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January 24, 2019

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

**RE: Office of Consumer Advocate v. PECO Energy Company**  
**Docket No. C-2018-3006242**  
**Non-Bypassable Transmission Service Charge (NBT) Semiannual Adjustment,**  
**PECO Energy Company Electric Tariff No. 5, Supplement No. 76**  
**Effective December 1, 2018**  
**Docket No. M-2018-3005860**

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Dear Secretary Chiavetta:

PECO's *Motion to Dismiss Objections and Compel Answers to Interrogatories, Set I* on the Office of Consumer Advocate, is attached for filing.

Very truly yours,



Ward L. Smith  
Assistant General Counsel

WLS/adz  
Attachment

c: Certificate of Service

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Office of Consumer Advocate	:	
	:	Docket No. C-2018-3006242
v.	:	
	:	
PECO Energy Company	:	
	:	
Non-Bypassable Transmission Service	:	
Charge (NBT) Semiannual Adjustment,	:	
PECO Energy Electric Tariff No. 5,	:	Docket No. M-2018-3005860
Supplement No. 76, Effective	:	
December 1, 2018	:	
	:	
v.	:	
	:	
PECO Energy Company	:	

**NOTICE TO PLEAD**

***To: The Office of Consumer Advocate***

PECO's Motion to Compel Answers to Set I Discovery is enclosed. Pursuant to 52 Pa. Code §5.342 (g)(1), you must file your answer to PECO's Motion, if any, within five days of service of the Motion (in this case, by Tuesday, January 29, 2019). Your answer must be filed with the Commission and served on PECO and the other parties on the certificate of service, with a copy to the Administrative Law Judge.

File with:  
Rosemarie Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor  
Harrisburg, PA 17120

Service to:

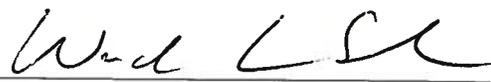
Ward L. Smith, Esq.  
PECO Energy Company  
2301 Market Street, S-23  
Philadelphia, PA 19103  
[ward.smith@exeloncorp.com](mailto:ward.smith@exeloncorp.com)

Certificate of Service

A copy to:

Administrative Law Judge Marta Guhl  
Commonwealth of Pennsylvania  
Public Utility Commission  
801 Market Street  
Philadelphia, PA 19107

Dated at Philadelphia, PA, January 24, 2019

  
\_\_\_\_\_  
Ward L. Smith

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Office of Consumer Advocate</b>	:	
<b>v.</b>	:	<b>Docket No. C-2018-3006242</b>
	:	
<b>PECO Energy Company</b>	:	
	:	
	:	
<b>Non-Bypassable Transmission</b>	:	
<b>Service Charge (NBT) Semiannual</b>	:	<b>Docket No. M-2018-3005860</b>
<b>Adjustment, PECO Energy Electric</b>	:	
<b>Tariff No. 5, Supplement No. 76</b>	:	
<b>Effective December 1, 2018</b>	:	
	:	

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**PECO ENERGY COMPANY’S MOTION TO DISMISS OBJECTIONS  
AND COMPEL ANSWERS TO INTERROGATORIES (SET I)**

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Pursuant to 52 Pa. Code § 5.342(g), PECO Energy Company (“PECO” or the “Company”) files this Motion to dismiss the Objections of the Office of Consumer Advocate (“OCA”) and to compel answers to PECO’s Interrogatories (Set I) Nos. 1-9, which were served on January 4, 2019. The OCA’s Objections to PECO’s Interrogatories (Set I) were served on January 14, 2019. A copy of the Set I Interrogatories is attached as Appendix A, and a copy of the Objections is attached as Appendix B to this Motion.

For the reasons set forth hereafter, the OCA’s Objections should be dismissed and OCA should be compelled to answer all of the Interrogatories in PECO Set I.

**I. OVERVIEW**

On November 7, 2018, PECO filed its Non-Bypassable Transmission Service Charge (“NBT”) Semiannual Adjustment in Docket No. M-2018-3005860. In its November 7 tariff

supplement, PECO proposed to provide refunds to customers to reflect certain adjustments to prior PJM Interconnection, L.L.C.'s ("PJM's") bills that will be made pursuant to a transmission rate settlement ("Settlement") approved by the Federal Energy Regulatory Commission ("FERC") at FERC Docket No. EL05-121-009.<sup>1</sup> The billing adjustments provide bill credits for a portion of PJM's Regional Transmission Expansion Plan ("RTEP") charges that were imposed on PECO after January 1, 2007. Under the Settlement, PJM will furnish to PECO \$79.5 million in prior-period bill adjustments that will be credited to PECO over a future period ending in 2025. PECO's tariff filing reflected all of the PJM bill credits it expects to receive through May 31, 2019 as a reduction to costs recoverable under the Company's existing NBT for the period after the Company's implementation of a reconcilable transmission cost adjustment clause ("TSC") on January 1, 2011.<sup>2</sup> The tariff supplement provides that PECO will continue to flow through to customers post-2011 bill credits it receives after May 31, 2019 in future semiannual adjustments to the Company's NBT. PECO did not flow through to customers \$5.5 million in billing adjustments related to transmission service for the period between 2007 and 2010, as an automatic adjustment clause was not in effect and all transmission costs were recoverable only through PECO's base rates, and PECO thus paid the RTEP charges itself.

On November 28, 2018, the Commission issued a Secretarial Letter in the M-docket in which it states that PECO's proposed rates "are consistent with the tariff and, accordingly, are permitted to become effective as filed" beginning on December 1, 2018.

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<sup>1</sup> *PJM Interconnection, L.L.C.*, Order on Contested Settlement, 163 FERC ¶ 61,168 (2018).

<sup>2</sup> PECO implemented the NBT on June 1, 2015 in accordance with the Pennsylvania Public Utility Commission's (the "Commission's") directive in the Company's third default service proceeding that certain PJM charges, including RTEP, should be recovered on a non-bypassable basis rather than through the bypassable TSC. *See* Petition of PECO Energy Co. for Approval of its Default Serv. Program for the Period from June 1, 2015 through May 31, 2017, Docket No. P-2014-2409362 (Order entered Dec. 4, 2014), p. 46.

Later in the day on November 28, 2018, the OCA filed its Complaint in new docket C-2018-3006242, claiming that it is unreasonable for PECO to retain the \$5.5 million of credits from 2007-2010.

The OCA's Complaint contains only two fundamental factual averments: (1) PECO will receive PJM bill credits under the FERC-approved Settlement and (2) PECO has not included \$5.5 million of those bill credits in the Company's semiannual adjustment to the NBT filed on November 7, 2018. Based solely on those averments, the Complaint further avers that it may be unreasonable for PECO not to refund to customers all of the prior-period bill adjustment credits that PJM is furnishing to PECO pursuant to the Settlement. However, the Complaint does not state or provide any additional factual detail as to why the OCA believes that PECO's proposal is unreasonable.

Because the Complaint is devoid of the averments that are reasonably necessary to enable PECO to begin to understand the basis for the OCA's claim for relief and to evaluate PECO defenses, on December 19, 2018, the Company filed a Preliminary Objection seeking a more specific pleading under 52 Pa. Code § 5.101(a)(3). Pursuant to that regulation, the OCA is permitted to file an amended Complaint to address the deficiencies in its original Complaint. The OCA chose, instead, to file an Answer to the Preliminary Objection on December 31, 2018 in which it opposed PECO's request. In its Answer, the OCA contended that PECO is not entitled to a more specific pleading because the OCA is not obliged to aver the fundamental factual or legal premises for the broad, conclusory statement in its Complaint that PECO's NBT is allegedly unlawful, unjust and unreasonable. Significantly, as an alleged justification for failing to remedy its deficient pleading, *the OCA stated that if PECO needed to probe the basis for the OCA's claim, discovery was available for PECO to do so. See OCA Answer, ¶ 4* (stating

that a more specific complaint is not required because “if a Defendant needs more information to prepare his answers, he may use discovery procedures”) (internal citations omitted).

In response to the OCA’s Answer, PECO served its Set I Interrogatories on January 4, 2019. Those Interrogatories seek to ascertain the factual averments upon which the OCA relies for its conclusory allegation that PECO’s NBT adjustment may be unreasonable, in violation of Sections 1301 and 2804 of the Code or contrary to “ratemaking policy.” A reasonable statement of those underlying averments is essential if PECO is to have a meaningful opportunity to prepare an Answer or dispositive motion to the OCA’s Complaint and to mount a defense. The OCA does not dispute that PECO’s discovery is relevant. Indeed, it invited such discovery in its Answer to PECO’s Preliminary Objections and admits in its Objections that it will ultimately provide the requested information through the discovery process. Nonetheless, the OCA now objects to all of PECO’s discovery because it contends that providing the fundamental factual averments underlying the legal conclusions in its Complaint would cause “unreasonable annoyance and burden” and would contravene the “attorney work product” privilege. The OCA’s Objections thus should be overruled for the reasons set forth more fully below.

**II. THE OCA’S OBJECTIONS SHOULD BE OVERRULED AND  
THE OCA SHOULD BE COMPELLED TO ANSWER ALL  
OF THE INTERROGATORIES IN PECO SET I**

**A. Legal Standard for Discovery Questions**

1. The Commonwealth Court of Pennsylvania has stated that “[d]iscovery itself is designed to promote free sharing of information so as to narrow the issues and limit unfair surprise. It is a tool which serves each litigant and promotes judicial economy.” *See Pittsburgh Bd. of Public Educ. V. M.J.N. by N.J.*, 105 Pa. Cmwlth. Ct. 397, 403, 524 A.2d 1385, 1388 (1987). Under the Commission’s regulations, the scope of discovery is broad. Section 5.321 outlines the scope of discovery as follows:

- (c) **Scope.** Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

52 Pa. Code § 5.321(c).

**B. PECO’s Set I Interrogatories Are Narrowly Tailored to Identify the Facts Upon Which the OCA’s Complaint Is Based and are Thus Relevant to the Subject Matter Involved in the Pending Action; Those Questions Provide PECO a Reasonable Opportunity to Prepare a Defense; The OCA’s Sweeping Objection That PECO’s Discovery is “Annoying” Does Not Provide a Basis For Allowing the OCA to Avoid Answering Discovery**

2. The OCA’s first objection argues that the information requested is “unreasonably annoying,” “oppressive,” and “burdensome.” According to Beasley’s Practice Guide for Pennsylvania Civil Discovery, 2017 Edition, §8.31: “If the basis for the objection is that the production would cause unreasonable annoyance, embarrassment, oppression, burden, or expense, the test to determine whether a request is ‘unreasonable’ under Pa. R. Civ. P. 4011(b)

involves weighing the relevance and materiality of discovery against the burden upon the responding party.”<sup>3</sup> The OCA made no attempt to describe how PECO’s interrogatories will place a burden on the OCA. As to relevance, however, a review of Appendix A will confirm that PECO’s Interrogatories were carefully tailored to elicit a factual explanation of why the OCA contends that PECO’s proposal is unreasonable. For example, ¶4G of the Complaint states in material part that:

A preliminary examination of PECO’s proposed NBT Semiannual Adjustment . . . indicates that the adjustment, specifically the proposal to retain \$5.5 million of the FERC-ordered credits, is or may be unjust, unreasonable, and in violation of the Pennsylvania Public Utility Code. . . Section 1301.

PECO’s Interrogatory I-1 inquires:

Reference OCA Complaint, Paragraph 4G. Please set forth the factual basis for the OCA’s allegation that the Proposed NBT Adjustment is in violation of Section 1301 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §1301.

That is a textbook example of a narrowly-tailored discovery question. Each of PECO’s remaining Set I Interrogatories follows that same pattern. PECO is not being unreasonably annoying, oppressive, or burdensome in making these inquires. PECO is trying to understand why the OCA thinks it may be unreasonable to exclude bill credits that relate to PJM charges that were incurred before the Company began recovering transmission costs from its customers through an automatic adjustment clause. Certainly that is relevant information that is critical for PECO to prepare its defense and determine whether the claims raised in the Complaint may be the proper subject of a early dismissal or resolution.

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<sup>3</sup> Pa. Rule of Civil Procedure is materially identical to the Commission’s parallel regulation at 52 Pa. Code 5.361 in that both allow an objection on the grounds of “unreasonable annoyance, embarrassment, oppression, burden or expense.”

**C. The OCA's Objections Cannot Be Reconciled with Its Previous Argument, Made in Response to PECO's Preliminary Objection, That PECO Should Use the Discovery Process to Seek Information Needed to Prepare the Company's Answer to the Complaint**

3. As previously explained, the OCA's Answer to PECO's Preliminary Objection, ¶4, contends that PECO is not entitled to a more specific Complaint because, the OCA alleges, *PECO has the opportunity to serve discovery to request information* needed to prepare a defense to the allegations raised in the Complaint. A few days after the OCA took that position, and in direct response to it, PECO propounded its Set I Interrogatories in which it uses the discovery process to elicit the factual support for the OCA's Complaint. The OCA now objects to answering those interrogatories, even though the OCA itself suggested that such interrogatories are the proper avenue for PECO to request the underlying factual support for the OCA's Complaint. The OCA is thus simultaneously claiming (in its Answer to POs) that it does not have to provide a more specific pleading because PECO can use the discovery process to develop its factual understanding of the OCA's Complaint, *and* (in its Objections) that it is burdensome and unreasonably annoying for PECO use the discovery process to develop its factual understanding of the OCA's Complaint.

