS, PECO shall fully and promptly remit the withheld accounts receivable amount to the EGS. PECO will continue to work in good faith with EGSs to resolve customer disputes in a prompt and timely fashion. EGSs shall retain the right, notwithstanding anything in the Settlement, to challenge before the PUC a PECO decision to withhold accounts receivable payments. Joint Petition at 5.

C. EGS Notification

(1) PECO and RESA will develop the specifications and cost to implement an EDI transaction to notify EGSs prior to customer termination ("the EDI Transaction") in coordination with the Commission's Electronic Data Exchange Working Group. PECO and RESA agree that the design of the transaction will provide that the proposed transaction would be sent on the same day as PECO sends its written notice of termination to a customer and include the projected customer service termination date. Upon finalization of a transaction design, and cost projection, if RESA agrees that the EDI Transaction should be implemented, PECO will work in good faith with suppliers to establish a supplier testing and implementation schedule. PECO may provide the notification only for shopping commercial and industrial customers in the event that implementation of the notification for all customers is materially more expensive in light of the total implementation costs of the Revised Electric POR Program. Joint Petition at 6.

D. Status Reports

(1) PECO will provide periodic status reports to the parties of its progress in implementing the systems, software and procedures necessary to institute the Revised Electric POR Program. Upon a final non-appealable order approving this Settlement by the Commission, PECO will hold monthly and, starting September, 2010, bi-weekly conference calls with the parties to report on the status of PECO's implementation of the Revised Electric POR Program and its readiness to provide service to EGS customers starting January, 2011. Joint Petition at 6.

E. Consolidated Billing for Residential Customers

For residential customers only, any EGS utilizing [Electric Distribution Company] EDC consolidated billing shall be required to utilize EDC consolidated billing for all of the EGS's residential customers, and all such residential accounts shall be included in PECO's Revised Electric POR Program. If an EGS is providing a residential customer with a service or product that does not meet the definition of "basic electricity supply" as defined in paragraph 9.A(1), or if the EGS is providing a service or product to residential customers that PECO's EDC consolidating billing system cannot accommodate, the EGS shall be permitted to issue a separate bill for such service or product in accordance with PECO's Separate EDC/EGS Billing procedures for that customer if the EGS provides written certification to PECO that the service or product cannot be billed under EDC consolidated billing. EGSs will not deny service to residential customers whose accounts are included in PECO's Revised Electric POR Program for credit-related reasons and will not ask residential customers for deposits separate from any deposit required by PECO pursuant to Commission regulations and Act 201. Joint Petition at 6, 7.

F. Customer Education and Notification

(1) PECO shall work with the parties to develop customer education and notification materials to be posted on PECO's website and stated in enrollment letters sent to PECO customers transferring generation service to an EGS and in a one-time notification by letter to existing EGS customers in PECO's service territory after the earliest date that PECO's price-to-compare ("PTC") for 2011 is calculated and posted publicly. These materials shall include the following information and the additional information specified in paragraph 9.F(2) and 9.F(3), as applicable:

(a) Effective January 1, 2011, the customer's service may be terminated for failure to pay for generation service provided by an EGS, as may be modified by resolution of paragraph 9.G(1)(a) below;

(b) The price charged by the customer's EGS for electric generation supply service could be either higher or lower than the rate the customer would owe to PECO if the customer bought default electric generation supply service from PECO.

(2) For shopping customers in rate classes R, RH, GS, PD, and HT, the one-time notification will include the following information:

(a) The charges the customer currently is paying for electric generation supply service from their EGS can be found on the customer's bill. For more information about current rates and charges, the customer should contact their EGS at the telephone number listed on the bill. For customers in rate classes GS, PD, and HT, the rate those customers would pay, if they were to purchase default electric generation supply service from PECO, can be found at http://www.peco.com/pecobiz/energy_rates/energy_choice/pricetocompare.htm (or the Commission website). For customers in rate classes R and RH, the rate those customers would pay, if they were to purchase default electric generation supply service from PECO, can be found at PECO's website, the OCA's website, and/or a website specified by the Commission. The notification will also contain a PECO telephone number which the customer may use to obtain rate information.

(3) For customers in rate classes R, RH, GS, PD and HT, whose EGS service start date is on or after January 1, 2011, the enrollment letter sent to them as switching customers will include a notice about the new termination rules that will include the following information:

(a) For customers in rate classes GS, PD, and HT, the customer-specific rate that the customer paid to PECO, before it switched, can be found in the message section of the customer's most recent bill from PECO. The rate the customer would have paid, had the customer continued to purchase default electric generation supply service from PECO, can be found at http://www.peco.com/pecobiz/energy_rates/energy_choice/pricetocompare.htm (or the Commission website). For customers in rate classes R and RH, the rate those customers would have paid, had those customers continued to purchase default electric generation supply service from PECO, can be found at PECO's website, the OCA's website, and/or a website specified by the Commission. The notification will also contain a PECO telephone number which the customer may use to obtain rate information.

(b) If the customer does not already know the rate the customer will be charged for generation service from an EGS, the customer should contact the EGS, whose phone number will be included in the enrollment letter.

(4) PECO's website shall contain a statement informing customers that the PTC will vary in future periods due to changes in consumption patterns and changes in PECO's cost of generation supply. Joint Petition at 7 – 9.

G. Issues Reserved for Briefing

(1) The following issues (the "Reserved Issues") are reserved for briefing in this proceeding:

(a) Whether PECO can terminate electric service to customers after January 1, 2011, based upon costs for EGS service incurred by such customers prior to January 1, 2011; and

(b) Whether PECO should be required to unbundle its generation-related uncollectible accounts expense from its distribution rates for collection from default service customers and also purchase EGS receivables at a discount corresponding to PECO's uncollectible expense, implementation costs and any administrative costs. Joint Petition at 9, 10.

H. Future Consideration of Program Terms and Conditions

(1) The parties agree that the terms and conditions of PECO's Revised Electric POR Program (as modified by this Settlement) shall not be raised or revisited by any party until PECO's next default service proceeding for the period commencing June 1, 2013, provided, however, that nothing in this Settlement shall preclude a party from enforcing the terms and conditions of PECO's Revised Electric POR Program (as modified by this Settlement). No party will affirmatively seek further unbundling of PECO's generation-related service costs (e.g., uncollectible accounts expense, call center charges, etc.) in PECO's next distribution rate case proceeding.

(2) The parties further agree that nothing in this Settlement shall preclude a party from challenging the reasonableness of the Revised Electric POR Program implementation costs (not including any costs to implement the EDI Transaction agreed to in paragraph 9.C(1)) if such costs exceed $ 2.5 million (the "Implementation Cost Total"). With respect to the costs associated with implementing the EDI Transaction, the parties agree that, if RESA agrees that the EDI Transaction should be implemented, the cost shall be recovered as an additional implementation cost and no party shall challenge the reasonableness of such costs. If the Commission should determine that PECO cannot terminate electric service to customers after January 1, 2011 based upon costs for EGS service incurred by such customers prior to January 1, 2011, any additional related implementation cost shall be included in the costs recovered through the temporary discount by an extension of the period of the recovery of the temporary discount and the Implementation Cost Total shall

be increased to $3.0 million. In no event shall the percentage amount of the temporary discount be changed. Joint Petition at 10, 11.

* * * *

10. PECO, OCA, OSBA, Constellation, RESA, Direct Energy, and Dominion Retail have each prepared, and attached to this Joint Petition, Statements in Support identified as Statements A through F, respectively, setting forth the bases on which they believe the Settlement is in the public interest. Joint Petition at 11.

11. The Joint Petitioners submit that the Settlement is in the public interest for the following additional reasons:

- ***Substantial Litigation And Associated Costs Will Be Avoided.*** The Settlement amicably and expeditiously resolves a number of important and potentially contentious issues. The administrative burden and costs to litigate these matters to conclusion would be significant. Joint Petition at 11.

