



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF SMALL BUSINESS ADVOCATE

December 27, 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 Answer, 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,

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Assistant Small Business Advocate
Attorney ID #306921

Enclosures

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 :

**ANSWER OF THE OFFICE OF SMALL BUSINESS ADVOCATE
TO PETITION OF RETAIL ENERGY SUPPLY ASSOCIATION (RESA) FOR
RECONSIDERATION *NUNC PRO TUNC* OR FOR AMENDMENT OF
THE COMMISSION'S OPINION AND ORDER OF OCTOBER 12, 2012**

I. INTRODUCTION

The Office of Small Business Advocate (“OSBA”) submits this answer to the Petition for Reconsideration *Nunc Pro Tunc* or for Amendment of the Commission’s Opinion and Order of October 12, 2012 (“DSP II Order”), filed by the Retail Energy Supply Association (“RESA”) on December 14, 2012, and served on December 17, 2012 (“Petition”), in the above-captioned proceeding. The Petition seeks reconsideration of or amendment to the DSP II Order, in order to make small business customers (under 25 kW) (“Small Business Customers”) eligible to participate in the Standard Offer Program of PECO Energy Company (“PECO” or the “Company”). As explained more fully below, RESA’s Petition is procedurally improper, factually flawed, unsupported by the record, and would constitute a gross denial of due process if granted. It should be denied.

II. BACKGROUND

On October 12, 2012, the Pennsylvania Public Utility Commission (“Commission”) entered the DSP II Order, which, among other things, granted in part

RESA's Exception No. 8 with respect to the eligibility of Small Business Customers to participate in PECO's Opt-In Program.¹

The DSP II Order acknowledged that RESA's Exception No. 8 also made a second recommendation that Small Business Customers be eligible to participate in the "Customer Referral Program" and that such aspect of the Exception would be addressed elsewhere in the Order.² However, the DSP II Order does not specifically address this second recommendation in the Order.

On October 31, 2012, the Company filed a Petition for Clarification and Reconsideration ("Clarification Petition"). Certain parties, including RESA, filed answers to the Clarification Petition addressing the issues it raised. RESA did not file its own petition for reconsideration or clarification. The Commission subsequently entered an Opinion and Order on November 21, 2012 ("Clarification Order"), in response to the Clarification Petition.

Pursuant to the DSP II Order and the Clarification Order, the Company engaged in collaborative discussions with interested stakeholders, a process in which the OSBA was an active participant.

On December 11, 2012, the Company submitted its Revised Default Service Plan Compliance Filing ("Revised Plan"), which reflects all of the revisions directed by the DSP II Order and the Clarification Order as well as the revisions agreed to by the collaborative participants with respect to PECO's retail market enhancement programs ("RME Programs"), including the "Opt-In Program" and "Standard Offer Program."

¹ DSP II Order at 85.

² DSP II Order at 83, fn. 15.

At the late date of December 14, 2012, RESA filed the instant Petition seeking to make Small Business Customers eligible to participate in “Customer Referral Programs” (a term newly redefined by RESA in its Petition as the New/Moving Customer Referral Program and the Standard Offer Program) in addition to the Opt-In Program.³ RESA’s newly redefined term “Customer Referral Programs” is *not* used in PECO’s initial default service plan or the Revised Plan. Although the term can be found in RESA’s Exceptions and in the DSP II Order (referring to RESA’s Exceptions), it is not defined in either document. As further explained below, RESA’s after-the-fact attempt to redefine “Standard Offer Program” as “Customer Referral Program” is unsupported in the record. The Commission should disregard RESA’s linguistic legerdemain.

II. ANSWER

Throughout this proceeding, RESA has argued that Small Business Customers should be eligible for PECO’s Opt-In Program. This issue was raised at the appropriate time in the proceeding (*i.e.*, in direct testimony), briefed by interested parties, rejected by the ALJ, subject to Exceptions, and then affirmatively and specifically addressed by the Commission in the DSP II Order.⁴ Although the OSBA took a different position on this issue during these proceedings, it accepts that the Commission has ordered otherwise after development of a record.

In contrast to its position with respect to Opt-In Program eligibility, RESA did not submit any testimony with respect to Small Business Customer eligibility for the Standard Offer Program. Neither did any other party. RESA, by its own admission,

³ RESA Petition at 1.

⁴ DSP II Order at 85-86.

claims to have raised this issue for the first time in its Reply Brief.⁵ That claim is false. Nevertheless, even if RESA had raised the issue for the first time in its Reply Brief, the OSBA and other interested parties would have had absolutely no opportunity to respond. Due process requires reasonable notice and an opportunity to meaningfully respond or object.⁶ It is well established that raising an issue for the first time in a main brief, much less a reply brief, is a violation of due process.⁷ This fact alone is sufficient for denial of RESA's Petition.