4. Overall, the upshot of these two arguments, if allowed, is that the OCA will not have to provide the factual basis for its Complaint at this time, and presumably will not provide the factual basis for its Complaint until the OCA files its testimony or at some other time later in this proceeding not yet defined by the OCA. Under that nebulous timeline, PECO would not have a reasonable opportunity to prepare an answer to the Complaint or a dispositive motion because it would not have available the factual information requested in the Set I Interrogatories. PECO also would not have the opportunity to complete its own factual investigation of matters that are of concern to the OCA because PECO does not, and under this timeline will not for some time,

know what the OCA's concerns are. Moreover, without an understanding of the OCA's factual averments, PECO will be hampered in the preparation of its own evidentiary case in this proceeding. These two arguments made in tandem, if allowed to prevail, thus would result in a violation of PECO's due process rights to prepare an informed defense against the OCA's claims, or even to know what those claims actually are.

**D. In its Objections, the OCA Admits That it is Proper for PECO to Use the Discovery Process to Seek the Factual Basis for the OCA's Complaint**

5. In its Objections, p. 5, the OCA admits that, ultimately, it will provide the factual basis for its Complaint through the discovery process: "The facts supporting the OCA's complaint *will be established through the discovery process* and testimony . . ." This is a rather stark admission that discovery process is a proper tool to elicit the facts supporting the OCA's Complaint. The OCA's argument thus appears to be that, while it knows that it must eventually answer these discovery questions, it prefers not to do so at this early stage of the proceeding, but will do so later. PECO respectfully submits that the OCA's preference on when to time its answers to discovery is not a valid basis for objecting to discovery. If the OCA currently knows the facts that support its Complaint, it is required to state those facts in answers to discovery within the 20-day return period set by the Commission's regulations.<sup>4</sup> If the OCA does not currently know the facts that support its Complaint, then its answer to the discovery questions should so state (and then, consistent with the Commission's rules, the OCA should supplement

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<sup>4</sup> See 52 Pa. Code §5.342(d).

those answers if and when it does gain knowledge of the facts supporting its Complaint.)<sup>5</sup> But, either way, it must answer the questions within 20 days of the questions being posed.<sup>6</sup>

**E. The OCA's Attempt to Invoke Work Product Immunity to Withhold the Factual Basis for The Allegations in Its Complaint Should Be Rejected**

6. The OCA's second objection – that providing a reasonable statement of the facts underlying the relief requested in the Complaint would invade the attorney work product privilege – is contrary to the Commission's regulations that permit interrogatories to explore the factual support for a party's claims and contentions made in pleadings. Section 5.342(c)(5) of the Commission's regulations provides that an objection to an interrogatory is not valid if "based solely on the claim that an answer will involve an opinion or contention that is related to a fact or the application of law to fact." Under that regulation, PECO is fully entitled to ask the OCA to state the basis for the conclusory averments set forth in its Complaint.

7. It should also be noted that, eventually, the OCA is going to have to disclose both its legal theory of the case and the facts underlying its Complaint. Simply, if the OCA never discloses the facts that support its Complaint, it will not be possible for the OCA to meet its

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<sup>5</sup> If the answer is that the OCA does not currently know the factual basis for its Complaint, that needs to be stated. PECO could use such an answer as a basis for a dispositive motion. Alternatively, that answer could be used to develop an orderly litigation schedule that, for example, allows further opportunity for the OCA time to determine the factual basis for its Complaint but does not require PECO to proceed with development of its case until the basis for the OCA's position is known.

<sup>6</sup> Alternatively, the OCA could have sought an extension of time in which to answer discovery. Under 52 Pa. Code §1.15 (b), such a request would have needed to be in writing, made at least five days prior to the due date for answers (in this case, by January 9, 2019), and would have been required to "state the facts upon which the application rests." Presumably, such a request and accompanying statement of facts would have included a proposed timeline for answering the discovery, which could have been evaluated and integrated into an orderly schedule for this proceeding. The OCA chose not to utilize the procedure to request an extension of time.

burden of proof in this proceeding. The OCA is thus going to have to find some way to describe the factual support for its Complaint in a manner that satisfies the OCA's own concerns regarding protection of attorney work product. That is what PECO is requesting it do now. No discovery privilege lies in the OCA's apparent desire to delay the time at which it will be required to disclose to PECO facts (or lack thereof) supporting the OCA's Complaint (until some undefined time later in the discovery process, the filing of testimony, or the filing of briefs).

8. The OCA's Objections also improperly equate a statement of the facts supporting its Complaint with protected attorney work product. The information requested by PECO does not call for legal advice, documents reflecting legal advice, or documents prepared in anticipation of litigation. In fact, PECO Set I Interrogatory Nos. 1 through 7 do not seek documents at all. Interrogatory Nos. 8 and 9 only ask for documents that the OCA will rely upon to support its position if it disputes the service periods covered by the retained PJM bill credits outlined in the Company's NBT filing and Preliminary Objection. Again, the OCA will ultimately have to disclose the documents that it will rely upon for factual support of its Complaint. Its claim that such documents are confidential provides no basis for precluding discovery of the documents that the OCA will rely upon in the evidentiary process.

**F. The *Blue Pilot Order* Cited by the OCA Does Not Support a Ruling in Favor of the OCA's Objections**

9. In support of its Objections, the OCA cites to a discovery order issued by Administrative Law Judges ("ALJs") Barnes and Cheskis in the Polar Vortex litigation initiated by the OCA and the Attorney General ("AG") (jointly) against an electric generation supplier, Blue Pilot Energy, LLC ("Blue Pilot") based on numerous customer contacts that the OCA/AG

received regarding Blue Pilot's high prices and variable fixed contracts.<sup>7</sup> In that proceeding,

Blue Pilot inquired as follows:

Set forth in full and complete detail each and every fact that supports any allegation that you assert in this proceeding that Blue Pilot violated any Pennsylvania law or regulation or rule of the Commission.

ALJs Cheskis and Barnes noted (Blue Pilot Order, pp. 1-6) that, at the time they were evaluating whether to allow this discovery, the following procedural events had already occurred:

- The OCA and AG filed a 62-paragraph Joint Complaint (attached as Appendix C to this Motion).<sup>8</sup> PECO notes that even a casual examination of the Blue Pilot Joint Complaint reveals that it provides an extensive disclosure of the facts, including Blue Pilot's market practices and sales tactics the OCA and AG claimed constituted significant violations of the Public Utility Code and the Commission's regulations;
- Blue Pilot had filed an Answer to the Complaint;
- Sworn testimony by and exhibits from 97 consumer witnesses, with attendant opportunity to cross-examine, had been entered into the record; and
- The OCA and the AG had served the written prefiled testimony of their expert witnesses.

Given that procedural context, the OCA and the AG argued that Blue Pilot's interrogatory was impermissible because Blue Pilot *already had all of the requested facts in its possession*:

Joint Complainants have served the written testimony of approximately 97 consumer witnesses, 49 of whom provided additional testimony at the hearings on March 30, 2015 through April 1, 2015. Thirty-five additional testimonies were moved into the record by stipulation. Many of those consumers provided numerous statements, exhibits, or both, which support Joint Complainants' position that Blue Pilot misled or deceived consumers. Blue Pilot had the opportunity to cross-examine the consumers whose testimony is in the record. Furthermore, Joint Complainants have turned over all information and documents received from consumers, including but not limited to all

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<sup>7</sup> See Objections, pp. 2, 5 (citing *Commonwealth of Pennsylvania et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Order Granting in Part and Denying in Part Motion to Compel Response's to Blue Pilot Energy LLC's Interrogatories Set IV entered October 28, 2015) ("Blue Pilot Order")).

<sup>8</sup> See *Commonwealth of Pennsylvania et al. v. Blue Pilot Energy, LLC*, Docket No. C-2014-2427655 (Complaint filed June 20, 2015) ("Joint Complaint").

OAG complaints and all information received from OCA from Blue Pilot customers. Joint Complainants in their legal briefs to the ALJs and the Commission will rely on the testimony and evidence in the record, their expert and other non-consumer testimonies that will be served pursuant to the litigation schedule, and cross-examination of Blue Pilot's witnesses to support the allegations in their Joint Complaint. *Blue Pilot has all of this information in its possession.*

OCA/AG October 20, 2015 Joint Response to Blue Pilot Motion to Compel, pp. 3-4 (emphasis added) <http://www.puc.state.pa.us/pcdocs/1388549.pdf>. The *Blue Pilot* ALJs consequently held that Blue Pilot's interrogatory "appears to be seeking an organization of this evidence into findings of fact prior to the briefing stage in this proceeding, which goes beyond permissible discovery" and that the request was "overly broad, vague, and asks for attorney work-product" and therefore Blue Pilot's Motion to Compel an answer was denied.

10. The OCA argues that *Blue Pilot* justifies a ruling that PECO's interrogatories are similarly overbroad and that they similarly seek privileged attorney-work product. The OCA thus offers (Objections, p. 5) that, instead of providing answers to the instant discovery, "the OCA intends to address PECO's NBT adjustment through testimony and discovery. See, Blue Pilot Order at 5. The facts supporting the OCA's complaint will be established through the discovery process and testimony as in all cases involving rate changes by utilities."

11. *Blue Pilot* does not support the interpretation or procedure suggested by the OCA. *Blue Pilot* held that, where extensive facts have already been elicited on the record, additional discovery questions that broadly seek additional "facts" are impermissibly vague and should be understood as an attempt to force a litigant to organize a party's evidence into pre-brief findings of fact. (Such a request obviously would be unduly annoying.) *Blue Pilot* did not hold, however, that the OCA is somehow freed from answering discovery questions until the filing of its testimony or such other time as the OCA decides that it is time for it answer discovery. The ruling requested by the OCA would be impermissible, for at least four reasons.

12. First, as noted above, the *Blue Pilot Order* was based upon a situation where the entity asking the discovery already had all of the requested information in its possession and thus was deemed to be impermissibly seeking to have their opponent reveal the organizational thinking of counsel. In the instant case, PECO has none of the information it has requested and can only obtain that information from the OCA.

13. Second, the Commission's discovery regulations specifically state that a party's right to pursue discovery commences with the filing of a complaint – not at some later time as suggested by the OCA. *See* 52 Pa. Code §5.331(b).<sup>9</sup> Under the OCA's theory, it claims to be freed of the obligation to answer any discovery that seeks to understand the factual basis for its Complaint until such time as the OCA is ready to file testimony, which would be directly contrary to the Commission's procedural rules.

14. Third, allowing this approach would violate PECO's due process rights to prepare for the defense of its case. Under the OCA's suggested approach, PECO would have to proceed with development of its case and testimony without knowing what the OCA thinks that PECO did wrong. PECO thus would not have a reasonable opportunity to prepare an answer to the Complaint or to prepare a dispositive motion because it would not have available the factual information requested in the Set I Interrogatories. It should also be noted that the OCA apparently intends to wait until after it has seen PECO's answers to the OCA's discovery, and potentially until it has seen PECO's testimony, before it will answer PECO's discovery. *See* OCA Objections, p. 5 ("Since the instant proceeding is in its early stages, and no testimony has

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<sup>9</sup> Section 5.331(b) provides: "A party shall initiate discovery as early in the proceedings as reasonably possible. In a proceeding, the right to discovery commences when a complaint, protest or other adverse pleading is filed or when the Commission institutes an investigation or on the record proceeding, whichever is earlier."

been filed, the OCA intends to address PECO's NBT adjustment through testimony and discovery.") Under that proposed procedure, PECO therefore would have to develop its evidentiary case to respond to something that is known to OCA (the OCA's theory of the case, but unknown to PECO. This process thus would deprive PECO of its due process rights to prepare an informed defense against the OCA's claims, or even to know what those claims actually are before proceeding.

15. Fourth, the OCA has stated (Objections, p. 1) that it filed its Complaint in this proceeding "in order to more fully investigate and analyze PECO's proposed NBT adjustment and its decision to retain \$5.5 million in FERC-ordered credits." But as of the date of the filing of this Motion – which is 78 days after PECO's November 7, 2018 NBT filing -- the OCA has not served PECO with any discovery in furtherance of that investigation.

16. Fifth, if Your Honor sustains the OCA's Objections and holds that it does not have to tell PECO the facts that support its Complaint because such a request is unduly annoying and violates the attorney-client privilege, then if and when the OCA serves PECO with discovery seeking to understand PECO's case, it reasonably should be allowed to make that same set of objections and simply offer that it will reveal its factual case in its testimony. Otherwise, the law of this case would be that the OCA does not need to answer discovery until it is ready to do so, but PECO must respond upon service of discovery. That obviously would create a procedural stalemate that would not be workable for any party or the Commission. But that is what the OCA's suggested procedure could lead to.

17. PECO is not seeking information that is already in its possession, as was the case in *Blue Pilot*. PECO is not seeking to have the OCA spend time (and reveal the mental impressions of counsel) by forcing the OCA to organize already-presented facts into a pre-brief

findings of fact, as was the case in *Blue Pilot*. PECO is simply seeking to understand what the OCA believes that PECO did wrong. If the OCA does not know what it thinks PECO did wrong, it should say so in its answers to discovery. The *Blue Pilot Order* provides no justification for sustaining the OCA's Objections and thus allowing it to avoid answering discovery altogether until some later time of the OCA's choosing.

#### IV. CONCLUSION

For the reasons set forth above, the Objections of the OCA to PECO Interrogatory (Set I) should be dismissed and the OCA should be directed to answer PECO Interrogatory (Set I) Nos. 1-9.

