



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 Retail Energy Supply Association, 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 RETAIL ENERGY SUPPLY ASSOCIATION**

The Office of Small Business Advocate (“OSBA”) files this motion to strike certain portions of the Exceptions of the Retail Energy Supply Association (“RESA”) 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 (“Petition”) with the Commission. 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. 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.

3. The RD also rejected RESA's proposal whereby PECO would recover not only costs associated with Generation Deactivation charges, but also other PJM Interconnection, LLC ("PJM") charges, including Network Integration Transmission Services ("NITS"), Regional Transmission Expansion Plan costs ("RTEP"), and Expansion costs (collectively, "PJM Charges").

4. RESA filed Exceptions to the RD on September 10, 2012, requesting that the Commission reject the ALJ's ruling with regard to RESA's proposal for recovery of Generation Deactivation charges and other PJM Charges. RESA's Exceptions improperly relied upon and cited to evidence outside the record of these proceedings.¹ Specifically, RESA cited to recent filings by generation owners in PJM with the Federal Energy Regulatory Commission ("FERC") for cost recovery under Reliability Must Run agreements ("RMR charges").² RESA also cited to joint proposals made by Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (the "FirstEnergy EDCs") in their current Default Service proceeding ("FirstEnergy DSP"),³ which were available prior to the close of the record, and to the ALJ's Recommended Decision in the FirstEnergy DSP case, which was available at the briefing stage of this proceeding.⁴ At a minimum, RESA should have requested that the Commission take judicial notice of the ALJ's recommended decision.

¹ RESA Exceptions at 14-16

² *Id.* at 14.

³ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania 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, and P-2011-2273670 ("First Energy DSP").

⁴ RESA Exceptions at 16. Not surprisingly, RESA fails to cite to the Commission's Order in the FirstEnergy DSP rejecting the ALJ's recommendation to recover NITS charges on a non-bypassable basis and finding that they should continue to be collected by EGSs. First Energy DSP (Order entered August 16, 2012 at 83).

Additionally, RESA cited to the practices of FirstEnergy Ohio utilities, which are outside of the Commission's jurisdiction.⁵

5. RESA's reliance on extra-record evidence is not only procedurally inappropriate, but raises serious due process concerns. The Commission should not consider the extra-record evidence proffered by RESA 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

6. It is well established that new evidence cannot be introduced at the briefing stage of contested proceedings, much less in Exceptions.⁶ Due process requires reasonable notice and an opportunity to meaningfully respond or object.⁷ If RESA's extra-record evidence had been had been raised in testimony, it would have been fully vetted by the parties over several months through discovery, subsequent testimony, cross-examination, and briefing, and then considered by the ALJ. However, because RESA's new evidence was 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 RESA's Exceptions containing extra-record evidence should be stricken.

⁵ *Id.*

⁶ *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).

⁷ *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.")

7. Section 5.571 of the Commission's regulations allows a party to request that the proceeding be re-opened for the purpose of taking additional evidence.⁸ 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.

8. 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.⁹

9. Instead of following the proper procedure and requesting that the Commission reopen the proceeding, RESA simply included extra-record evidence in its Exceptions. Unlike the Joint Suppliers, who also included extra-record evidence in their Exceptions, RESA did not

⁸ 52 Pa. Code §5.71.

⁹ *Id.*

even request that the Commission take judicial notice of this new evidence.¹⁰ If the Commission does not strike the extra-record evidence and/or require that the procedures of Section 5.571 be adhered to, the parties will have only seven days to evaluate this evidence and prepare a response in Reply Exceptions. This result is improper procedurally, woefully inadequate, and deprives the parties of their due process rights.

WHEREFORE, the OSBA respectfully requests that the Commission strike RESA's extra-record evidence with regard to the recovery of Generation Deactivation charges and other PJM Charges.

Respectfully submitted,



Elizabeth Rose Triscari
Attorney ID No. 306921
Assistant Small Business Advocate

For:

Steven C. Gray
Acting Small Business Advocate
Attorney ID No. 77538

Office of Small Business Advocate
300 North Second Street, Suite 1102
Harrisburg, PA 17101
717 783-2525

Dated: September 13, 2012

¹⁰ See Joint Suppliers Exceptions at 4. The OSBA has filed a Motion to Strike certain portions of the Joint Suppliers Exceptions concurrently with this motion. The OSBA does not concede that it is proper to take judicial notice of the extra-record evidence proffered by the Joint Suppliers and RESA.

**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 Retail Energy Supply Association, 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:

Hon. Dennis J. Buckley
Administrative Law Judge
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105
(717) 787-1191
(717) 787-0481 (fax)
debuckley@pa.gov
(E-mail and Hand Delivery)

Richard A. Kanaskie, Esquire
Carrie B. Wright, Esquire
Bureau of Investigation & Enforcement
Pa. Public Utility Commission
P. O. Box 3265
Harrisburg, PA 17105
(717) 787-1976
(717) 772-2677 (fax)
rkanaskie@pa.gov
carwright@pa.gov

Divesh Gupta, Esquire
Constellation Energy
100 Constellation Way - #500C
Baltimore, MD 21202
(410) 470-3158
(443) 213-3556 (fax)
divesh.gupta@constellation.com

Stephen L. Huntoon, Esquire
NextEra Energy Resources, LLC
801 Pennsylvania Avenue, N.W. - #220
Washington, DC 20001
(202) 349-3348
shuntoon@nexteraenergy.com

Anthony E. Gay, Esquire
Exelon Business Services Co.
2301 Market Street
P. O. Box 8699
Philadelphia, PA 19101-8699
(215) 841-4635
(215) 568- 3389 (fax)
anthony.gay@exeloncorp.com