- ***The Settlement Is Consistent With Commission Policies Promoting Negotiated Settlements.*** The Joint Petitioners arrived at the Settlement terms after conducting discovery and engaging in in-depth discussions over several weeks. The Settlement terms and conditions constitute a carefully crafted package representing reasonable negotiated compromises on the issues addressed herein. Thus, the Settlement is consistent with the Commission's rules and practices encouraging negotiated settlements (*See* 52 Pa. Code §§ 5.231, 69.391, 69.401), and, with the ALJ's approval of the Stipulation for admission of testimony and exhibits, is supported by a substantial record. Joint Petition at 11.

12. The Commission's approval of the Settlement shall not be construed as approval of any party's position on any issue, except to the extent required to effectuate the terms and agreements of the Settlement. Accordingly, this Settlement may not be cited as precedent in any future proceeding,

except to the extent required to implement this Settlement. Joint Petition at 12.

13. It is understood and agreed among the Joint Petitioners that the Settlement is the result of compromise and does not necessarily represent the position(s) that would be advanced by any party in this or any other proceeding, if it were fully litigated. Joint Petition at 12.

14. This Settlement is being presented only in the context of this proceeding in an effort to resolve the proceeding in a manner that is fair and reasonable. The Settlement is the product of compromise. This Settlement is presented without prejudice to any position which any of the parties may have advanced and without prejudice to the position any of the parties may advance in the future on the merits of the issues in future proceedings, except to the extent necessary to effectuate the terms and conditions of this Settlement. Joint Petition at 12.

15. This Settlement is conditioned upon the Commission's approval of the terms and conditions contained herein without modification. If the Commission should disapprove the Settlement or modify any terms and conditions herein (including, without limitation, by ruling that PECO must unbundle its generation-related uncollectible accounts expense), this Settlement may be withdrawn upon written notice to the Commission and all active parties within five (5) business days following entry of the Commission's Order by any of the Joint Petitioners and, in such event, shall be of no force and effect. In the event that the Commission disapproves the Settlement or the Company or any other Joint Petitioner elects to withdraw the Settlement as provided above, the Joint Petitioners reserve their respective rights to fully litigate this case, including, but not limited to, presentation of witnesses, cross-examination and legal argument through submission of Briefs, Exceptions and Replies to Exceptions. Joint Petition at 12, 13.

16. If the ALJ, in the Recommended Decision, recommends that the Commission adopt the Settlement as herein proposed without modification, the Joint Petitioners

> agree to waive the filing of Exceptions with respect to any issues addressed by the Settlement. However, the Joint Petitioners do not waive their rights to file Exceptions with respect to any modifications to the terms and conditions of this Settlement, or any additional matters proposed by the ALJ in the Recommended Decision (including the ALJ's determination regarding the Reserved Issues). The Joint Petitioners also reserve the right to file Replies to any Exceptions that may be filed. Joint Petition at 13.

III. DISCUSSION

A. Background

PECO is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office in Philadelphia, Pennsylvania. PECO provides electric delivery service to approximately 1.6 million customers and natural gas delivery service to approximately 475,000 customers in Southeastern Pennsylvania. Joint Petition at ¶1.

The Electricity Generation Customer Choice and Competition Act (the "Competition Act"), 66 Pa. C.S. § 2801, *et seq.*, restructured the provision of retail electric service in Pennsylvania by mandating the introduction of customer choice for retail electric generation supply by January 1, 1999. This Act became effective on January 1, 1997. 66 Pa. C.S. § 2801 Joint Petition at ¶2.

On April 1, 1997, PECO submitted a comprehensive restructuring plan in accordance with the Competition Act. After extensive litigation and settlement proceedings, PECO and the other parties submitted a Joint Petition for Settlement (the "Restructuring Settlement") which resolved all of the issues concerning PECO's restructuring plan. The *Restructuring Settlement* was approved by the Commission on May 14, 1998. *See Application of PECO Energy Company for Approval of its*

Restructuring Plan under Section 2806 of the Public Utility Code, et al., Docket Nos. R-000973953 and P-00971265. Joint Petition at ¶3.

PECO's *Restructuring Settlement* included an extensive program to support retail competition, containing specific standards for competitive billing and collection. *See Restructuring Settlement* ¶ 22 & Appendix C. The standards for PECO's billing and collection program were subsequently organized into PECO's Electric Generation Supplier Coordination Tariff ("EGS Supplier Tariff"). This tariff has governed the retail supply interaction and coordination of PECO and EGSs since January 1, 1999. Joint Petition at ¶4.

Under the EGS Supplier Tariff, PECO offers three billing options: (1) Separate EDC/EGS billing, which is also known as dual billing, where PECO and the EGS send separate bills directly to the customer; (2) Consolidated EGS billing, where the EGS bills for all charges; and (3) Consolidated EDC billing, the option used by most electric distribution companies (EDCs). Under the Consolidated EDC billing option, PECO transmits metered customer usage data to the EGS; the EGS calculates its customers' charges for EGS service and transmits the charges to PECO electronically. PECO then sends a single bill to the customer containing both EGS and PECO charges. Joint Petition at ¶5.

Under the Consolidated EDC billing program, PECO pays the EGS, dollar for dollar, all undisputed EGS charges billed by PECO regardless of whether or not the customer has paid PECO for the charges for up to 90 days. At the end of the 90 day period, the account is considered seriously delinquent and PECO's current practice is to return customers to dual billing for non-payment of EGS charges. Joint Petition at ¶6.

PECO's expenses associated with its current POR program, including uncollectible expenses, are recovered through its distribution rates. Joint Petition at ¶7.

On September 10, 2008, PECO filed its proposed program for procurement of default service supply in accordance with the requirements of the Competition Act as amended by Act 129 of 2008. *See* 66 Pa. C.S. § 2807(e)(3.1). By Order entered June 2, 2009, the Commission approved the *Default Service Settlement* filed by PECO and the parties to the default service proceeding. Joint Petition at ¶8.

The *Default Service Settlement* required PECO to either file a revised POR program as a part of its next general electric distribution rate case under Section 1308(d) of the Public Utility Code, 66 Pa. C.S. § 1308(d), to become effective on or before January 1, 2011, or file a stand - alone POR program no later than July 1, 2010, and request that the Commission decide the case in sufficient time to implement the stand-alone POR program by January 1, 2011. *See* PECO's Default Service Settlement ¶ 65; Joint Petition at ¶9.

The *Default Service Settlement* also required that in advance of either its stand-alone POR program filing or an Electric Distribution Base Rate Case, as applicable, PECO will hold at least three meetings with interested Parties to discuss the details of the POR program. As part of this collaborative process, the Joint Petitioners agree that interested parties are to consider implementing a POR program as an alternative to "unbundling" uncollectible accounts and collection-related expenses from distribution rates. Default Service Settlement at ¶ 66.

B. Burden of proof

Pursuant to Section 332(a) of the Public Utility Code, 66 Pa. C.S. § 332(a), the burden of proof is on the proponent of a rule or order. In this proceeding, the Petitioner is the proponent of a rule or order. Therefore, the Petitioner bears the burden of proving by a preponderance of the evidence that the Petition is reasonable and should be approved. Section 332 (a) of the Public Utility Code, 66 Pa. C. S. § 332(a), *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950); *Samuel J. Lansberry, Inc. v. Pa. Public Utility Commission*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992).

The record in this proceeding must be reviewed to determine whether the Petitioner has satisfied its burden of proof. If the burden of proof has been satisfied, then it must be determined whether the opposing parties have submitted evidence of "co-equal" value or weight to refute the Petitioner's evidence. If this has occurred, the burden of proof has not been satisfied, unless the Petitioner presented additional evidence. *Morrissey v. Pa. Dept. of Highways*, 424 Pa. 87, 225 A.2d 895 (1967).

In addition to determining whether the Petitioner has satisfied its burden of proof, care must be exercised to insure that the Commission's decision is supported by substantial evidence. 2 Pa. C.S. § 704. The term "substantial evidence" has been defined by various Pennsylvania courts as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Substantial evidence is more than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa.109, 413 A. 2d 1037 (1980); *Murphy v. Dept. of Public Welfare*, 85 Pa. Cmwlth. Ct. 23, 480 A.2d 382 (1984).

To determine whether the parties' Settlement should be approved, one must decide whether the Settlement promotes the public interest. See *Pennsylvania Public*

Utility Commission v. C.S. Water & Sewer Associates, 74 Pa. P.U. C. 767 (1991); *Pennsylvania Public Utility Commission v. Philadelphia Electric Company*, 60 Pa. P.U.C. 1 (1985).