Respectfully submitted,



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*Counsel for PECO Energy Company*

Dated: January 24, 2019

**PECO Motion to Compel**

**C-2018-3006242**

**M-2018-3005860**

**Appendix A**

**PECO's Interrogatories, Set I**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Non-Bypassable Transmission Service :  
Charge (NBT) Semiannual Adjustment, :  
PECO Energy Electric Tariff No. 5, : Docket No. M-2018-3005860  
Supplement No. 76, Effective : C-2018-3006242  
December 1, 2018 :

**NOTICE TO PLEAD**

*To: The Office of Consumer Advocate*

PECO Set I Discovery is enclosed. Pursuant to 52 Pa. Code §5.342, if you have any objections to these questions, you must state those objections in writing within ten days (in this case, by Monday, January 14, 2019); if you do wish to state a written objection, you must serve that objection on PECO, and separately file a Certificate of Service with the Commission (with a copy to the Administrative Law Judge, if one has been assigned by that date) to demonstrate that you have raised such objections. If you do not object to these questions, then within twenty days (in this case, by January 24, 2019) you must serve PECO with full written answers; at that time you must also file a Certificate of Service with the Commission (with a copy to the Administrative Law Judge) to demonstrate that you have served such answers.

File with:  
Rosemarie Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor  
Harrisburg, PA 17120

Serve any objections and the discovery answers, along with the certificate of service, to

Ward L. Smith, Esq.  
PECO Energy Company  
2301 Market Street, S-23  
Philadelphia, PA 19103  
[ward.smith@exeloncorp.com](mailto:ward.smith@exeloncorp.com)

Dated at Philadelphia, PA, January 4, 2019

  
Ward L. Smith

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>NON-BYPASSABLE TRANSMISSION</b>	<b>:</b>	
<b>SERVICE CHARGE (NBT)</b>	<b>:</b>	
<b>SEMIANNUAL ADJUSTMENT, PECO</b>	<b>:</b>	
<b>ENERGY ELECTRIC TARIFF NO. 5,</b>	<b>:</b>	<b>DOCKET NOs. M-2018-3005860</b>
<b>SUPPLEMENT NO. 76 EFFECTIVE</b>	<b>:</b>	<b>C-2018-3006242</b>
<b>DECEMBER 1, 2018</b>	<b>:</b>	

**INTERROGATORIES OF PECO ENERGY COMPANY  
TO THE OFFICE OF CONSUMER ADVOCATE  
SET I**

PECO Energy Company (“PECO” or the “Company”) hereby propounds these Interrogatories (Set I) to the Office of Consumer Advocate (“OCA”), to be answered by such person or persons capable of responding to these Interrogatories and authorized to do so. Telephone or other contact concerning availability and timing of formal responses is encouraged. The answer to each interrogatory should be started on a new page. The answers should restate the question asked and indicate the person(s) supplying the information.

**INSTRUCTIONS**

A. In answering these Interrogatories, please furnish all information available to you, including any such information in possession of your attorneys or anyone acting on your behalf, and not merely such information known of your own personal knowledge. If you cannot answer the Interrogatories in full after exercising due diligence to secure the information to do so, so state and answer to the extent possible.

B. If the answer to any of the Interrogatories is that you lack knowledge of some or all of the requested information, describe all efforts made by you to obtain the information necessary to answer that Interrogatory.

**C. If any matter responsive to any of the Interrogatories is withheld based on any claim of privilege, describe generally the matter withheld, state the privilege being relied upon, and identify all persons or entities who have or have had access to said matters. If you refuse to describe and/or produce any document on the basis of a claim of privilege or protection from discovery of any kind, with respect to each such document, set forth the following information:**

- (i) the date of the document;**
- (ii) its authors;**
- (iii) all recipients of the document;**
- (iv) the present location and custodian of the document; and**
- (v) the basis of the claim of privilege or protection from discovery.**

**In addition, if you refuse to produce information based on the grounds that such information is preliminary and/or still in draft form, set forth the following information:**

- (i) the date the information was first created or recorded;**
- (ii) the last date on which the information was changed or altered in any manner; and**
- (iii) the expected date that the information will be finalized.**

**D. Each lettered sub-part of a numbered Interrogatory is to be considered a separate Interrogatory for the purpose of your answers and objections. You must object separately to each sub-part and must answer any other sub-parts.**

**E. These Interrogatories are to be deemed continuing in nature, and you shall promptly supply, by way of supplemental response, any additional responsive information that may become known to you or anyone acting on your behalf after your answers have been prepared or served.**

F. For all documents produced, identify by Bates number (or other method of equal precision) which document or documents are responsive to each separate Interrogatory. If you respond by stating that the requested documents already have been produced in response to prior discovery requests, identify the responsive documents previously produced either by Bates number or other method of equal precision that, at a minimum, identifies the author(s), recipients(s) and date of creation and provides a general description of the document.

### **DEFINITIONS**

- a. "You" or "OCA" refers to the Office of Consumer Advocate and any agent, agency, representative, member or affiliate of the OCA.
- b. "PECO" or the "Company" refers to PECO Energy Company, and any agent, agency, or affiliate thereof.
- c. "Company" or "Respondent" refers to any agent, agency, or affiliate thereof.
- d. "Commission" or "PaPUC" refers to the Pennsylvania Public Utility Commission.
- e. "Assumption" refers to any predictions, projections, assumptions, or other estimates.
- f. "Proceeding" refers to the proceedings before the Pennsylvania Public Utility Commission at the docket numbers set forth in the caption of these Interrogatories.
- g. "Person" or "persons" means all individuals and entities, including natural persons, representative persons, public or private corporations, companies, unincorporated associations, partnerships, organizations, government entities or groups, plus any divisions, departments, or units thereof.
- h. "Document" or "documents" means any written, printed, typed, recorded, or graphic matter, whether produced or reproduced or stored on paper, cards, tapes, film, electronic facsimile, computer storage devices or any other devices or media, including, but not limited to papers; books; letters; photographs; objects; tangible things; correspondence; telegrams; cables; telex messages; memoranda; notes; notations; records; work papers; transcripts; minutes; reports and recordings of telephone or other conversations, or of interviews, or of conferences, or of other meetings; affidavits; statements; opinions; proposals; reports; studies; analyses; audits; evaluations; contracts; agreements; journals; statistical records; ledgers; books of account; bookkeeping entries; financial statements; tax returns; vouchers; checks; check

stubs; invoices; receipts; desk calendars; appointment books; diaries; lists; tabulations; summaries; sound recordings; computer printouts; data processing input and output; microfilms; all records kept by electronic, photographic, or mechanical means; and things similar to any of the foregoing, however denominated. When one or more of the foregoing documents is requested or referred to, the request or reference shall include, but is not limited to, the original and each and every copy and draft thereof having writings, notations, corrections, or markings unique to such copy or draft.

i. "Oral communication" means any and all non-written forms of expression or communication, whether face-to-face or by telephone, in a conference or otherwise.

j. "Identify" or "identification", when used in reference to a document, means to:

1. state the type of document (e.g., letter, log, report, etc.);
2. state its date;
3. state its title, heading or other designation and any other information (e.g., index or file number) which would facilitate the identification thereof;
4. identify the person(s) who prepared and/or signed the document;
5. identify the persons (or if widely distributed, the organization or classes of persons) to whom it was sent;
6. identify the last known location of the document and of each copy thereof having notations or markings unique to such copy;
7. if the document was, but no longer is, in your possession or subject to your control, identify its last known custodian, describe the circumstances under which it passed from your control to that person, and identify each person having knowledge of such circumstances;
8. describe its general subject matter and contents; and
9. if the document exceeds one page in length, or is contained in a series of documents or a larger portion, identify the specific document by appropriately identifying name or symbol, the number of the particular page or pages (or other descriptive aid) and of the line or lines thereof upon which the information referred to in the Interrogatory or your response appears.

k. "Identify" or "identification", when used in reference to a natural person, means to provide the following information:

1. his or her full name;

2. his or her business affiliation(s), position(s), title(s), and job description(s) during the period delineated in the Interrogatory (and the dates during which each affiliation, position, title, and job description applied to him or her);

3. his or her present or last known business address (and the date of that last knowledge); and

4. his or her present or last known residence address (and the date of that last knowledge).

1. “Identify” or “identification”, when used in reference to an oral communication or statement, means to:

1. state the date of the oral communication or statement;
2. state the place where it occurred;
3. identify the persons(s) making and listening to the oral communication or statement;
4. identify all other persons present at the time it was made;
5. if by telephone, identify the persons participating in the conversation and where each was located at the time of the call; and
6. describe the substance of the oral communication or statement.

m. “Date” means the exact day, month, and year if ascertainable, or, if not, the best approximation thereof or best approximation in relation to other events.

n. “Describe” means to set forth fully and clearly every relevant fact and/or event, including particulars of time, place and manner.

o. “Proposed NBT Adjustment” means the semiannual adjustment to PECO’s non-bypassable transmission charge set forth in PECO Electric Tariff No. 5, Supplement No. 76.

p. “RTEP charges” means the Regional Transmission Expansion Plan charges addressed in Federal Energy Regulatory Commission Docket No. EL05-121-009.

q. “Set forth the factual basis” for a particular assumption, belief or allegation means: (a) describe in detail the facts underlying the assumption or belief; (b) identify each and every document which constitutes, evidences, refers, or relates in any way to the assumption, belief or allegation; (c) identify each and every person who knows or believes to have knowledge or information concerning the assumption, belief, or allegation; and (d) describe in detail the nature of each such person’s knowledge or information.

- r. Where the context so requires:
1. the terms “and” and “or” mean “and/or”;
  2. the plural of a word includes the singular, and the singular includes the plural;
  3. the past tense of verb includes the present, and the present tense includes the past;
  4. the masculine gender includes feminine and neuter genders, and the neuter gender include the masculine and feminine.
- s. All other words are to be given their ordinary and usual meanings, according to a current edition of Webster’s Dictionary.

**PECO ENERGY COMPANY'S  
INTERROGATORIES TO THE  
OFFICE OF CONSUMER ADVOCATE  
SET I**

- PECO-OCA-I-1. Reference OCA Complaint, Paragraph 4.G. Please set forth the factual basis for the OCA's allegation that the Proposed NBT Adjustment is in violation of Section 1301 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1301.
- PECO-OCA-I-2. Reference OCA Complaint, Paragraph 4.G. Please set forth the factual basis for the OCA's allegation that the Proposed NBT Adjustment is in violation of Section 2804 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 2804.
- PECO-OCA-I-3. Reference OCA Complaint, Paragraph 4.G. Please set forth the factual basis for the OCA's allegation that the Proposed NBT Adjustment is contrary to "sound ratemaking principles and public policy" to the extent not already identified in the OCA's responses to Interrogatories OCA-I-1 and OCA-I-2.
- PECO-OCA-I-4. Reference OCA Complaint, Paragraph 4.D. If the OCA believes that customers paid all RTEP charges for which PECO was responsible from 2007 through 2010, please set the factual basis for its belief and identify the applicable provisions of PECO's tariffs under which PECO customers paid those charges.
- PECO-OCA-I-5. Reference OCA Answer to Preliminary Objections, p. 4. If the OCA believes the Proposed NBT Adjustment does or will constitute an action (done or omitted to be done) or thing in violation of the settlement of PECO's electric restructuring proceedings approved by order of the Commission at PaPUC Docket No. R-00973953, or in violation of the Order approving that settlement, please identify each provision of the settlement (or the portion of the Order) that the OCA believes is or will be violated.
- PECO-OCA-I-6. Reference OCA Answer to Preliminary Objections, p. 4. If the OCA believes the Proposed NBT Adjustment does or will constitute an action (done or omitted to be done) or thing in violation of the settlement of PECO's 2010 electric distribution base rate proceedings approved by order of the Commission at PaPUC Docket No. R-2010-2161575, or in violation of the Order approving that settlement, please identify each provision(s) of the settlement (or the portion of the Order) that the OCA believes is or will be violated.

- PECO-OCA-I-7. Reference OCA Answer to Preliminary Objections, ¶ 4. Please identify each method, act and practice with consumers that are the subject of the OCA's Complaint.
- PECO-OCA-I-8. Reference OCA Answer to Preliminary Objections, ¶ 1. Does the OCA deny that the settlement approved by the Federal Energy Regulatory Commission at Docket No. EL05-121-009 implemented a schedule of credits and charges to address costs collected from PECO and other load-serving entities for certain covered transmission enhancements during the 2007-2015 period? If the OCA denies that averment, state with specificity each part of the averment that the OCA denies and set forth the factual basis for the OCA's position that the averment (or any part of the averment) is not accurate. If any of such facts are set forth in any document upon which the OCA relied or intends to rely to support its position, identify each such document.
- PECO-OCA-I-9. Reference OCA Answer to Preliminary Objections, ¶ 5. Is it the OCA's position that RTEP charges billed to PECO prior to January 1, 2011 were recovered by PECO from PECO retail customers through charges that PECO imposed under its non-bypassable transmission charge? If the OCA's answer is in the affirmative, set forth the factual basis for the OCA's position. If any of such facts are set forth in any document upon which the OCA relied or intends to rely to support its position, identify each such document.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Non-Bypassable Transmission</b>	:	
<b>Service Charge (NBT) Semiannual</b>	:	<b>Docket No. M-2018-3005860</b>
<b>Adjustment, PECO Energy Electric</b>	:	
<b>Tariff No. 5, Supplement No. 76</b>	:	<b>Docket No. C-2018-3006242</b>
<b>Effective December 1, 2018</b>	:	
<b>v.</b>	:	
	:	
<b>PECO Energy Company</b>	:	

**CERTIFICATE OF SERVICE**

I, Ward L. Smith hereby certify that I served a copy of Interrogatories, Set I to the Office of Consumer Advocate , upon all interested parties listed below, via overnight delivery to:

**Richard Kanaskie  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120**

**Erin K. Fure  
Small Business Advocate  
Office of Small Business Advocate  
300 North Second Street  
Harrisburg, PA 17101**

**Harrison W. Breitman  
Darryl A. Lawrence  
Lauren M. Burge  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923**

**Dated: January 4, 2019**

  
\_\_\_\_\_  
**Ward L. Smith  
Counsel for PECO Energy Company  
2301 Market Street, S23-1  
Philadelphia, PA 19103  
Phone: (215) 841-6863  
Ward.Smith@exeloncorp.com**

**PECO Motion to Compel**  
**C-2018-3006242**  
**M-2018-3005860**  
**Appendix B**  
**OCA's Objections to**  
**PECO's Interrogatories, Set I**

**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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**OBJECTIONS OF THE OFFICE OF CONSUMER ADVOCATE TO PECO ENERGY  
COMPANY INTERROGATORY SET I**

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Pursuant to 52 Pa. Code Sections 5.342(e) and 5.349(d), the Office of Consumer Advocate (OCA) hereby files these Objections to PECO Energy Company (PECO or the Company) Interrogatories Set I to the OCA (PECO's Set I).

