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# ORIGINAL

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October 13, 2006

James McNulty, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor  
Harrisburg, PA 17120

## RECEIVED

OCT 13 2006

Re: Rachel & Stephen Petyk v. PECO Energy Company  
PUC Docket No. C-20065838

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

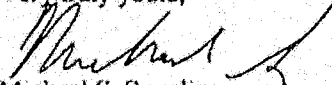
Dear Mr. McNulty:

Enclosed for filing with the Commission are the following documents and copies in the matter referenced above.

- Answer and New Matter (original and 3 copies)
- Petition (original and 3 copies)
- Motion to Dismiss (original and 3 copies)
- Reply to Motion/Petition (original and 3 copies)
- Exceptions (original and 9 copies)
- Reply Exceptions (original and 9 copies)
- Brief (original and 9 copies)
- Reply Brief (original and 9 copies)

Also enclosed is an extra copy of this letter, which I request that you date stamp and return to me in the envelope provided as proof of filing. I have enclosed a Certificate of Service showing that a copy of the above document was served on the interested parties

Very truly yours,

  
Michael S. Swerling  
Counsel for PECO Energy Company

## DOCUMENT FOLDER

MSS/zr

Etc

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BEFORE THE

PENNSYLVANIA PUBLIC UTILITY COMMISSION OCT 13 2006

PA PUBLIC UTILITY COMMISSION  
ELECTRICITY'S BUREAU

RACHEL & STEPHEN PETYK :  
:  
COMPLAINANT :  
:  
v. :  
:  
PECO ENERGY COMPANY :  
:  
RESPONDENT :

DOCKET NO. C-20065838

BRIEF OF RESPONDENT, PECO ENERGY COMPANY

DOCUMENT  
FOLDER

I. STATEMENT OF THE CASE:

On or about June 03, 2003, PECO Energy Company ("PECO Energy") filed a request with the Public Utility Commission ("PUC") to close its off-peak electric service rate, Rate OP. The "Availability" section of Rate OP was changed by adding the following sentence: "Effective January 1, 2004, service under Rate OP will be restricted to service locations receiving Rate OP service or that are the subject of a Rate OP service application as of December 31, 2003."

In the PECO filing supporting the Rate OP change, (p. 1) PECO stated that it was closing Rate OP because: "The technology currently used for the OP system is outdated and the Company has been unable to find adequate sourcing for supply of the existing equipment. At the present time, an adequate replacement technology is not yet available at a reasonable cost." The Commission approved this change by order entered on July

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OCT 17 2006

17, 2003. (Docket No. R-00038497). (Copy attached.) Rate OP is, therefore, not available to new applicants at this time.

The instant case involves a complaint, filed on February 03, 2006, by Rachael and Stephen Petyk and requesting that they be placed on Rate OP. The Petyks do not claim that they were on Rate OP on January 1, 2004, nor do they claim that they had an application pending on December 31, 2003; to the contrary, all parties agree that the Petyks did not approach PECO Energy to request being placed on Rate OP until 2005. Put simply, the Petyks do not claim that they meet the "Availability" requirements for Rate OP as currently set forth in PECO's Tariff. Rather, the Petyks claim that the Tariff itself constitutes unlawful discrimination because the rate is now closed to them, while other customers are allowed to remain on the rate.<sup>1</sup>

As described below, the Petyks' complaint should be dismissed. Rate OP was closed for good reasons, and the Petyks have not met their burden of proving that they are being *unreasonably* discriminated against.<sup>2</sup>

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<sup>1</sup> The Petyks' Complaint states that: "Many other customers throughout their (PECO Energy's) distribution system are permitted this rate (rate OP). I am being discriminated against."

<sup>2</sup> At hearing, Mr. Petyk testified that the Tariff violates state law by not allowing him off-peak service. Mr. Petyk did not specify which state law he believes is being violated. PECO Energy reserves the opportunity to respond in its Reply Brief to any specification that may be made in the Petyks' Main Brief.

