

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy :
Company For Approval of Its : Docket No. P-2012-2283641
Default Service Program :

**OBJECTIONS OF FIRSTENERGY SOLUTIONS CORP. TO SET II
INTERROGATORIES OF PECO ENERGY COMPANY**

FirstEnergy Solutions Corp. ("FES"), pursuant to 52 Pa. Code § 5.342 and Section D, Paragraph (b) of the Second Prehearing Order dated March 19, 2012, hereby objects to Interrogatory PECO(FES)-II-1 of the Set II Interrogatories ("Discovery Request") served by PECO Energy Company ("PECO"). In accordance with the Second Prehearing Order, FES provided PECO with its oral objections, which the parties were unable to resolve. FES has submitted a Response to this Discovery Request concurrent with the service of these objections. The Response incorporated these objections and FES noted that it was being provided subject to and without waiving FES' objections set forth herein.

FES states the following in support of these Objections:

I. INTRODUCTION

1. On April 20, 2012, PECO served its Discovery Request on FES.
2. As stated above, FES objects to the Discovery Request propounded by PECO. FES objects to this Discovery Request because it seeks information that is irrelevant to the subject matter involved in the pending action and will not lead to the discovery of admissible evidence. In addition, PECO's Discovery Request is unreasonably burdensome because it seeks access to highly confidential, competitively sensitive information of FES, one of several electric generation supplier ("EGSs") that have intervened in this case. The protection of this

competitively sensitive information is critical to an EGS's business. If such discovery were permissible, it would have a chilling effect on the participation of competitive EGSs like FES in default service proceedings and ultimately deprive the Commission of the perspective of critical participants in these proceedings, where the Commission is considering programs intended to stimulate retail electric competition. These adverse impacts and broader implications of disclosure can easily be avoided by recognizing that the Discovery Request is completely irrelevant to the issues in this proceeding and no possible answer will lead to evidence admissible at hearing. Further, the Discovery Request is unreasonably burdensome because it requests FES to provide "average customer acquisition cost" without defining what costs this term includes in the context of PECO's Discovery Request.

3. Set forth below is the subject Discovery Request, followed by FES' specific objections.

II. OBJECTIONS

A. PECO Discovery Requests No. 1:

Reference FES Statement No. 1, page 12, lines 1-5. Please provide FirstEnergy Solutions' average customer acquisition cost for Pennsylvania residential customers.

FES Objection:

4. FES objects to this Discovery Request because the information sought is irrelevant to the subject matter involved in this proceeding and will not lead to the discovery of admissible evidence. The central issue in this proceeding is PECO's proposed Default Service Plan ("DSP"), not anything related to the conduct or operation of FES' business operations. Yet, the Discovery Request requests highly confidential and proprietary information from FES

regarding its costs to acquire Residential customers in Pennsylvania. EGSs like FES scrupulously protect and maintain the confidentiality of information regarding its costs, since any dissemination of this information would be invaluable to FES' competitors and would compromise FES' ability to successfully compete for customers.

The Discovery Request Seeks Irrelevant Information

5. The Discovery Request completely misconstrues the direct testimony of FES witness Tony Banks in FES Statement No. 1. The portion of Mr. Banks' testimony to which the Discovery Request refers reads in its entirety¹ as follows:

Proponents of a bonus payment such as that proposed in PECO's Opt-In EGS Offer Program claim that such bonuses are appropriate in part because they represent customer acquisition costs that EGSs will avoid. IWP Order at 64. However, if EGSs must pay a bonus and the costs of the program as well, a significant benefit of the program from the EGS's perspective is lost, and the EGS's cost-benefit analysis for participating in the program may be substantially altered.

FES St. 1, page 11, line 20 – page 12, line 5. While the Discovery Request specifically seeks the details of *FES'* average customer acquisition cost, the testimony to which the request purportedly relates was addressing the perspective of those EGSs that advocated in the Commission's Retail Markets Investigation ("RMI") in favor of the inclusion of a bonus payment in retail opt-in auction programs. According to the IWP Order, certain EGSs expressed support for an incentive signing "bonus" of \$50-\$150, representing the customer acquisition cost the EGS avoided by obtaining the customer through the Retail Opt-in Auctions. IWP Order at 64. Critically, FES *did not* support the payment of a bonus in the RMI. The referenced FES testimony is not discussing FES's cost-benefit analysis or decision to participate in PECO's proposed program.

¹ While the Discovery Request references FES St. 1, page 12, lines 1-5, line 1 on page 12 continues a sentence which begins on page 11, line 20, which is included for completeness.

