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October 3, 2012

Via Electronic Filing

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

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

Dear Secretary Chiavetta:

Enclosed please find the Answer of the Retail Energy Supply Association (RESA) to the Motion of the Office of Small Business Advocate to Strike Portions of RESA's Exceptions in the above-referenced matter.

Sincerely,



Edward G. Lanza

EGL/imk
Enclosure

c: Rosemary Chiavetta (Certificate of Service only)
Parties on Certificate of Service (with Enclosure)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the Answer of Retail Energy Supply Association to the Motion of the Office of Small Business Advocate to Strike Portions of RESA's Exceptions upon the participants listed below in accordance with the requirements of § 1.54 (relating to service by a participant).

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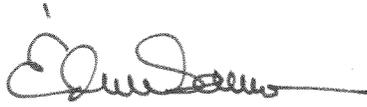
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Date: October 3, 2012

A handwritten signature in black ink, appearing to read "Edward G. Lanza", written over a horizontal line.

Edward G. Lanza, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for :
Approval of Its Default Service Program : Docket Nos. P-2012-2283641
:

**ANSWER OF
RETAIL ENERGY SUPPLY ASSOCIATION
TO THE MOTION OF
THE OFFICE OF SMALL BUSINESS ADVOCATE
TO STRIKE PORTIONS OF RESA'S EXCEPTIONS**

Pursuant to Section 5.103(c) of the Commission's regulations, 52 Pa. Code §5.103(c), the Retail Energy Supply Association ("RESA") hereby submits this Answer to the Motion of the Office of Small Business Advocate ("OSBA") to Strike Certain Portions of the Exceptions of RESA filed with the Commission on September 13, 2012. RESA respectfully submits that the Motion to Strike should be denied because, (a) the motion is moot, (b) RESA did not submit any "new evidence" in its Exceptions as claimed by OSBA, (c) the Presiding Office and the Commission have the discretion to take administrative notice of public records, and (d) OSBA has not been prejudiced by the inclusion of the material that it seeks to have stricken.

In support of its Answer, RESA submits the following.

I. ANSWER TO MOTION

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted in part, denied in part. It is admitted that RESA filed Exceptions to the

Recommended Decision ("RD") of Administrative Law Judge ("ALJ") Dennis J. Buckley on

September 10, 2012. RESA's Exceptions are part of the record in this proceeding and they speak for themselves. It is specifically denied that RESA's Exceptions improperly relied upon or cited to extra-record evidence. It is admitted that RESA relied upon and cited to public records readily available to the Commission. It is specifically denied that RESA was under any obligation to request that the Commission take administrative notice of the public records cited in RESA's Exceptions.

5. Denied. It is specifically denied that RESA engaged in any activity which can be characterized as "procedurally inappropriate" or which "raises serious due process concerns." It is denied that RESA cited to extra-record evidence or that the Commission should not consider RESA's Exceptions. By way of further answer, OSBA has not been prejudiced as it had ample opportunity to respond to RESA's arguments in its reply exceptions.

6. Admitted in part, denied in part. It is admitted that due process requires reasonable notice and a meaningful opportunity to respond or object. It is specifically denied that RESA introduced new evidence at the briefing stage or as part of its Exceptions. Further, it is specifically denied that OSBA had no notice or opportunity to present evidence in response to RESA's position. It is denied that RESA's Exceptions or any part thereof should be stricken.

7. Admitted in part, denied in part. It is admitted that Section 5.571 of the Commission's regulations provides a process for reopening the record to admit new evidence. It is specifically denied that Section 5.571 is applicable to this situation because RESA has not submitted new evidence in this proceeding.

8. Admitted.

9. Denied. It is specifically denied that RESA included extra-record evidence in its Exceptions or that reopening the proceeding is necessary or appropriate under the circumstances.

Further, it is denied that RESA was under any obligation to request that the Commission take administrative notice of “new evidence” because RESA did not submit any new evidence in its Exceptions. It is specifically denied that the record should be reopened or that the parties have been deprived of their due process rights.

