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January 14, 2020

VIA eFILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

Re: Office of Consumer Advocate v. PECO Energy Company
Docket Nos. M-2018-3005860, C-2018-3006242, M-2019-3010032 and C-2019-3010737

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced matters is the **Main Brief of Respondent PECO Energy Company**. Copies have been served on all parties of record as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Kenneth M. Kulak

KMK/tp
Enclosure

c: Per Certificate of Service (w/encl.)

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

OFFICE OF CONSUMER ADVOCATE	:	
	:	
v.	:	**Docket Nos. M-2018-3005860**
	:	**C-2018-3006242**
PECO ENERGY COMPANY	:	
	:	
OFFICE OF CONSUMER ADVOCATE	:	**Docket Nos. M-2019-3010032**
	:	**C-2019-3010737**
v.	:	
	:	
PECO ENERGY COMPANY	:	

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Main Brief of Respondent PECO Energy Company** on the following persons in the manner specified in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

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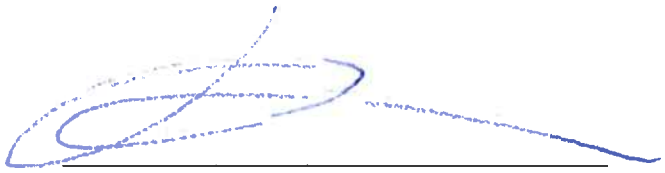

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Dated: January 14, 2020

Counsel for PECO Energy Company

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

OFFICE OF CONSUMER ADVOCATE	:	
	:	
v.	:	**Docket Nos. M-2018-3005860**
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OFFICE OF CONSUMER ADVOCATE	:	**Docket Nos. M-2019-3010032**
	:	**C-2019-3010737**
v.	:	
	:	
PECO ENERGY COMPANY	:	

MAIN BRIEF OF RESPONDENT PECO ENERGY COMPANY

Before Administrative Law Judge
Marta Guhl

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Dated: January 14, 2020

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I. OVERVIEW AND SUMMARY

In this proceeding, the Office of Consumer Advocate ("OCA") is asking the Pennsylvania Public Utility Commission ("Commission" or "PUC") to require PECO Energy Company ("PECO" or the "Company") to refund bill credits of approximately $5.5 million related to Regional Transmission Expansion Plan ("RTEP") charges that PECO paid for transmission service obtained from PJM Interconnection, L.L.C. ("PJM") during the period 2007-2010. These credits relate to charges that were never passed through to customers and which PECO never had the opportunity to include for recovery in any rates it charged to customers. In short, the OCA wants to force PECO to refund dollars to customers that PECO – not customers – paid.

Significantly, PECO is also receiving bill credits for a second time period (beginning January 1, 2011), during which the charges were included in PECO's rates and were paid by PECO's customers. PECO is already refunding to customers all of the RTEP bill credits (totaling approximately $77.5 million) that relate to transmission service PECO obtained from PJM during the period from and after January 1, 2011, when it first put in place, with PUC approval, a reconcilable automatic adjustment clause to provide dollar-for-dollar recovery from customers of PECO's transmission costs, including RTEP.

The net retrospective billing adjustments made by PJM that relate to periods when PECO had the opportunity to recover the underlying costs from customers on a reconcilable basis and imposed those charges on its customers are already flowing through to customers today. PECO should not, however, be required to transfer to customers PJM bill credits related to costs that were never included in PECO's rates and which its customers therefore never paid in the first place. The unfairness of requiring such refunds is self-evident.

In addition to being fundamentally inequitable, the OCA's position is contrary to well-established law prohibiting the PUC from requiring a utility to refund revenues that it collected under base rates that the PUC, by final Order, found and determined to be just and reasonable. This is the doctrine of "Commission-made rates," which has been repeatedly affirmed by Pennsylvania appellate courts and is enshrined in Section 316 of the Public Utility Code ("Code").

The OCA, through its witness, Karl Richard Pavlovic, Ph.D., contends that PECO should refund RTEP bill credits related to charges PJM imposed during the period 2007-2010. These arguments center on Dr. Pavlovic's unsubstantiated contention that PECO allegedly recovered all of the PJM-imposed RTEP costs through some combination of retail rates and/or wholesale transmission rates within the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Dr. Pavlovic's arguments were addressed and thoroughly refuted by PECO's witness, Joseph A. Bisti, as explained in detail in Section III.C., *infra*, and the OCA's Complaints in this proceeding should be dismissed.

II. STATEMENT OF THE CASE

A. Overview Of The Transmission Service PECO Provides And PJM Transmission-Related Costs

During the period at issue in this case, PECO was (and continues to be) a load serving entity ("LSE"). As an LSE, PECO obtains transmission service to move electricity to its distribution system to serve retail customers. In addition, PECO was, and is, the owner of transmission facilities that are used to move electricity on behalf of other entities, including other LSEs. This distinction in PECO's roles is important for three reasons. First, this case only involves costs (and subsequent bill credits) imposed on PECO in its capacity as an LSE – costs that PECO would recover, if at all, only in rates charged to retail customers. Second, PECO's provision of transmission service to other LSEs is legally and analytically distinct from its role as

an LSE, and the costs PECO incurs to furnish that service are recovered in its FERC-approved transmission rates charged to other entities, including other LSEs. Third, in an ultimately unsuccessful effort to demonstrate that PECO charged rates that included a component for recovery of RTEP costs, Dr. Pavlovic has tried to blur the distinction between transmission service PECO purchases in its role as an LSE and the transmission service it furnishes to other entities, including other LSEs, in its capacity as a transmission owner. Each of these points is elaborated upon below.

As explained by PECO witness Bisti, the Company, in its capacity as an LSE, acquires transmission service provided by others to serve its retail customers. Under its 1998 Commission-approved Restructuring Plan,[1] PECO had the obligation to offer and furnish "Provider Of Last Resort" ("POLR") generation service, as required by Section 2807(e)(1) of the Code,[2] to customers that did not, or could not, shop with an electric generation supplier. To fulfill its statutory obligation, PECO had to obtain and furnish transmission service to deliver the electricity it supplied to PECO's PJM-designated transmission zone ("PECO Zone"), where that electricity could then be distributed by PECO to POLR customers' premises. Because PECO's retail rates had been unbundled, the cost of providing POLR service included two components: a generation price, which remained capped until January 1, 2011, and a transmission component, to recover the cost of bringing that generation to the PECO Zone.[3] PECO's "price to compare"

[1] *Application of PECO Energy Co. for Approval of Its Restructuring Plan Under Section 2806 of the Public Utility Code et al.*, Docket Nos. R-00973953 and P-00971265 (Joint Petition for Settlement filed Apr. 29, 1998) ("Restructuring Plan"), p. 11. The Restructuring Plan was approved by the Commission in its Opinion and Order entered on May 14, 1998 ("PECO Restructuring Order").