Thomas P. Gadsden, Esquire
Kenneth M. Kulak, Esquire
Brooke E. Leach, Esquire
Morgan Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103-2921
(215) 963-5234
(215) 963-5001 (fax)
tgadsden@morganlewis.com
kkulak@morganlewis.com

Tanya J. McCloskey, Esquire
Candis A. Tunilo, Esquire
Christy M. Appleby, Esquire
Aron J. Beatty, Esquire
Office of Consumer Advocate
555 Walnut Street - 5th floor
Harrisburg, PA 17101-1923
(717) 783-5048
(717) 783-7152 (fax)
tmccloskey@paoca.org
ctunilo@paoca.org
cappleby@paoca.org
abeatty@paoca.org
(E-mail and Hand Delivery)

Charles E. Thomas III, Esquire
Thomas Long Niesen & Kennard
P. O. Box 9500
Harrisburg, PA 17108-9500
(717) 255-7600
(717) 236-8278 (fax)
cet3@thomaslonglaw.com

Melanie J. Elatieh, Esquire
UGI Corporation
460 North Gulph Road
King of Prussia, PA 19406
(610) 992-3750
(610) 992-3258 (fax)
ElatiehM@ugicorp.com

Brian J. Knipe, Esquire
Buchanan Ingersoll & Rooney, PC
17 North Second Street - 15th Floor
Harrisburg, PA 17101-1503
(717) 237-4280
(330) 384-3875 (fax)
brian.knipe@bipc.com

Jeffrey J. Norton, Esquire
Carl R. Shultz, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street - 8th Floor
P. O. Box 1248
Harrisburg, PA 17101
(717) 237-6000
(717) 237-6019 (fax)
jnorton@eckertseamans.com
cshultz@eckertseamans.com

Thu B. Tran, Esquire
Robert W. Ballenger, Esquire
George D. Gould, Esquire
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
(215) 981-3777
(215) 765-6481 (fax)
ttran@clsphila.org
rballenger@clsphila.org
ggould@clsphila.org

Todd S. Stewart, Esquire
Hawke McKeon & Sniscak, LLP
P. O. Box 1778
Harrisburg, PA 17105-1778
(717) 236-1300
(717) 236-4841 (fax)
tsstewart@hmslegal.com

Amy M. Klodowski, Esquire
FirstEnergy Solutions Corp.
800 Cabin Hill Drive
Greensburg, PA 15601
(724) 838-6765
(724) 830-7737 (fax)
aklodow@firstenergycorp.com

Patrick M. Cicero, Esquire
Harry S. Geller, Esquire
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
(717) 236-9486
(717) 233-4088 (fax)
pulp@palegalaid.net

Daniel Clearfield, Esquire
Deanne M. O'Dell, Esquire
Edward Lanza, Esquire
Eckert Seamans Cherin & Mellott, LLC
213 Market Street - 8th Floor
P. O. Box 1248
Harrisburg, PA 17101
(717) 237-6000
(717) 237-6019 (fax)
dclearfield@eckertseamans.com
dodell@eckertseamans.com
elanza@eckertseamans.com

Charis Mincavage, Esquire
Adeolu A. Bakare, Esquire
McNees Wallace & Nurick, LLC
P. O. Box 1166
Harrisburg, PA 17108-1166
(717) 232-8000
(717) 237-5300 (fax)
cmincavage@mwn.com
abakare@mwn.com

Andrew S. Tubbs, Esquire
Post & Schell, PC
17 North Second Street - 12th Floor
Harrisburg, PA 17101-1601
(717) 612-6057
(717) 731-1985 (fax)
atubbs@postschell.com

Barbara R. Alexander
83 Wedgewood Drive
Winthrop, ME 04364
(207) 395-4143
barbalex@ctel.net
(E-mail Only)

Thomas McCann Mullooly, Esquire
Trevor D. Stiles, Esquire
Foley & Lardner, LLP
777 East Wisconsin Avenue
Milwaukee, WI 53202
(414) 297-5566
tmullooly@foley.com
tstiles@foley.com

Scott H. DeBroff, Esquire
Alicia R. Duke, Esquire
Rhoads & Sinon, LLP
One South Market Square - 12th Floor
P. O. Box 1146
Harrisburg, PA 17108-1146
(771) 237-6798
(717) 238-8623 (fax)
sdebloff@rhoads-sinon.com
aduke@rhoads-sinon.com

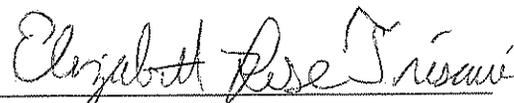
Melanie Santiago-Mosier
Washington Gas Energy Services, Inc.
13865 Sunrise Valley Drive - #200
Herndon, VA 20171
(703) 793-7565
mmosier@wges.com
(E-mail Only)

Jesse A. Dillon, Esquire
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18106
(610) 774-5013
(610) 774-6726 (fax)
jadillon@pplweb.com

Richard Hahn
LaCapra Associates, Inc.
One Washington Mall - 9th Floor
Boston, MA 02108
(617) 778-2467
rhahn@lacapra.com
(E-mail Only)

Tori L. Giesler, Esquire
FirstEnergy Service Company
2800 Pottsville Pike
P. O. Box 16001
Reading, PA 19612-6001
(610) 921-6658
(610) 939-8655 (fax)
tgiesler@firstenergycorp.com

Telemac N. Chryssikos, Esquire
Washington Gas Energy Services, Inc.
101 Constitution Avenue, N.W. - #319
Washington, DC 20080
(202) 624-6116
tchryssikos@washgas.com
(E-mail Only)



Elizabeth Rose Triscari
Assistant Small Business Advocate
Attorney ID No. 306921

Date: September 13, 2012