II. ARGUMENT

OSBA challenged the following references in RESA’s Exceptions as improper “extra-record evidence” which should be stricken:

- A citation to a FERC Order at Docket No. ER12-1901-000 issued in July 30, 2012.¹
- A citation to FERC informational filings at Docket No. ER10-2710-0000 on July 10, 2012.²
- A reference to proposals that FE has made in its own default service proceeding recently decided by this Commission.³
- A reference to the FE Default Service Plan before the Commission and the ALJ’s Recommended Decision in which the relevant information is discussed.⁴

As more fully set forth below, these references do not constitute new evidence. These are the types of citations and references that are generally relied upon by parties to make legal arguments at the Commission and elsewhere. Sustaining OSBA’s objections to these citations as “new evidence” would lead to the absurd result of having the Commission rule that citations to its own orders and those of other administrative agencies constitute the submission of evidence. Citations to legal authorities and official documents of administrative proceedings are not evidence, and no legitimate grounds exist to allege that RESA’s Exceptions should be stricken because “new evidence” has been introduced after the close of the record in this matter. These citations are not offered by RESA as evidence, and it should not be assumed that facts and

¹ RESA Exceptions at 14, fn. 40.

² RESA Exceptions at 14, fn. 41.

³ RESA Exceptions at 16, fn. 46.

⁴ *Id.*

evidence in the proceedings cited are offered here for the truth of the matters asserted in those proceedings.

OSBA's Motion to Strike portions of RESA's Exceptions should be denied for a number of reasons. First, recent Commission actions in this proceeding have rendered the Motion to Strike moot. Also, RESA has not submitted new evidence into the proceeding and merely referenced filings before this Commission and federal agencies. Therefore, there are no grounds for striking any portion of RESA's Exceptions. Furthermore, the Presiding Officer or the Commission have the discretion to take administrative notice of the references that RESA provided in its Exceptions, even without the specific request of a party. Lastly, OSBA was not prejudiced by the inclusion of record references to public proceedings in RESA's Exceptions because the OSBA had ample opportunity to respond to any of RESA's exceptions. For all these reasons, OSBA's Motion to Strike should be denied.

A. OSBA's Motion to Strike Should Be Denied as Moot

The Commission's actions with regard to the issues in this proceeding have rendered OSBA's Motion to Strike moot. On Thursday, September 27, 2012, the Commission conducted a binding poll with regard to the disputed issues in the PECO Default Service Proceeding ("DSP"). In particular, the Commission voted to resolve the issue that is addressed in the portions of the RESA Exceptions that the OSBA seeks to strike. The issue involves whether PECO, as the default service provider, should be responsible for the recovery of generation deactivation charges and other PJM charges. The Commission voted to adopt PECO's position that the default service provider should not be responsible for collecting the subject charges and against RESA's proposal to have PECO be responsible for collection of all these charges. The action of the Commission with regard to this issue renders the OSBA's Motion to Strike moot

because the Commission has ruled against RESA and in favor of other parties, including OSBA, who objected to RESA's proposal. Where, as is the case here, the Commission rules in favor of a party moving to strike another party's filing, the Commission should deny the motion to strike as moot.⁵

B. RESA Did Not Submit Any New Evidence as Part of its Exceptions

The OSBA's Motion to Strike is premised on the mischaracterization of certain contents of RESA's Exceptions as "new evidence." The fact is that RESA included citations to pending proceedings at FERC and this Commission, not new evidence, to illustrate its point that the charges at issue are unpredictable and PECO is in a better position to recover these charges from customers.⁶ These references were citations to public records in public proceedings that are readily available to any party and to the Commission. In other words, this is not evidence, but citations to legal authority or filings that the Commission can rely on in making a legal determination on a disputed issue of law.⁷ A citation to existing case law is not "new evidence" that should be stricken if offered after the close of evidentiary hearings.