Rather, it discusses the perspective of those EGSs that have supported making a bonus payment to customers as a component of the retail opt-in auction product because, in their minds, it represents an avoided customer acquisition cost. Notably, the referenced testimony does not mention "FES's perspective" or "FES's cost-benefit analysis." Mr. Banks in his testimony was *not* talking about FES' estimation of its own participation in the opt-in auction. Rather, he was observing that it is reasonable to conclude that other EGSs that have advocated a bonus payment in the RMI could re-evaluate their interest in PECO's proposed program in light of the obligation to pay the program costs as well. Decisions by these EGSs not to participate would reduce the overall level of EGS participation in the program. The point Mr. Banks made is a general one that could have been made by any non-EGS intervenor in this proceeding. The Discovery Request is irrelevant to the issue actually addressed in FES Statement No. 1 that is the very predicate for the interrogatory.

6. Also, this proceeding is about PECO's DSP and related retail market enhancement programs, not that of FES or other EGSs. Instead of proposing a single uniform retail opt-in auction program for all electric distribution companies ("EDCs") to implement, the Commission directed EDCs to propose their own retail market enhancement programs in these proceedings, presumably for the purpose of obtaining input from stakeholders, including competitive retail suppliers, on how to design a program that best promotes retail electric competition in their service territories. FES intervened in this proceeding to offer suggestions on how the design and implementation of certain aspects of the DSP can be improved in order to meet the legal and policy objectives that have been adopted by the Commission with respect to the establishment and maintenance of a vibrant and competitive retail electric energy market in PECO's service

territory. Information related to FES's costs of doing business in Pennsylvania has no bearing on the issues in this proceeding.

7. In addition, the information sought by PECO in the Discovery Request will not lead to the discovery of admissible evidence. PECO has no credible way to use the requested information. To the extent PECO contends that it wants to test FES' testimony by performing its own cost-benefit analysis on FES, there are too many variables, on which PECO would have to speculate, to make that data usable or relevant in this proceeding. Among other things, PECO would need to speculate and/or project a prospective clearing price, a number of participating customers, and a number of customers won by FES. At best, the Discovery Request plays to PECO's "curiosity" about FES' customer acquisition costs. However, the standard for discovery is relevance, not curiosity.² The only impact of this and similar discovery requests served by PECO on other EGSs in this proceeding is to harass and deter EGS participation in these default service proceedings. There are other, legitimate ways for PECO to test the referenced FES testimony, without seeking disclosure of competitively sensitive information.

The Requested Information Is Highly Confidential And Competitively Sensitive

8. The information sought by PECO in the Discovery Request relates to Highly Confidential and competitively sensitive business information of FES that demands full and complete protection from any actual or potential competitor — including PECO. The existing Protective Order in this case is not sufficient to protect a party like FES that is not seeking any

² See, e.g., *Pa. P.U.C. v. Pennsylvania-American Water Company*, Docket No. R-2011-2232243, Order on Motion to Compel of Administrative Law Judges Angela T. Jones and Eranda Vero (July 21, 2011), at 21-22; *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Penn Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670, Order on Motion to Compel of Administrative Law Judge Elizabeth H. Barnes (March 16, 2012), at 6.

specific approval/authorization from the Commission in this proceeding and whose testimony does not even address the requested information. When coupled with the fact that the Discovery Request does not seek relevant information, there is no basis on which FES should be required to answer this interrogatory.

9. Importantly, the Protective Order does not provide PECO any support for demanding otherwise irrelevant information by suggesting that such data would be fully protected from public or competitor exposure. Given the type and nature of the cost data being requested by PECO in the Discovery Request and the competitive disadvantage to a competitive EGS if the information were disclosed, the Protective Order *does not protect* FES and its business and interests. Allowing PECO to pursue discovery of EGS' competitively sensitive information, which is unrelated to the issues in the proceeding, will intimidate and deter active participation by FES and other EGSs in this and other DSP proceedings.

The Discovery Request Is Vague

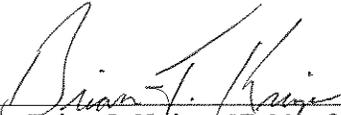
10. The Discovery Request is unreasonably burdensome because it requests FES to provide "average customer acquisition cost" without defining that term. The term "customer acquisition cost" was not developed by Mr. Banks in his testimony. Instead, it was drawn from page 64 of the Commission's IWP Order. PECO's Discovery Request does not define what costs this term includes in the context of PECO's Discovery Request. FES should not be required to determine the costs PECO is including in this term.

III. CONCLUSION

For the reasons specified above, FES objects to the Discovery Request.

Respectfully submitted,

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