## II. ARGUMENT

### A. Summary of Argument

The Petyks have the burden of proof in this proceeding. What must be proven is *not* simply that the tariff discriminates against them. Utility tariffs are allowed to *reasonably* discriminate; the Petyks must prove that the tariff is *unreasonably* discriminating against them.

The Petyks did not prove that closure of Rate OP constitutes unreasonable discrimination. Indeed, Rate OP is a Commission-approved rate and, therefore, its terms and conditions have the force of law and must be followed absent a showing of unreasonableness. The Petyks, however, did not present any evidence or argument to attack the Commission's rationale for originally approving the closure of Rate OP. Nor did the Petyks demonstrate that the closing of Rate OP resulted in them paying excessive rates to subsidize rates for another class of customers that were set unreasonably low. Nor did the Petyks demonstrate that their exclusion from Rate OP is placing them at a competitive commercial disadvantage against business competitors. In the absence of any of those showings, the Commission must dismiss the Petyks' complaint.

### B. The Complainants Have The Burden of Proof

The Petyks have the burden of proof in this proceeding. As noted above, the Petyks are attacking the provision of PECO's existing, Commission-approved Rate OP. In such a case, the burden of proof falls on the complainant. As the Commonwealth Court stated in Brockway Glass Co. v. Pennsylvania Public Utility Commission, 63 Pa. Commw. 238, 243 (1980), "[w]here the complaint involves an existing rate, however, the

burden then falls upon the customer to prove that the charge is no longer reasonable.”

This burden specifically exists for claims that a rate is discriminatory. “[T]he complainant has the burden of proving that the rates in question are discriminatory.”

Philadelphia Electric Co. v. Pennsylvania Public Utility Commission, 79 Pa. Commw. 445, (1984).<sup>3</sup>

**C. The Standard For Evaluating The Tariff Is *Not* Whether It Is Discriminatory; It Is Whether The Tariff Is *Unreasonably* Discriminatory**

The Petyks’ claim is that denial of Rate OP discriminates against them. Two sections of the Public Utility Code address discrimination – Sections 1304 and 1502.

Section 1304 states that:

“No public utility shall, as to rates, make or grant any *unreasonable preference or advantage* to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any *unreasonable prejudice or disadvantage*. No public utility shall establish or maintain any *unreasonable difference as to rates*, either as between localities or as between classes of service. Unless specifically authorized by the commission, no public utility shall make, demand, or receive any greater rate in the aggregate for the transportation of passengers or property of the same class, or for the transmission of any message or conversation for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or any greater rate as a through rate than the aggregate of the intermediate rates. This section does not prohibit the establishment of reasonable zone or group systems, or classifications of rates or, in the case of common carriers, the issuance of excursion, commutation, or other special tickets at special rates, or the granting of nontransferable free passes, or passes at a discount to any officer, employee, or pensioner of such common carrier. No rate charged by a municipality for any public

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<sup>3</sup> See also, Philadelphia Suburban Transit Co. v. Pennsylvania Public Utility Commission, 3 Pa. Commonwealth Ct. 184, 281 (1971). and Carpenter v. Pennsylvania Public Utility Commission, 141 Pa Superior Ct. 447, (1940).

utility service rendered or furnished beyond its corporate limits shall be considered unjustly discriminatory solely by reason of the fact that a different rate is charged for a similar service within its corporate limits.” (emphasis added).

Section 1502 states that:

“No public utility shall, as to service, make or grant any *unreasonable preference* or advantage to any person, corporation, or municipal corporation, or subject any person, corporation, or municipal corporation to any *unreasonable prejudice* or disadvantage. No public utility shall establish or maintain any *unreasonable difference* as to service, either as between localities or as between classes of service, but this section does not prohibit the establishment of reasonable classifications of service.” (emphasis added).

In both cases, the text of the statute is clear: the statutory prohibition is against “unreasonable” prejudice, disadvantage, or differences as to service or rates.

