



COMMONWEALTH OF PENNSYLVANIA

December 19, 2014

E-File

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 for the Period From June 1, 2015 Through May 31, 2017
Docket No. P-2014-2409362**

Dear Secretary Chiavetta:

I am delivering for filing today the original plus three copies of the Petition for Reconsideration, on behalf of the Office of Small Business Advocate, in the above-captioned matter.

Two copies have been served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed. If you have any questions, please do not hesitate to contact me.

Sincerely,

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

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

Enclosures

cc: Parties of Record

Hon. Cynthia W. Fordham
Pennsylvania Public Utility Commission

Brian Kalcic

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for :
Approval of Its Default Service Plan for the : **Docket No. P-2014-2409362**
Period from June 1, 2015 through May 31, 2017 :

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Petition for Reconsideration, 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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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY COMPANY :
FOR APPROVAL OF ITS DEFAULT : Docket No. P-2014-2409362
SERVICE PROGRAM FOR THE PERIOD :
FROM JUNE 1, 2015 THROUGH MAY 31, 2017 :**

**PETITION FOR RECONSIDERATION
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

Pursuant to 52 Pa. Code §5.572, the Office of Small Business Advocate (“OSBA”) files this Petition for Reconsideration of the Opinion and Order (“Order”) of the Pennsylvania Public Utility Commission (“Commission”) entered in the above-captioned proceeding on December 4, 2014.

I. Procedural History

1. On March 10, 2014, PECO Energy Company (“PECO” or “the Company”) filed with the Commission the *Petition of PECO Energy Company for Approval of Its Default Service Program for the Period From June 1, 2015 Through May 31, 2017*, seeking approval of PECO’s proposed third Default Service Program (“DSP III”) to secure default service supply for the Company’s customers for the period from June 1, 2015, through May 31, 2017.

2. On March 28, 2014, the Office of Small Business Advocate (“OSBA”) filed a Notice of Intervention and Answer in this proceeding in order to protect the interests of the Company’s small business customers.¹

¹ PECO’s non-residential procurement groups are defined on the basis of peak load, rather than by rate class. The Small Commercial procurement group is defined as all non-residential customers with peak demands less than 100 kW. The Medium Commercial procurement group is defined as all non-residential customers with peak demands greater than or equal to 100kW, but less than 500 kW. For the purposes of this proceeding, the OSBA considers customers in PECO’s Small Commercial and Medium Commercial procurement groups to constitute small business customers whose interests the OSBA is authorized and directed to protect.

3. Answers were also filed by the Office of Consumer Advocate (“OCA”) and the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (“CAUSE-PA”) on April 1, 2014.

4. Petitions to Intervene were filed by CAUSE-PA, NextEra Power Marketing, LLC (“NextEra”), Philadelphia Area Industrial Energy Users Group (“PAIEUG”), FirstEnergy Solutions Corp. (“FES”), Interstate Gas Supply, Inc. (“IGS”), Direct Energy Services, LLC (“Direct Energy”), Retail Energy Supply Association (“RESA”), Noble Americas Energy Solutions LLC (“Noble”), and PECO Energy Suppliers Group (“PESG”).

5. This matter was assigned to Administrative Law Judge (“ALJ”) Cynthia Williams Fordham. ALJ Fordham held a telephonic prehearing conference on April 10, 2014, at which time a procedural schedule and discovery modifications were established, all petitions to intervene were granted, and PECO’s motion for a protective order was granted.

6. The OSBA submitted the Rebuttal Testimony and Surrebuttal Testimony of Brian Kalcic on June 26, 2014, and July 9, 2014, respectively.

7. An evidentiary hearing was held in Philadelphia on July 17, 2014 (the “Hearing”). At the Hearing, PECO presented oral rejoinder testimony and certain witnesses for the parties were cross-examined. The parties agreed to waive cross-examination of other witnesses prior to the Hearing and they were excused from appearing. The testimony and exhibits of the parties were entered into the record.

8. The OSBA filed its Main Brief on August 5, 2014, pursuant to the procedural schedule. Briefs were also filed by PECO, RESA, OCA, PAIEUG, Noble, and NextEra.

