

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

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December 31, 2018

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Non-Bypassable Transmission Service Charge  
(NBT) Semiannual Adjustment, PECO Energy  
Electric Tariff No. 5, Supplement No. 76  
Effective December 1, 2018  
Docket No. M-2018-3005860

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Answer to PECO's Preliminary Objection in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Harrison W Breitman".

Harrison W Breitman  
Assistant Consumer Advocate  
PA Attorney I.D. # 320580  
E-Mail: [HBreitman@paoca.org](mailto:HBreitman@paoca.org)

Enclosures:

cc: Office of Administrative Law Judge  
Certificate of Service  
\*264412

CERTIFICATE OF SERVICE

Non-Bypassable Transmission Service Charge (NBT) :  
Semiannual Adjustment, PECO Energy Electric Tariff : Docket No. M-2018-3005860  
No. 5, Supplement No. 76 Effective December 1, 2018 :

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Answer to PECO's Preliminary Objection, upon parties of record in this processing in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 31<sup>st</sup> of December 2018.

SERVICE BY E-MAIL & INTER-OFFICE MAIL

Richard Kanaskie  
Bureau of Investigation and Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
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SERVICE BY E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Non-Bypassable Transmission Service Charge (NBT) :  
Semiannual Adjustment, PECO Energy Electric Tariff : Docket No. M-2018-3005860  
No. 5, Supplement No. 76 Effective December 1, 2018 :

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ANSWER OF THE OFFICE OF CONSUMER ADVOCATE TO THE  
PRELIMINARY OBJECTIONS OF PECO ENERGY COMPANY

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Pursuant to Sections 5.61 and 5.101 of the Pennsylvania Public Utility Commission's (Commission) regulations regarding Answers to Preliminary Objections, 52 Pa. Code Sections 5.61 and 5.101, the Office of Consumer Advocate (OCA), provides the following Answer to the Preliminary Objections of PECO Energy Company (Answer), in the above-captioned proceeding and requests that the Preliminary Objections be dismissed.

**I. INTRODUCTION**

On November 29, 2018, the OCA filed a Complaint with the Commission, pursuant to the Public Utility Code, 66 Pa. C.S. Section 1301 *et seq* and 66 Pa. C.S. Section 2804. The Complaint alleges that a preliminary examination of PECO Energy Company's (PECO) proposed semiannual adjustment to its Non-Bypassable Transmission Service Charge (NBT) to PECO Energy Electric Tariff No. 5, Supplement No. 76, specifically the proposal to retain \$5.5 million of FERC-ordered credits, is or may be unjust, unreasonable, in violation of the Pennsylvania Public Utility Code, and otherwise may be contrary to sound ratemaking principles and public policy. With respect to relief, the OCA's Complaint requests that the Commission suspend and investigate the operation of the proposed NBT adjustment; consolidate all complaints filed against the proposed NBT adjustment; hold evidentiary hearings examining the

reasonableness of the Company's NBT adjustment; and grant such other relief that the Commission deems necessary.

On December 19, 2018, PECO filed Preliminary Objections (P.O.s). PECO objects to the OCA's formal complaint based on an alleged insufficiency of the pleading. P.O. ¶¶ 4-5, citing 52 Pa. Code § 5.101(a)(3).

The OCA submits that PECO's Preliminary Objections are unsupported, as set forth in more detail below. It is clear and free from doubt that the OCA's Complaint is legally sufficient and seeks that the Commission make determinations pursuant to the Commission's powers and jurisdiction. As such, PECO's Preliminary Objections to the Complaint must be dismissed.

## **II. LEGAL STANDARD**

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code §§ 5.101 (a)(1)-(7). The grounds for preliminary objections are limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

PECO is alleging that the Complaint is legally and factually insufficient since, according to PECO, the Complaint broadly avers that PECO's decision to retain \$5.5 million in credits without specifically addressing why it is unreasonable. The OCA, however, specifically averred that PECO's proposed NBT adjustment is or may be in violation of the Pennsylvania Public Utility Code, 66 Pa. C.S. Section 1301 *et seq.*, 66 Pa. C.S. Section 2804, and otherwise may be contrary to sound ratemaking principles and public policy. See, OCA Complaint at ¶ 4.G. Additionally, the OCA specifically averred that under PECO's proposal, PECO would retain \$5.5 million in credits instead of refunding its customers. See, OCA Complaint at ¶ 4.D.