However, contrary to its claim, RESA did *not* raise this issue for the first time in its Reply Brief. At the Reply Brief pages cited by RESA in its Petition, RESA advocated for Small Business Customer eligibility in the Opt-In Program, not the Standard Offer Program.⁸

RESA next claims to have raised the issue in its Exception No. 8, which states as follows: "The ALJ Erred in Recommending That Small Commercial Customers Should Be Excluded from the Opt-In Auction and Customer Referral Programs (RD at 58)." However, there is an obvious problem not only with the timing of RESA's claim, but also with the substance of its position.

⁵ RESA Petition at 4, fn 7.

⁶ *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 *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).

⁸ *See* RESA Reply Brief at 30-32.

With respect to timing, PECO noted in its Reply Exceptions that RESA's Exception No. 8 contended *for the first time* in this proceeding that Small Business Customers be eligible to participate in the Standard Offer Program and correctly argued that such presentation of a new argument in Exceptions is entirely inappropriate.⁹ On these grounds alone, the Exception should have been denied in the DSP II Order.

Moreover, despite PECO's apparent ability to decipher RESA's use of the undefined term "Customer Referral Programs" in RESA's Exception No. 8, the OSBA contends that there was no reason for the OSBA or any other party to even know that RESA's Exception No. 8 dealt with the Standard Offer Program. First, RESA's Exception No. 8 used the term "Customer Referral Programs" when, in fact, as the OSBA (and possibly other parties) have just now learned from the Petition, RESA's alleged intention was to refer to the unmentioned Standard Offer Program. The OSBA reasonably interpreted RESA's Exception No. 8 to be advocating for Small Business Customer eligibility in the Opt-In Program and the "New/Moving *Customer Referral Program*." Since the OSBA had already stated in testimony and briefs that it had no opposition to Small Business Customers being eligible for the New/Moving Customer Referral Program, the OSBA did not reply to that part of RESA's Exception No. 8.¹⁰

Second, RESA's Exception No. 8 was to the Recommended Decision ("RD") at 58, which had absolutely nothing to do with the Standard Offer Program. The RD at 58 recommends that Small Business Customers be excluded from the Opt-In Program, but

⁹ PECO Reply Exceptions at 17, *citing, e.g., Pa. P.U.C. v. Columbia Gas of Pa., Inc.*, 245 PUR4th 1 (2005) ("IOGA first raised its opposition...on Exception...As such, we will deny IOGA's Exceptions on this issue.").

¹⁰ OSBA Statement No. 1 at 7; OSBA Main Brief at 17.

makes *no mention* of the Standard Offer Program. In fact, the RD specifically discusses customer eligibility for the Standard Offer Program at 69, noting that “The only party to propose a change in customer eligibility [in the Standard Offer Program] is RESA, whose proposal to permit CAP customers to participate is addressed, below...”¹¹ The RD thus correctly acknowledged that RESA had *only* raised the issue of CAP customer eligibility in the Standard Offer Program in testimony and briefs, *not* Small Business Customer eligibility.

In its Exception No. 8, RESA alleges that it recommended Small Business Customer eligibility in both the Opt-In Program and the “customer referral programs.”¹² As explained above, that representation simply is not true. RESA submitted no testimony to that effect with regard to “customer referral programs” (or the Standard Offer Program) and did not advocate for it in briefs. It was untimely raised for the first time in Exceptions. The OSBA can only assume that RESA is seeking to wedge this issue into this proceeding out of time, after the Commission issued its August 12, 2012, Opinion and Order in the FirstEnergy Companies default service proceeding (“FE DSP Order”), which, after proper notice and opportunity for parties to respond or object, included Small Business Customers in all RME programs.¹³

Having failed to (i) raise the issue of Small Business Customer eligibility for the Standard Offer Program in a timely fashion and (ii) achieve Commission approval of its

¹¹ DSP II Order at 69.

¹² RESA Exceptions at 23.

¹³ *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-2012-2273650, *et al.*, (Opinion and Order entered August 12, 2012) at 103-104.

position in the DSP II Order, RESA is now attempting to attain Commission approval through two alternative prayers for relief.