[2] After PECO's generation rate caps expired on January 1, 2011, PECO began to furnish "default service" to non-shopping customers under a "commission-approved competitive procurement plan" pursuant to Section 2807(e)(3.1) of the Code and the Commission's regulations on default service (52 Pa. Code §§ 54.181 – 54.189) instead of POLR service at the capped generation price established by its Restructuring Plan. PECO's Transmission Service Charge ("TSC") was implemented at the same time PECO began to provide default service under its first Commission-approved default service program at generation prices that were no longer subject to the generation rate cap. PECO St. No. 1, pp. 7-8.

[3] The statutory caps on PECO's transmission and distribution rates that had initially been extended pursuant to its Restructuring Plan and further extended in the PECO/Unicom merger settlement expired on December 31, 2006.

("PTC") for POLR service was the sum of the generation and transmission components. PECO St. No. 1-R, pp. 4-5.

PJM has been approved by the FERC as the Regional Transmission Operator for its members' transmission systems in all or parts of thirteen states and the District of Columbia. PJM's annual RTEP identifies transmission system upgrades and enhancements to provide for operational, economic, and reliability requirements of the bulk power system under PJM's operational control. PJM, on behalf of transmission owners, charges RTEP costs to LSEs in the transmission zones that are assigned cost responsibility for the applicable RTEP projects. PECO St. No. 1, pp. 10-11. As explained hereafter, the manner in which RTEP costs were allocated was disputed at the FERC, and the resolution of that dispute via a FERC-approved settlement was the genesis of the PJM bill credits that are the subject of this proceeding.

PJM first began to impose RTEP charges in the PECO Zone on June 1, 2007. The RTEP costs imposed on PECO were designed to recover the costs of transmission facilities owned by other transmission service providers outside the PECO Zone. Consequently, RTEP costs represented a cost incurred by PECO associated with the transmission service it obtained in its capacity as an LSE to serve its own retail customers. PECO St. No. 1, p. 7.

The Company also provides transmission service to other entities, chiefly other LSEs, to move power on their behalf within or across the PECO Zone using transmission facilities owned by PECO. The costs that PECO incurs for that service, including the fixed costs of PECO-owned transmission facilities, are recovered in PECO's wholesale network integration transmission service ("NITS") rate from the entities that receive that service. PECO's NITS rates are filed with and approved by the FERC. PECO St. Nos. 1, p. 10 & 1-R, pp. 4-5, 10.

See PECO Restructuring Order, pp. 3-4, 8; *Application of PECO Energy Co. Pursuant to Chapters 11, 19, 21, 22 and 28 of the Pub. Util. Code for Approval of (1) a Plan of Corporate Restructuring, Including the Creation of a Holding Company and (2) the Merger of the Newly Formed Holding Company and Unicom Corp.*, Docket No. A-00110550F0147 (Opinion and Order entered June 22, 2000), pp. 8, 26.

PECO's NITS rate in effect during the 2007-2010 period was fixed at $20,942 per megawatt-year based on a "black box" settlement approved by the FERC at Docket No. ER97-3189-000 ("1998 Settlement"). That proceeding was initiated to restructure PJM, establish PJM as an Independent System Operator and provide PJM operational control of the regional transmission system. In implementing the 1998 Settlement, PJM's Open Access Transmission Tariff adopted PECO's revenue requirement established in a prior proceeding based on costs recorded by PECO in 1994. PECO St. Nos. 1, p. 10, 1-R, pp. 9-10 and 1-RJ, pp. 4-6; PECO Exh. Nos. JAB-1RJ to JAB-4RJ.[4]

B. History Of the Ratemaking Treatment Of PJM Charges Incurred By PECO In Its Capacity As A Load Serving Entity

PECO's base rates in effect at the time PJM initiated RTEP charges had been established in PECO's 1989 base rate case and were subsequently unbundled effective January 1, 1999. The 1989 base rates did not provide for the recovery of any RTEP charges because RTEP charges had not been created and PECO was not yet incurring those costs. PECO St. No. 1, p. 7.

PECO did not file another electric distribution base rate case until March 2010. In that case, PECO's pro forma revenue requirement included estimates of the PJM transmission charges (including RTEP charges) PECO expected to incur during the future test year (calendar year 2010) as an LSE to serve its retail customers.[5] In parallel with its requested base rate increase, PECO proposed a bypassable, reconcilable TSC under Section 1307 of the Code[6] "as an alternative cost recovery method" for the "transmission costs" PECO had included, on a pro

[4] In the course of preparing this Main Brief, PECO identified two typographical errors in Mr. Bisti's written testimony. First, on page 11, footnote 7 of PECO Statement No. 1, "119 FERC ¶ 61,038" should be replaced with "119 FERC ¶ 61,063". Second, on page 2, footnote 3 of PECO Statement No. 1-RJ, "Docket No. R-2010-216575" should be replaced with "Docket No. R-2010-2161575".

[5] *Pa. P.U.C. v. PECO Energy Co. – Elec. Div.*, Docket No. R-2010-2161575, PECO St. No. 9 – Direct Testimony of Alan B. Cohn (Mar. 31, 2010), p. 24. Dr. Pavlovic provided a copy of Mr. Cohn's direct testimony in the Company's 2010 base rate case as OCA Exhibit No. KRP-4SR.

[6] 66 Pa.C.S. § 1307.

forma basis, in developing its proposed base rates. The Commission approved PECO's proposal, and the base rates and TSC approved by the Commission in the 2010 base rate case became effective on January 1, 2011.[7] As a result, on January 1, 2011, PECO began to recover PJM transmission-related costs, including RTEP charges, from default service customers, on a dollar-for-dollar basis, through the TSC. Prior to the implementation of the TSC, PECO did not include RTEP costs in the rates charged to retail customers. PECO St. No. 1, pp. 7-9; PECO Exh. Nos. JAB-1 and JAB-2.

PECO's Non-Bypassable Transmission Charge ("NBT") was implemented on June 1, 2015, in accordance with the Commission's directive in the Company's third default service proceeding. In that proceeding, the Commission directed that certain PJM charges, including RTEP charges, should be recovered on a non-bypassable basis from all distribution customers rather than through PECO's bypassable TSC that was billed only to default service customers.[8] Accordingly, the NBT was established as a Section 1307 mechanism to provide for reconcilable, dollar-for-dollar recovery of the categories of transmission costs that the PUC directed to be recovered on a non-bypassable basis. PECO St. No. 1, pp. 9-10.