As a preliminary matter, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pennsylvania Public Utility Commission*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pennsylvania Public Utility Commission*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

C. Statements in Support of the Joint Petition for Partial Settlement

1. PECO

PECO stated that the Settlement is in the public interest and fully satisfies PECO's POR obligations under the *Default Service Settlement.* PECO's Statement in Support at 2. PECO explained that in paragraph 66 of the *Default Service Settlement* certain elements were identified that were required to be included in PECO's revised POR program. *Id.* PECO concluded that the Revised POR program as modified by the Settlement is consistent with the *Default Service Settlement* and represents a proper balancing of customer protections and the interests of PECO, the participating EGSs and the other stakeholders. PECO's Statement in Support at 3.

2. The OCA

The OCA submitted that the majority of its proposed modifications to the Revised POR Program have been addressed by the Partial Settlement. In the Joint Petition, the Parties agreed to include consumer protections that are critical when customers can be terminated for unpaid EGS charges. OCA Statement in Support at 4. The OCA supported the Settlement because it is beneficial to PECO's distribution service customers. The OCA agreed that the Settlement is fair and reasonable. OCA Statement in Support at 8.

3. The OSBA

OSBA stated that in *PECO's Default Service Settlement* P-2008-2062739 (Order entered June 2, 2009), PECO agreed that if payments from shopping customers were insufficient to cover the cost of the receivables purchased from the EGSs, PECO would not try to recover the shortfall from other customers. OSBA Statement in Support at 3. The OSBA stated that PECO's revised POR program complies with the *Default Service Settlement* prohibiting recovery of shortfalls from non-shopping customers. OSBA Statement in Support at 3.

4. Dominion Retail

Dominion Retail submitted that the Joint Petition provides a fair and reasonable modification to PECO's POR program. Dominion Retail stated that the proposed modified POR program should allow for the development of a more competitive market for retail electric supply in PECO's service territory and that it is in the public interest. Dominion Retail Statement in Support at 2. Therefore, Dominion Retail supported the approval of the Joint Petition. Dominion Retail Statement in Support at 1.

5. RESA and Direct Energy

RESA[4] and Direct Energy filed a Joint Statement in Support of Joint Petition for Settlement. Notwithstanding its concerns about various aspects of PECO's proposal, RESA/Direct Energy supports the POR program as modified by the Settlement because it will insure that a workable POR program is implemented in time for PECO's market opening in January 2011. RESA/Direct Energy Statement in Support at 2.

D. The OTS' Opposition to the Joint Petition for Partial Settlement

The OTS argued that the Joint Petition, as presented, is not in the public interest and must be modified. The OTS contended that the Joint Petition contains averments that are not in the public interest and it suffers from a lack of credible evidentiary support. The OTS recommended that the Joint Petition be rejected, unless modified, because it fails to satisfy the standards allowing for approval of a settlement. The averment addressing modification of the Settlement Agreement is one of the provisions that OTS finds violates the public interest. OTS R.B. at 8, 9.

Although it recognized that the Commission has a policy of encouraging settlements, the OTS asserted that a Commission regulation promoting settlements cannot supersede the legal review necessary when evaluating this agreement. The OTS also noted that this non-unanimous agreement is only a stipulation among the signatories. It is well settled that approval of the proposed Settlement Agreement requires the determination that the terms contained therein are in the public interest. *Pennsylvania*

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[4] RESA is a non-profit organization and trade association of retail energy suppliers whose members include several companies that are licensed EGSs in the Commonwealth of Pennsylvania and sell, or are authorized to sell, electric energy in PECO's service territory. RESA/Direct Energy Statement in Support at 1. RESA's members include Constellation NewEnergy, Inc.; Direct Energy Services, LLC; and Exelon Energy Company. RESA/Direct Energy Statement in Support at 1.

Public Utility Commission v. C S Water and Sewer Assoc., 74 Pa. PUC 767 (1991); *Pennsylvania Public Utility Commission v. Philadelphia Electric Co.*, 60 Pa. PUC 1 (1985). Accordingly, the OTS maintains that the Joint Petition, as filed, fails to satisfy the standards for approval. OTS R.B. at 9.

It is the OTS' position that the following condition of the Joint Petition is not in the public interest:

> **H. Future Consideration of Program Terms and Conditions**
>
> (1) The parties agree that the terms and conditions of PECO's Revised Electric POR Program (as modified by this Settlement) shall not be raised or revisited by any party until PECO's next default service proceeding for the period commencing June 1, 2013, provided, however, that nothing in this Settlement shall preclude a party from enforcing the terms and conditions of PECO's Revised Electric POR Program (as modified by this Settlement). No party will affirmatively seek further unbundling of PECO's generation-related service costs (e.g., uncollectible accounts expense, call center charges, etc.) in PECO's next distribution rate case proceeding.

Joint Petition at 10.

The OTS stated that the Future Consideration of Program Terms and Conditions contained in Issue H(1) of Averment 9, as presented above, may be interpreted as precluding any party from evaluating any issues associated with this POR plan in any proceeding outside PECO's next default service plan filing. OTS R.B. at 9, 10. Specifically, according to the OTS, this clause seeks to limit the scope of the investigation of the Company's next base rate case by barring the review of unbundling PECO's non-jurisdictional generation related costs. The OTS has maintained that to the extent this provision could be interpreted as barring the review of PECO's generation

related costs in its next base rate case by non-signatory parties; the provision is unreasonable and is not in the public interest. OTS R.B. at 10. The OTS intends to discharge its duties through a thorough and complete review of any filing submitted by PECO, including its base rate case filed March 31, 2010 at Docket No. R-2010-2161575. OTS R.B. at 10.

Additionally, the OTS asserted that although it has not submitted testimony on many of the issues presented in the Joint Petition, the presence of Averment No. 15 contradicts the provisions contained therein by allowing for withdrawal upon the modification of any proposed stipulation. Averment 15 reads as follows:

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

Joint Petition for Partial Settlement, Averment 15, at 12-13; OTS R.B. at 11.

The OTS argued that this provision is not in the public interest in this proceeding since the outcome of an issue reserved for resolution by the Commission is intentionally included as grounds for revocation of the Settlement Agreement. OTS R.B.

at 11. The OTS interpreted this provision as an attempt by the signatories to influence the outcome of an issue reserved for litigation. OTS R.B. at 11. This is simply inconsistent with the practice of carving an issue out for independent resolution and entirely unnecessary in this proceeding. OTS R.B. at 11. The provision allowing for withdrawal when a term of the settlement is altered may have some merit in certain circumstances. However, OTS asserted that is not the case with an issue reserved for litigation. The Parties to the Joint Petition clearly did not contemplate resolution of the issue of unbundling of PECO's generation related uncollectible accounts expense in the formation of the agreement as it has been carved out for decision through the litigation process. The OTS maintained that the stipulation among the parties is otherwise sound and should not be disturbed based on the outcome of litigated issues. OTS R.B. at 11, 12.

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

E. The ALJ's Recommendation

The ALJ noted that seven of the nine parties have signed the Joint Petition. One other party, PAIEUG, did not oppose the Joint Petition. The ALJ found that the signatories have provided compelling reasons for approving PECO's revised POR as modified by the Joint Petition. As noted above the OTS has cited two reasons for rejecting the Settlement. R.D. at 25.

The OTS' first reason for rejecting the Settlement is that the Parties agreed not to raise or revisit any of the terms and conditions of PECO's Revised Electric POR Program (as modified by this Settlement) until PECO's next default service proceeding. As explained by the ALJ, even if this was meant to limit the issues a party raises, that does

not mean that a non-signatory party cannot raise the issue in another proceeding. R.D. at 25, 26.

The OTS' second reason for rejecting the Settlement is that the language concerning reasons for withdrawing from the Settlement included modification of a provision in Joint Petition that was not a part of the Settlement. OTS R.B. at 11, 12. The ALJ found that it is inconsistent to brief the issue for the Commission to decide and then state that if PECO is required to unbundle its generation-related uncollectible accounts expense, any party can withdraw. However, the ALJ did not recommend that PECO unbundle its generation-related uncollectible accounts expense, rendering the issue moot.