9. Subsequent to the filing of Main Briefs, the parties engaged in further settlement discussions. Ultimately, the parties were able to agree on a partial settlement, reserving only two

issues for litigation: Medium Commercial class procurement; and recovery of certain PJM charges. On August 18, 2014, the parties notified ALJ Fordham of the partial settlement-in-principle and requested that the date for Reply Briefs be extended until September 4, 2014.

10. A Joint Petition for Partial Settlement (“Partial Settlement”) was filed on August 28, 2014. The signatories to the Partial Settlement were PECO, OCA, OSBA, CAUSE-PA, NextEra, and RESA. Direct Energy, FES, IGS, PESG, and Noble filed letters of non-opposition to the Partial Settlement and PAIEUG filed a letter of opposition to the Partial Settlement.

11. Reply Briefs were filed on September 4, 2014, by PECO, OSBA, PAIEUG, and RESA.

12. ALJ Fordham issued a Recommended Decision (“RD”) dated September 19, 2014, recommending: (1) approval of the Partial Settlement without modification; (2) implementation of hourly priced default service for Medium Commercial customers (pursuant to the timeline as agreed to in the Partial Settlement in the event that hourly pricing was directed by the Commission); and (3) approval of a non-bypassable service charge for all distribution customers for certain PJM charges, but with a carve out for large commercial and industrial (“Large C&I”) customers to allow them to continue to remit transmission and transmission-related charges to their respective electric generation suppliers (“EGSs”).

13. The OSBA filed Exceptions to the RD on October 10, 2014. Exceptions were also filed by PAIEUG, RESA, and PECO.

14. Reply Exceptions were filed by PECO, PAIEUG, and RESA on October 17, 2014.

15. On December 4, 2014, the Commission entered its Order in this matter.

II. Legal Requirements for Granting Reconsideration Under 52 Pa. Code §5.592.

16. In *Philip Duick et al. v. Pennsylvania Gas and Water Company*, Docket No. C-R0597001 (Order entered December 17, 1982), 1982 Pa. PUC LEXIS 4, 56 Pa. PUC 553 (1982), the Commission explained the basis for rescinding or amending a prior order:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. . . . What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Duick, 1982 Pa. PUC LEXIS 4, at *11-*13.

17. In *Pennsylvania Public Utility Commission v. Jackson Sewer Corporation*, 2001 Pa. PUC LEXIS 44, the Commission also stated:

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

Jackson Sewer, 2001 Pa. PUC LEXIS 44, at *6.

18. This Petition for Reconsideration satisfies *Duick* and *Jackson Sewer*, in that the Petition raises issues “which appear to have been overlooked or not addressed by the Commission” and “alleges errors of law.”

III. Argument

19. The issue on which the OSBA seeks reconsideration is hourly pricing for PECO’s Medium Commercial customers, *i.e.*, those with peak demands greater than or equal to 100kW, but less than 500 kW. The Commission’s December 4th Order mandates hourly pricing for PECO’s Medium Commercial customers as part of PECO’s DSP III, consistent with its final order in *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*,

Docket No. I-2011-2237952 (Final Order entered February 15, 2013), 2013 Pa. PUC LEXIS 306, 303 P.U.R.4th 28 (“*End State Order*”).

20. However, achieving consistency with the *End State Order* is not the appropriate objective. The *End State Order* is not consistent with the Commission’s own prior orders and duly published policy statement. Furthermore, the *End State Order* is not consistent with the Public Utility Code’s standard for default service, which requires that electric distribution companies (“EDCs”) procure a mix of spot market purchases, short-term contracts, and long-term contracts, which are prudent, meaning they are designed to provide adequate and reliable service at the least cost to customers over time.²

21. Achieving consistency with the statutes enacted by the legislature is the proper objective. Thus, any discussion of default service procurement must begin with these statutory requirements. In contrast, the adjudication of this proceeding has focused almost entirely on the Commission’s *End State Order*, while virtually ignoring the statute as well as the Commission’s policy statement with regard to default service and its prior default service rulemaking orders.