C. Changes To The FERC-Approved RTEP Cost Allocation Methodology

In 2007, the FERC issued Order No. 494, which adopted a methodology for allocating RTEP costs among the PJM zones of PJM transmission owners, who, in turn, would have to recover those costs from other entities, including LSEs.[9] The entry of FERC Order No. 494

[7] *Pa. P.U.C. v. PECO Energy Co. – Elec. Div.*, Docket No. R-2010-2161575 (Opinion and Order entered Dec. 21, 2010), p. 9.

[8] *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.

[9] *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007). FERC Order No. 494 directed PJM to continue to allocate RTEP project costs for facilities that operate below 500 kV across the transmission zones within PJM based on a net benefit analysis known as the "DFAX" method. For higher voltage facilities at or above 500 kV, FERC determined that all customers in PJM would pay a "postage stamp" rate that recovers total average costs

initiated more than a decade of litigation at the FERC in which certain owners of transmission within PJM, including PECO, contested the RTEP cost allocation methodology the FERC had adopted. That litigation was resolved by a settlement (the "Settlement"), which the FERC approved on May 31, 2018.[10] PECO St. No. 1, pp. 11-12.

The Settlement implements a schedule of adjustments to PJM's prior-period billings for RTEP charges. These billing adjustments are based on a hybrid method of allocating costs for RTEP transmission enhancements that differs from the method used to calculate the bills PJM originally issued to comply with FERC Order No. 494. The total net bill credits generated by the Settlement are adjustments to RTEP charges PECO paid between June 1, 2007 and June 30, 2018. PECO St. No. 1, pp. 12-13; PECO Exh. Nos. JAB-3 and JAB-4.

Under the Settlement, there are two periods designated for tracking the differences between the prior allocation method and the Settlement allocation method – the "transitional period" (January 1, 2016 to June 30, 2018) and the "historical period" (from the initiation of RTEP charges in 2007 to January 1, 2016). For the transitional period, PJM was charged with tracking and accumulating the aggregate differences, plus interest, between the previous RTEP charges and the revised allocations approved by the FERC. PJM published a summary of the transitional period billing adjustments in each transmission zone on July 31, 2018. For the "historical period," which includes the 2007-2010 period relevant to this case, the total amounts that were reallocated and the corresponding billing adjustments are based on a "black box" settlement. PECO St. No. 1, pp. 12-13; PECO Exh. No. JAB-3.

on a pro-rata load share basis from all customers irrespective of the "net benefit" any individual customer may actually derive from such facilities. *Id.* at 31-38.

[10] *PJM Interconnection, L.L.C.*, Order on Contested Settlement, 163 FERC ¶ 61,168 (2018).

D. Adjustments To Prior PJM Billings For RTEP Charges Under The Settlement

As shown on PECO Exhibit No. JAB-4, based on the most recent data available from PJM, PECO will receive approximately $83 million in total net credit adjustments to prior bills for both the transitional period and the historical period.[11] Of that total, PECO will refund to customers $77.5 million, reflecting bill credits for RTEP charges imposed from and after January 1, 2011. PECO St. No. 1, pp. 13-14. Specifically, the NBT charges in effect from December 1, 2018 to June 1, 2019 reflect a reduction of $63.2 million to the NBT costs that would otherwise be recoverable by PECO in order to reflect PJM bill credits for the post-2010 period that PECO anticipated receiving by November 30, 2019. Post-2011 Settlement credits that PECO receives after November 30, 2019 (approximately $14.3 million) will be passed through to customers as reductions to PECO's NBT-recoverable costs in future semi-annual recalculations of PECO's NBT rate. PECO St. No. 1, pp. 15-19; PECO Exh. Nos. JAB-7 to JAB-10.

PECO's NBT rate calculations do not reflect Settlement credits related to PECO's overpayment of RTEP charges during the 2007-2010 period because that period elapsed before PECO implemented its reconcilable TSC and NBT that, for the first time, included a component for the recovery of RTEP charges. As shown on PECO Exhibit No. JAB-6, the credits for those pre-2011 billing adjustments total approximately $5.5 million based on time-segmented "black box" RTEP reallocation amounts for the PECO Zone that PJM provided during the settlement negotiations in the proceeding at FERC Docket No. EL05-121-009. PECO St. No. 1, p. 14.

[11] The sum of $83 million for both the "transitional period" and the "historical period" is an upward revision of the estimate of $79.5 million set forth in PECO's November 7, 2018 NBT filing. Even though the total PJM bill credits under the Settlement increased, PECO did not increase the $5.5 million portion that related to RTEP charges imposed on PECO prior to January 1, 2011. PECO St. No. 1, p. 14.

E. Procedural History

As previously noted, on November 7, 2018, PECO filed its semi-annual adjustment to the Company's NBT for the period of December 1, 2018 through May 31, 2019 set forth in Supplement No. 76 to its Tariff Electric – Pa. P.U.C. No. 5 ("Supplement No. 76") with accompanying supporting schedules. In Supplement No. 76, PECO proposed to include post-2010 PJM bill credits totaling $77.5 million in its NBT calculations. On November 28, 2018, the Commission issued a Secretarial Letter at Docket No. M-2018-3005860 finding that the NBT charges set forth in Supplement No. 76 "are consistent with the tariff and, accordingly, are permitted to become effective as filed" on December 1, 2018. Later in the day on November 28, 2018, after the Commission had issued its Secretarial Letter, the OCA filed its Complaint initiating this proceeding ("2018 Complaint"). PECO St. No. 1, pp. 5-6.

The OCA's 2018 Complaint did not set forth either the facts or the applicable legal principles that allegedly formed the basis for the OCA's belief that credits to pre-2011 PJM RTEP charges should be refunded to customers despite the fact that those charges had not previously been reflected in PECO's rates. Absent a pleading that identified the factual and legal predicates for the OCA's position, PECO did not believe it had adequate notice of the claims against it in order to prepare its defense and draft an Answer responsive to the allegations leveled by the OCA. Accordingly, on December 19, 2018, the Company invoked the provisions of 52 Pa. Code § 5.101(a)(3) to file a Preliminary Objection seeking a more specific pleading so that PECO could properly assess the basis for the claims made by the OCA. On December 31, 2018, the OCA filed an Answer in opposition to the Company's Preliminary Objection in which it contended that PECO was not entitled to a more specific pleading at that stage of the proceeding and committed to furnish more fulsome averments of the factual and legal premises for its 2018

Complaint in subsequent testimony and other submissions, which the OCA indicated would address PECO's concerns.