In light of the above, the ALJ found that the Settlement allows the Parties to conserve resources, incur less expense, and avoid the uncertainties associated with a fully litigated case. R.D. at 26.

After considering the Joint Petition, including the customer service protections, the customer education and notice provisions, the billing dispute procedures, the Company's status reports to the other parties, the notifications to the EGSs, and the savings achieved by not litigating the case fully, the ALJ recommended that the Joint Petition be approved. R.D. at 26.

F. Litigated Issues

1. PECO's Proposal To Terminate Service Based On EGS Charges Incurred Prior To January 1, 2011

a. PECO's Position and RESA's Support for PECO's Position

PECO explained that its ability to terminate service based on unpaid EGS charges was addressed in both PECO's *Restructuring Settlement* and the *Default Service Settlement.* PECO M.B. at 3. The Parties agreed that under the *Restructuring Settlement*, PECO is precluded from terminating electric service to a customer who is delinquent on payment of EGS charges until after December 31, 2010. Paragraph ¶22 of the *Restructuring Settlement*, provides that "Physical termination of service may only be permitted for failure to pay for EDC or [Provider of Last Resort] service." In addition, ¶43 reads as follows: "This settlement, including all of the terms and conditions set forth above, shall expire on December 31, 2010." PECO M.B. at 3, 4; OSBA M.B. at 8. In addition, the *Default Service Settlement* identifies certain minimum requirements for a revised purchase of receivables program, including the following: "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." *See Default Service Settlement*, ¶66. PECO M.B. at 4.

PECO's position is that the *Restructuring Settlement* and *Default Service Settlement* allow PECO to terminate service to customers for failure to pay EGS charges for basic electric supply, including unpaid charges that accrued before January 1, 2011, the Revised Electric POR Program's implementation date. PECO M.B. at 4; PECO St. No. 1 at 13-14. PECO asserted that the ability to terminate service for such unpaid

charges will reduce program implementation costs, simplify program procedures, and clarify the operation of the program for customers, EGSs and others. PECO estimated that it will avoid approximately $500,000 in implementation costs if it has the ability to terminate service based on unpaid EGS charges incurred prior to January 1, 2011. The avoided system modifications would include 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. PECO M.B. at 4, 5; PECO St. No. 1-R at 6.

PECO stated that all of the parties except the OCA and OSBA[5] agree with, or do not oppose, PECO's proposal to terminate service for EGS charges incurred before January 1, 2011. PECO M.B. at 5. RESA joined PECO in citing implementation costs as a basis to approve PECO's position. RESA M.B. at 3-4, 16-17. RESA also suggested that these costs may potentially deter EGSs from participating in PECO's electric supply market. RESA M.B. at 4.

b. The OCA and the OSBA Oppose PECO's Position

It is undisputed that under the terms of the *Restructuring Settlement* PECO customers are protected from termination for unpaid EGS charges through December 31, 2010. PECO M.B. at 3, 4; OCA M.B. at 3; OSBA M.B. at 8; OSBA R.B. at 6. The OCA and the OSBA argued that PECO's proposal to terminate customers for unpaid EGS charges that were incurred prior to January 1, 2011, is not consistent with the *Restructuring Settlement* and the *Default Service Settlement.* OCA M.B. at 5-7, OCA R.B. at 4; OSBA R.B. at 6, 7. However, the terms of PECO's proposed POR program

[5] The OSBA did not address the issue in testimony except to note that it would brief the issue, as appropriate. *See* OSBA St. No. 1 at 3.

would permit the Company to terminate the same customers for EGS charges that were incurred prior to January 1, 2011[6]. PECO M.B. at 4.

The OCA and the OSBA emphasized that the 1998 *Restructuring Settlement*, and all of its terms and conditions, remains in effect until December 31, 2010. *Restructuring Settlement*, ¶ 43. According to the *Restructuring Settlement* only unpaid PECO charges for distribution or POLR service may be the basis for termination of PECO service. OCA M.B. at 5-7; OCA R.B. at 5; OSBA M.B. at 5; OSBA R.B. at 6. However, according to PECO, tracking EGS charges for service provided under the protections of the *Restructuring Settlement* would be inconvenient and expensive. PECO M.B. at 3-5.

The OCA insisted that the protections of the *Restructuring Settlement* cannot be changed before the expiration of the *Restructuring Settlement*. Under its existing POR program, PECO cannot terminate customers for unpaid EGS charges. OCA M.B. at 3, 6; OCA R.B. at 5. If however, a customer has unpaid EGS charges, after 90 days PECO can convert the customer to dual billing where the EGS then becomes responsible for billing and collection of its own charges. If the EGS does not want to perform this service, the EGS can have the customer returned to PECO's default service. OCA M.B. at 3, 6-7. It is only after the customer is returned to default service and accrues an arrearage of default service charges that PECO is authorized to terminate the customer's service.[7] OCA R.B. at 5. The OCA submitted that these are important consumer protections which were bargained for as part of the *Restructuring Settlement* and are part of PECO's existing POR program implemented under the *Restructuring*

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[6] According to the OCA's website 2,480 of PECO's residential customers were served by EGSs for the quarter ending 4/1/10.

[7] OCA explained that as part of the comprehensive *Restructuring Settlement*, PECO assumed the risk and cost of uncollected or unpaid EGS charges for this 90 day period. Since the *Restructuring Settlement* is in effect until December 31, 2010, PECO is to bear this risk for all charges associated with service up to that date.

Settlement. The OCA and the OSBA's position is that the *Default Service Settlement* does not disturb, nor was it intended to disturb, the *Restructuring Settlement*.

The OCA and the OSBA stated that the *Default Service Settlement* does *not* provide PECO with the ability to terminate service based on unpaid EGS charges for service incurred *before* PECO's Revised POR program is implemented. PECO's proposal to terminate service to customers based on EGS charges incurred before the Revised POR Program takes effect would alter the protections bargained for under the *Restructuring Settlement*, protections that are reflective of the design of the existing POR program. *See* OCA M.B. at 3-9; OCA St. 1 at 6-7, 18; OSBA R.B. at 7.

The OSBA contended that despite the arguments based on the interpretation of a document, PECO failed to cite anything in the *Restructuring Settlement* which explicitly or implicitly authorizes termination after December 31, 2010, for EGS charges which were not paid by that date. Therefore, the *Restructuring Settlement* does not authorize such terminations. OSBA R.B. at 6, 7.

The OSBA submitted that there is no language in the *Default Service Settlement* that contemplates the termination of a customer's service for non-payment of EGS charges incurred prior to January 1, 2011. The language in the *Default Service Settlement* is *prospective*, not retrospective. OSBA R.B. at 7. Accordingly, the OSBA objected to the retrospective application of service termination procedures to previously protected customers OSBA R.B. at 7.

The OCA noted the significant differences between the design of the existing POR and the revised POR. Under PECO's Revised POR program, PECO will accept for consolidated billing and purchase without recourse only those EGS charges which the EGS certifies comply with the tariffed definition of basic electricity supply. OCA M.B. at 8-9; Joint Petition, ¶ 9.A. That tariff definition has been agreed to by the

parties to the Joint Petition and will only take effect, after Commission approval, on January 1, 2011. The definition of basic electric supply specifically ensures that termination of essential utility service is based only on failure to pay charges associated with the delivered electric supply, and not charges for early cancellation fees, deposits or other unregulated charges. In contrast, EGS charges for service which PECO might bill for under its existing POR program are not subject to such screening and limitation. OCA M.B. at 8, 9; *See* OCA St. 1 at 8, 9.

The OCA stated that both PECO and RESA ask the Commission to find that avoidance of implementation costs justifies denying EGS customers receiving service under PECO's current POR program the protection against termination that is contained in the *Restructuring Settlement*, in the event that the customer is in arrears after PECO's Revised POR takes effect. OCA R.B. at 8; PECO M.B. at 4; RESA M.B. at 3-4, 16, 17. In its direct case, PECO suggested that approval would reduce program implementation costs and simplify program procedures. PECO St. 1 at 13-14. PECO only quantified the implementation costs in rebuttal as $500,000. PECO St. 1-R at 6. RESA suggested that these costs may potentially deter EGSs from participating in PECO's electric supply market. RESA M.B. at 4.