In deciding whether to grant or deny a preliminary objection, the truth of all facts averred in the complaint must be assumed, and it must be determined whether, based on well-pleaded factual averments of the complainant, recovery or relief is possible. See Feingold v. Bell of Pa., 383 A.2d 791 (Pa. 1977); See also Equitable Small Transp. Interveners v. Equitable Gas Co., 1994 Pa PUC LEXIS 69, \*3. Further, any inferences fairly deducible from the facts must be accepted for purposes of the disposition of the preliminary objections. See Commonwealth v. Bell Telephone Co., 551 A.2d 602 (Pa. Commw. Ct. 1988). The Commission shall deny a preliminary objection, in favor of the non-moving party, if there are any doubts that must be resolved. Boyd v. Ward, 802 A.2d 705, 707 (Pa. Commw. Ct. 2002); Weber v. PPL Electric Utilities Corp., Docket No. C-2008-2052894, Order at 4 (March 23, 2009). Also, preliminary objections must be denied, where factual or legal issues remain to be examined. See P. J. S. v. PA State Ethics Comm'n, 669 A.2d 1105 (Pa. Commw. Ct. 1996).

Preliminary objections alleging "legal insufficiency of pleading" serve judicial economy by avoiding a hearing where no factual dispute exists. Drake v. Pennsylvania Electric Co.,

Docket No. C-2014-2413771, Order at 5 (May 7, 2014). The Commission will find a complaint legally sufficient if it provides the following:

...an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission.

Drake, Order at 6; 52 Pa. Code § 5.22(a)(5).

The purpose of a preliminary objection raising specificity is to ensure that an adverse party's ability to answer and defend will not be unduly impaired by a complainant's vagueness in stating grounds of his or her suit. Stilp v. Com., 910 A.2d 775 (Pa. Commw. Ct. 2006), *order aff'd*, 601 Pa. 429, 974 A.2d 491 (2009). When a respondent files a preliminary objection alleging "insufficient specificity of a pleading," an answer is not required until further directed by the presiding officer or the Commission. 52 Pa. Code § 5.101(e)(1). Such preliminary objection requires consideration of the following questions:

whether the complaint is sufficiently clear to enable the defendant to prepare his defense, or whether the plaintiff's complaint informs the defendant with accuracy and completeness of the specific basis on which recovery is sought so that the defendant may know without question upon what grounds to make his or her defense.

Rambo v. Greene, 906 A.2d 1232, 1269 (2006).

PECO's Preliminary Objections seek to limit the OCA's ability to pursue its legitimate interests. The sufficiency standard for a complaint requires the complainant to provide an act or thing done or omitted to be done or about to be done or omitted to be done by the respondent in violation, or claimed violation, of a statute which the Commission has jurisdiction to administer, or of a regulation or order of the Commission. See, Drake, Order at 6; 52 Pa. Code § 5.22(a)(5). Here, the Complaint meets the sufficiency standard as it specifically avers that PECO's proposed NBT adjustment may have violated Sections 1301 *et seq.* and Section 2804 of the Public Utility

Code and may otherwise be contrary to public policy by retaining \$5.5 million in FERC-ordered credits. Additionally, the Complaint is sufficiently clear to enable PECO to prepare its defense as the Complaint informs PECO accurately and completely of the specific basis on which recovery is sought and PECO is aware of the OCA's position regarding PECO's proposal to retain \$5.5 million in FERC-ordered credits. Accepting as true all well-pleaded material facts in the Complaint, PECO's Preliminary Objections should be dismissed and the OCA should be permitted to pursue the legitimate issues that it has identified in its Complaint.

### **III. ANSWER**

1. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, the Complaint is of record and speaks for itself. Additionally, the OCA disagrees that PECO's retention of \$5.5 million in credits as relating to PECO's alleged overpayment of Regional Transmission Expansion Plan charges during the 2007-2010 period before implementation of the transmission service charge and the NBT is reasonable.

2. Admitted in part, denied in part. Respondent's allegations constitute conclusions of law to which no response is required. By way of further answer, the OCA submits that PECO's adjustment to the NBT to retain \$5.5 million in FERC-ordered credits to compensate shareholders is unreasonable as proposed and is contrary to the Public Utility Code and public policy.