The first request for relief, reconsideration *nunc pro tunc* of the DSP II Order, should be denied. RESA had every opportunity to file a timely petition for reconsideration and has no valid grounds for failing to do so. RESA claims that it has only recently learned of what it characterizes as a “differing interpretation of the Commission’s Order” among the parties with respect to the issue of Small Business Customer eligibility in the Standard Offer Program. However, RESA’s recent self-serving learning experience is irrelevant given that the plain language of both the RD and DSP II Order is unambiguous on this issue.¹⁴ The DSP II Order, in Section D (Retail Market Enhancements), subsection (3) (EGS Standard Offer Program), subpart (b) (Customer Eligibility), provides in pertinent part:

As recommended in the *IWPF Order*, PECO’s proposed Standard Offer Program would target residential default service customers, but would be open to shopping customers as well. CAP customers, however, would be excluded...*The only Party to propose a change in customer eligibility was RESA, which proposed that CAP customers be permitted to participate.* This issue is addressed below.¹⁵

The DSP II Order, like the RD, correctly acknowledged that RESA had not raised the issue of Small Business Customer eligibility in the Standard Offer Program, only the

¹⁴ RD at 69; DSP II Order at 109. Additionally, the OSBA signaled multiple times during these proceedings prior to entry of the DSP II Order that its position was that the *only* RME Program Small Business Customers should possibly be included in was the New/Moving Customer Referral Program (as initially proposed by PECO). See OSBA Main Brief at 17, fn. 38. The OSBA consistently advocated against Small Business Customer eligibility in the Opt-In Program (as recommended by RESA). The testimony (and briefs) of the OSBA are silent with respect to Small Business Customer eligibility in the Standard Offer Program, because it was never recommended by any party.

¹⁵ DSP II Order at 109 (emphasis added).

eligibility of CAP customers. Thus, the Commission rightly made no determination on that issue in the DSP II Order.

Moreover, RESA's request for a waiver pursuant to 52 Pa. Code §1.2(c) of the requirement that petitions for reconsideration be filed within 15 days of the entry of a Commission order is inappropriate under these circumstances. Section 1.2(c) permits the Commission to waive a requirement at any stage of a proceeding, provided that "the waiver does not adversely affect a substantive right of a party."¹⁶ Granting RESA's request to waive the regulation and "reconsider" an issue only arguably, at best, raised for the first time in Exceptions would result in a denial of the due process owed to the other parties in this proceeding. The OSBA and other interested parties should not be denied due process when it was RESA that raised this issue too late (if at all) in the proceeding.

RESA's second request for relief is to treat the Petition as a petition for amendment under 66 Pa. C.S. §703(g), to determine issues that RESA alleges appear to have been overlooked or not addressed.¹⁷ Such a petition can be filed at any time during the proceedings pursuant to 52 Pa. Code §5.572(d). However, the OSBA asserts that RESA's second request for relief should also be denied. Even if the Commission somehow intended to address the issue of Small Business Customer eligibility in the Standard Offer Program, there is no record evidence to support the amendment proposed by RESA.

RESA cites essentially three things it believes supports its contention that the Commission intended to include Small Business Customers in the Standard Offer Program: (1) the Commission's decision to include Small Business Customers in the Opt-

¹⁶ 52 Pa. Code §1.2(c)

¹⁷ Petition at 8.

In Program; (2) the Commission's decision in the FE DSP Order to include Small Business Customers in all RME Programs; and (3) a footnote in the DSP II Order stating that RESA's Exception No. 8 also argues that Small Business Customers be included in the "Customer Referral Program" and that such argument would be addressed elsewhere in the DSP II Order.¹⁸

However, the plain language of the DSP II Order states that only Residential customers are eligible for the Standard Offer Program. RESA's views with respect to the Commission's extra-Order intentions are irrelevant. Whether the Commission somehow intended, as RESA believes, to include Small Business Customers in the Standard Offer Program, such a decision would violate Section 703(e) of the Public Utility Code because there is no testimony on the record in support of it.¹⁹ The testimony cited by RESA in its Petition as alleged support of its proposed amendment pertains only to Small Business Customer eligibility for the Opt-In Program. Small Business Customer eligibility for the Standard Offer Program was simply never a part of this record.

Considering that RESA (1) did not raise the issue in testimony, (2) raised it ambiguously, at best, in Exceptions, and (3) failed to timely address the issue after entry of the DSP II Order, in the interest of fairness to the other parties, as well as established case law, the OSBA asserts that RESA's Petition must be denied.

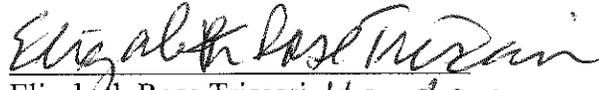
¹⁸ DSP II Order at 83, fn. 15.

¹⁹ 66 Pa. C.S. §703(e).

III. CONCLUSION

In view of the foregoing, the OSBA respectfully requests that the Commission deny RESA's Petition in its entirety.

Respectfully submitted,


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Dated: December 27, 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 Answer, 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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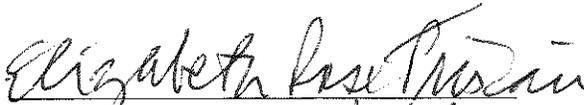
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