On January 4, 2019, the Office of Small Business Advocate filed a Notice of Intervention and Public Statement in response to the OCA's 2018 Complaint. On January 8, 2019, this matter was assigned to Administrative Law Judge Marta Guhl (the "ALJ"). On February 8, 2019, the ALJ, relying on the arguments and representations in the OCA's Answer, denied the Company's Preliminary Objection. The ALJ reasoned that, at the pleadings stage of the case, the OCA's Complaint met the minimum requirements for legal sufficiency because it stated the "act or thing" the OCA alleged was a violation of the Code, namely, PECO's exclusion from its NBT calculation of $5.5 million of pre-2011 PJM billing adjustments issued under the Settlement. In the February 8, 2019 Order Denying PECO Energy Company's Preliminary Objection, the ALJ directed PECO to file an Answer to the OCA's Complaint within twenty days. On February 28, 2019, PECO filed an Answer and New Matter to the OCA's 2018 Complaint.

A Prehearing Conference was held on April 26, 2019 before the ALJ and a schedule was established for submitting written testimony, holding evidentiary hearings and filing briefs. *See* Prehearing Order #1 (May 1, 2019). Thereafter, written direct, rebuttal and surrebuttal testimony was submitted by the Company and the OCA on the dates previously established for each submission.

As described in Mr. Bisti's direct testimony, on May 15, 2019, PECO filed its semi-annual adjustment to its NBT rates for the period from June 1, 2019 through November 30, 2019 as set forth in Supplement No. 13 to PECO's Tariff Electric – Pa. P.U.C. No. 6 ("Supplement No. 13") at Docket No. M-2019-3010032. On May 30, 2019, the Commission issued a Secretarial Letter finding that PECO's proposed NBT rates in Supplement No. 13 were consistent with its tariff and, therefore, permitting those rates to become effective as filed on June 1, 2019. PECO St. No. 1, pp. 17-19.

On June 13, 2019, the OCA filed a Complaint against PECO at Docket No. M-2019-3010032 disputing the Company's exclusion of pre-2011 PJM billing adjustments made under the Settlement from the NBT rates set forth in Supplement No. 13 ("2019 Complaint"). On June 14, 2019, the Commission issued a Secretarial Letter docketing the 2019 Complaint as a formal rate case complaint at Docket No. C-2019-3010737. The 2018 and 2019 Complaints were subsequently consolidated for hearing and decision. *See* Order Granting Request to Consolidate (Nov. 27, 2019).

A telephonic evidentiary hearing was held on November 14, 2019 after the parties waived cross-examination of their respective witnesses. At the hearing, the written testimony and exhibits of PECO witness Bisti and OCA witness Pavlovic were admitted into evidence.

III. ARGUMENT

A. PECO's NBT Rate Calculations Properly Reflect All Adjustments To Post-2010 PJM Bills That PECO's Customers Are Entitled To Receive. It Would Not Be Proper To Credit Refunds To Customers For Charges Incurred Prior To January 1, 2011 Because PECO, Not Its Customers, Paid For The Charges Imposed Prior To That Date

As explained in Section II.B. above, after January 1, 2011, PECO implemented a TSC (and as of June 1, 2015, an NBT) to recover PJM transmission-related costs on a full, current and reconcilable basis. Under the terms of those automatic adjustment clauses, PECO compares the billed revenue it receives from customers under those clauses to the costs the Company actually incurs to obtain transmission service for retail customers. Both the TSC and NBT include a charge or credit, known as the "E-Factor," to refund or recoup any overcollection or undercollection of actual costs. As such, PECO recovered PJM transmission-related costs, including RTEP charges, from customers through those clauses on a dollar-for-dollar basis from and after January 1, 2011. PECO is flowing through to customers, through the NBT, all of the retrospective adjustments to post-2010 PJM bills (totaling $77.5 million) that relate to

transmission service PECO obtained for customers during the period customers paid reconcilable TSC and NBT charges that included RTEP costs.

A very different outcome is required for credits that are attributable to charges imposed by PJM prior to January 1, 2011. Mr. Bisti testified that, until PECO's reconcilable TSC was implemented on January 1, 2011, PECO recovered the cost of obtaining transmission service for POLR customers through the transmission component of its retail base rates reflected in the PTC charged to POLR customers. PECO's base rates in effect prior to January 1, 2011 were established in 1989 and did not include an allowance for recovery of RTEP charges because PJM had not yet begun imposing those charges and did not do so until 2007. Unlike the TSC and NBT, the transmission component of PECO's retail base rates did not provide for dollar-for-dollar recovery of costs actually incurred and, therefore, was not subject to reconciliation to true-up costs incurred with revenues received. As a consequence, prior to January 1, 2011, PECO absorbed all RTEP charges without reflecting those costs in its retail base rates. The Company's pre-2011 base rates were established before PJM began to impose RTEP charges in 2007 and, as previously explained, were not subject to reconciliation. PECO St. Nos. 1, pp. 7-9, 20-21 & 1-R, pp. 4-7.

The OCA's claim that PECO should refund $5.5 million of PJM bill credits related to transmission service obtained by PECO for retail customers prior to January 1, 2011 would effectively require PECO to refund dollars that PECO paid but never had the opportunity to include in its base rates for recovery from customers. The OCA's position is fundamentally unfair and contrary to sound ratemaking principles. As discussed in Section III.B., *infra*, it is also contrary to well-settled and long-standing appellate authority that precludes the PUC from ordering refunds that retrospectively diminish the revenues a utility recovered pursuant to a Commission-made rate.

B. The Commission Is Barred From Ordering Refunds Of PECO's Pre-2011 Base Rates

The OCA's witness, Dr. Pavlovic, contends that PECO should be required to refund to retail electric customers all of the credits to PECO's historical PJM bills provided under the Settlement, including credits related to RTEP charges imposed prior to January 1, 2011. OCA St. Nos. 1, pp. 3, 9, 12 & 1-SR, pp. 16-17. Dr. Pavlovic's testimony, however, did not engage the fundamental unfairness of his position, and neither he nor the OCA has refuted the unassailable proposition that the doctrine of Commission-made rates is a complete legal bar to the kind of retrospective reduction to previously approved rates that the OCA is urging the Commission to make.