22. On October 17, 2014, the same day that Reply Exceptions were filed in this proceeding, a Recommended Decision was entered by ALJ Susan D. Colwell in *Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2015 Through May 31, 2017*, Docket No. P-2014-2417907 (“PPL RD”). The PPL RD analyzed the same issue that the OSBA has petitioned for reconsideration here. The OSBA submits this Petition for Reconsideration to give the Commission the opportunity to fully review the PPL RD, which addresses the enforceability of the *End State Order’s* directive with respect to hourly pricing for Medium Commercial customers. The PPL RD provides the

² 66 Pa. C.S. §§2807(e)(3.2) and (3.4).

legal analysis lacking in the Recommended Decision in this proceeding and should be considered by the Commission.

23. The PPL RD correctly acknowledges that “the Commission’s *End State Order* is not consistent with its duly published policy statement creating a dilemma for the recommendation here.”³ The referenced policy statement, published in the Pennsylvania Code, *inter alia*, discusses electric generation supply procurement for customers with 25-500kW in maximum registered peak load and provides as follows:

A proposed procurement plan should balance the goals of allowing the development of a competitive retail supply market and also including a prudent mix of arrangements to minimize the risk of over-reliance on any energy products at a particular point in time. In developing a proposed procurement plan, a DSP should consider including a prudent mix of supply-side and demand-side resources such as long-term, short-term, staggered-term and spot market purchases to minimize the risk of contracting for supply at times of peak prices.

...

(2) *Nonresidential customers with 25—500 kW in maximum registered peak load.* The DSP should acquire electric generation supply for these customers using a mix of resources as described in the introductory paragraph to this section. Fixed-term contracts may be laddered to minimize risk, with a minimum of two competitive bid solicitations a year to further reduce the risk of acquisition at a time of peak prices. In subsequent programs, the mix percentage of supply acquired through long-term and short-term contracts and spot market purchases should be adjusted, depending on developments in retail and wholesale energy markets *to ensure least cost to customers.*⁴

³ PPL RD at 41.

⁴ 52 Pa. Code §69.1805 (emphasis added).

24. The PPL RD explains that it is evident that the Commission's policy statement promotes the "prudent mix" standard "taken from the statute," 66 Pa. C.S. § 2807(e), whereas the *End State Order* prefers the hourly pricing approach (by implication, *not* taken from the statute).⁵

25. The *End State Order* steps outside the bounds of the statute and the Commission's duly published policy statement by instituting the following new general rule:

Therefore, at this time, the Commission continues to support the threshold of 100 kW for purposes of determining medium and large C&I customers, but expects the EDCs to offer hourly LMP products only to the customers above that demand level who have interval meters. We expect the EDCs to continue adding medium C&I customers to the hourly LMP product as interval meters are deployed.⁶

26. In directing hourly pricing for PECO's Medium Commercial customers, the Commission has ignored its own determination that it should pursue legislative changes to obtain the authority necessary to implement the proposals contained within the *End State Order*. The Commission's *End State Order* explains as follows:

While the Commission is steadfast in its view that our decisions to permit [100%] spot market approaches in specific situations are appropriate, we are concerned that a general pronouncement directing a 90-day product for residential and small business customers and an hourly LMP product for "medium" C&I customers may raise legal questions about compliance with the above-referenced provisions of the Competition Act. *To avoid any legal uncertainty, the Commission would prefer to pursue legislative amendments that clearly provide the authority to approve default service plans containing products that more closely resemble current market conditions at the time of delivery.*⁷

⁵ PPL RD at 43.

⁶ *End State Order* at 31-32.

⁷ *End State Order* at 45 (emphasis added).

27. However, no such legislative changes have been effectuated. Although the Commission is “steadfast in its view” that 100% spot market approaches are appropriate in “specific situations,” it is precisely a general rule imposing an hourly pricing product for Medium Commercial customers that gave the Commission pause and raised questions as to compliance with Act 129.⁸

28. Regardless, neither the *End State Order* nor the policy statement is a regulation with the binding legal effect of a substantive regulation. As the PPL RD explains:

...the distinctions between rules adopted under administrative agencies' legislative rulemaking power and their interpretative rulemaking power. The former, known as substantive rules or regulations, result from legislative power granted by the legislature and establish new law, rights or duties and "enjoy a general presumption of reasonableness." *Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, 551 Pa. 605, 610, 712 A.2d 741, 743 (1998). Regulations adopted under legislative rulemaking power [*1057] have the force of law and are binding on reviewing courts as part of a statute as long as they are within the granted power, issued under proper procedures and are reasonable. *Bailey v. Zoning Board of Adjustment of Philadelphia*, 569 Pa. 147, 801 A.2d 492 (2002). Interpretative rules or regulations construe a statute and do not expand upon its terms, and courts defer to agency interpretations so long as they are reasonable [**17] and genuinely track the meaning of the underlying statute. *Id.* 6

Bayada Nurses, Inc. v. Commonwealth of Pennsylvania, Department of Labor and Industry, 958 A.2d 1050 (Pa.Cmwlt. 2008), 2008 Pa. Commw. LEXIS 395.⁹

29. As an implementation order, the *End State Order* is merely advisory and is *not* enforceable law. The statute is the binding authority. Therefore, directing hourly pricing for PECO's Medium Commercial customers solely on the basis of consistency with the *End State*

⁸ *Id.*

⁹ PPL RD at 43.

Order is an error of law that must be reversed. Rather, the threshold question should be whether hourly pricing for Medium Commercial customers is consistent with the statute.

30. However, the Commission's Order appears to have overlooked the statute, which requires that PECO procure default service supply through a *prudent* mix of products designed to provide adequate and reliable service at the *least cost to customers* over time. There is no evidence on the record in this proceeding that moving PECO's Medium Commercial default service customers to hourly pricing is prudent or will result in the least cost to customers over time. Instead, the proponents of hourly pricing have focused their arguments on its market-reflectiveness, a standard that was specifically rejected by the legislature when it replaced "prevailing market price" with the current "prudent mix" statutory standard.

31. Moreover, the Commission itself has explicitly rejected the argument that the "least cost" standard of Act 129 mandates that default service prices be "market-reflective" and "market-responsive" and has explicitly recognized that price stability should remain an important consideration when designing a default service procurement plan:

We disagree with RESA's overall recommendations as to the proper interpretation of the "least cost" standard as mandating that default service rates approximate, on a prospective basis, the market price of energy. Such an interpretation would signal retention of the "prevailing market price" standard that has been expressly replaced under Act 129. Moreover, this interpretation conflicts with the Act 129 objective of achieving price stability which dictates consideration of a range of energy products, not just those that necessarily reflect the market price of electricity at a given point in time. Price stability benefits are very important to some customer groups in that exposing them to significant price volatility through general reliance on short term pricing would be inconsistent with Act 129 objectives.¹⁰

...

¹⁰ *Default Service and Retail Electric Markets*, Docket No. L-2009-2095604, Order entered October 4, 2011 ("Final Default Service Rulemaking Order") at 39-40.

Finally, we disagree with RESA's assertion that the "least cost" standard mandates that a default service plan be reasonably likely to result in a "market-reflective and market-responsive" service rate that recovers all costs related to providing default service. We interpret this standard, not contained in either the Competition Act or Act 129, to mean a preference for short term and spot price supplies which ignore both the Act 129 concerns of price stability and a "prudent mix" of products. We do not believe that adoption of RESA's suggested standard is consistent with the "least cost" standard contained in Act 129 and would not adequately protect retail customers from volatility and risks inherent in the energy market. Price stability benefits are very important to some customer groups, so an interpretation of "least cost" that mandates subjecting all default service customers to significant price volatility through general reliance on short term pricing is inconsistent with Act 129's objectives. 66 Pa. C.S. § 2807(e)(3.2).¹¹

32. Thus, the Commission's *End State Order* is not only contrary to the Public Utility Code's "prudent mix" standard, it represents a complete change in position from its policy statement and prior rulemaking Orders. The *End State Order* adopts a standard other than the statutory "prudent mix" standard as a general rule, rather than a specific exception, such as in the case of Pike.