The OCA submitted that PECO's and RESA's arguments are unconvincing. First, cost and convenience cannot be used as an excuse to abrogate consumer protection commitments made in the *Restructuring Settlement*. PECO had several choices as to how to structure its revised POR program. PECO selected a design that results in a short term transition from one program design to the next that must be addressed. Second, the Company has only provided estimates of implementation costs without details. OCA R. B. at 8, 9; OCA St. 1 at 14; PECO St. 1-R at 6. The OCA argued that PECO's estimate of the cost to resolve the transition issue should not be given weight when considering the need for PECO to meet its existing obligation. OCA R.B. at 8, 9.

The OCA contended that the provisions of the Joint Petition regarding the revised POR also undermine both PECO's and RESA's positions. The Partial Settlement, which RESA signed, expressly allows PECO to recover these implementation costs from EGSs through the temporary discount. OCA R.B. at 9; See Joint Petition at ¶ 9. PECO would not bear the costs of assuring that EGS customers receive all appropriate protections during the transition from PECO's existing POR program under the *Restructuring Settlement* to PECO's Revised POR program. The Joint Petition provides that the temporary discount would not increase from 0.2% if these additional costs were incurred; rather the 0.2% temporary discount would continue in effect until PECO has recouped the costs of protecting these EGS customers. Joint Petition at ¶ 9.H.(2). Therefore, the OCA maintained that RESA's argument that the costs could potentially deter EGSs from participating in PECO's electric supply market is without merit as the discount will not increase at all under the settlement. OCA R.B. at 9.

RESA/Direct Energy noted that EGSs would bear the burden of paying the $500,000 if PECO is not permitted to terminate for pre-2011 unpaid EGS charges. RESA/Direct M.B. at 17. The OSBA stated that RESA/Direct Energy did not acknowledge that 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. OSBA R.B. at 8. The OSBA contended that the money that the EGSs receive from PECO could 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. OSBA R.B. at 6, 7.

The OSBA noted that PECO failed to explain why the Company should purchase debts owed to EGSs. OSBA R.B. at 6, 7. In addition, the OSBA argued that PECO failed to provide evidence to show why the Commission should permit PECO to terminate customers' service for debts which were not owed to PECO prior to the Company's purchase of receivables as of December 31, 2010. OSBA R. B. at 6, 7.

Furthermore, the OSBA asserted that PECO failed 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 uncollectible accounts expense in its distribution rates. PECO has presented no such evidence. OSBA M B. at 10; OSBA R.B. at 10.

PECO's final argument is that EGS customers will receive "advance notice," pursuant to the Joint Petition, of PECO's change in its customer service termination policy. PECO M.B. at 5. The Joint Petition provides that PECO will provide current EGS customers with a one-time notice of PECO's change in policy for the Revised POR. OCA R.B. at 10; Joint Petition ¶ 9.F(1)(a). The timing of this one-time notice to current EGS customers will depend on when price to compare information is available from PECO. *Id.* PECO's argument, however, ignores the fact that some customers may have been shopping for some time prior to the receipt of any notice from PECO, and may have already entered contracts with EGSs that do not contain this fundamental change in terms and conditions. OCA R. B. at 10; OCA M.B. at 6; OCA St. 1 at 16. The OCA argued that the customer notices directed at advising customers of the prospective change in PECO's termination policy are not sufficient to warn current shopping customers. *Id.* at 5.

The OSBA questioned whether PECO will apply the consumer protection to non-residential customers since Chapter 14 only applies to residential customers and it is not clear whether Chapter 56 applies to non-residential customers. OSBA M.B. at 11.

The OCA and the OSBA submitted that none of PECO's and RESA's arguments support approval of PECO's request to include EGS charges for service

provided under PECO's existing POR program as a basis for termination of PECO service after PECO's Revised POR program takes effect. OCA R.B. 3-9; OSBA R.B. at 6-9. The OCA and the OSBA urged the Commission to find that PECO's ability to terminate service for unpaid EGS charges attaches only to those EGS charges for service incurred on and after PECO's Revised POR is implemented and only for those EGS charges for basic electricity supply as certified by EGSs eligible to participate in PECO's Revised POR program. OCA M.B. at 10; OCA R.B. at 11; OSBA M.B. at 14; OSBA R.B. at 11.

c. PECO's Response

PECO asserted that the OCA and the OSBA are ignoring the *Default Service Settlement*. PECO R.B. at 4. PECO denied that the *Restructuring Settlement* imposes a restriction on termination for pre-2011 EGS arrearages. PECO R.B. at 5.

PECO argued that there are flaws in the OSBA's argument regarding double recovery. PECO R.B. at 5. First, the argument is based on factual contentions advanced for the first time in OSBA's main brief. PECO R.B. at 5. Second, there is no basis for assuming that PECO's right to terminate for pre-2011 EGS arrearages will reduce its overall uncollectible accounts expense. Third, the uncollectible accounts expense is usually based on a multi-year average of accounts receivable written off less actual recoveries. Thus, the potential for "double recovery" would be eliminated in future base rate cases. PECO R.B. at 6.

PECO insisted that the OCA's and the OSBA's objections lack merit and should be rejected.

d. ALJ's Recommendation

The ALJ found the arguments advanced by the OCA and the OSBA concerning the retroactive effect of terminating customers' service for EGS charges that were protected in the *Restructuring Settlement* persuasive. It is undisputed that PECO has been able to recover the 90 day payments made to EGSs and will be able to recover implementation costs if unable to terminate customers with unpaid EGS charges. The language in the *Default Settlement* does not change the protections afforded in the *Restructuring Settlement.* Furthermore, it is not clear that the consumer protections referenced by PECO will be applied to non-residential customers. R.D. at 35.

Consequently, the ALJ recommended that PECO's ability to terminate service for unpaid EGS charges should apply only to those EGS charges for service incurred on and after PECO's Revised POR is implemented and only for those EGS charges for basic electricity supply. R.D. at 35. Accordingly, the ALJ denied PECO's proposal to treat unpaid EGS charges for service incurred before the effective date of PECO's Revised POR Program as a basis for termination of electricity service. R.D. at 35.

e. Exceptions

PECO's sole Exception to the ALJ's Recommended Decision is the finding that only EGS charges incurred after January 1, 2011, if not paid by the customer, may qualify as a reason for service termination of that customer. PECO asserts that its authority to terminate service for unpaid EGS charges incurred prior to January 1, 2011, is consistent with the terms of its 1998 Restructuring Settlement and its Default Service Settlement. R.D. at 35, 36; PECO Exc. at 3.

In its Exception, PECO states that the ALJ has improperly extended the duration and scope of the termination restriction in the 1998 Restructuring Settlement which precluded PECO from terminating electric service to a customer who is delinquent on payment of EGS charges until after December 31, 2010. PECO Exc. at 4. PECO notes that this restriction terminates on December 31, 2010 and does not expressly, or by implication, limit PECO's post-2010 termination authority. PECO Exc. at 4.

PECO also believes that its service termination proposal is consistent with the terms of the Default Service Settlement which contemplates PECO's ability to terminate service for unpaid EGS charges as co-extensive with its existing authority to termite service for nonpayment of EDC charges. PECO also notes that EDC charges will not distinguish between charges incurred before or after January 1, 2011. PECO Exc. at 4. The Default Service Settlement provides that:

> 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.

Default Service Settlement, ¶ 66 [emphasis added].

PECO believes that under the ALJ's approach, PECO would be obligated to purchase the accounts receivable that already exist at January 1, 2011 and, therefore, necessarily arise from service furnished before that date, but would be denied service termination authority if those receivables are not paid. PECO Exc. at 5. PECO asserts that a reasonable interpretation of Paragraph 66 of the Default Service Settlement is that the constraint on the exercise of PECO's authority to terminate service for non-payment of EGS charges, which the Restructuring Settlement imposed, expires on December 31, 2010. PECO Exc. at 5.