**I. INTRODUCTION**

On January 4, 2019, PECO served PECO's Set I on the OCA. PECO's Set I consists of nine questions directed to the OCA. The OCA submits that, at this stage of the proceeding, PECO's interrogatories are unreasonable, oppressive and burdensome, and would require responses that are protected by the attorney work product privilege. See, 52 Pa. Code § 5.361(a); see also, 52 Pa. Code § 5.323(a); Pa. R.C.P. 4003.3. The OCA reviewed PECO's filing, conducted preliminary investigation and research, and concluded that more facts were needed in order to understand whether PECO's proposal is, in fact, consistent with the Public Utility Code, sound ratemaking principles, and public policy. Thus, exercising its statutory authority, the OCA filed a Complaint in order to more fully investigate and analyze PECO's proposed NBT adjustment and its decision to retain \$5.5 million in FERC-ordered credits. The OCA's Complaint, as in all complaints filed when a utility files to change its rates, alleged that the rate change is, *or may be*, unjust, unreasonable, or otherwise in violation of the Public Utility Code,

sound ratemaking principles, and public policy. In this case, PECO has provided no testimony in support of its rate change at this time, and the OCA Complaint requested an investigation and denial of any rate change that is found not to be just, reasonable, or in accordance with sound ratemaking principles and public policy. A recent decision issued by Deputy Chief Judge Cheskis and Administrative Law Judge Barnes on a similar issue regarding an EGS' attempt to request every fact supporting an allegation or claim that the EGS violated any Pennsylvania law, regulation, or rule of the Commission states as follows:

Joint Complainants contend this interrogatory is impermissible as it seeks a mental impression, conclusion, or legal theory of Joint Complainants. Much of this case has already been litigated as the consumer testimonies together with consumer exhibits were already entered into the record subject to cross-examination on March 30 -- April 1, 2015. Blue Pilot appears to be seeking an organization of this evidence into findings of facts prior to the briefing stage in this proceeding, which goes beyond permissible discovery.

The Joint Complainants have pre-served written direct testimony of their expert witnesses as of October 20, 2015. Blue Pilot will be given opportunities to seek clarification and cross-examine expert witnesses as part of the procedural schedules. The identities of Joint Complainants' expert witnesses have been revealed to Blue Pilot. The request is overly broad, vague, and asks for attorney work product; accordingly, it will be denied.

Commonwealth of Pennsylvania, et al. v. Blue Pilot Energy, LLC, C-2014-2427655, Order Granting in Part and Denying in Part Motion to Compel Responses to Blue Pilot Energy, LLC's Interrogatories Set IV (entered on October 28, 2015) (Blue Pilot Order) at 5.

The OCA orally communicated its objections to Set I to PECO on January 9, 2019. The OCA and PECO were not able to resolve these issues. With respect to relief, the OCA requests that the Commission sustain the OCA's objections and find that PECO Set I seeks responses that are attorney work product in addition to being overly burdensome, oppressive, and unreasonably annoying. As such, the OCA submits the following objections pursuant to 52 Pa. Code Sections 5.342(e).

## II. PROCEDURAL HISTORY

On November 7, 2018, PECO filed its proposed semiannual adjustment to its Non-Bypassable Transmission Service Charge (NBT) to PECO Energy Electric Tariff No. 5, Supplement No. 76. As a part of this filing, PECO submitted a one-page explanation to the Commission regarding its reasoning for the NBT adjustment and the Company's decision to retain \$5.5 million in FERC-ordered credits. On November 29, 2018, the OCA filed a Complaint with the Commission. The Complaint alleges that a preliminary examination of PECO Energy Company's (PECO) proposed semiannual adjustment to its 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. See gen'ly, OCA Complaint. On December 19, 2018, PECO filed Preliminary Objections (P.O.s). See gen'ly, PECO P.O.s. PECO objected to the OCA's formal complaint based on an alleged insufficiency of the pleading. PECO P.O. ¶¶ 4-5, citing 52 Pa. Code § 5.101(a)(3). On December 31, 2018, the OCA provided its Answer to PECO's P.O.s. The OCA's Answer argues that PECO's P.O.s are unsupported and that the OCA's Complaint is sufficient. See gen'ly, OCA Answer to the P.O.s of PECO. On January 4, 2019, PECO served PECO's Set I interrogatories on the OCA. On January 8, 2019, Administrative Law Judge Marta Guhl was assigned to the proceeding in order to resolve any issues which may arise during the preliminary phase of the proceeding. On January 9, 2019, the OCA orally communicated their objections to PECO Set I interrogatories to PECO's Counsel. No resolution of the OCA's objections could be reached. Currently, there is no testimony filed by PECO in support of its proposed NBT adjustment and no procedural schedule has been issued in this matter. Moreover, a decision regarding PECO's

P.O.s alleging that the OCA's complaint is insufficient and the OCA's answer to PECO's P.O.s has not been issued.

### III. OBJECTIONS

The Pennsylvania Public Utility Commission's (Commission) regulations allow a participant to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant. 52 Pa. Code § 5.321(c). It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Id.

Section 5.361 of the Pennsylvania Code, however, specifically limits the scope of discovery in proceedings before the Commission. In particular, Section 5.361 provides the following:

- (a) No discovery or deposition is permitted which:
  - (1) Is sought in bad faith.
  - (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or participant.
  - (3) Relates to a matter which is privileged.
  - (4) Would require the making of an unreasonable investigation by the deponent, a participant or witness.

52 Pa. Code § 5.361(a).

The OCA objects to PECO's Set I interrogatories, because the requests seek information that is overly burdensome, oppressive, and would cause unreasonable annoyance. Further, the interrogatories seek information that is protected by the attorney work product privilege. In the following subsections, the OCA will explain its objections generally and specifically object to each interrogatory.

**A. PECO's Set I Interrogatories are Unreasonably Annoying, Oppressive, and Burdensome.**

The OCA objects to PECO Set I-1 through I-9 because the information sought is unreasonably annoying, oppressive, and burdensome. Pursuant to the Commission's regulation, discovery which would cause unreasonable annoyance or burden is not permitted. See, 52 Pa. Code § 5.361(a).

Further, several interrogatories in PECO's Set I mischaracterize the OCA's Complaint. See, PECO Set I-1 through I-4. Referring to the OCA's Complaint, PECO requests the factual bases for the OCA's underlying allegations beyond what is set forth in the Complaint. Id. PECO states that the OCA alleges that PECO's NBT adjustment is in violation of specific sections of the Public Utility Code, sound ratemaking principles and public policy. Id. The OCA's Complaint, however, states that PECO's NBT adjustment, specifically the proposal to retain \$5.5 million of the FERC-ordered credits, 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, OCA Complaint at ¶ 4.G (emphasis added). Moreover, PECO's allegations regarding the supposed legal and factual insufficiency of the OCA's Complaint have already been raised in its P.O.s, which have been answered by the OCA and are currently pending before Administrative Law Judge Guhl. See, PECO P.O.s; see also, OCA Answer to PECO's P.O.s. Since the instant proceeding is in its early stages, and no testimony has been filed, the OCA intends to address PECO's NBT adjustment through testimony and discovery. See, Blue Pilot Order at 5. The facts supporting the OCA's complaint will be established through the discovery process and testimony as in all cases involving rate changes by utilities.

The remaining interrogatories in PECO's Set I reference the OCA's Answer to PECO's P.O.s. See, PECO Set I-4 through I-9. As the OCA's Answer to PECO's P.O.s was recently filed with the Commission, the OCA is currently awaiting an ALJ decision. Instead of waiting for ALJ Guhl's decision regarding PECO's preliminary objections, PECO seeks additional explanation of the OCA's answers to PECO's preliminary objections beyond what is reasonable at this stage of the proceeding. The OCA's governing statute authorizes the OCA to represent the interests of Pennsylvania consumers. The OCA filed its Complaint to further investigate PECO's claim that retaining \$5.5 million in FERC-ordered credits is lawful and in accordance with sound ratemaking principles and public policy. See gen'ly, OCA Complaint. Requesting the OCA to provide further factual explanation and legal opinions at this stage of the proceeding is inappropriate, annoying, overly burdensome, and unreasonable. As such, the OCA's objections should be sustained.

**B. PECO's Set I interrogatories are beyond the permissible scope of discovery because it seeks attorney work product.**

The OCA objects to PECO Set I-1 through I-9 insofar as the interrogatories require the OCA to disclose attorneys' mental impressions, conclusions, opinions, or legal theories. Such information is attorney work product, which is beyond the permissible scope of discovery. Section 5.323(a) of the Pennsylvania Code is consistent with Pa. R.C.P. 4003.3 which codifies the attorney work product privilege and states the following:

The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

Pa. R.C.P. 4003.3. PECO is asking the OCA to disclose legal and factual research and reasoning regarding PECO's proposal to adjust its NBT. In the Commonwealth of Pennsylvania, the existence of the attorney work product privilege when attorneys act in their professional capacity for governmental agencies is well established. Sedat, Inc. v. Dep't of Env'tl. Res., 163 Pa. Commw. 29, 33, 614 A.2d 1243, 1244 (1994), citing Okum v. Unemployment Compensation Board of Review, 77 Pa. Commw. 386, 465 A.2d 1324 (1983). To allow the defendant access to such privileged information, would allow him to “. . . get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate ‘on wits borrowed from the adversary.’” Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they may be settled.” Sedat, 163 Pa. Commw. At 34, 641 A.2d at 1245, quoting F.T.C. v. Grolier, 462 U.S. 19, 30-31, 103 S.Ct. 2209, 2216, 76 L.Ed.2d 387, 397-98 (1983)(J. Brennan, concurring). Moreover, when a representative employee of the attorney who is acting as the agent of the attorney and is directed by the attorney to do the desired preparatory work in the investigation of a case and its preparation for trial, the product of that work becomes a part of the hiring attorney's work product, just as if the work had been done by the attorney in person or by an employee of his office. 35 ALR 3d 412, 429; See also Brant v. Turnamian, 9 Pa. D. & C. 4<sup>th</sup> 216, 219 (Com. Pl. 1991).

In PECO's Set I, PECO is requesting the OCA to disclose 1) the factual basis for the OCA's legal opinion that PECO's proposed NBT adjustment is in violation of Sections 1301 and 2804 of the Public Utility Code; 2) the factual basis for OCA's legal opinion that PECO's proposed NBT adjustment is contrary to sound ratemaking principles and public policy; 3) a factual and legal analysis of specific provisions of PECO's tariffs; 4) the OCA's legal opinion

regarding the settlement entered in Pa. PUC Docket No. R-00973953 and its relationship to the instant proceeding; 5) the OCA's legal opinion regarding the settlement entered in Pa. PUC Docket No. R-2010-2161575 and its relationship to the instant proceeding; 6) each method, act and practice with consumers that are the subject of the OCA complaint beyond the act of retaining \$5.5 million in FERC-ordered credits already identified in the OCA's Complaint and the OCA's answer to PECO's P.O.s; 7) the OCA's legal position regarding FERC Docket No. EL05-121-009 and basis for the OCA's alleged anticipated denial of a FERC schedule of credits, and; 8) the OCA's position regarding Regional Transmission Expansion Plan (RTEP) charges billed to PECO prior to January 1, 2011. See, PECO Set I. Discovery seeking further analysis by counsel for the OCA equates to seeking the OCA's preliminary legal analysis, which will be provided by the OCA in their brief in final form in the event that the proceeding reaches the briefing phase.

The OCA's position regarding PECO's proposed adjustment to its NBT is not solely factual data. PECO is essentially seeking an evaluative summary because this is information that would have been included in the overall strategic and tactical approach in the determination of whether to file a Complaint in this matter. In short, PECO's Set I seeks attorney work product. As such, the OCA's objections should be sustained.

**C. The OCA's Specific Objections to PECO's Set I Interrogatories Should be Sustained.**

The OCA specifically responds to PECO's Set I interrogatories as follows:

PECO-OCA-I-1. Reference OCA Complaint, Paragraph 4.G. Please set forth the factual basis for the OCA's allegation that the Proposed NBT Adjustment is in violation of Section 1301 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 1301.