**D. The Complainants Did Not Prove That The Tariff is Unreasonably Discriminatory**

**1. Rate OP Is Part of An Approved Tariff And, Therefore, Has The Force Of Law; PECO is Required To Follow Its Provisions And Deny Rate OP To The Petyks Because They Are Not Eligible For Rate OP**

PECO’s rates have been approved by and are regulated by the Public Utility Commission and/or the Federal Energy Regulatory Commission. The charges are regulated by the PUC and they are contained within PECO Energy’s Electric Service Tariff, Pa. P.U.C. No. 3, approved by and on file with the PUC. The Tariff provisions

approved by the PUC are prima facie reasonable. 66 Pa. C.S.A. § 316 (1999); See also. Kossman v. Pennsylvania Public Utility Commission, 694 A.2d 1147 (Pa. Cmwlth. 1997) Moreover, tariffs that have been approved by the PUC have the full force and effect of law and are binding on both the utility and its customers. Brockway Glass Co. v. Pennsylvania Utility Commission, 437 A.2d 1067 (Pa. Cmwlth. 1981).

As stated earlier, the Commission adopted PECO Energy's request to close Rate OP. At that time, the Commission determined that closing Rate OP off to new customers was reasonable and accepted the Tariff revision. From that point forward, the Tariff revision had the full force and effect of law. That being said, PECO Energy must abide by the current Tariff and deny Rate OP to new customers.

The current Electric Service Tariff expressly holds that Rate OP is not offered to new customers after the December 31, 2003 application deadline. The Petyks did not provide a Rate OP application or request on or before the December 31, 2003 Rate OP closing date. According to the record, the Petyks first requested Rate OP in January, 2005. Their request for Rate OP service obviously failed to comply with the "Availability" section of the Tariff. Following the current Tariff, PECO Energy must deny Rate OP to the Petyks because they failed to qualify under the expressly approved terms of the Tariff.

**2. The Complainants Did Not Attack The Rationale For Closing Rate OP**

In both their complaint and at the hearing, the Petyks chose not to address PECO's underlying rationale for closing Rate OP – “The technology currently used for the OP system is outdated and the Company has been unable to find adequate sourcing for supply of the existing equipment. At the present time, an adequate replacement technology is not yet available at a reasonable cost.” The Petyks presented no evidence or argument of any sort to address this issue.

Given the fact that the Petyks have the burden of proof in this proceeding, the absence of any evidence attacking the rationale for closing Rate OP is critical. The Petyks provided no basis for re-examining the Commission's approval of the closure of Rate OP. As a result, the Commission's previous approval of the closure of Rate OP is both presumptively reasonable and not under evidentiary challenge in this proceeding. The only conclusion that can be drawn is that the closure of Rate OP resulted in a reasonable utility rate.

**3. The Complainants Did Not Prove That The Closing Of Rate OP Provides An Unreasonable Preference Or Advantage to Another**

As noted previously in this brief, the statutory sections that address discrimination in utility rates and service clearly state that, before a rate can be held to be unreasonably

discriminatory, it must provide an unreasonable preference or advantage to another customer of PECO Energy. The courts, in turn, have held that such a situation of unreasonable preference exists when it can be demonstrated that (a) one rate is inappropriately subsidizing the other, or (b) when the differential between rates gives one customer an unfair competitive advantage in a commercial enterprise in which they are both engaged. As the Commonwealth Court stated in Philadelphia Suburban Transportation Company v. Public Utility Commission and Philadelphia Electric Company, 3 Pa. Commw. 184 (1971):

“Before a rate can be declared unduly preferential and therefore unlawful, it is essential that there be not only an advantage to one, but a resulting injury to another. Such an injury may arise from collecting from one more than a reasonable rate to him in order to make up for inadequate rates charged to another, or because of a lower rate to one of two patrons who are competitors in business. There must be an advantage to one at the expense of the other.”

The Petyks did not attempt to demonstrate that either of these situations exists, and this is fatal to their complaint.