Lastly, PECO notes that pursuant to its current Supplier Coordination Tariff consolidated billing is provided only for a customer's basic charges imposed by an EGS. As 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. PECO Exc. at 5.

The OCA believes that the ALJ properly rejected all of PECO's arguments and concluded that PECO's ability to terminate service based upon unpaid EGS charges can apply only to EGS charges incurred after the terms of the Restructuring Settlement expire and only to those EGS charges which meet the definition of "basic electricity supply." OCA R.Exc. at 5; R.D. at 32, 34 – 36.

The OCA also contends that PECO's Exception requires the language in the Restructuring Settlement and Default Service Settlement be interpreted differently and that the Joint Petition for Settlement – which defines "basic electricity supply" – should be ignored. OCA R.Exc. at 6.

The OSBA, in its Reply to PECO's Exception states that by "permitting PECO to begin terminating customers on January 1, 2011, for unpaid EGS charges incurred during the restructuring period, *i.e.*, the first type of debt[8], would be unwarranted double recovery, in that PECO has already been recovering unpaid EGS charges through distribution rates." OSBA R.Exc. at 6. The OSBA further asserts that giving PECO recourse against EGS customers for pre-January 1, 2011, arrearages would violate the Restructuring Settlement and Commission regulations. OSBA R.Exc. at 6; OSBA M.B. at 10.

f. Disposition

[8] This is identified by the OSBA as 90-day debt accumulated prior to reversion to dual billing. OSBA R.Exc. at 6.

We consider PECO's customers to be adequately protected under the Revised Plan, as submitted, from unjust termination of service for non-payment of EGS charges. PECO has stated that it will continue to follow Chapter 14 and Chapter 56 requirements, which include a service termination moratorium period of December 1 through March 31[9], to determine when service termination would be appropriate and in proceeding with such an action, thus providing shopping customers with the same protections as default service customers.

The OCA and the OSBA believe that consumer protection from service termination for EGS arrearages incurred prior to January 1, 2011 should continue into 2011, as provided by the Restructuring Settlement. We disagree. The language of the Restructuring Settlement is clear. Paragraph 43 states that "this settlement shall expire on December 31, 2010." The expiration of the Restructuring Settlement also causes the consumer protection at issue here to expire.

The Default Service Settlement provides that "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." [10] This language is clear in defining PECO's rights regarding service terminations. We believe the Default Service Settlement language complements the Restructuring Settlement language by defining PECO's ability to initiate service termination actions for a customer's non-payment of EGS charges incurred either prior or subsequent to January 1, 2011.

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9 See 52 Pa. Code § 56.100 Winter Termination Procedures.

10 *Default Service Settlement ¶ 66.*

Based upon the record established in this proceeding, the voluntary nature of PECO's POR Program and the reasonableness of PECO's service termination policies to be followed and applied to shopping customers, we shall adopt PECO's proposal, grant its Exception and deny the Reply Exceptions of the OCA and the OSBA. Accordingly, PECO may commence service termination actions with respect to any shopping customer whose account has been purchased by PECO, if PECO is not paid by the shopping customer, in the same manner as is permissible under current statute and Commission regulations.

2. The unbundling of generation-related uncollectible accounts expense from its distribution rates for collection from default service customers

a. PECO's Proposal

PECO proposed to employ an initial temporary discount of 0.2% on the receivables purchased by PECO to recover the implementation costs of the Revised Electric POR Program. The ongoing operating and administrative costs of the Program would be included in PECO's subsequent electric distribution base rate cases. PECO M.B. at 6. PECO also proposes to continue to recover uncollectible expenses (including the expense associated with purchased EGS receivables) in its distribution rates. Joint Petition at ¶¶19-21; PECO St. No. 1, at 14-16. All parties except the OTS agree with, or do not oppose, the Company's proposed method for recovering POR-related costs. PECO M.B. at 6.

b. The OTS' Proposal

It is the OTS' position that PECO's proposal understates the administrative factor and completely ignores the inclusion of an appropriate factor for uncollectible accounts. The OTS states that PECO has not presented substantial evidence, as defined

by the Courts, in support of the omission of these key elements from its proposed POR program. OTS M.B. at 9.

The OTS submits that the issue in this proceeding is whether the uncollectible accounts expense associated with the non-jurisdictional EGS should be collected from the jurisdictional distribution ratepayer. The OTS' position is that the avoided costs of a non-jurisdictional EGS should not be shifted to jurisdictional ratepayers. OTS M.B. at 11; OTS R.B. at 2. "The use of the discount rate OTS is proposing will properly assign the generation related uncollectible expense to the EGS." OTS R.B. at 2; OTS Statement No. 1-R at 3. The OTS also recommended that PECO's generation related uncollectible accounts expense be unbundled from distribution rates and collected from default service customers through a surcharge per kWh which would put everyone on a "level playing field." (OTS R.B. at 2; OTS Statement No. 1 at 10).

The OTS submitted that the Commission provided guidance on the development of a proper POR Plan in PPL's POR proceeding.[11] In that Order, the OTS asserted that the Commission properly assigned jurisdictional and non-jurisdictional costs. OTS R.B. at 3. In the PPL proceeding, the Commission recognized that a properly designed POR Plan utilizes a discount rate that includes a factor for uncollectible accounts expense. R.D. at 38. The OTS contended that there is no credible evidence in the instant proceeding to suggest that the same treatment is not appropriate here and if the standards established in the PPL proceeding are not followed, a situation where an EDC in one service territory will have different standards than an EDC in another territory may be created. OTS R.B. at 3; R.D. at 38. The OTS contended that by failing to provide consistency in POR programs, an EGS would have the opportunity to shop its supply to the most advantageous market and ratepayers are potentially harmed by this practice.

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

OTS maintained that POR programs must have a level of consistency throughout the Commonwealth in order to provide the same level of protections and opportunities to all participants. OTS R.B. at 3, 4; R.D. at 38. The OTS contended that PECO, RESA and Dominion Retail have failed to provide substantial evidence demonstrating why an EGS in the PECO service territory should be afforded terms that are more advantageous than the terms enforced in the PPL service territory. The OTS stated that the record does not support a differing treatment of uncollectible accounts expense recovery presented in the Commission approved PPL proceeding and PECO's plan. OTS R.B. at 4, 5; R.D. at 38.

c. PECO's Response to the OTS' Proposal

PECO argued in surrebuttal testimony that, the OTS' witness conceded that the uncollectible rate should be the same "for both shopping and non-shopping customers." PECO M. B. at 7; OTS St. No. 1-SR at 4; PECO R.B. at 8. Thus, under either PECO's proposal (i.e., uncollectible accounts expense recovered in distribution rates that apply to all customers) or the approach recommended by OTS (i.e., uncollectible accounts expense included in EGSs charges for shopping customers and in a separate surcharge applied only to default service customers), all customers will be paying the same level of uncollectible expense on a per-kWh basis. Since the rate would be the same for all customers under either approach, there is no risk of inequality or improper "subsidization" associated with PECO's cost recovery method. PECO M.B. at 7; R.D. at 40.

Given the fact that the PECO and OTS proposals "achieve the same result," the relevant inquiry is which proposal will recover POR-related costs in a more efficient and appropriate manner. The OTS proposal will require separate tracking, on an ongoing basis, of POR-related implementation costs, administrative costs and uncollectible expense. It will also require that PECO develop and obtain Commission approval for a

new surcharge to recover default service-related uncollectible expense from default service customers and make annual filings with the Commission under the associated adjustment clause. PECO M.B. at 7; R.D. at 40. PECO's proposal, on the other hand, requires the separate tracking of POR-related implementation costs only, which will then be recovered directly through a temporary discount on purchased receivables. POR-related uncollectible expense, as well as any ongoing operating and administrative costs, will be recovered through distribution rates. PECO believes, and the EGSs agree, that its cost recovery method is simpler and will be easier to administer. PECO M.B. at 7, 8; RESA St. No. 1-R, at 4; Dominion Retail St. No. 1-R at 7; RESA R.B. at 10; Dominion Retail R.B. at 8; R.D. at 40, 41.