Objection: The OCA objects to PECO-OCA-I-1 as the interrogatory is overly burdensome, oppressive, and unreasonably annoying, and requests information that is protected by the attorney work product privilege. The

OCA has already set forth the factual basis for the allegation that the proposed NBT adjustment is or may be in violation of Section 1301 of the Pennsylvania Public Utility Code in the paragraph of its Complaint referenced by PECO. PECO has already filed preliminary objections arguing that the OCA's Complaint is insufficient, yet, the OCA's Complaint is based on a one-page explanation for PECO's NBT adjustment provided by PECO. Requesting that the OCA provide additional facts currently within the control of PECO is unreasonably burdensome at this stage of the proceeding. The interrogatory is unreasonably annoying since PECO is aware that its preliminary objections alleging insufficiency have already been filed and are pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. Moreover, this interrogatory mischaracterizes the OCA's Complaint. The OCA's Complaint states that PECO's NBT adjustment, specifically the proposal to retain \$5.5 million of FERC-ordered credits is *or may be* unjust, unreasonable, and in violation of the Pennsylvania Public Utility Code, 66 Pa. C.S. Section 1301 *et seq.* See, OCA Complaint at ¶ 4.G. Additionally, this interrogatory requests attorney work product since the interrogatory asks for a factual basis for the OCA's allegation that PECO's proposed NBT adjustment is in violation of Section 1301, which would necessitate a legal analysis. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-2. Reference OCA Complaint, Paragraph 4.G. Please set forth the factual basis for the OCA's allegation that the Proposed NBT Adjustment is in violation of Section 2804 of the Pennsylvania Public Utility Code, 66 Pa. C.S. § 2804.

Objection: The OCA objects to PECO-OCA-I-2 as the interrogatory is overly burdensome, oppressive, and unreasonably annoying, and requests information that is protected by the attorney work product privilege. Requesting that the OCA provide additional facts currently within the control of PECO is unreasonably burdensome at this stage of the proceeding. The interrogatory is unreasonably annoying since PECO is aware that its preliminary objections alleging insufficiency have already been filed and are pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. Moreover, this interrogatory mischaracterizes the OCA's Complaint. The OCA's Complaint states that PECO's NBT adjustment, specifically the proposal to retain \$5.5 million of FERC-ordered credits is *or may be* unjust, unreasonable, and in violation of the Pennsylvania Public Utility Code, 66 Pa. C.S. Section 2804 *et seq.* See, OCA Complaint at ¶ 4.G. Additionally, this interrogatory requests attorney work product since the interrogatory asks for a factual basis for the OCA's allegation that PECO's proposed NBT adjustment is in violation of Section

2804, which would necessitate a legal analysis. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-3. Reference OCA Complaint, Paragraph 4.G. Please set forth the factual basis for the OCA's allegation that the Proposed NBT Adjustment is in contrary to "sound ratemaking principles and public policy" to the extent not already identified in the OCA's responses to Interrogatories OCA-I-1 and OCA-I-2.

Objection: The OCA objects to PECO-OCA-I-3 as the interrogatory is overly burdensome, oppressive, and unreasonably annoying, and requests information that is protected by the attorney work product privilege. Requesting that the OCA provide additional facts currently within the control of PECO is unreasonably burdensome at this stage of the proceeding. The interrogatory is unreasonably annoying since PECO is aware that its preliminary objections alleging insufficiency have already been filed and are pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. Moreover, this interrogatory mischaracterizes the OCA's Complaint. The OCA's Complaint states that PECO's NBT adjustment, specifically the proposal to retain \$5.5 million of FERC-ordered credits is in 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." OCA Complaint at ¶ 4.G (emphasis added). Additionally, this interrogatory requests attorney work product since the interrogatory asks for a factual basis for the OCA's allegation that PECO's proposed NBT adjustment is contrary to sound ratemaking principles and public policy, which would necessitate a legal analysis. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-4. Reference OCA Complaint, Paragraph 4.D. If the OCA believes that customers paid all RTEP charges for which PECO was responsible from 2007 through 2010, please set the factual basis for its belief and identify the applicable provisions of PECO's tariffs under which PECO customers paid those charges.

Objection: The OCA objects to PECO-OCA-I-4 as the interrogatory is overly burdensome, oppressive, and unreasonably annoying, and requests information that is protected by the attorney work product privilege. This interrogatory mischaracterizes the OCA's Complaint. Requesting that the OCA provide additional facts currently within the control of PECO is

unreasonably burdensome at this stage of the proceeding. The interrogatory is unreasonably annoying since PECO is aware that its preliminary objections alleging insufficiency have already been filed and are pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. Additionally, this interrogatory requests attorney work product since the interrogatory asks for not only a factual basis for the OCA's belief, but additionally asks the OCA to identify and analyze applicable provisions of PECO's tariffs, which would necessitate a legal opinion. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-5. Reference OCA Answer to Preliminary Objections, p. 4. If the OCA believes the Proposed NBT Adjustment does or will constitute an action (done or omitted to be done) or thing in violation of the settlement of PECO's electric restructuring proceedings approved by order of the Commission at PaPUC Docket No. R-00973953, or in violation of the Order approving that settlement, please identify each provision of the settlement (or the portion of the Order) that the OCA believes is or will be violated.

Objection: The OCA objects to PECO-OCA-I-5 as the interrogatory requests information that is protected by the attorney work product privilege and is overly burdensome, oppressive, and unreasonably annoying. PECO is asking the OCA to provide its legal opinion of the settlement of PECO's electric restructuring proceedings approved by order of the Commission at Pa. PUC Docket No. R-00973953, or the Order approving the settlement. Moreover, PECO is requesting that the OCA specifically identify each provision of the settlement or the portion of the order that the OCA believes is or will be violated. Any response provided by the OCA would necessitate a legal impression as the OCA would be legally analyzing both a settlement approved by the Commission and a Commission order. The interrogatory is unreasonably burdensome and annoying since PECO is asking the OCA to reference its answer to PECO's P.O.s, in which PECO is alleging that the OCA's Complaint is insufficient, and provide additional legal analysis beyond what is stated in the OCA's answer to PECO's P.O.s which are currently pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-6. Reference OCA Answer to Preliminary Objections, p. 4. If the OCA believes the Proposed NBT Adjustment does or will constitute an action (done or omitted to be done) or thing in violation of the settlement of PECO's 2010 electric distribution base rate proceedings approved by order of the Commission at PaPUC Docket No. R-2010-2161575, or in violation of the Order approving that settlement, please identify each provision(s) of the settlement (or the portion of the Order) that the OCA believes is or will be violated.

Objection: The OCA objects to PECO-OCA-I-6 as the interrogatory requests information that is protected by the attorney work product privilege and is overly burdensome, oppressive, and unreasonably annoying. PECO is asking the OCA to provide its legal opinion of the settlement of PECO's 2010 electric distribution base rate proceedings approved by order of the Commission at Pa. PUC Docket No. R-2010-2161575, or the order approving the settlement. Moreover, PECO is requesting that the OCA specifically identify each provision of the settlement or the portion of the order that the OCA believes is or will be violated. Any response provided by the OCA would necessitate a legal impression as the OCA would be legally analyzing both a settlement approved by the Commission and a Commission order. The interrogatory is unreasonably burdensome and annoying since PECO is asking the OCA to reference its answer to PECO's P.O.s, in which PECO is alleging that the OCA's Complaint is insufficient, and provide additional legal analysis beyond what is stated in the OCA's answer to PECO's P.O.s which are currently pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-7. Reference OCA Answer to Preliminary Objections, ¶ 4. Please identify each method, act and practice with consumers that are the subject of the OCA's Complaint.

Objection: The OCA objects to PECO-OCA-I-7 as the interrogatory requests information that is protected by the attorney work product privilege and is overly burdensome, oppressive, and unreasonably annoying. Requesting that the OCA provide additional facts currently within the control of PECO is unreasonably burdensome at this stage of the proceeding. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. The interrogatory is unreasonably annoying since PECO is asking the OCA to reference its answer to PECO's P.O.s, in which PECO is alleging that the OCA's Complaint is insufficient, and provide additional legal analysis beyond what is stated in the OCA's answer to PECO's P.O.s

which are currently pending before the ALJ. Additionally, any response provided by the OCA would necessitate a legal impression as the OCA would be legally analyzing whether certain methods, acts, and practices violate the Public Utility Code, sound ratemaking principles, and public policy. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-8. Reference OCA Answer to Preliminary Objections, ¶ 1. Does the OCA deny that the settlement approved by the Federal Energy Regulatory Commission at Docket No. EL05-121-009 implemented a schedule of credits and charges to address costs collected from PECO and other load-serving entities for certain covered transmission enhancements during the 2007-2015 period? If the OCA denies that averment, state with specificity each part of the averment that the OCA denies and set forth the factual basis for the OCA's position that the averment (or any part of the averment) is not accurate. If any of such facts are set forth in any document upon which the OCA relied or intends to rely to support its position, identify each such document.

Objection: The OCA objects to PECO-OCA-I-8 as the interrogatory requests information that is protected by the attorney work product privilege and is overly burdensome, oppressive, and unreasonably annoying. PECO is asking the OCA to provide a legal analysis of a settlement approved by FERC at Docket No. EL05-121-009. The interrogatory is unreasonably burdensome and annoying since PECO is asking the OCA to reference its answer to PECO's P.O.s, in which PECO is alleging that the OCA's Complaint is insufficient, and provide additional legal analysis beyond what is stated in the OCA's answer to PECO's P.O.s which are currently pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. Additionally, any response provided by the OCA would necessitate a legal impression as the OCA would be legally analyzing the FERC order at Docket No. EL05-121-009. PECO-OCA-I-8 goes one step further by asking the OCA to identify documents which the OCA relies on or intends to rely on to support its legal position, which would further necessitate additional attorney work product. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

PECO-OCA-I-9. Reference OCA Answer to Preliminary Objections, ¶ 5. Is it the OCA's position that RTEP charges billed to PECO prior to January 1, 2011 were recovered by PECO from PECO retail customers through charges that PECO imposed under its non-bypassable transmission charge? If the

OCA's answer is in the affirmative, set forth the factual basis for the OCA's position. If any of such facts are set forth in any document upon which the OCA relied or intends to rely to support its position, identify each such document.

Objection: The OCA objects to PECO-OCA-I-9 as the interrogatory requests information that is protected by the attorney work product privilege and is overly burdensome, oppressive, and unreasonably annoying. PECO is asking for the OCA's legal position regarding RTEP charges billed to PECO prior to January 1, 2011. The interrogatory is unreasonably burdensome and annoying since PECO is asking the OCA to reference its answer to PECO's P.O.s, in which PECO is alleging that the OCA's Complaint is insufficient, and provide additional legal analysis beyond what is stated in the OCA's answer to PECO's P.O.s which are currently pending before the ALJ. The facts supporting the OCA's Complaint will be established through the discovery process as in all cases involving rate changes by utilities. Additionally, any response provided by the OCA would necessitate a legal impression as the OCA would be legally analyzing whether RTEP charges billed to PECO prior to January 1, 2011 were recovered by PECO from PECO retail customers through charges that PECO imposed under its NBT. PECO-OCA-I-9 goes one step further by asking the OCA to identify documents which the OCA relies on or intends to rely on to support its legal position, which would further necessitate additional attorney work product. As such, the OCA objects and requests relief in the form of a sustained objection as the interrogatory is overly burdensome, oppressive, unreasonably annoying, and requests information that is protected by the attorney work product privilege.

**V. CONCLUSION**

WHEREFORE, the Office of Consumer Advocate respectfully requests that these Objections be sustained, because PECO's Set I seeks information that is unreasonably burdensome and constitutes attorney work product.

Respectfully Submitted,

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Harrisburg, PA 17101-1923  
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Fax: (717) 783-7152

January 14, 2019  
265164

**PECO Motion to Compel**

**C-2018-3006242**

**M-2018-3005860**

**Appendix C**

**Joint Complaint, Blue Pilot Energy**

**PECO's Interrogatories, Set I**

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by	:	
Attorney General KATHLEEN G. KANE,	:	
Through the Bureau of Consumer Protection.	:	
	:	
And	:	
	:	
TANYA J. McCLOSKEY, Acting Consumer	:	
Advocate,	:	
Complainants	:	Docket No. C-2014-
	:	
v.	:	
	:	
BLUE PILOT ENERGY, LLC	:	
Respondent	:	

**JOINT COMPLAINT**

AND NOW, comes the Commonwealth of Pennsylvania, by Attorney General Kathleen G. Kane through the Bureau of Consumer Protection (Attorney General) and the Acting Consumer Advocate Tanya J. McCloskey (OCA) (collectively referred to as Joint Complainants), who bring this action pursuant to the Public Utility Code, 66 Pa. C.S. Ch. 28, the Pennsylvania Public Utility Commission's regulations, 52 Pa. Code Ch. 54, 56 and 111, the Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1, *et seq.* (Consumer Protection Law) and the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.*

## **PRELIMINARY STATEMENT**

1. This Joint Complaint is brought in the public's interest to address multiple violations of Pennsylvania law and Pennsylvania Public Utility Commission (Commission) orders and regulations, whereby consumers were misled and deceived as to the price they would pay for their electricity, all to their harm and detriment.

## **PARTIES**

2. Tanya J. McCloskey is the Acting Consumer Advocate. The Office of Consumer Advocate is the agency authorized by law to represent the interests of utility consumers before the Commission as provided in 71 P.S. § 309-1, *et seq.* The names and address of the OCA's attorneys are as follows:

Candis A. Tunilo  
Assistant Consumer Advocate  
Christy M. Appleby  
Assistant Consumer Advocate  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923

3. The Attorney General is authorized by the Consumer Protection Law to bring an action in the name of the Commonwealth of Pennsylvania to restrain by temporary or permanent injunction unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as provided in 73 P.S. § 201-4.

4. The Consumer Protection Law further authorizes the Attorney General to take such action when she has reason to believe that any person is using or is about to use a method, act, or practice unlawful under the Consumer Protection Law and when she determines that proceedings would be in the public interest as provided in 73 P.S. § 201-4.