3. Admitted.

4. Denied as stated. Respondent's allegations constitute conclusions of law to which no response is required. The OCA Complaint is of record in this matter and speaks for itself. By way of further answer, the Commission's regulations on the content required in a formal

complaint is based on Pennsylvania's Rule of Civil Procedure 1019, which requires a plaintiff to plead all the facts that he must prove in order to achieve recovery on the alleged cause of action. The pleading must be sufficiently specific so that the defending party will know how to prepare its defense. See e.g. Steven Higgins v. National Fuel Gas Distribution Corp., Docket No. C-2012-2338926, Initial Decision (Feb. 26, 2013). In addition, a party is not required to plead evidence, and preliminary objections shall not be used to make a party plead purely evidentiary matters. See Local No. 163, Intern. Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America v. Watkins, 417 Pa. 120, 207 A.2d 774 (1965). A more specific complaint will not be ordered to develop matters that are essentially evidentiary because if a Defendant needs more information to prepare his answers, he may use the discovery procedures. See e.g. Totani v. Lansford-Coaldale Joint Water Authority, 2 Pa. D. & C.3d 143, 146 (Carbon Co. 1975).

Further, the requirement of specificity is more easily met when the matters are equally or more in the knowledge of the objecting party. Local No. 163, 417 Pa. at 122, 207 A.2d at 778. See also Philadelphia County Intermediate Unit No. 26 v. Com. Dept. of Ed., 60 Pa. Commw. 546, 552, 432 A.2d 1121, 1126 (1981) (A more specific pleading was not necessary because the information sought was either evidentiary in nature or of such a character that the objecting party's knowledge of the facts was equal, if not superior, to that of the pleader). Where pleadings, along with information already in the possession of the defendant, apprise defendant of what it is required to defend, preliminary objections should be dismissed. See e.g. Big Boys Auto v. Bon Ton Store, 15 D. & C.2d 551 (Luzerne Co. 1958).

All allegations against Respondent have been specifically pled in accordance with the Commission's regulations, and all allegations are sufficiently specific. The Complaint has

provided to Respondent enough information and facts such that Respondent may prepare and file an adequate answer and prepare a proper defense to all averments contained in the Complaint.

PECO's NBT adjustment to PECO's tariff, and PECO's decision to retain \$5.5 million in credits, is within the knowledge of PECO. The OCA specifically averred in the Complaint that under PECO's proposal, PECO would retain \$5.5 million in credits instead of refunding its customers. See, OCA Complaint at ¶ 4.D. It was the Respondent which engaged in the methods, acts and practices with consumers, which are the subject of the Complaint. The Respondent proposed the NBT adjustment to their tariff that proposes to retain \$5.5 million of FERC-ordered credits instead of refunding the total amount of the FERC-ordered credits to its ratepayers. Respondent is, therefore, in a better position to know the information that Respondent is now demanding to be pleaded in the Complaint. As such, the OCA's Complaint provided sufficient allegations that Respondent's proposed NBT adjustment is or may be unjust, unreasonable, and in violation of the Pennsylvania Public Utility Code, 66 Pa. C.S. Section 1301 *et seq.*, 66 Pa. C.S. Section 2804, and otherwise may be contrary to sound ratemaking principles and public policy. See gen'ly, OCA Complaint.

5. Denied. Respondent's allegations constitute conclusions of law to which no response is required. The Complaint is of record in this matter and speaks for itself. By way of further answer, the Complaint avers that PECO's proposed NBT adjustment, specifically the proposal to retain \$5.5 million of FERC-ordered credits, is in violation of Public Utility Code 66 Pa. C.S. Section 1301 *et seq.*, 66 Pa. C.S. Section 2804, and otherwise may be contrary to sound ratemaking principles and public policy. See, OCA Complaint at ¶ 4.G. As such, PECO'S averment that the Complaint is factually and legally insufficient is without merit.

#### IV. CONCLUSION

WHEREFORE, the Complainant respectfully request that Respondent's Preliminary Objections to the Complaint be dismissed.

Respectfully Submitted,

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December 31, 2018  
264408

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

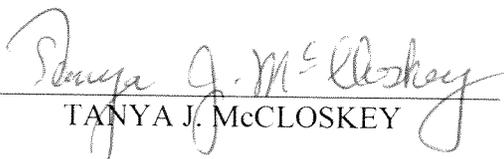
Non-Bypassable Transmission Service :  
Charge (NBT) Semiannual Adjustment, : Docket No. M-2018-3005860  
PECO Energy Electric Tariff No. 5, :  
Supplement No. 76 Effective December 1, :  
2018

VERIFICATION

I, TANYA J. McCLOSKEY, hereby state that the facts set forth in the Office of Consumer Advocate's Answer in the above-referenced proceeding are true and correct (or are true and correct to the best of my knowledge, information, and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

DATE: December 31, 2018

\*264413

Signed:   
TANYA J. McCLOSKEY