The Petyks made no claim, and provided no evidence, that PECO is collecting excessive charges from them in order to make up for inadequate charges to other customers. The Petyks made no claim, and provided no evidence, that they are being disadvantaged in a commercial enterprise because a business competitor of theirs is unfairly receiving a lower rate than they.<sup>4</sup>

In sum, the Petyks have not met their burden of proof in this proceeding. They effectively put on no evidence to support their discrimination claim. They provided no evidence or argument challenging the Commission's prior approval of the closure of Rate

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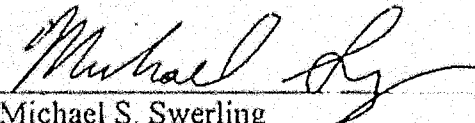
<sup>4</sup> Given that Rate OP is a residential rate, no such claim would be possible.

OP; they provided no evidence or argument to prove that their rates are unreasonable in amount; they provided no evidence or argument to prove that they are at an unfair commercial disadvantage. Their claim of unreasonable discrimination has not been supported and the Commission should reject that claim.

### III. Conclusion

For the reasons set forth above, PECO Energy requests that the Commission dismiss this complaint with prejudice.

Sincerely,



Michael S. Swerling  
Counsel for PECO Energy Company  
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COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

-CROWE  
IN REPLY PLEASE  
REFER TO OUR FILE

JULY 17, 2003

R-00038497

BRIAN D CROWE DIRECTOR  
PECO ENERGY COMPANY  
2301 MARKET STREET  
PO BOX 8699  
PHILADELPHIA PA 19101-8699

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OCT 13 2006

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

Pennsylvania Public Utility Commission  
V.  
PECO Energy Company

To Whom It May Concern:

This is to advise you that the Commission in Public Meeting on July 17, 2003 has adopted an Order in the above entitled proceeding.

An Order has been enclosed for your records.

Very truly yours,

James J. McNulty  
Secretary

fg  
encls  
cert. mail

PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA. 17105-3265

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JUL 21 2003  
BRIAN

Public Meeting held July 17, 2003

Commissioners Present:

Terrance J. Fitzpatrick, Chairman, Concurring Statement attached  
Robert K. Bloom, Vice Chairman  
Aaron Wilson, Jr.  
Glen R. Thomas  
Kim Pizzingrilli

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OCT 13 2006

PA PUBLIC UTILITY COMMISSION  
ELECTRICITY'S BUREAU

Pennsylvania Public Utility Commission  
v.  
PECO Energy Company

Docket Number  
R-00038497

**ORDER**

**BY THE COMMISSION:**

On June 3, 2003, PECO Energy Company ("PECO") filed Supplement No. 51 to Tariff Electric - PA P. U. C. No. 3. This filing, which is to become effective on August 2, 2003, affects the availability of service under Rate OP (Off-Peak). Effective January 1, 2004, availability of service under Rate OP will be restricted to service locations receiving Rate OP service, or that are the subject of a Rate OP service application as of December 31, 2003.

PECO stated that the specific reason for this change is that the technology currently used for the OP system is outdated and the Company has been unable to find adequate sourcing for supply of the existing equipment. At the present time, an adequate replacement technology is not yet available at a reasonable cost and the Company

believes when future technologies are developed, they will require a more sophisticated tariff design than Rate OP. Also, by restricting Rate OP to current service locations, the Company can extend its current inventory of replacement parts and continue to provide the service to existing customers.

PECO stated that as of April 2003, it served 1,531,728 customers and that this change will have no effect on its existing customers. PECO affirmed that the proposed change will not have any impact on the services it renders to the public. PECO also stated that there will be a negligible indirect impact of increased revenues and costs associated with new customers that may have opted for Rate OP. This impact is negligible because:

- 1) there are fewer than 500 new OP customers per year.
- 2) any increased revenue due to customers paying Rate R (or Rate RH) versus Rate OP is offset by higher supply cost.