5. The Attorney General, as the chief law officer of the Commonwealth of Pennsylvania pursuant to Article IV § 4.1 of the Pennsylvania Constitution, is further authorized to initiate and maintain this action, and does so, pursuant to the Commonwealth Attorneys Act, 71 Pa. Stat. § 732-204. The names and address of the Attorney General attorneys are as follows:

John M. Abel, Senior Deputy Attorney General  
Margarita Tulman, Deputy Attorney General  
Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, Pennsylvania 17120

6. Blue Pilot Energy, LLC (Respondent) is a Nevada limited liability company licensed as an aggregator and broker/marketer of retail electricity to residential, small commercial (25 kw and under demand), large commercial (over 25 kw demand), and industrial customers throughout the Commonwealth. The Commission approved Respondent's license application by Order entered June 10, 2011 at Docket No. A-2011-2223888.

7. The Commission is responsible for regulating the service of electric generation suppliers, as it relates to their activities in the marketing and sale of electricity and electric services. See 66 Pa. C.S. § 2809(e).

8. Respondent provides electric generation supplier (EGS) services to residential customers, and as such, it must comply with applicable residential service regulations in Chapters 54 and 56 of the Commission's regulations. See 52 Pa. Code Ch. 54 and 56. See also License Application of Blue Pilot Energy, LLC for Approval to Offer, Render, Furnish or Supply Electricity or Electric Generation Services as an Aggregator and Broker/Marketer of Retail Electric Power, Docket No. A-2011-2223888, Order at 3 (June 10, 2011) (Licensing Order). Respondent must also comply with Chapter 111 of the Commission's regulations. See 52 Pa. Code § 111.1.

9. Additionally, Respondent must abide by all applicable federal and state laws and Commission regulations, procedures and orders and ensure that its employees, representatives, agents and independent contractors do so as well. See Licensing Order at 3-4.

10. Respondent offers variable rate electric generation service to residential customers throughout Pennsylvania.

11. Upon information and belief, Respondent uses a variety of marketing and advertising mediums to solicit residential customers for its variable rate plan including telephonic, internet, mass mail and print solicitations.

12. Respondent by advertising, marketing, and selling variable rate electric generation service is engaged in trade or commerce within the Commonwealth.

13. Nearly one-third of the consumers charged high variable prices by Respondent's actions are citizens over the age of 60.

14. On or about February 10, 2014, the OCA began receiving a high volume of calls and written correspondence from residential consumers on variable rate plans with EGSS regarding the level of electric generation charges on the consumers' electric bills. The OCA has received approximately 3,000 contacts from consumers regarding variable rates.

15. As of May 5, 2014, the OCA had collected information from approximately 2,434 of its consumer contacts.

16. Of the referenced 2,434 contacts, 83 or 3.4% were from customers of Respondent. Of the referenced 83 total contacts, the OCA collected written information from approximately 10 customers.

17. From February 27, 2014 to June 4, 2014, the Attorney General received approximately 39,607 telephone calls and 7,503 consumer complaints related to variable rates

charged by EGSs. Of the 7,503 consumer complaints, 232 or approximately 3.1% were against Respondent.

18. Upon information and belief, from January 1, 2014 to April 21, 2014, approximately 500 Formal Complaints were filed at the Commission by customers regarding variable rates charged by EGSs. Additionally, upon information and belief, approximately 6,500 informal complaints and nearly 10,000 inquiries were made by consumers to the Commission regarding variable rates charged by EGSs. Of the approximately 203 Formal Complaints reviewed by the OCA to date, approximately 11 or 5.4% were filed against Respondent.

#### **COUNT I – FAILING TO PROVIDE ACCURATE PRICING INFORMATION**

19. The foregoing paragraphs are incorporated herein.

20. Respondent's Disclosure Statement states as follows regarding pricing:

**Price per Kilowatt Hour.** You have a variable rate plan. Your price may vary on a month-to-month basis. This price includes Transmission Charges, but excludes applicable state and local Sales Taxes and the Distribution Charges from your local EDC. At any time, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets. Your variable rate will be based upon PJM wholesale market conditions. Sudden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot's electricity customer relationships. Such fluctuations or conditions may result in Blue Pilot incurring unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill. Please log on to [www.bluepilotenergy.com](http://www.bluepilotenergy.com) or call Customer Service at 877-513-0246 for additional information about our current pricing.

The Disclosure Statement is attached hereto as Appendix A.

21. The Commission's regulations require that variable pricing terms include the conditions of variability and the limits on price variability. See 52 Pa. Code § 54.5(c). The variable pricing terms of Respondent fail to adequately state the conditions of variability and the limits on price variability in violation of the Commission's regulation.

22. The Commission's regulations require that EGSs "provide accurate information about their electric generation services using plain language and common terms in communications with consumers." See 52 Pa. Code § 54.43(1). Additionally, EGSs must provide information to consumers "in a format that enables customers to compare the various electric generation services offered and the prices charged for each type of service." Id.

23. The Commission's regulations require compliance with the Consumer Protection Law. See 52 Pa. Code § 54.43(f) and 111.12(d)(1).

24. The Consumer Protection Law prohibits fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding. See 73 P.S. § 201-2(4)(xxi).

25. It is believed and therefore, averred that the Respondent has violated and continues to violate the Commission's regulations by failing to provide accurate pricing information in plain language and using common terms that consumers understand.

26. It is believed and therefore, averred that consumers could not determine from the Disclosure Statement the price that they would or could be charged by the Respondent or how the price would be calculated by Respondent.

27. It is believed and therefore, averred that Respondent violated and continues to violate the Commission's regulations by failing to provide information to its customers in a manner that would allow them to compare offers.

## **COUNT II – PRICES NONCONFORMING TO DISCLOSURE STATEMENT**

28. The foregoing paragraphs are incorporated herein.

29. Upon information and belief, Respondent charged its variable rate customers prices that were at least as high as \$0.50 per kWh for electricity.

30. It is averred, upon information and belief, that Respondent's prices charged to customers in early 2014 were not reflective of the cost to serve residential customers.

31. By way of example, the cost to serve the average residential heating customer in January 2014 should not have exceeded approximately \$0.23 per kWh. See Affidavit of Dr. Steven L. Estomin, attached hereto as Appendix B.

32. It is averred, upon information and belief, that the aforementioned prices do not conform to the variable rate pricing provision of the Company's Disclosure Statement.

### **COUNT III – MISLEADING AND DECEPTIVE PROMISES OF SAVINGS**

33. The foregoing paragraphs are incorporated herein.

34. Of the referenced 232 consumer complaints against Respondent received by the Attorney General, 5 of the complainants indicated that they believed Respondent would always save them money over the Price to Compare (PTC), based upon Respondent salespeople's promises. These complainants then received bills for Respondent's generation service that were at least two or three times more than the PTC and in some cases, over six times more than the PTC.

35. Of the referenced 232 consumer complaints against Respondent received by the Attorney General, 17 or approximately 7.3% of the complainants indicated that they believed Respondent would always be "lower than or equal to" the PTC and/or that Respondent price would be competitive with the PTC. The complainants' understanding was based upon Respondent salespeople's promises. These complainants then received bills for Respondent's generation service that were at least two or three times more than the PTC and in some cases, over six times more than the PTC.

36. Of the referenced 10 customers that provided written correspondence and information to the OCA, 3 or 30% stated that Respondent's salespeople promised guaranteed savings over the PTC and/or promised a price "competitive" with the PTC as inducement for complainants to switch to Respondent. These complainants then received bills for Respondent's generation service that were at least two or three times more than the PTC and in some cases, over six times more than the PTC.

37. Of the referenced 11 Formal Complaints filed at the Commission against Respondent and reviewed by the OCA to date, at least 3 complainants averred that Respondent's salespeople promised guaranteed savings over the PTC and/or promised a price "competitive" with the PTC as inducement for complainants to switch to Respondent. These complainants then received bills for Respondent's generation service that were at least two or three times more than the PTC and in some cases, over six times more than the PTC.

38. The Commission's regulations state that a licensed EGS is responsible for any fraudulent, deceptive or other unlawful marketing acts by its employees, agents and representatives. See 52 Pa. Code § 54.43(f).

39. The Commission's regulations require compliance with the Consumer Protection Law. See 52 Pa. Code §§ 54.43(f) and 111.12(d)(1).

40. The Consumer Protection Law defines "unfair or deceptive acts or practices" as, *inter alia*:

- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has sponsorship, approval, status, affiliation, or connection that he does not have;

- Making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; and
- Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.

See 73 P.S. § 201-2(4)(v), (xi) and (xxi).

41. It is averred, upon information and belief, that Respondent's employees, agents and/or representatives have engaged in and continue to engage in activities that are fraudulent, deceptive and/or in violation of the Commission's regulations and orders and the Consumer Protection Law by promising savings that may not, and for many customers did not, materialize.

42. Additionally, as averred above, upon information and belief, Respondent has failed to adequately train and monitor its agents, as required by the Commission's regulations.

See 52 Pa. Code §§ 111.4 and 111.5.

#### **COUNT IV- LACK OF GOOD FAITH HANDLING OF COMPLAINTS**

43. The foregoing paragraphs are incorporated herein.

44. Of the referenced 11 Formal Complaints filed at the Commission against Respondent reviewed by the OCA to date, at least 3 or approximately 27% of the complainants averred that when they attempted to contact Respondent about the variable rate charges on their bills, they could not get through to the Company on the telephone and/or their emails to the Company went unanswered.

45. Of the referenced 10 customers that provided written correspondence and information to the OCA, 3 or 30% stated that when they contacted Respondent about the variable rate charges on their bills, the Company refused to address the customers' complaints and disputes about their rates.

46. The Commission's regulations require EGSs to utilize good faith, honesty and fair dealing with residential customers. See 52 Pa. Code § 56.1(a). See also Licensing Order at 3.

47. The Commission's regulations set forth the procedure for EGSs to use when they receive notice of a dispute, including a billing dispute, from a residential customer. Upon notice of such dispute, EGSs are required to investigate the matter, provide the customer with information necessary to make an informed judgment and issue a report to the customer within 30 days. See 52 Pa. Code §§ 56.141(a), 56.151 and 56.152.

48. It is averred, upon information and belief, that Respondent has violated and continues to violate the Commission's regulations and orders by failing to adequately staff its call center, failing to provide reasonable access to Company representatives for purposes of submitting complaints, failing to properly investigate customer disputes, failing to properly notify customers of the results of the Company's investigation into a dispute when such investigation was conducted, and failing to utilize good faith, honesty and fair dealing in its dealings with customers.

**COUNT V – FAILURE TO COMPLY WITH THE TELEMARKETER REGISTRATION ACT**

49. The foregoing paragraphs are incorporated herein.

50. Of the referenced 232 consumer complaints against Respondent received by the Attorney General, at least 36 or approximately 16% of the complainants indicated that their service with Respondent was initiated by a telemarketing call from Respondent.

51. The Commission's regulations require EGSs to comply with the Telemarketer Registration Act, 73 P.S. § 2241, *et seq.* See 52 Pa. Code § 111.10(a)(1).

52. When Respondent sells its goods or services through the use of a telemarketing call, the Telemarketer Registration Act requires the Respondent to reduce any sale of goods or

services made during such call to a written contract and obtain the consumer's signature on the written contract. See 73 P.S. § 2245(a)(7).

53. Additionally, the Telemarketer Registration Act requires the Respondent to provide consumers with a contract that contains, *inter alia*, the following:

- A detailed description of the consumer goods and services purchased which shall match the oral description given in the telemarketing solicitation;
- Any oral or written representations made during the telemarketing solicitation; and
- A statement that reads: "You are not obligated to pay any money unless you sign this contract and return it to the seller."

See 73 P.S. § 2245(c).

54. Respondent failed to provide consumers with a contract that contained all of the required information set forth in Sections 2245(a)(7) and 2245(c) of the Telemarketer Registration Act, 73 P.S. § 2245(a)(7) and (c), and has therefore, violated and continues to violate the Commission's regulations and orders and the Telemarketer Registration Act.

55. Under the Telemarketer Registration Act, any violation of 73 P.S. § 2241, *et seq.*, is also a violation of the Consumer Protection Law. See 73 P.S. §2246(a).

56. The Commission's regulations require that E:GSs comply with the Telemarketer Registration Act and the Consumer Protection Law. See 52 Pa. Code § 54.43(f) and 111.10(a).

57. The Consumer Protection Law prohibits fraudulent or deceptive conduct which creates a likelihood of confusion or misunderstanding. See 73 P.S. § 201-2(4)(xxi).

58. By failing to provide a contract that complies with the Telemarketer Registration Act, Respondent has also violated and continues to violate the Consumer Protection Law.

**RELIEF**

59. The foregoing paragraphs are incorporated herein.

60. Pursuant to Section 54.42 of the Commission's regulations, 52 Pa. Code § 54.42, the Commission may suspend or revoke an EGS's license and impose civil penalties for the following EGS conduct:

- Failure to follow the principles in 52 Pa. Code § 54.43;
- Violation of applicable provisions of the Public Utility Code, Commission regulations and Commission orders; and
- Violation of the consumer protection law.

61. Under the Consumer Protection Law, it is appropriate to impose a permanent injunction to restrain and prevent violations of the Consumer Protection Law and restore to any person in interest any moneys or property that may have been acquired by means of any violation of the Consumer Protection Law. See 73 P.S. § 201-4.1.

62. As outlined above, Respondent violated and continues to violate the Public Utility Code, Commission's regulations and orders, the Consumer Protection Law, the Telemarketer Registration Act and the Licensing Order.