PECO's base rates in effect during the 2007-2010 period at issue in this proceeding were established in the Company's 1989 base rate proceeding, which was concluded with a final Order of the Commission entered on May 16, 1990 at Docket No. R-891364 approving those rates for service rendered on and after April 20, 1990. That Order found and determined that PECO's rates, as modified by the Order, were just and reasonable.[12] On January 1, 1999, PECO's 1989 base rates were functionally "unbundled" into distribution, transmission and generation components pursuant to a final Order of the Commission entered on May 14, 1998, and, once again, the Commission determined those rates to be just and reasonable.[13] Accordingly, PECO's pre-2011 base rates are "Commission-made" rates.[14]

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[12] *Pa. P.U.C. v. Phila. Elec. Co.*, Docket No. R-891364, 1990 Pa. PUC LEXIS 155 (May 16, 1990).

[13] PECO Restructuring Order, pp. 3-4, 7-11.

[14] *Zucker v. Pa. P.U.C.*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *see also* 66 Pa.C.S. § 316 ("Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review."). In contrast to base rates approved by a final PUC Order, both the Commission and Pennsylvania appellate courts have held that charges imposed under automatic adjustment clauses are not "commission made rates." *See, e.g., Metropolitan Edison Co. v. Pa. P.U.C.*, 437 A.2d 76, 79-80 (Pa. Cmwlth. 1983). Therefore, the doctrine of "commission made rates" does not apply to preclude retrospective adjustments and resulting refunds of amounts collected under PECO's TSC and NBT.

In the seminal case of *Cheltenham & Abington Sewerage Co. v. Pa. P.U.C.*, the Pennsylvania Supreme Court held that "a commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission."[15] In that case, the Court reversed the decisions of the Pennsylvania Superior Court and the Commission that would have required the utility to refund amounts collected pursuant to a final order establishing Commission-made rates based on a subsequent order purporting to find, retroactively, that those rates were unjust and unreasonable. The Pennsylvania Supreme Court provided the following prescription, which has been consistently reaffirmed:

> Rates having in other respects the attributes of commission-made rates do not lose their effect as such by an indefinite expression of opinion that some of the factors on which they are based are variable and may not stand a pragmatic test, a situation which is always implied. To sustain the position of the Superior Court would be to give a retroactive effect to the order of August 30, 1935, without notice to the utility. The mere institution of an inquiry did not constitute notice that a departure would be made from the tariff established by the commission in its quasi-legislative capacity.[16]

The principle established in *Cheltenham & Abington Sewerage Co*. was subsequently applied in *West Penn Power Co. v. Pa. P.U.C*, where the Pennsylvania Superior Court articulated further the dimensions of the prohibition against giving retroactive effect to Commission orders determining just and reasonable rates:

> Finally, the Commission, having approved the rates under tariff No. 30, could not summarily reverse its order of approval and apply such reversal retroactively by ordering refunds for the period between October 29, 1951 [the effective date of the October 26, 1951 order finding West Penn's rates just and reasonable], and April 14, 1953 [the date of an order denying rehearing of a February 16, 1953 order directing refunds of amounts billed under the approved rates back to October 29, 1951]. The order of October 26, 1951, amounted in law to formal Commission approval of the new rates filed by the Company under tariff No.

[15] 25 A.2d 334, 337 (Pa. 1942).

[16] *Id.* at 338-39.

> 30, and rendered the rates in effect Commission-made rates. Consequently, *after it had previously approved the rates, the Commission could not give retroactive effect to its order of February 16, 1953, and direct refunds to customers for charges made beginning October 29, 1951*.[17]

Thus, in *C & D Technologies, Inc. v. Pennsylvania Power & Light Co.*, the Commission held:

> The doctrine of Commission-made rates prohibits the Commission from ordering refunds of amounts collected by a public utility under and pursuant to tariff provisions that the Commission, by formal administrative action, found to be just and reasonable. *Toll Brothers, Inc. v. Pennsylvania-American Water Company*, 1994 Pa. PUC LEXIS 122 *33. *See, also, Philadelphia Electric Co. v. PA Public Utility Comm'n*, 122 Pa.Commw. 421, 552 A.2d 342 (1989); *Cheltenham & Abington Sewerage Co. v. PA Public Utility Comm'n*, 344 Pa. 366, 25 A.2d 334 (1942).[18]

The Settlement that required PJM to make retrospective billing adjustments to RTEP charges paid by PECO during the 2007-2010 period does not provide a valid basis for refunds of revenues collected under PECO's "Commission-made" base rates during that pre-2011 period. Indeed, as Mr. Bisti testified, if PJM's RTEP charges imposed on PECO had been in the correct amount from the outset, there would have been no cost-based justification to require PECO to reduce its pre-2011 base rates. Similarly, if PJM had overcharged PECO $5.5 million for transmission enhancements but discovered its error and issued a $5.5 million bill adjustment for those RTEP charges prior to January 1, 2011, there would not have been a legal basis to require PECO to reduce its pre-2011 base rates by $5.5 million. PECO St. No. 1, pp. 18-19. Simply because the Settlement was approved after January 1, 2011 does not change the fact that the revenues PECO received prior to January 1, 2011 were the product of Commission-made rates and, for that reason, those revenues cannot lawfully be made subject to refunds as the OCA proposes.

[17] 100 A.2d 110, 114 (Pa. Super. 1953) (emphasis added).

[18] Docket Nos. C-00992119 et al., 2004 Pa. PUC LEXIS 57, at **28-29 (June 25, 2004).

In sum, the protection afforded by the doctrine of Commission-made rates bars the Commission from mandating refunds of revenues collected under PECO's 1989 PUC-approved base rates regardless of whether RTEP charges were actually included in PECO's rates. That protection is even more important in this case because the record evidence clearly shows that PECO's rates during the 2007-2010 period did not include an allowance for recovery of the RTEP charges to which the PJM bill credits apply.

C. The OCA Has Not Demonstrated The Reasonableness Of Paying Credits To Pre-2011 RTEP Charges To Customers When The Charges Were Not Included In PECO's Retail Base Rates

For the reasons discussed above, PECO has established by a preponderance of substantial evidence that there is no valid basis for requiring it to refund bill credits to customers related to pre-2011 RTEP charges that were not paid by customers. In short, even if PECO bore the burden of proof to establish the reasonableness of the rates that the OCA is contesting, the Company has clearly carried that burden. That said, however, it is equally clear that the OCA is the proponent of a "rule or order,"[19] is seeking a retrospective change (i.e., refunds) of PECO's PUC-approved 2007-2010 base rates outside of a Commission-initiated investigation[20] and, therefore, had both the burden of production and the burden of persuasion as to all elements necessary to sustain its Complaint. As explained hereafter, the OCA did not carry that burden; its positions are unsupported by (indeed, contradicted by) the record evidence and are both conceptually and legally defective.