33. In the case of Pike, where a majority of customers are not taking default service, the Commonwealth Court held that 100% hourly spot market purchases are prudent, but this obviously does not mean that 100% spot market purchases are prudent for all EDCs and all customer classes. Pike is anomalous to other Pennsylvania EDCs and as such, the Commonwealth Court's holding must be read narrowly, *i.e.*, that 100% spot market purchases are prudent in the specific and unique circumstances of Pike, but not necessarily in other situations. The Pike decision approved 100% spot market purchases due to specific circumstances that no party has alleged are present in PECO. It does not provide authority for the *End State Order's* new blanket rule. Moreover, even though Pike's default service supply is

¹¹ Final Default Service Rulemaking Order at 41.

procured on an hourly basis, it does not set prices on an hourly basis. In contrast to the Commission's Order in this proceeding, Pike sets its default service rates on a quarterly basis, thereby keeping price volatility in check.

34. Commissioner Gladys M. Brown emphasized that "the Commission was treading a fine line between setting market-reflective competitive policies and complying with the prudent mix procurement language in Act 129 of 2008."¹² Further, Commissioner Brown specifically recognized that the *End State Order* represents a questionable policy change by stating:

As noted in the RMI Order, this Commission is a creature of the Legislature and, as such, is well-served to ensure that the General Assembly is supportive of our overall policy on matters as important as the retail market for electricity. The then sitting Commission which approved the RMI Order stated its intent to seek legislative changes that afford the Commission the flexibility to make this kind of questionable policy change. Those legislative changes have not yet been made; therefore, I had to weigh this issue carefully.¹³

35. Commissioner Brown's statement also recognized that while the Commonwealth Court in the Pike decision approved 100% spot market procurement, it did so only because the Commission properly took price stability into consideration. The Commission considered the possibility of including financial hedges and determined it was not prudent to do so because of the additional costs.

36. The procurement contracts that the OSBA urges the Commission to approve for Medium Commercial procurement in PECO are not financial hedges like in Pike, but rather are six-month, fixed price, full requirements, load following contracts. Such contracts, which Pike was unable to secure due to the minority of customers remaining on default service, do not have the additional costs associated with the financial hedges contemplated in Pike.

¹² Statement of Commissioner Gladys M. Brown to the December 4th Order at 2.

¹³ *Id.*

37. Moreover, unlike in Pike, there has been no evidence presented in this proceeding that hourly spot market purchases are more prudent than six-month, fixed price, full requirements, load-following contracts. The only authority that has been offered for hourly pricing is its consistency with the *End State Order*.¹⁴

38. Although Commissioner Brown ultimately joined in the Commission's decision finding that overall, across all customer classes, PECO's default service plan included a prudent mix (even if Medium Commercial did not), she made a point to note that "if the default service plans that were in place during the polar vortex had been priced solely on short term or hourly contracts, default service customers would have been exposed to extreme pricing volatility."¹⁵

39. In light of the well-publicized difficulties in the winter of 2013-14, with unexpected and volatile utility rates, it is not only imprudent, but absurd to force PECO's Medium Commercial customers off of fixed rate generation default service and onto a completely unhedged hourly priced service. Hourly pricing for these customers would blatantly disregard the price stability goals of Act 129.

40. PECO's initial procurement plan for Medium Commercial customers consisting of six-month, fixed price, full requirements, load-following contracts will provide reasonable price stability for these default service customers, while still promoting EGS participation in the market. This proposal is the same as that approved for Medium Commercial procurement in DSP II, which, as of May 2014, has resulted in approximately 80% of Medium Commercial customers and 85% of the Medium Commercial load being served by an EGS.¹⁶ Clearly, EGS participation in the competitive retail market is extensive for this class and has not been hindered

¹⁴ See, e.g., Order at 39-40, Recommended Decision at 44.

¹⁵ Commissioner Brown Statement at 3.

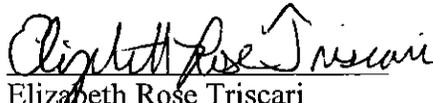
¹⁶ PECO Statement No. 2-R at 8.

by PECO's use of six-month, fixed price, full requirements, load-following contracts to procure default service supply. This current procurement plan is consistent with the statute and also accomplishes the goals of the Commission to promote retail competition. It should be approved again for DSP III.

IV. Conclusion

WHEREFORE, the OSBA respectfully requests that the Commission reverse its decision that directs hourly priced default service for Medium Commercial customers and approve PECO's original proposal to procure default service supply for Medium Commercial customers through six-month, fixed price full requirements, load following contracts without overlap.

Respectfully submitted,



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Dated: December 19, 2014