It is important to note that, in addition to the legal citations in the Exceptions, RESA relied on the testimony of Ms. Williams and Mr. Alessandrini as evidentiary support of its position.⁸ The testimony of these witnesses is the evidence upon which RESA relied to support its case, and the facts set forth by these witnesses is what RESA asked the Commission to consider in the course of its deliberations in this proceeding. RESA did not rely on so-called

⁵ See, *Sandra L. Feigley v. AT&T & BA-PA*, Docket Nos. C-00981434 and C-00981435, 1998 Pa. PUC LEXIS 156 (R.D. of ALJ Cocheres issued September 16, 1998) (a motion to strike complainant's filing was denied as moot after the judge ruled in favor of the movant on the substance of the proceeding).

⁶ See, RESA Exceptions at 14-16, footnotes 40, 41 and 46.

⁷ See, *Com. v. Washington*, 2011 Pa. Dist. & Cnty. Dec. LEXIS 119 (Mar. 24, 2011) (Petitioner in a post-conviction relief proceeding was denied relief because he offered case law in place of the required new evidence to seek review of his conviction). This case stands for the proposition that a citation to existing law is not new evidence.

⁸ See, RESA Exceptions at 14-16.

“new evidence” in Exceptions to support its case, but instead, offered sworn evidence properly introduced into the record in this proceeding. Because no new evidence was introduced by RESA after the close of the record, OSBA’s Motion to Strike should be denied.

C. The Presiding Officer or the Commission May Take Administrative Notice of Public Records

The Commission's Rules of Administrative Practice and Procedure provide for the incorporation of records from other proceedings and the official and administrative notice of facts.⁹ Under its own regulations, the Commission has the discretion to take administrative notice of the cases which are cited by RESA in its Exceptions. It should be clear, however, that RESA has not offered any new evidence in the case, such that RESA would need to request a reopening of the record for the introduction of new facts. Likewise, it is unnecessary for the Presiding Officer or the Commission to reopen the record to admit any new evidence, as no such new evidence is being offered by RESA. The references to which OSBA objects are simply citations to public proceedings or official submissions that are readily available to any party and which, as discussed above, should not be mischaracterized as new facts or evidence. As set forth above, RESA has relied on the testimony of its witness Ms. Williams and PPL EnergyPlus’ witness Mr. Alessandrini to support its position, and it believes that the evidence of record is sufficient to sustain its arguments.

D. OSBA Has Not Been Prejudiced as It Had Ample Opportunity to Respond to RESA’s Arguments

OSBA’s Motion to Strike should be denied because inclusion of the disputed material in RESA’s Exceptions has not prejudiced OSBA in any way.¹⁰ OSBA opposed RESA’s proposal

⁹ 52 Pa. Code §§ 5.407, 5.408; *see also*, *PUC, et al v. Newtown Artesian Water Co.*, Docket No. R-00943157 (Final Order entered June 26, 1995) 1995 Pa. PUC LEXIS 68 (Pa. PUC 1995).

¹⁰ *Slaybaugh v. Newman*, 441 A.2d 429 (Pa. Super. 1982) (A motion to strike will not be sustained absent a showing of prejudice by the moving party).

to make PECO responsible for the collection of all non-market based charges, including PJM charges in testimony as well as in its Reply Exceptions.¹¹ OSBA had the opportunity to respond to anything in RESA's Exceptions, including the sections of the exceptions that it now seeks to strike, in the course of drafting its Reply Exceptions. In fact, OSBA availed itself of the opportunity to counter RESA's arguments, responded to RESA's Exceptions and continued to oppose RESA's proposal for the recovery of PJM and other charges.¹² OSBA cannot argue that it did not have an opportunity to respond to the inclusion of legal citations in RESA's Exceptions or that it was prejudiced by the references at issue. In its binding poll, the Commission decided the issue against RESA and in favor of the parties opposing RESA's proposal. OSBA was not prejudiced by any portion of RESA's exceptions, and therefore, the Motion to Strike should be denied.

¹¹ See, OSBA St. No. 2 at 9-10; OSBA Reply Exceptions at 11-12.

¹² See, OSBA Reply Exceptions at 11-12.

III. CONCLUSION

Based on the foregoing, RESA respectfully requests that the Commission deny OSBA's Motion to Strike and issue an Order providing for any other relief it deems appropriate.

Respectfully submitted,



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