

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17120**

**Petition of PECO Energy Company
for Approval of its Default Service
Plan**

**Public Meeting March 6, 2014
2283641-OSA
Docket No. P-2012-2283641**

**JOINT STATEMENT OF
CHAIRMAN ROBERT F. POWELSON
AND COMMISSIONER PAMELA A. WITMER**

Before the Commission today for disposition are (1) the Petition for Reconsideration and Clarification of PECO Energy Company (PECO); (2) the Petition for Reconsideration and Clarification of the Office of Consumer Advocate (OCA); and (3) the Joint Petition for Reconsideration and/or Clarification of the Tenant Union Representative Network, Action Alliance of Senior Citizens of Greater Philadelphia, and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (Joint Petitioners) filed in response to this Commission's Opinion and Order, entered on January 24, 2014, disposing of PECO's Customer Assistance Program (CAP) retail electricity shopping plan; as well as (4) Answers to the aforementioned Petitions filed by PECO, the OCA, Direct Energy Services, LLC and FirstEnergy Solutions, Inc. (FES).

In their respective Petitions, PECO, the OCA and the Joint Petitioners (collectively, the various Petitioners) take issue with the Commission's determination that it does not have the authority to place either a ceiling on the rates of electric generation suppliers (EGSs) or limits on the terms and conditions (specifically, early termination fees) of the contracts entered into by customers and EGSs. The various Petitioners' arguments against this decision range from being nuanced (that the Commission's mandate to ensure just and reasonable universal service rates requires it to place limits on the rates generation suppliers can charge CAP customers) to absurd (that Act 129's requirement that electric distribution companies' *default service plans* be designed to ensure the least cost over time somehow grants the Commission authority to regulate electric generation suppliers' rates *offered in competition with those default service prices*).

First and foremost, we must say that, from a policy perspective, while we appreciate the desire of the various Petitioners to protect both CAP customers and PECO's customers that pay for universal service programs, we strongly disagree with the notion that the Commission should place limits on the products to which competitive suppliers can offer PECO's CAP customers. We very much share the goal of controlling universal service costs, but we disagree that the proposals set forth by the various Petitioners are the proper way to achieve these goals. Further, we have consistently chided those that believe that being low-income equates to being unable to make reasoned, rational choices when purchasing anything from a loaf of bread to a kilowatt-hour of electricity. Rather, it has been our experience that low-income consumers are among the savviest shoppers, because they have to be out of necessity.

A requirement that competitive generation offers must always be less than PECO's price to compare (PTC) would absolutely be a barrier to entry for any generation supplier attempting to serve this class of customers. Our reasoning for this belief is simple: electric generation suppliers must be able to accurately price their products to be able to cover their costs of generation supply as well as other additional costs incurred in offering service. Electric distribution companies (EDCs), like PECO, have no such need. Instead, PECO can (and often does) incorrectly project their costs by millions of dollars, and still recover those costs from default service ratepayers at a later date. Therefore, the fluctuations in PECO's PTC often bear no rational relationship to changes in wholesale electricity market prices, but rather are frequently driven by its ability to reconcile past miscalculations in estimated costs.

No competitive supplier, therefore, could guarantee that it could always offer generation service at rates lower than the PTC because there is no way to predict what a future PTC will be, even if an EGS had a foolproof way to accurately project its wholesale energy costs. And because EGS shareholders bear any losses, unlike EDCs, whose default service customers bear any EDC generation supply-related losses, it would likely be an imprudent business move to elect to serve PECO CAP customers.

In other words, we strongly doubt that any EGS would choose to serve PECO's CAP customers if the Commission imposed the conditions requested by the various Petitioners, thereby continuing to deprive those customers of their right to a choice of electric generation suppliers.

Lastly on the policy aspects of this decision, we believe it is imprudent to judge whether a customer is receiving a benefit from being on an EGS offer simply by comparing the EGS price to the EDC PTCs on a quarterly basis. Certainly, there are some months that EGS customers may be paying rates higher than their local EDC's PTC, but the reverse scenario is also true -- in some months, customers may be paying rates lower than their local EDC's PTC.