In tacit recognition of the fundamental unfairness of requiring PECO to refund bill credits for RTEP charges that were not included in its rates, OCA witness Dr. Pavlovic searched for

[19] 66 Pa.C.S. § 332(a).

[20] *See id.* § 315(a).

some way to demonstrate that, contrary to unrefuted record evidence, PECO actually recovered RTEP charges imposed before the PUC approved PECO's TSC as of January 1, 2011. As a fallback position, Dr. Pavlovic argued that, irrespective of the legal and equitable strengths of PECO's position, the Commission should nonetheless require PECO to refund bill credits related to pre-2011 RTEP charges because PECO's calculation of the portion ($5.5 million) of the total bill credits ($83 million) related to the 2007-2010 period allegedly lacked the absolute precision he demanded. Reduced to its essence, Dr. Pavlovic argued that, despite PECO's presentation of a reasonable basis for allocating bill credits between pre- and post-2011 periods, the Commission should make the facially implausible finding that *none* of those bill credits authorized by the FERC related to the 2007-2010 period. Dr. Pavlovic's arguments are demonstrably incorrect and, therefore, do not provide any valid basis to sustain the OCA's Complaints. Moreover, regardless of the merits of Dr. Pavlovic's contentions, the relief the OCA is requesting in this case – a reduction in PECO's revenues collected under pre-2011 base rates to "refund" after-the-fact reductions to PECO's historical PJM bills for RTEP charges – is barred by the doctrine of Commission-made rates discussed in Section III.B. above.

1. The OCA Has Not Established Any Basis For The Commission To Find That Either PECO's FERC-Jurisdictional Transmission Rates Or Its PUC-Jurisdictional Rates in Effect from 2007 Through 2010 Provided For Recovery of RTEP Charges

In his written testimony, Dr. Pavlovic offered various reasons why he believes PECO actually recovered RTEP charges from customers during the 2007-2010 period before customers began to pay reconcilable TSC and NBT charges on January 1, 2011. Specifically, Dr. Pavlovic asserted, at different times, that:

- The FERC-approved NITS rate that PECO charged to other LSEs to move power on PECO's transmission system on their behalf included costs recorded in Account 561.8 of the FERC Uniform System of Accounts and, therefore,

necessarily included RTEP charges imposed prior to 2011. OCA St. Nos. 1, pp. 6-7 & 1-SR, pp. 8-10, 13-14.

- Irrespective of whether PECO's NITS rates actually included a component for recovery of pre-2011 RTEP charges, PECO's "transmission revenues" allegedly exceeded its "transmission revenue requirement" and, therefore, produced revenues "more than enough to cover" RTEP charges paid by PECO between 2007 and 2010. OCA St. No. 1, pp. 8-9.

- The transmission component of PECO's retail base rates in effect prior to January 1, 2011 included, and were recovering, RTEP charges even though those rates had been established well before PJM began to impose RTEP charges in the PECO Zone. OCA St. No. 1-SR, pp. 6-7, 13-14.

As discussed below, each of Dr. Pavlovic's contentions is based on clear factual and legal errors and, therefore, does not provide any support for the OCA's position.

Dr. Pavlovic Errs in Blurring the Important and Highly Relevant Distinction Between Transmission Costs PECO Incurs in Its Capacity as an LSE and the Transmission Costs It Incurs in Its Capacity as a Transmission Owner. This case involves PJM costs PECO incurred to obtain wholesale transmission service on behalf of retail POLR customers, not costs to provide transmission service to other entities using Company-owned facilities in the PECO Zone. The RTEP charges at issue in this proceeding were paid by PECO in its capacity as an LSE and, therefore, could not be a part of PECO's NITS rate. Indeed, Dr. Pavlovic does not refute Mr. Bisti's testimony that PJM RTEP charges were imposed on PECO to recover the cost of transmission facilities outside the PECO Zone – transmission facilities owned and operated by transmission service providers other than PECO. PECO St. Nos. 1, pp. 10-11 & 1-R, p. 11.

Dr. Pavlovic also erroneously implies that the manner in which PECO recorded RTEP charges for accounting purposes determined the manner in which they are recovered for ratemaking purposes. The fact that PECO recorded RTEP costs in Account No. 561.8 does not support Dr. Pavlovic's conclusion that those costs were recovered in PECO's FERC-approved transmission rate for NITS. Contrary to Dr. Pavlovic's contention, PECO could not recover any RTEP costs recorded in Account No. 561.8 during the 2007-2010 period through its NITS rates

regardless of the manner in which the FERC functionalizes that account. As Mr. Bisti's testimony demonstrates, PECO's NITS rate in effect during that period was established by the 1998 Settlement (which, in turn, was based on a 1994 revenue requirement) before PJM began imposing RTEP charges in the PECO Zone and before the FERC had even created Account No. 561.8. PECO St. Nos. 1-R, pp. 9-10 & 1-RJ, pp. 2-6.

Dr. Pavlovic Improperly Commingles Revenues from Two Different Kinds of Transmission Service. As explained in Section III.A. above, PECO's pre-2011 base rates could not have included a provision for RTEP costs because the transmission component of PECO's retail base rates was established before RTEP charges existed. Nonetheless, Dr. Pavlovic contends that pre-2011 Settlement bill credits should be refunded to retail customers through PECO's reconcilable NBT rate because "PECO has not demonstrated that it was unable to recover any portion of its PECO Zone RTEP charges during the period June 2007 through December 2010." OCA St. No. 1, p. 3; *see also id.*, pp. 7-8. Dr. Pavlovic's argument is flawed for several reasons.

At the outset, as previously explained, the OCA had the burden to prove that PECO's pre-2011 base rates were unjust and unreasonable. Thus, Dr. Pavlovic's argument is largely a rhetorical device to shift the burden of proof to PECO to prove an element of the OCA's own case. The OCA's argument should be rejected for that reason alone.

In any event, even on its own terms, the OCA's argument fails. In an attempt to support his argument, Dr. Pavlovic tried to compare PECO's "transmission revenues" reported in its annual FERC Form 1 for the years 2007-2009 to the Company's "transmission revenue requirement" for providing NITS. OCA St. No. 1, pp. 7-8; OCA Exh. No. KRP-6. However, the revenue requirement he alluded to is the same revenue requirement embodied in the 1998 Settlement, which in turn was derived from PECO's 1994 transmission rate case. PECO St. No. 1-RJ, pp. 4-5. Dr. Pavlovic contends that this arithmetic exercise somehow shows that PECO's

"transmission revenues" were sufficient to recover RTEP charges that PECO paid during the 2007-2010 period.