PECO stated that following Commission approval, ratepayers will be informed of these changes through the biannual (November and July) information on residential rates provided in the Company's "EnergyNews" newsletter accompanying the bill and through communication with customer service representatives.

Investigation and analysis of this proposed tariff filing indicate that the proposed change does not appear to be unlawful, unjust, unreasonable, or contrary to the public interest; **THEREFORE,**

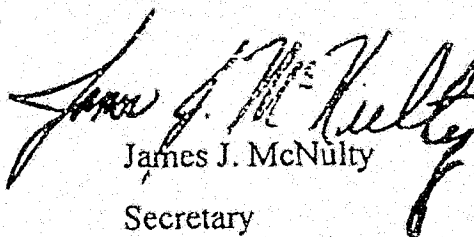
**IT IS ORDERED:**

1. That Supplement No. 51 to Tariff Electric-Pa. P.U.C. No. 3 be and hereby is approved.

2. That this Order is without prejudice to any formal complaints timely filed against the proposed Tariff.

3. That this proceeding at Docket No. R-00038497 be closed.

BY THE COMMISSION,

  
James J. McNulty  
Secretary

(SEAL)

ORDER ADOPTED: July 17, 2003

ORDER ENTERED: JUL 17 2003

PENNSYLVANIA PUBLIC UTILITY COMMISSION  
HARRISBURG, PENNSYLVANIA 17105

PECO ENERGY CO.  
Supplement No. 51 to Tariff  
Electric – PA. P.U.C. No 3, filed  
June 3, 2003, to become effective  
August 2, 2003.

Public Meeting held July 17, 2003  
JUL-2003-FUS-1073\*  
Docket No. R-00038497

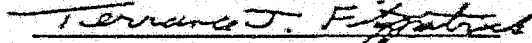
CONCURRING STATEMENT OF CHAIRMAN  
TERRANCE J. FITZPATRICK

This matter involves a tariff filing by PECO Energy Company ("PECO") to restrict the availability of service under Rate OP (Off-Peak) to new customers, effective January 1, 2004. Existing Rate OP customers will not be impacted. PECO states that the reason for this change is that the technology currently used for the Rate OP system is outdated, and PECO has been unable to find adequate sourcing for supply of the existing equipment.

As a result of my interest and active involvement in promoting Demand Side Response ("DSR") initiatives, I have carefully reviewed PECO's request to close its Rate OP. Initially, I want to commend PECO for its cooperation and commitment in helping to further the Commission's DSR objectives. I encourage PECO, as well as the other interested parties, to continue to participate in the DSR Working Group in order to advance effective wholesale and retail competition.

While I am voting in favor of approving PECO's tariff filing, I do so somewhat reluctantly because I think this rate may have some benefit to PECO's customers and the overall electric system. My vote is based on PECO's averment that they are unable to find a vendor to supply the necessary equipment. It is my hope that PECO will direct new customers who are interested in, but restricted from, participating in the Rate OP program to an alternative rate such as Rate RT (time of use) or other similar DSR initiatives.

Date: July 17, 2003

  
TERRANCE J. FITZPATRICK  
CHAIRMAN

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RACHEL & STEPHEN PETYK

v.

PECO ENERGY COMPANY

DOCKET NO. C-20065838

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of PECO Energy Company's Main Brief in the above matter upon all interested parties a copy thereof by Federal Express:

Rachel & Stephen Petyk  
602 Pomona Hill Drive  
West Chester, PA 19382

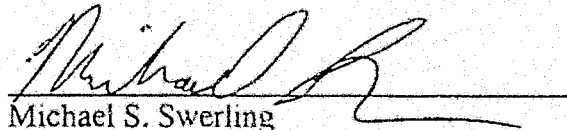
Administrative Law Judge Herbert Smolen  
1302 Philadelphia State Office Building  
1400 West Spring Garden Street  
Philadelphia, PA 19130

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OCT 13 2006

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S OFFICE

Dated at Philadelphia, Pennsylvania, October 13, 2006.



Michael S. Swerling  
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