



COMMONWEALTH OF PENNSYLVANIA  
OFFICE OF SMALL BUSINESS ADVOCATE

September 13, 2012

**E-FILED**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

**Re: Petition of PECO Energy Company for Approval of its Default Service  
Program  
Docket No. P-2012-2283641**

Dear Secretary Chiavetta:

Enclosed for filing is the Motion to Strike Certain Portions of the Exceptions of the Joint Suppliers Group, on behalf of the Office of Small Business Advocate, in the above-docketed proceeding. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Elizabeth Rose Triscari".

Elizabeth Rose Triscari  
Assistant Small Business Advocate  
Attorney ID #306921

Enclosure

cc: Parties of Record

Brian Kalcic

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY COMPANY        :**  
**FOR APPROVAL OF ITS DEFAULT                :**        **Docket No. P-2012-2283641**  
**SERVICE PROGRAM                               :**

**MOTION OF THE OFFICE OF SMALL BUSINESS  
ADVOCATE TO STRIKE CERTAIN PORTIONS OF THE  
EXCEPTIONS OF THE JOINT SUPPLIERS GROUP**

The Office of Small Business Advocate (“OSBA”), files this motion to strike certain portions of the Exceptions of the Joint Suppliers (as hereafter defined) pursuant to the regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code §5.103, and avers the following in support of the Motion:

**I.        BACKGROUND**

1.        On January 13, 2012, PECO Energy Company (“PECO” or the “Company”) filed the Petition of PECO Energy Company for Approval of its Default Service Program with the Commission (“Petition”). The Petition seeks approval of PECO’s proposed second Default Service Program to secure default service supply for the Company’s customers for the period from June 1, 2013 through May 31, 2015.

2.        The OSBA has actively participated in these proceedings. The OSBA filed an Answer to the Petition as well as a Notice of Intervention and Public Statement. The OSBA served the Direct, Rebuttal, and Surrebuttal Testimony of its witness, Brian Kalcic. The OSBA participated in the evidentiary hearing held in Harrisburg on May 22, 2012, and submitted both a Main Brief and Reply Brief.

3. Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (“Constellation”), Exelon Generation Company, LLC and Exelon Energy Company (“Exelon”), and NextEra Energy Services, Pennsylvania, LLC and NextEra Power Marketing, LLC (“NextEra”) (collectively, the “Joint Suppliers”), among others, also filed Interventions and are parties to this proceeding. However, none of the Joint Suppliers submitted testimony or briefs during the course of this proceeding.

4. After the close of the record, Administrative Law Judge (“ALJ”) Dennis J. Buckley issued a Recommended Decision (“RD”) on August 29, 2012. The RD rejected a proposal made by PPL EnergyPlus, LLC (“PPL EnergyPlus”) whereby PECO would recover costs associated with Generation Deactivation charges from and on behalf of all distribution customers through a non-bypassable charge.

5. The Joint Suppliers filed Exceptions to the RD on September 10, 2012, requesting that the Commission reject the ALJ’s ruling with regard to PPL EnergyPlus’s proposal for recovery of Generation Deactivation charges. The Joint Suppliers’ Exceptions improperly relied upon and cited to evidence outside the record of these proceedings.<sup>1</sup> The Joint Suppliers’ Exceptions also recommended that the Commission consider two proposals never before raised by any party to the proceeding or considered by the ALJ.<sup>2</sup>

6. The Joint Suppliers’ reliance on extra-record evidence and recommendation of entirely new proposals is not only procedurally inappropriate, but raises serious due process concerns. The Commission should not consider the extra-record evidence and new proposals

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<sup>1</sup> Joint Suppliers Exceptions at 4, 10-13.

<sup>2</sup> *Id.* at 3.

proffered by the Joint Suppliers without formally reopening the proceeding prior to a final decision, as provided for in the Commission's regulations.