As should be evident, Dr. Pavlovic made an apples-to-oranges comparison by trying to equate a 1994 revenue requirement with 2007-2010 revenues. Many elements of a utility's revenue requirement change over time and, therefore, there is no valid basis to assume, as Dr. Pavlovic did, that PECO's revenue requirement remained static between 1994 and 2007-2010. Obviously, PECO could – and did – make increasing investments in transmission property and incurred increases in various expenses, including, to cite one obvious example, the wages and salaries of its employees. Dr. Pavlovic did not present a scintilla of evidence to show that there is any reasonable basis to assume that a 1994 calculation of revenue requirement could properly be compared to revenues in 2007-2010 before leaping to the conclusion that PECO was recovering more than its actual cost of providing NITS service. Indeed, had PECO been recovering more than its cost to furnish NITS to the extent Dr. Pavlovic assumes, it would be equally reasonable to assume that the FERC, either on its own accord or at the urging of transmission customers actually paying PECO's NITS charges, would have initiated a detailed review of PECO's rates. That never happened.

In addition to the errors addressed above, Dr. Pavlovic's argument suffers from a fundamental legal and conceptual defect. It is improper – indeed, contrary to applicable legal principles – to commingle revenues that PECO recovers under its FERC-approved wholesale NITS rate with the retail "transmission" component in the PTC it charged to POLR customers in order to apply an alleged and unproven excess in the former to offset a clearly established deficiency in the latter. Solid legal precedent under both federal and Pennsylvania law requires a strict jurisdictional separation of FERC- and PUC-jurisdictional revenues in establishing retail rates.

Section 1311(c) of the Code provides for segregation of plant-in-service by service type in establishing a public utility's base rates:

> When any public utility furnishes more than one of the different types of utility service, the commission shall segregate the property used and useful in furnishing each type of such service, and shall not consider the property of such public utility as a unit in determining the value of the rate base of such public utility for the purpose of fixing base rates.[21]

Consistent with that ratemaking principle, the Commission has long held that general rate increase filings must be made on a "Pennsylvania jurisdictional basis only."[22] In the *Met-Ed* decision, the Commission found that the presiding ALJ's imputation of revenues from sales for resale, which are subject to FERC jurisdiction, was "troubling" in light of the Commission's prior direction requiring the jurisdictional separation of rate base, revenues and expenses.[23]

The United States Supreme Court has required jurisdictional separation in ratemaking to avoid conflicts between state and federal regulatory agencies:

> The separation of intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation.
>
> But the interstate tolls are the rates applicable to interstate commerce, and neither these interstate rates nor the division of the revenue arising from interstate rates was a matter for the determination of either of the Illinois Commission or of the court in dealing with the order of that Commission….The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority.[24]

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[21] 66 Pa.C.S. § 1311(c).

[22] *Pa. P.U.C. v. Metropolitan Edison Co.*, Docket No. R-80051196, 55 Pa. P.U.C. 19, 21 (Apr. 2, 1981) ("*Met-Ed*").

[23] *Id.* ("[T]his is a convenient occasion and opportunity to express ourselves generally on this subject, since we will again order Metropolitan Edison Company that when filing its next general rate increase application to do so on a Pennsylvania jurisdictional basis only.").

[24] *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133, 148-49 (1930).

The Commission has also concluded that jurisdictional limitations imposed by the dictates of federal and state law require each regulatory body to examine revenue and revenue requirement separately for the distinct forms of service that each agency is authorized to regulate.[25]

Dr. Pavlovic does not dispute that PECO incurred RTEP charges during the 2007-2010 period in its capacity as an LSE to provide transmission service to POLR customers. However, as previously explained, deficiencies or excesses in PECO's revenues for FERC-jurisdictional wholesale transmission service are not included in calculating PECO's PUC-jurisdictional rates for transmission service to retail customers and vice versa. Thus, revenues produced by PECO's NITS rate during the 2007-2010 period cannot be used to reduce PECO's pre-2011 state-regulated rates, as Dr. Pavlovic proposes.

For all of the foregoing reasons, PECO's revenues during the 2007-2010 period under its FERC-jurisdictional wholesale NITS rate do not provide a valid basis to require PECO to refund Settlement credits for PJM RTEP charges that PECO incurred during the pre-2011 period to retail customers.[26]

Dr. Pavlovic Mischaracterized the Testimony of PECO Witness Cohn in the Company's 2010 Rate Case. Mr. Bisti testified that during the 2007-2010 period, PJM RTEP charges were not included for recovery in any rate charged by PECO for either retail service or FERC-regulated transmission service. PECO St. Nos. 1, pp. 7-11, 1-R, pp. 7-13 & 1-RJ, pp. 3-6. Dr. Pavlovic argues that the direct testimony of PECO witness Alan B. Cohn in PECO's 2010

[25] *Pa. P.U.C. v Bell Tel. Co. of Pa.*, 16 P.U.R.3d 207, 230 (1956) ("Because respondent's total plant and facilities are used for [both intrastate and interstate] services above described, and because our jurisdiction is limited to the services relating to Pennsylvania alone, it becomes necessary to 'separate' respondent's property, revenue and expenses between intrastate service and all other service furnished by respondent.").

[26] Dr. Pavlovic's related contention that, if PECO was not recovering RTEP charges during the 2007-2010 period, it should have sought FERC approval either to increase its "stated" FERC rate or to implement a "formula" adjustment mechanism to reflect annual changes in its costs fails for the same reasons. Under either alternative, PECO would be asking the FERC for an increase in revenue requirement for the Company's FERC-jurisdictional transmission service – not an increase in retail electric rates (which the FERC would be powerless to confer) to recover costs PECO incurred to furnish service to PUC-jurisdictional customers. PECO St. No. 1-R, p. 13.

electric base rate case refutes Mr. Bisti's testimony and affirms that the Company's pre-2011 base rates included cost recovery of RTEP charges from POLR service customers.[27] According to Dr. Pavlovic, Mr. Cohn's testimony stated that PECO "removed transmission costs from base rates" in effect when PECO filed its 2010 electric rate case, including PJM RTEP charges. OCA St. No. 1-SR, pp. 6-7.