WHEREFORE, Joint Complainants Attorney General Kathleen G. Kane, through the Bureau of Consumer Protection, and Tanya J. McCloskey, Acting Consumer Advocate, respectfully request that the Pennsylvania Public Utility Commission take the following actions:

A. Find that Respondent violated the Telemarketer Registration Act, the Consumer Protection Law, the Public Utility Code and the Commission's regulations and orders, as specified in the foregoing Joint Complaint, and revoke or suspend the Respondent's EGS license:

B. Find that Respondent violated the Telemarketer Registration Act, the Consumer Protection Law, the Public Utility Code and the Commission's regulations and orders, as specified in the foregoing Joint Complaint, and impose a civil penalty:

C. Order Respondent to provide appropriate restitution including without limitation refunding all charges to its customers that were over and above the Price To Compare in the customers' respective service territories from January 1, 2014 through the date of resolution of this matter, as well as any late, cancellation and/or termination fees and/or other such penalties charged to consumers as a result of the Respondent's charges and consumers leaving Respondent to obtain generation service elsewhere:

D. Order Respondent to prohibit its salespeople from making pricing promises to consumers that are deceptive and inaccurate:

E. Order Respondent to implement proper customer dispute procedures and adequately staff, train and monitor all employees and agents in such procedures:

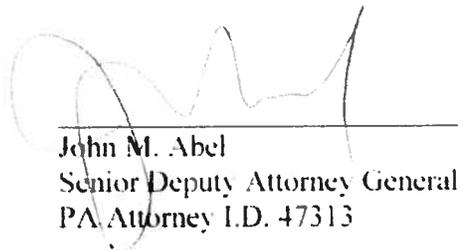
F. Order Respondent to discontinue all other practices that violate the Consumer Protection Law and/or Telemarketer Registration Act and/or the Public Utility Code and/or Commission's regulations or orders:

G. Order that the Respondent, its agents and employees, be permanently enjoined from engaging in any practice that violates the Consumer Protection Law and the Telemarketer Registration Act:

H. Consolidate all similar pending formal complaints against Respondent with this Joint Complaint; and

I. Impose any other such relief that the Commission deems appropriate in this matter.

Respectfully submitted.



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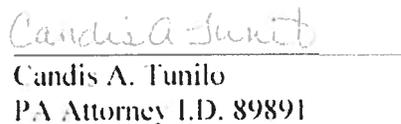
John M. Abel  
Senior Deputy Attorney General  
PA Attorney I.D. 47313

Margarita Tulman  
Deputy Attorney General  
PA Attorney I.D. 313514

Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
T: (717) 787-9707  
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jabel@attorneygeneral.gov  
mtulman@attorneygeneral.gov

Counsel for:

Kathleen G. Kane, Attorney General  
Bureau of Consumer Protection



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Candis A. Tunilo  
PA Attorney I.D. 89891

Christy M. Appleby  
PA Attorney I.D. 85824  
Assistant Consumer Advocates

Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> Floor, Forum Place  
Harrisburg, PA 17101-1923  
T: (717) 783-5048  
F: (717) 783-7152  
ctunilo@paoca.org  
cappleby@paoca.org

Counsel for:

Tanya J. McCloskey  
Acting Consumer Advocate

DATE: 6.20.14

# APPENDIX A

**Blue Pilot Energy, LLC**  
**Disclosure Statement and Agreement for Electric Service**

This Disclosure Statement and Agreement (the "Agreement") sets forth the terms and conditions that apply to your purchase of electric services from Blue Pilot Energy, LLC ("Blue Pilot" or the "Company"). In this Agreement, the terms "you," "our" and "Customer" shall mean: (a) for residential service, the account holder and/or the person whose name appears on the invoice for service under this Agreement; (b) for small business/commercial service, the account holder and/or the person and/or entity whose name appears on the bill for service under this Agreement, or an authorized agent thereof.

**Right of Rescission.** You may rescind your election of service from Blue Pilot, this Agreement, and any related agreements without penalty at any time before midnight Eastern Time of the 3rd business day after receiving this Agreement. Please provide Blue Pilot with the following information when requesting rescission: Customer name, address and phone number(s); and account/ meter number(s). To rescind, you must contact Blue Pilot by midnight Eastern Time of the 3rd business day: by Phone at 1-877-513-0246, or by email at [are@bluepilotenergy.com](mailto:are@bluepilotenergy.com).

**Background:** Blue Pilot is licensed by the Pennsylvania Public Utility Commission ("PA PUC") to offer and supply electric generation and related services in Pennsylvania. Blue Pilot's PA PUC license number is A-2011-2223888. Blue Pilot sets the generation prices and charges that you pay. The PA PUC regulates distribution prices and services. The Federal Energy Regulatory Commission regulates transmission prices and services. You will receive a single bill from your Electric Distribution Company (hereinafter, "EDC") that will contain the EDC's charges and Blue Pilot's charges.

**Definitions:**

- **Generation Charge** - Charge for production of electricity.
- **Transmission Charge(s)** - Charge(s) for moving high voltage electricity from a generation facility to the distribution lines of an Electric Distribution Company.
- **Distribution Charge(s)** - Charge(s) for delivering electricity over a distribution system to your home or business from the transmission system.

**I. CONTACT INFORMATION**

Blue Pilot Energy, LLC  
250 Pilot Rd., Ste. 300  
Las Vegas, NV 89119  
1-800-451-6956 Corporate Office  
1-877-513-0246 Customer Service  
[www.BluePilotEnergy.com](http://www.BluePilotEnergy.com)

Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
Choice Hotline Number: 1-800-692-7380

**West Penn Power:**  
West Penn Power d/b/a Allegheny  
Power  
800 Cabin Hill Drive  
Greensburg, PA 15601-1689  
1-800-255-3443

**Duquesne Light:**  
411 Seventh Street, MD 16-4  
Pittsburgh, PA 15219  
(412) 393-7100

**PPL:**  
Two North Ninth Street  
Allentown, PA 18108-1179  
1-800-342-5775

Universal Service Program  
LIURP: 1-800-207-1250

Universal Service Program  
Customer Assistance Program:  
1-888-393-7600

Universal Service Program  
Low Income Home Energy  
Assistance Program  
1-800-342-5775

**PECO:**  
2301 Market Street  
Philadelphia, PA 19101-8699  
1-800-494-4000

**Met-Ed, Penelec, and Penn Power:**  
First Energy  
2800 Portsville Pike  
Reading PA, 19612

Universal Service Program  
Customer Assistance Program:  
1-800-744-7040

Universal Service Program  
Low Income Home Energy  
Assistance Program:  
1-800-720-3600

Any formal notices to Blue Pilot shall be sent to the address stated above (the "Notice Address"). Customer has the right to additionally receive this Agreement or any notices related to this Agreement or the services provided hereunder via electronic communications at Customer's request.

2. **Price per Kilowatt Hour.** You have a variable rate plan. Your price may vary on a month-to-month basis. This price includes Transmission Charges, but excludes applicable state and local Sales Taxes and the Distribution Charges from your local EDC. At any time, but not more frequently than monthly, Blue Pilot may increase or decrease your rate based on several factors, including changes in wholesale energy market prices in the PJM Markets. Your variable rate will be based upon PJM wholesale

market conditions. Sudden, atypical fluctuations in climate conditions, including but not limited to, extraordinary changes in weather patterns may be detrimental to Blue Pilot's electricity customer relationships. Such fluctuations or conditions may result in Blue Pilot incurring unusual costs when supplying electricity service, which may be passed through as a temporary assessment on your bill. Please log on to [www.bluepilotenergy.com](http://www.bluepilotenergy.com) or call Customer Service at 877-513-0246 for additional information about our current pricing.

**Cancellation Provisions.** Customer may cancel service at any time and for any reason without penalty. The cancellation will become effective on a date determined by the EDC. If the EDC cancels your electric service, then this agreement shall be cancelled on the date that your electric service is terminated. Cancellation will not relieve the Customer of any payment obligations for service. In the event of a Customer bankruptcy, late payment or nonpayment, fraud or misrepresentation, Blue Pilot has the right to cancel Customer's account, this Agreement and/or any related agreements. If Customer moves from the meter address Blue Pilot is servicing, Blue Pilot shall cancel service to that meter. If Blue Pilot cancels Customer's account, this Agreement or any related agreements for any reason other than for Customer non-payment, Blue Pilot will follow applicable rules in providing notice to you.

**Billing.** Customer will receive one monthly electric bill processed and provided by Customer's local EDC. Customer consents to the EDC disclosing basic account information to Blue Pilot. Payment is due to Customer's local EDC in accordance with the EDC's standard billing practices. Billing cycles may change from time to time without notice. Customers may contact their EDC for information about Universal Service Programs that may be available to them. Allegheny/West Penn at 800-207-1250, Duquesne Light at 888-393-7600, Met-Ed/Penelec 800-962-4848, or PPL at 800-342-5775. In the event there is a change (including a change in interpretation) in law, regulation, rule, ordinance, order, directive, filed tariff, decision, writ, judgment or decree by a governmental authority (including a regulatory agency or PJM), including, without limitation, changes affecting fees, costs, or charges imposed by PJM or a regulatory agency, changes in market rules, changes in load profiles or changes in nodal and zonal definitions; or upon the occurrence of any event that materially changes the obligations of Blue Pilot or the cost or expense of Blue Pilot performing its obligations under this agreement, these costs or expenses are your responsibility. These costs or expenses, including reasonable margin related thereto, will be assessed on your monthly bill or separate invoice.

**Purchase of Electric Service from Blue Pilot.** Customer agrees to purchase electric generation and related services from Blue Pilot for the service addresses identified by Customer (the "Service Address"). Service from Blue Pilot will begin on the next regularly scheduled meter read date after your EDC has switched your account to Blue Pilot and will continue on a month to month basis until either you or Blue Pilot cancels service as provided in Section 3 above. The Blue Pilot per kWh rate does not include EGS Reconciliation Assessment, which is applied by the Company to recover costs associated with acquisition of required renewable energy credits and related administrative charges. This charge currently is set at 4.89% of total Blue Pilot Energy charges. Customer shall not resell electricity to any third party. If your electric service is terminated by your EDC, then your account, this Agreement and any related agreements with Blue Pilot shall be cancelled on the date that your electric service is terminated. You will owe Blue Pilot for amounts unpaid for its charges of electric generation service up to the date of termination. If you move from one address to another, your service may be cancelled.

**Security Deposit.** Blue Pilot does not require a security deposit from its Customers. If the Customer has paid a deposit to his/her current supplier, it is the Customer's responsibility to request a refund from his/her/its current supplier.

**Discrimination.** Blue Pilot does not discriminate, deny service, or require prepayment or a deposit for service based on a customer's race, creed, color, national origin, ancestry, sex, marital status, lawful source of income, level of income, sexual orientation, disability, familial status, location of customer in an economically distressed geographic area or qualification for low income or energy efficiency services.

**Renewal Provision/ Agreement Expiration/ Change in Terms:** If Customer has a fixed term agreement with Blue Pilot and it is approaching the expiration date or if we propose to change our terms of service, we will send you two (2) advance notices either in your bill or in separate mailings between 45 and 90 days before either the expiration date or the effective date of the changes. Your options will be explained in these two (2) advance notices. For Customers under variable rate pricing plans, a change to the variable price per kWh does not constitute a change in terms of service as outlined in this section.

**EMERGENCY:** In the event of an emergency, such as a power failure or a downed power line, Customers should contact their EDC. Allegheny/West Penn at 800-255-3443, Duquesne Light at 888-393-7000, Met-Ed at 888-544-4877, Penelec at 888-544-4877, PECO at 800-841-4141, or PPL at 800-342-5775.

**Dispute Resolution and Mandatory Agreement to Arbitrate On An Individual Basis.** Blue Pilot will work with you to answer/resolve any questions or concerns that you may have regarding the terms of this Agreement, the service you receive from Blue Pilot, or any other aspect of your relationship with Blue Pilot. If you are not satisfied after discussing any issue with Blue Pilot, you are welcome to contact the PA PUC at 1-800-692-7380.