## II. BASIS FOR THE MOTION TO STRIKE

7. On page 3 of their Exceptions, the Joint Suppliers propose three alternatives with regard to the recovery of Generation Deactivation charges. The first was raised in testimony by the OSBA and was therefore a part of the record and considered by the ALJ (who rejected it). The Joint Suppliers admit, however, that the second and third alternatives were not raised by any party or considered by the ALJ.<sup>3</sup>

8. As support for these two new alternatives, the Joint Suppliers rely on extra-record evidence from PJM and certain filings at the Federal Energy Regulatory Commission ("FERC"), as well as the Public Utilities Commission of Ohio ("Ohio PUC") and the New York State Public Service Commission ("NYSPSC") that became available after the close of the record.<sup>4</sup>

9. It is well established that new evidence cannot be introduced at the briefing stage of contested proceedings, much less in Exceptions.<sup>5</sup> Due process requires reasonable notice and an opportunity to meaningfully respond or object.<sup>6</sup> If the Joint Suppliers' new evidence had been available or if these new proposals had been raised in direct testimony, they would have been fully vetted by the parties over several months through discovery, subsequent testimony, cross-

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<sup>3</sup> Joint Suppliers Exceptions at 3-4.

<sup>4</sup> *Id.* at 4, 10-13.

<sup>5</sup> *Enron Capital & Trade Resources Corp. v. The Peoples Natural Gas Co., et al.*, Docket No. R-00973928C0001, 1998 Pa. PUC LEXIS 199 (Aug. 24, 1998) (holding that raising new evidence in a brief is a violation of due process).

<sup>6</sup> *Dee-Dee Cab, Inc. v. Pa. P.U.C.*, 817 A.2d 593, 598 (Pa. Cmwlth. 2003), *appeal denied*, 575 Pa. 698, 836 A.2d 123 (2003) ("For matters coming before an administrative agency, procedural due process, however, requires that a party be afforded reasonable notice of the issues raised and the agency's rulings on those issues, so that the party has an opportunity to present any response or objection.")

examination, and briefing, and then considered by the ALJ. However, because the Joint Suppliers' new evidence and proposals were not introduced until Exceptions were filed, the OSBA and other parties have been given no notice and no opportunity to present evidence in response. Therefore, those portions of the Joint Suppliers' Exceptions containing extra-record evidence and proposals should be stricken.

10. Acknowledging that new evidence may arise after the close of the record, Section 5.571 of the Commission's regulations allows a party to request that the proceeding be re-opened. This gives other parties to the proceeding the opportunity to weigh in on whether re-opening the proceeding is appropriate, and if ultimately re-opened, adequate time to evaluate newly proffered evidence and prepare a response.

11. Section 5.571 states as follows:

(a) At any time after the record is closed but before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence.

(b) A petition to reopen must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(c) Within 10 days following the service of the petition, another party may file an answer thereto.

(d) The record may be reopened upon notification to the parties in a proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

(1) The presiding officer may reopen the record if the presiding officer has not issued a decision or has not certified the record to the Commission.

(2) The Commission may reopen the record after the presiding officer has issued a decision or certified the record to the Commission.<sup>7</sup>

12. Instead of following the proper procedure and requesting that the Commission reopen the proceeding, the Joint Suppliers instead requested that the Commission simply take judicial notice of this new evidence.<sup>8</sup> In contrast to the procedure outlined in Section 5.571, if the Commission takes judicial notice of this new evidence and these new proposals, the parties would have only seven days to evaluate them and prepare a response in Reply Exceptions.<sup>9</sup> This result is improper procedurally, woefully inadequate, and deprives the parties of their due process rights.

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<sup>7</sup> 52 Pa. Code §5.71.

<sup>8</sup> Joint Suppliers Exceptions at 4, *citing* 52 Pa. Code §5.408 and 1005.148 (a section which does not exist).

<sup>9</sup> The OSBA does not concede that it is proper to take judicial notice of the evidence proffered by the Joint Suppliers.

WHEREFORE, the OSBA respectfully requests that the Commission strike the Joint Suppliers extra-record evidence and proposals with regard to the recovery of Generation Deactivation charges.

Respectfully submitted,

  
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For:

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Dated: September 13, 2012

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

I certify that I am serving two copies of the Motion to Strike Certain Portions of the Exceptions of the Joint Suppliers Group, on behalf of the Office of Small Business Advocate, by e-filing, e-mail, and/or first-class mail (unless otherwise noted) upon the persons addressed below:

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