In addition to providing simplicity, PECO's proposal will appropriately support the development of retail competition. By recovering all uncollectible expense in its distribution rates, PECO will create a straightforward "level playing field" for all EGSs and default generation suppliers. When combined with the purchase of receivables without discount (after program implementation costs are recovered), PECO believes that this "level playing field" will provide significant support to retail competition in its territory. PECO St. No. 1-R at 14, 15. PECO noted that, pursuant to the Settlement, all parties other than the OTS have agreed that the issue of unbundling generation-related uncollectible accounts expense should be deferred until PECO's next Default Service proceeding. For all these reasons, PECO recommended that the OTS cost recovery proposal be rejected (PECO M. B. at 8; PECO R. B. at 9).

d. Dominion Retail's Position

Dominion Retail contended that the discount rate proposed by OTS is incorrect because it is based on information from PECO's 1997 restructuring filing. Dominion Retail M.B. at 9. In addition, Dominion Retail submitted that OTS failed to

present a rationale for rejecting PECO's proposal, and noted that the proposal is a continuation of PECO's present procedures. Dominion Retail M.B. at 10; R.D. at 41.

Dominion Retail also argued that the PPL Final Order does not include a statement from the Commission stating that the cost recovery structure approved in that Order is mandatory for all subsequent POR programs, nor did the Commission say that the only appropriate cost recovery methodology for POR programs would be to impose a discount and unbundling structure. In fact, there is no discussion of the notion at all except to mention that the Settlement contains such a provision. Contrary to the OTS position, there is no legal basis to assert that the PPL Final Order controls here in any manner. The OTS argument must, therefore, be rejected. Dominion Retail R.B. at 5; R.D. at 41.

e. RESA's Position

RESA denied that it fully supported PPL's proposal to address uncollectible accounts expense in its 2010 POR program. RESA/Direct Energy R.B. at 7; R.D. at 42. RESA specifically opposed PPL's proposed (and ultimately adopted) recovery of uncollectible accounts expense and advocated that PPL should recover all of its uncollectible accounts expense through distribution rates, as PECO has proposed in the instant case with RESA/Direct Energy's support. RESA/Direct Energy R.B. at 7; RESA St. No. 1 at 5-9; R.D. at 42. While RESA/Direct Energy continued to maintain that PPL's proposed approach was not preferable, it made clear that it was willing to accept the settlement to ensure that a POR program would be established in time for market opening in January 2010 (less than two months after the date main briefs were filed). Specifically, RESA/Direct Energy stated:

> Because a functioning POR program is so crucial for the facilitation of competition, the Retail Energy Supply Association ("RESA") and Direct Energy Services, LLC ("Direct Energy") (collectively "RESA/Direct Energy")

> reached a settlement with all parties in this proceeding to implement a compromise program for 2010 only which permits PPL to move forward with implementing a POR program this coming January. The settlement addresses almost all of the program's elements including how EGSs will be able to enroll small commercial and industrial ("C&I") customers into PPL's POR program for 2010. Although RESA/Direct Energy do not support all aspects of the settlement as the appropriate long-term policy for POR programs (and reserve their rights to challenge those aspects in the future), implementation of a workable POR program on January 1, 2010 was the ultimate goal.
>
> *Petition of PPL Electric Utilities Corporation Requesting Approval of a Voluntary Purchase of Receivables Program and Merchant Function Charge*, Docket No. P-2009-2129502, Main Brief of The Retail Energy Supply Association and Direct Energy Services, LLC dated October 30, 2009 at 2 (citations omitted, emphasis original). (RESA/Direct Energy R.B. at 7)

R.D. at 42.

RESA also objected to OTS' reliance on the PPL POR case and cited several differences between the instant case and the PPL case. First, PPL's POR proceeding was on an extremely expedited schedule. The Commission established due dates for the proceeding by notice dated September 25, 2009, entered its final decision on November 19, 2009, and PPL's POR Program became operable on January 1, 2010. In addition, the approved PPL POR program is limited to 2010. For these reasons, as explained in the quote above, RESA/Direct Energy chose to lend limited support to this aspect of the Settlement even though it had reservations and made clear that its approval of the Settlement was fact specific and did not waive its rights to challenge the various program aspects. RESA/Direct Energy R.B. at 8; R.D. at 42, 43.

RESA/Direct Energy agrees that, as a matter of general policy, full unbundling can achieve the same competitively neutral result as implementing a POR program with a zero discount rate for uncollectible costs. Both methods, if properly

implemented, can place EGSs on equal footing in terms of bad debt expense as compared to the EDC. As the record makes clear, PECO's proposal is the one that is favored by the EGS parties in this proceeding and is the one that is most likely to encourage the development of a competitive market. RESA/Direct Energy R.B. at 4; R.D. at 43.

RESA noted that the record provides at least three concrete examples of how adoption of OTS' proposal could complicate PECO's POR program and throw into doubt whether EGSs would find the newly designed program desirable enough to promote market entry. First, the foundation of OTS' proposal, to use an uncollectible expense factor developed in 1997, would force EGSs to factor into their decision an outdated uncollectible expense factor which has no rational relationship to the current general understanding of uncollectible levels experienced today. RESA/Direct Energy M.B. at 12, 13; R.D. at 43. Second, implementation of OTS' proposal in strict adherence to how it was adopted in PPL, could result in implementation of a complicated EGS uncollectible tracking mechanism that requires careful monitoring and calculations, administrative processes, costly EDC systems modifications, and potential litigation RESA/Direct Energy M.B. at 15; R.D. at 43. All of this would add additional burdens, costs and uncertainty into this process, impacting how EGSs may view the desirability of entering into this market. Finally, if adopted as proposed by the OTS, there is no dispute that PECO would be required to discount the EGS receivables purchased at significantly higher discounted rates than proposed. For residential customers, the discount would increase from the currently proposed .2% to 2.27%. For small C&I customers, the discount would increase from .2% to .34%. For large C&I customers, the discount would increase from .2% to .55%.[12] There is no dispute that the greater the discount at which PECO purchases an EGS's receivables the less attractive market entry looks to a potential

[12] OTS M.B. at 9. As an example, for residential customers PECO proposes to temporarily discount the receivables by .2% while OTS supports a 2.27% discount rate. Dividing 2.27% by .20% equals 11.35 and multiplying that by 100 results in an 1135% difference between the discount rate proposed by PECO and that supported by OTS.

EGS. The cost of uncollectible account expense would ultimately be socialized under either proposal. Under the OTS' approach the cost of uncollectible accounts expense would be reflected in the discount rate charged to EGSs and the EGSs would either pass this cost onto all of their customers in their rates or choose not to participate in the POR program. If EGSs choose not to participate in the POR program, then customers will remain on default service and uncollectible costs will be socialized through default service rates because uncollectible costs would be unbundled through an adder applied to default service. RESA/Direct Energy R.B. at 4, 5; R.D. at 44.

RESA/Direct Energy fully support the idea that all EDCs in Pennsylvania should operate under uniform standards and uniform tariffs, the fact is that each EDC has its own billing systems and unique service territory issues that prevent such uniformity. Therefore, RESA submits that deference should be given to PECO in its decision to recommend a proposal that achieves the goal of appropriately structuring a POR program that will encourage EGSs to participate in the market. RESA/Direct Energy R.B. at 6, 7; R.D. at 44.

RESA explained that OTS' sole reliance on PPL's 2010 POR program ignores the POR programs that are in place in the service territories of Duquesne Light Company ("Duquesne")[13] and Pike County Light & Power Company ("PCL&P")[14] in Pennsylvania. Further, guidelines for implementation of a POR program for the service territories of Metropolitan Edison Company and Pennsylvania Electric Company (collectively "Met-Ed/Penelec") have been approved by the Commission.[15] RESA/Direct Energy R.B. at 9.

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[13] *Petition of Duquesne Light Company for Approval Of a Default Service Plan for the Period January 1, 2008 Through December 31,* 2010, Docket No. P-00072247, Order entered June 22, 2007.

[14] *Petition of Direct Energy Service, LLC For Issuance of Emergency Order*, Docket No. P-00062205, Final Opinion and Order entered April 20, 2006.