You and Blue Pilot both agree to resolve Disputes (as defined below) only by arbitration or in small claims court (for qualifying claims), subject to specific exceptions listed herein. There is no judge or jury in arbitration, the procedures may be different, and is subject to very limited review by court, but an arbitrator can award you the same damages and relief, and must honor the same terms in this Agreement, as a court would. If the law allows for an award of attorneys' fees, an arbitrator can award them too. In addition, you and Blue Pilot also both agree that:

- (a) "Disputes" are any claims or controversies against each other related in any way to, or arising from Blue Pilot's services, this Agreement, or any related agreements, including but not limited to, billing, services and practices, policies, contract practices (including enforceability), service claims, privacy, or advertising, even if it arises after your services with Blue Pilot have terminated. Disputes include any claims that (a) you bring against Blue Pilot or any of its employees, agents, affiliates, or other representatives; (b) you bring against a third party that are based on, relate to, or arise from Blue Pilot's services, this Agreement or any related agreements; or (c) that Blue Pilot brings against you. It also includes, but is not limited to, claims related in any way to, or arising from any aspect of the relationship between Customer and Blue Pilot, whether based in contract, tort, statute, fraud, misrepresentation, or any other legal theory.
- (b) The Federal Arbitration Act ("FAA") applies to this agreement to arbitrate, and this agreement to arbitrate is intended to be broadly interpreted. The arbitrator's decision and award is final and binding, with some exceptions under the FAA, and judgment on the award may be entered in any court with jurisdiction.
- (c) A party who intends to seek arbitration must first send to the other, by certified mail, a written notice of dispute ("Dispute Notice"). The Dispute Notice to Blue Pilot should be addressed to the Notice Address listed in Paragraph 1 above. The Dispute Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If Blue Pilot and you do not reach an agreement to resolve the claim within 30 days after the Dispute Notice is received, you or Blue Pilot may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by Blue Pilot or you shall not be disclosed to the arbitrator.
- (d) Unless we each agree otherwise, the arbitration will be conducted by a single neutral arbitrator and will take place in the county (or parish) of the Service Address.
- (e) The arbitration will be conducted by: (a) a neutral third party arbitrator mutually agreed upon by Customer and Blue Pilot; or (b) the American Arbitration Association (the "AAA"). The arbitration will be governed by the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (collectively, "AAA Rules") of the AAA, as modified by this Agreement. Where the terms of this agreement to arbitrate conflict with the AAA Rules, the terms of this agreement to arbitrate shall override and govern. The AAA Rules are available online at [adr.org](http://adr.org), by calling the AAA at 1-800-778-7879, or by writing to the Notice Address for Blue Pilot. The arbitrator is bound by the terms of this agreement to arbitrate. All issues are for the arbitrator to decide, except that issues relating to the scope and enforceability of the arbitration provision are for the court to decide. If your claim is for \$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds \$10,000, the right to a hearing will be determined by the AAA Rules. Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision sufficient to explain the essential findings and conclusions on which the award is based. Except as otherwise provided for herein, Blue Pilot will pay all AAA filing, administration, and arbitrator fees for any arbitration initiated in accordance with this agreement to arbitrate. If, however, the arbitrator finds that either the substance of your claim or the relief sought in the Demand is frivolous or brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b)), then the payment of all such fees will be governed by the AAA Rules. However, nothing in this paragraph will require or allow you or Blue Pilot to arbitrate on a class-wide, representative or consolidated basis.

**You and Blue Pilot each agree that arbitration will only be pursued on an individual basis, and will not be pursued on a classwide, representative or consolidated basis. This Agreement does not allow class, representative or collective arbitrations even if the AAA procedures or rules would. If for any reason any court or arbitrator holds that this restriction is unconscionable or unenforceable, then this agreement to arbitrate doesn't apply and the dispute must be brought in court.**

- (f) You and Blue Pilot agree that notwithstanding this agreement to arbitrate, either party may bring qualifying claims in a small claims court located in Pennsylvania. In addition, this arbitration provision does not prevent you from bringing your dispute to the attention of federal, state, or local government agencies (including the PA PUC), and if the law allows, they can seek relief against Blue Pilot on your behalf.
- (g) If for any reason a claim proceeds in court rather than through arbitration, you and Blue Pilot agree that there will not be a jury trial. You and Blue Pilot unconditionally waive any right to trial by jury in any action, proceeding or counterclaim arising out of or relating in any way to this Agreement or the services provided by Blue Pilot. In the event of litigation, this paragraph may be filed to show a written consent to a trial by the court.

1. **Force Majeure.** Except for your obligation to make payments when due, neither party shall be liable to the other for any delay or failure to perform caused by an occurrence of *Force Majeure*. *Force Majeure* means occurrences beyond a party's reasonable control, including, without limitation, acts of God, strikes, lockouts or other industrial disturbances, acts of terrorism, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, washouts, civil disturbances, explosions, breakage, shortage or unavailability of transmission facilities, and actions of any governmental authority or your EDC that result in conditions, limitations, rules, or regulations that materially impair either party's ability to perform hereunder. The affected party shall give to the other, reasonably prompt and detailed notice of the occurrence of any Force

Majeure relied upon. If either party is unable, wholly or in part, by Force Majeure to perform or comply with any obligations or conditions of this Agreement, such party shall give immediate written notice, to the maximum extent practicable, to the other party. Such obligations or conditions, so far as they are affected by such Force Majeure, shall be suspended during the continuance of any inability so caused, and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during the period. The party claiming suspension of obligations must in good faith attempt to mitigate and/or terminate the Force Majeure.

- 12. **Limitation Of Liability.** Blue Pilot will endeavor to provide service in a commercially reasonable manner; however, the Company does not guaranty a continuous supply of electrical energy. Blue Pilot does not generate or transport electricity and the Company does not provide services in connection with Customers' meters. Customer agrees that Blue Pilot is not responsible for actions of (or inaction by) regional transmission organization(s), independent system operator(s), or other third parties involved in the production and delivery of Customer's electrical supply. In addition, Blue Pilot's liability in connection with this Agreement or the services that it provides to Customer is limited to direct actual damages. **NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INDIRECT, SPECIAL, CONSEQUENTIAL (INCLUDING LOST PROFITS OR REVENUE), INCIDENTAL, INDIRECT, OR PUNITIVE DAMAGES FOR CLAIMS ARISING UNDER THIS AGREEMENT.**
- 13. **Representations and Warranties.** Blue Pilot makes no other representations or warranties, express or implied, except as expressly stated in this Agreement and expressly disclaims all other warranties, express or implied, including warranties of merchantability and fitness for a particular purpose. Electricity sold by Blue Pilot will be obtained from a number of generating sources, at the discretion of the Company. Blue Pilot does not commit to deliver electricity to Customer from any particular source, unless expressly agreed in writing between Customer and the Company.
- 14. **Assignment.** Customer may not assign any agreements or accounts with Blue Pilot, in whole or in part, or any of Customer's rights or obligations hereunder, without the prior written consent of Blue Pilot. Blue Pilot may, without Customer's consent: (i) transfer, sell, pledge, encumber or assign any agreement or the accounts, revenues or proceeds thereof in connection with any financing or other financial arrangement; (ii) transfer or assign agreements or accounts to an affiliate of Blue Pilot; (iii) transfer or assign agreements or accounts to any person or entity succeeding to all or substantially all of the assets of Blue Pilot; and/or (iv) transfer or assign agreements or accounts to a certified retail electric provider. In the case of (ii), (iii) or (iv), any such assignee shall agree in writing to be bound by the terms and conditions hereof. Blue Pilot shall provide customer with thirty (30) day's notice prior to Assignment. Customer agrees that, upon such assignment, Blue Pilot shall have no further obligations to Customer.
- 15. **Title, Risk of Loss and Indemnity.** Customer acknowledges that Blue Pilot does not have care, control or custody of Customer's property or premises, or of any electrical facilities, including, but not limited to, lines, wires, or the meter, located on or near Customer's property or premises. Customer further acknowledges that Customer is in exclusive control of (and responsible for any damages or injury caused by) electricity at and/or from the lines, wires, or the meter, located on or near Customer's property or premises. Title to electricity and risk of loss related to electricity shall transfer from Blue Pilot to Customer at the respective meter or the Service Address. **CUSTOMER SHALL INDEMNIFY, DEFEND, AND HOLD BLUE PILOT HARMLESS FROM ANY CLAIMS, INCLUDING CLAIMS FOR PERSONAL INJURY, DEATH, PROPERTY DAMAGE AND ATTORNEYS' FEES, ARISING FROM ANY ACT OR INCIDENT OCCURRING WHEN TITLE TO ELECTRIC SERVICE IS DEEMED TO BE IN THE EXCLUSIVE CONTROL OF THE CUSTOMER, DESPITE THE COMPANY'S NEGLIGENCE OR STRICT LIABILITY.**
- 16. **Waiver.** No waiver of any provision contained in this Agreement shall be deemed or shall constitute a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. Failure of the Company to exercise any right hereunder shall not constitute a waiver hereunder and shall not impair the exercise of such rights at any later time.
- 17. **Governing Law.** With the exception of Paragraph 8 hereof, which is governed by the FAA, the terms of service under this Agreement are made under, and shall be governed by and construed in accordance with the laws of the State of Pennsylvania, exclusive of any conflict of laws provisions thereof that would apply the laws of another jurisdiction. Except as otherwise expressly provided herein, the Pennsylvania Uniform Commercial Code ("UCC") shall apply to the terms of service and electricity shall be considered a "good" (and not a "service") for purposes of the UCC.
- 18. **Complete Agreement.** This Agreement contains the complete understanding between Blue Pilot and the Customer and supersedes all other written or oral communications and representations.
- 19. **Customer Information Release Authorization:** You agree that your EDC may release to Blue Pilot certain information that it needs to provide service to you, including your address, telephone number, account numbers, historical usage information and peak electricity demand. Blue Pilot will not give or sell your personal information to any unaffiliated party without your consent unless we are required to do so by law or except as necessary to enforce this Agreement.

# APPENDIX B

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

AFFIDAVIT  
OF  
STEVEN L. ESTOMIN, Ph.D.

JUNE 19, 2014

---

**EXETER**

ASSOCIATES, INC.  
10480 Little Patuxent Parkway  
Suite 300  
Columbia, Maryland 21044

## AFFIDAVIT

1. My name is Steven L. Estomin. I am a Senior Economist and Principal with Exeter Associates, Inc., an economics consulting firm. My business address is 10480 Little Patuxent Parkway, Suite 300, Columbia, Maryland 21044.
  
2. At the request of the Pennsylvania Office of Consumer Advocate (OCA), I performed an analysis addressing residential variable rate pricing in Pennsylvania during the winter of 2014. Specifically, I conducted an analysis regarding day-ahead and real-time market prices for electric energy during the winter of 2014.
  
3. Separate analyses were conducted for electric space heating and non-electric space heating residential customers.
  
4. Separate analyses were conducted for the residential customers in the following Electric Distribution Company (EDC) service territories:
  - Allegheny Power System (APS)
  - Duquesne Light Company (DLC)
  - Metropolitan Edison Company (Met-Ed)
  - PECO
  - Penelec
  - PPL Utilities (PPL)
  
5. The categories of generation costs included in the analyses are:
  - Energy cost (the cost of energy delivered to the relevant EDC zone) – both day-ahead and real-time prices were relied upon
  - Cost of Alternative Energy Portfolio Standard compliance

- Capacity cost
  - Cost of ancillary services, margin (i.e., profit) and risk.
6. Prices were calculated for four separate 4-week billing cycles:
- January 1 through January 30
  - January 8 through February 6
  - January 15 through February 13
  - January 22 through February 20
7. The APS and Duquesne zones exhibit the lowest total all-in, per-MWh generation costs, varying from approximately \$70 per MWh (based on real-time energy prices for the Duquesne zone over the January 8 through February 6 billing cycle) to approximately \$135 per MWh (based on day-ahead energy prices for the APS zone over the January 15 through February 13 billing cycle).
8. Costs for the remaining four zones are similar to each other and range from a total cost of approximately \$129 per MWh (based on real-time energy prices for the Penelec zone for non-space heat customers over the January 8 through February 6 billing cycle) to approximately \$228 per MWh (based on day-ahead energy prices for the PECO zone for space heating customers over the January 1 through February 30 billing cycle).
9. The results obtained from this analysis suggest that the cost to serve residential consumers covering any of the four billing cycles examined would be not more than \$0.23 per kWh in any of the six EDC zones examined, even under the assumption that all supply were procured on the PJM spot markets.

**AFFIDAVIT**

Steven L. Estomin, being first duly sworn, deposes and says that this affidavit was prepared by him; that he is familiar with the contents thereof; and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

Steven Estomin  
Steven L. Estomin

Subscribed and sworn to before me on this 19 day of June 2014

Deborah M. Estomin  
Notary Public

My Commission Expires: 2/2015

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Commonwealth of Pennsylvania, by :  
Attorney General KATHLEEN G. KANE, :  
Through the Bureau of Consumer Protection. :

And :

TANYA J. McCLOSKEY, Acting Consumer :  
Advocate. :

Complainants :

Docket No. C-2014-

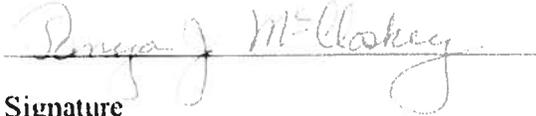
v. :

BLUE PILOT ENERGY, LLC :

Respondent :

**VERIFICATION**

I, Tanya J. McCloskey, Acting Consumer Advocate, hereby state that the facts set forth above in this Joint Complaint 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).

  
Signature

6/20/14  
Date

**VERIFICATION**

I, Heather M. Weaver, Consumer Protection Agent for the Office of Attorney General, Bureau of Consumer Protection, hereby state that the facts above set forth are true and correct to the best of my knowledge, information and belief and that the Pennsylvania Office of Attorney General's Bureau of Consumer Protection expects 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: 11-26-14



Heather M. Weaver  
Consumer Protection Agent  
Bureau of Consumer Protection  
Office of Attorney General  
15<sup>th</sup> Floor, Strawberry Square  
Harrisburg, Pennsylvania 17120

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Office of Consumer Advocate	:	
v.	:	Docket No. C-2018-3006242
	:	
PECO Energy Company	:	
	:	
	:	
Non-Bypassable Transmission	:	
Service Charge (NBT) Semiannual	:	Docket No. M-2018-3005860
Adjustment, PECO Energy Electric	:	
Tariff No. 5, Supplement No. 76	:	
Effective December 1, 2018	:	
	:	
v.	:	
	:	
PECO Energy Company	:	

CERTIFICATE OF SERVICE

I, Ward L. Smith hereby certify that I served ***PECO Energy Company's Motion to Dismiss Objections and Compel Answer to Interrogatories, Set I*** to the Office of Consumer Advocate upon all interested parties listed below, via email and overnight delivery to:

Richard Kanaskie  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Erin K. Fure  
Small Business Advocate  
Office of Small Business Advocate  
300 North Second Street  
Harrisburg, PA 17101

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Dated: January 24, 2019

A handwritten signature in black ink, appearing to read "Ward L. Smith", written over a horizontal line.

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