As such, a determination regarding whether a customer made or lost money cannot be made until their contract has reached its conclusion, and the entirety of the price paid to the EGS is compared to the entirety of the price that would have been paid to the EDC. In fact, because such an analysis would be largely driven by the price paid during periods of peak usage, it is entirely possible for a customer to be supposedly "underwater" on a 12-month contract during three of the four quarters of those 12 months and still be "in the money" if their EGS price beat the PTC during June, July and August (since Pennsylvania is generally a summer peaking state). Simply put, it is overly simplistic and entirely disingenuous to suggest that CAP customers can *only* save money by shopping if the EGS-provided price is always below the PTC.

We know that some will argue that this is not an appropriate time to allow CAP customers to shop without the requested protections because of the large price increases some customers on variable EGS rates have experienced recently. We believe the opposite is true. Because the PTC is essentially a three-month variable rate, we believe it is more important than ever to allow these customers to enter the market place and choose a product that offers stable and budget-friendly pricing for six, 12, 18 months or more rather than being trapped on roller-coaster default service rates.

Regardless of the policy reasons for not imposing a ceiling on EGS CAP offers, however, it is abundantly clear that the Commission lacks the legal authority to impose this, or any other (i.e., a prohibition on early termination fees), condition on EGS offers to customers, whether enrolled in CAP or otherwise.

Before addressing the specific arguments raised by the various Petitioners, we feel it is necessary to point out the mandate found in Section 2806(a) of the Public Utility Code:

The generation of electricity shall no longer be regulated as a public utility service or function, except as provided in this Chapter. . . . As of January 1, 2001, consistent with the commission's discretion under this section, all customers of electric distribution companies in this Commonwealth shall have the opportunity to purchase electricity from their choice of electric generation suppliers. The ultimate choice of the electric generation supplier is to rest with the consumer.

66 Pa. C.S. § 2806(a) (Emphasis supplied). This is as clear a mandate from the General Assembly as any government agency could hope to receive. There is no equivocation – all Pennsylvania electric consumers shall have the ability to choose their electric generation supplier and the Commission does not have any authority over the generation of electricity, which necessarily includes the specific prices charged to end-user consumers. Given the clear and unambiguous nature of this language and pursuant to the rules of statutory construction,¹ any legal arguments that the Commission has the authority to regulate specific EGS prices must begin and end with specific language in the Public Utility Code granting the Commission that authority. With that foundation, we turn to the discrete arguments raised by the various Petitioners.

Section 1301

The various Petitioners attempt to draw a connection between the requirement found in Section 1301 of the Code² that utilities' rates, including those charged pursuant to universal service riders, be just and reasonable and their belief that the Commission should impose a ceiling on the rates EGSs providing service to CAP customers can charge. They argue that, by allowing CAP customers to potentially pay rates that exceed PECO's PTC in any given quarter, all other residential customers will be required to pay higher universal service rates, and therefore, the Commission cannot guarantee that those higher rates will be just and reasonable.

This argument must fail for several reasons. First and foremost, the Commission's authority under Section 1301 is clearly limited to utilities' rates ("[e]very rate made, demanded, or received by any **public utility** . . ." (emphasis supplied)). Therefore, to the extent that the Commission needs to exercise its authority under Section 1301 due to any higher rates that non-CAP residential customers may or may not be subjected to as a result of the Commission's decision today, that authority is clearly limited to examining the rates *charged by PECO*. To follow this point to its logical conclusion, if a party could assert at some point in the future³ that PECO's universal service charges had become unjust and unreasonable due to the Commission's enforcement of the Public Utility Code's requirement that all customers have an opportunity to choose their generation supplier, that party would be limited to forcing PECO to reevaluate the

¹ See generally, 1 Pa. C.S. §§ 1921, 1933.

² 66 Pa. C.S. § 1301.

³ Implicit in this is that the various Petitioners' arguments that the Commission needs to protect residential consumers from unjust and unreasonable rates are entirely speculative and are in no way based upon any actual facts in evidence. Moreover, the various Petitioners ignore the possibility that, by ensuring an open and competitive market, PECO's universal service charges could decline.

design of its universal service program⁴ to bring it more in line with every other energy utility in the Commonwealth.⁵

Second, in raising this argument, Petitioners conveniently neglect to point out that the rate that PECO's CAP customers currently pay (PECO's PTC) changes every three months without any limit imposed on the amount of that change. As such, the amount that non-CAP customers pay in their rates already varies from universal service charge reconciliation period to reconciliation period due to the rise and fall of the PTC without any of the protections the Petitioners now seek related to PECO's CAP shopping plan.