[15] *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric*

Each of these POR programs addresses how to socialize the cost of uncollectible accounts expense associated with generation service differently. The PCL&P POR program has been in place since the Commission ordered it in 2006. All generation-related uncollectible expense is recovered through distribution rates and EGSs receivables are purchased at 0% discount. For Duquesne, a negotiated uncollectible rate for EGS customers was derived and all distribution customers (which include both default service and EGS customers) pay for the costs of default service related uncollectible accounts that may exceed the level of the negotiated discount rate. For Met-Ed and Penelec, generation related uncollectible accounts will be recovered via a non-bypassable charge, either in distribution rates or as a separate mechanism. As this sampling of current and future POR programs demonstrates, the approach that has been more often adopted for the long term is more closely aligned with the PECO proposal rather than the 2010 PPL POR structure. RESA/Direct Energy R.B. at 9, 10; R.D. at 45. Thus, RESA/Direct Energy recommended that OTS' proposal should be rejected and PECO's adopted as the approach most consistent with achieving the goals of the Competition Act (RESA/Direct Energy R. B. at 6).

f. ALJ's Recommendation

The ALJ found that PECO has proposed a method for recovering uncollectible expenses that it currently uses supported by record evidence to show that the method is reasonable. Thus, PECO established a prima facie case. In addition, the ALJ found that there are other utilities with Commission approved PORs that are more like PECO's proposal than PPL's POR. Furthermore, the ALJ noted that the OTS' witness admitted that the unbundling approach would achieve the same result as PECO's

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Company for Approval of their Default Service Programs Opinion and Order at Docket Nos. P-2009-2093053 and P-2009-2093054 entered November 6, 2009.

proposal. Accordingly, the ALJ adopted PECO's POR Plan and rejected to OTS' proposal. R.D. at 46.

g. Exceptions

The OTS's Exception relates to the unbundling of uncollectible accounts expense and states that the ALJ's recommendation not to unbundle this expense is not in the public interest and must be rejected. OTS Exc. at 4. The OTS also avers that shopping customers will be paying for uncollectible accounts expense twice, once through the EGS' billings and also through PECO's distribution rate. OTS Exc. at 6. The OTS also believes the ALJ's recommendation is flawed because it ignores the guidance established in PPL's POR proceeding. OTS Exc. at 8. The OTS asserts that RESA's position in this proceeding is different from its position in, for example, in the PPL POR proceeding and RESA has not provided any substantial evidence to support such a difference. OTS Exc. at 12. In conclusion the OTS states that PECO's POR program must be amended to allow for the unbundling of rates in order to properly assign costs in order to protect the interests of all regulated parties. OTS Exc. at 13.

As stated in its main brief and again in its Reply Exceptions RESA/Direct state that the record shows that PECO's proposal is consistent with the way in which bad debt expense is handled today from a ratemaking perspective, allows PECO to treat all customers the same from a billing and expense collection perspective and facilitates the development of the competitive market with an attractive POR program. RESA/Direct R.Exc. at 3.

In Reply Exceptions RESA/Direct state that as the opposing Party to PECO's proposal, the OTS has the burden to support its counter proposal and the OTS did not satisfy this burden. RESA/Direct states that the undisputed record provides at least three concrete examples of how adoption of the OTS proposal could needlessly

complicate PECO's POR program and thwart the goals of the Choice Act by discouraging EGSs from participating in the competitive market. RESA/Direct R.Exc. at 7.

RESA/Direct also address the OTS' reliance upon the PPL POR Settlement as what should be the standard approach for all POR Programs in Pennsylvania. RESA/Direct R.Exc. at 9. RESA/Direct states that the OTS has failed to provide persuasive evidence that its proposal is, or should be, the standard approach for all POR programs in Pennsylvania. RESA/Direct R.Exc. at 9.

Lastly, RESA/Direct state that the OTS' contention that RESA's position regarding POR, as presented on its website, must be conclusive as to all of RESA/Direct settlement positions for every EDC, is inconsistent with the Commission's rules and practices encouraging negotiated settlements. *See* 52 Pa. Code §§ 5.231, 69.391, 69.401.

In its Reply to the OTS Exception, Dominion states that the OTS is factually incorrect. Dominion R.Exc. at 3. Dominion explains that PECO's proposal continues to have all customers bear the risk of uncollectible accounts expense the way they are borne today. Since there will be no discount rate, after PECO's start-up costs are recovered, PECO will continue to recover uncollectible account expense associated with both delivery and commodity charges from all customers on an equivalent basis. Dominion R.Exc. at 3. Additionally, since the unbundling/discount methodology proposed by the OTS produces the same result as PECO's proposal, there is no shifting of risk at issue in this proceeding. Dominion R.Exc. at 5.

PECO's reply to the OTS' Exception is, among other things, that OTS' position would require changes in rates that more appropriately should be considered in a base rate proceeding and that all Parties to the Joint Petition have agreed that the issue of

unbundling generation-related uncollectible accounts expense should be deferred until PECO's next Default Service proceeding. PECO R.Exc. at 3; Joint Petition at § 9.(H)1.

h. Disposition

Based upon the discussion above, we shall adopt PECO's proposal to include the entirety of uncollectible accounts expense within its distribution service base rates. We shall also adopt the Section 9(H)(1) of the Settlement which bars any of the Parties to the Settlement from seeking further unbundling of PECO's generation-related service costs in PECO's next distribution rate case proceeding. Any non-signatory to this Settlement is free to argue in favor of further unbundling of PECO's generation-related service costs (e.g., uncollectible accounts expense, call center charges, etc.) in PECO's next distribution base rate case. Accordingly, we shall deny the Exception of the OTS on this issue.

IV. CONCLUSION

Based upon our review of the record in this proceeding and the supporting statements of the Parties, we find that the Joint Petition for Settlement, and the rates, terms and conditions contained in the Settlement Agreement are just, reasonable and within the public interest and are in accord with the rules and regulations of the Commission and with the provisions of the Pennsylvania Public Utility Code; **THEREFORE,**

IT IS ORDERED:

1. That the Recommended Decision of Administrative Law Judge Cynthia Williams Fordham is adopted as modified by this Opinion and Order.

2. That the Joint Petition for Partial Settlement submitted by PECO Energy Company, the Office of Consumer Advocate, the Office of Small Business Advocate, Constellation NewEnergy, Inc. Direct Energy Services, Inc., Dominion Retail, Inc. and the Retail Energy Supply Association at Docket No. P-2009-2143607, including all terms and conditions thereof, is hereby approved.

3. That PECO Energy Company is permitted to commence service termination actions on or after January 1, 2011, pursuant to Chapter 14 and Chapter 56 of the Commission's regulations for accounts purchased, in accordance with the Purchase of Receivables Program herein approved, and unpaid pursuant to PECO Energy Company billings, representing Energy Generation Supplier charges incurred by the customer prior to January 1, 2011.

4. That the Exceptions of PECO Energy Company are granted.

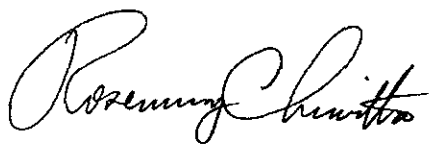
5. That the Exceptions of the Office of Trial Staff are denied.

6. That the Petition of PECO Energy for Approval of Its Revised Electric Purchase of Receivables Program, as modified by the Joint Petition for Partial Settlement, is approved.

7. That upon entry of the Commission Order approving the recommendation to adopt the Petition of PECO Energy for Approval of Its Revised Electric Purchase of Receivables Program, as modified by the Joint Petition for Partial Settlement, PECO Energy Company shall be permitted to file a tariff or tariff supplement consistent with this Opinion and Order to become effective on one day's notice after entry of the Commission's Final Order.

8. That upon acceptance and approval by the Commission of the tariff or tariff supplements filed by PECO Energy Company consistent with this Order, this proceeding at Docket No. P-2009-2143607 shall be marked closed.

BY THE COMMISSION



Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: June 16, 2010

ORDER ENTERED: **June 18, 2010**

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 **Reply Brief** dated September 20, 2010, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

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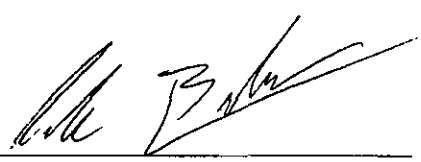

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