Further, if the Commission has the ability under Section 1301 to limit EGS rates in order to protect customers from high universal service rates, we must also have that same authority over default service rates. We would therefore expect these same Petitioners, including PECO, to petition the Commission in the near future to put a hard cap on the price PECO can charge for default service so as to ensure that universal service rates do not become unjust and unreasonable as a result of PTC increases. This, of course, also must mean (the Exelon Board of Directors should pay particular attention to this part) that PECO believes the Commission has the authority to prohibit it from reconciling past under-recovered costs into a future default service rate if that reconciliation (and resulting PTC increase) would lead to higher universal service costs for customers (we are, of course, being facetious to point out the fallacy of this argument).⁶

Standard Offer Program

The various Petitioners also attempt to draw a parallel (with PECO essentially accusing the Commission of hypocrisy) between the Commission's requirement that PECO allow CAP customers to enroll in its Standard Offer Program, for which the Commission set specific terms and conditions, and its supposed authority to set terms and conditions for suppliers serving CAP customers. In a nutshell, the Petitioners argue that if the Commission believes it has the authority to set terms and conditions for the Standard Offer Program, it must also believe it has the authority to set terms and conditions for suppliers serving PECO's CAP customers.

In so arguing, the Petitioners ignore the fact that the Standard Offer program is one of many generation supply options available to PECO customers. This is quite different from imposing conditions on *every* offer made to members of a specific subset of PECO's customers that desire to exercise their legally-guaranteed right to select an electric generation supplier. A more apt comparison would be if the Commission had attempted to say that, *as a prerequisite for serving PECO's residential customers*, EGSs were required to participate in the Standard Offer Program or otherwise offer a specific rate. Clearly such a requirement would violate the Public Utility Code, just as imposition of the conditions suggested here by the Petitioners would also violate the Public Utility Code.

Further, if the Commission has the ability to impose specific terms and conditions for suppliers electing to serve CAP customers, then it must have the ability to impose specific terms and conditions for other discrete customers groups. Following this logic, the Commission would be able to completely circumvent Section 2806(a)'s prohibition on regulating generation service by simply dividing an EDC's customer base into specific groups of customers and then imposing

⁴ To put it another way, to the extent Section 1301 is relevant to this issue, it would be as a sword in the future against PECO's rates, not as a shield in this proceeding against EGS rates.

⁵ To quote PECO, "PECO's CAP uniquely employs a tiered rate approach." PECO Petition at ¶ 5.

⁶ If this were actually true, we can only imagine the stampede that would result from EDCs petitioning the Commission to exit the default service function.

conditions on supplier offers tailored to meet the supposed needs of those specific customer groups. Clearly, the Legislature did not intend such a result.

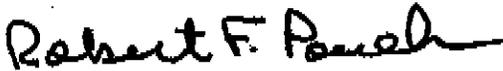
Least Cost Requirement

Lastly, PECO attempts to argue that the General Assembly's insertion of the "least cost" default service standard in the Public Utility Code somehow confers upon the Commission "ample" jurisdiction to control CAP costs and therefore regulate the prices EGSs charge to CAP customers. Quite frankly, this argument is so unreasoned and inconsistent with the Public Utility Code and any jurisprudence flowing therefrom that we simply do not know how to rebut it. Suffice it to say, the Code's requirement that EDC default service plans be "designed to ensure . . . [t]he least cost to customers over time" solely addresses the makeup of proposed default service plans filed by EDCs and has absolutely nothing to do with any prices, terms or conditions of EGS product offerings.

In conclusion, we will quote from FES's Answer in this matter, which quite succinctly summarizes the problems with the positions put forth by the various Petitioners:

Instead of identifying language from the [Electric Competition Act] conferring jurisdiction over EGS prices, [the various Petitioners] cobble together various sections of the Public Utility Code regarding the Commission's regulation of public utilities, and rely on the design of PECO's Standard Offer Program, to argue that the Commission has jurisdiction over EGS prices.

For the all the reasons discussed herein, we reject the arguments set forth that the Commission either has a mandate, or the ability, to impose conditions on EGS products marketed to PECO CAP customers.


ROBERT F. POWELSON
CHAIRMAN


PAMELA A. WITMER
COMMISSIONER

DATE: March 6, 2014