Contrary to Dr. Pavlovic's characterization, Mr. Cohn's testimony regarding PECO's TSC proposal referred to estimated future test year PJM transmission charges included in PECO's proposed base rates, effective in 2011, for which it was seeking approval in that case. Mr. Cohn explained that those amounts would have to be removed if the Commission approved PECO's proposed TSC because PECO was offering two alternatives to recover all of the estimated future test year PJM transmission charges – in its proposed base rates or through the TSC:

> All of the costs charged to PECO by PJM have been included in base rate revenue requirements in developing the *proposed* base rates. However, the Company is proposing an alternative cost recovery method that would recover such costs under a [TSC]. The proposed TSC is a Section 1307 adjustment clause in the form set forth in PECO's proposed TSC Rider. The tariff pages that comprise the TSC Rider are provided as PECO Exhibit ABC-6. If the TSC Rider is approved, the Company will recover the transmission costs charged to it by PJM under that rider, and accordingly, those costs would not be included in the base rates established at the conclusion of this case.

[27] Dr. Pavlovic also misconstrued the operation of the combined rate cap on PECO's transmission and distribution ("T&D") base rates under the Company's Restructuring Plan. Specifically, he asserted that PECO's actual PJM charges incurred during the 2007-2010 period were "passed-through" to POLR customers via increases to the transmission component of PECO's base rates with an automatic corresponding decrease to the distribution component of those retail base rates. OCA St. No. 1-SR, pp. 12-14. Dr. Pavlovic's argument is wrong for two principal reasons. First, as Dr. Pavlovic acknowledges (*id.*, p. 12), PECO's combined T&D rate cap expired on December 31, 2006 – *before* the period he claims PECO actually recovered PJM transmission costs through retail base rates. *See* note 3, *supra*. Second, the transmission and distribution components of PECO's base rates subject to the combined cap were fixed at the level approved in the Restructuring Plan, unless PECO asked for PUC approval to increase retail transmission rates. *See* OCA Exh. No. KRP-9SR, p. 14 ("[A]ny Joint Petitioner may participate as a complainant or otherwise in any future transmission rate proceeding in which an increase in PECO's current transmission rates or change in rate structure is proposed, and, further, may file a complaint or otherwise participate in any proceeding before the Commission to adjust PECO's distribution rates as a result of any increase in PECO's transmission rates or change in rate structure in effect as of April 29, 1998."). As explained in Section II.B. above, PECO did not seek an increase in base rates until March 2010 after the combined T&D rate cap expired.

OCA Exh. No. KRP-4SR, p. 24 (emphasis added). Dr. Pavlovic's interpretation of Mr. Cohn's testimony is further belied by PECO Exhibit ABC-7, which is part of OCA Exhibit No. KRP-4SR. Mr. Cohn's analysis of future test year transmission costs in that exhibit clearly shows that the RTEP charges PECO was removing from the proposed base rate revenue requirement were "estimated 2010 payments," not experienced costs embedded in PECO's existing base rates. PECO St. No. 1-RJ, pp. 8-9.

In summary, Dr. Pavlovic's attempt to show that PECO actually recovered PJM RTEP charges prior to January 1, 2011, contrary to the record evidence in this case, should be rejected for three principal reasons. First, Dr. Pavlovic ignores the fact that both the transmission component of PECO's retail base rates and FERC-jurisdictional wholesale transmission rates in effect during the pre-2011 period at issue in this case were established before PJM began imposing RTEP charges in the PECO Zone. Second, he inaccurately conflates the transmission costs PECO incurs to provide transmission service in its role as an LSE to its own retail customers with the costs the Company incurs as a transmission owner to provide wholesale service to other entities. Third, Dr. Pavlovic improperly commingles revenues from two different kinds of transmission service, contrary to the jurisdictional separation required in ratemaking. More importantly, for the reasons discussed in Section III.B., *supra*, the Commission cannot lawfully grant Dr. Pavlovic's request to require the Company to "refund" a portion of the revenues PECO collected pursuant to Commission-made rates equal to the pre-2011 PJM bill credits PECO received under the Settlement. Accordingly, the Complaints should be dismissed.

2. PECO's Calculation Of Pre-2011 Settlement Billing Adjustments Based On Data Provided By PJM Is Reasonable

As explained in Mr. Bisti's direct and rebuttal testimony, for the "historical period" (2007-2016), the total amount of RTEP charges that were reallocated, and the corresponding billing adjustments, under the Settlement are based on a "black box" settlement, not actual PJM invoices paid by PECO and other LSEs in each PJM transmission zone. However, PJM provided time-segmented amounts of RTEP reallocated costs under the Settlement for the PECO Zone that were used as the basis for Settlement negotiations. PECO used those time-segmented amounts to calculate its pre-2011 bill credits under the Settlement. PECO St. Nos. 1, pp. 12-14 & 1-R, pp. 14-15. While Dr. Pavlovic concedes that the FERC found that the time-segmentation that was employed by the parties and PJM to negotiate the Settlement was reasonable,[28] he contends that PECO's calculation of pre-2011 Settlement credits based on such data is a "highly speculative estimate." OCA St. No. 1, pp. 3, 12.

Notably, Dr. Pavlovic did not propose any alternative approach to try to discern what he would consider a "reasonable" amount of Settlement credits related to the 2007-2010 period. Instead, he pointed to the fact that PJM and the other settling parties did not find it necessary to specifically correlate, by transmission zone, each agreed-upon annual billing adjustment to each of the original (and erroneous) line-item charges PJM previously imposed.[29] OCA St. No. 1-SR, p. 15. Because the FERC-approved Settlement did not provide those data, which Dr. Pavlovic insisted upon, he argued that the only alternative is for the PUC to assume that the Settlement

[28] OCA St. No. 1-SR, p. 15 ("The FERC found the PJM estimates to be a reasonable basis for the settlement calculation of PECO zone RTEP credits.").

[29] Dr. Pavlovic's additional argument that PECO's calculation of the $5.5 million of Settlement credits related to the pre-2011 period "is not supported by its actual PJM billed RTEP charges" (OCA St. Nos. 1, pp. 3, 12 & 1-SR, p. 3) is refuted by Mr. Bisti's alternative calculation in PECO Exhibit No. JAB-4R, which demonstrates that PECO could have claimed that it was entitled to retain as much as $8.1 million of the Settlement credits based on the available PJM invoices for 2008-2016. PECO St. No. 1-R, pp. 15-16.

credits related to pre-2011 PJM RTEP charges are *zero*. That assertion is not credible, reasonable or lawful.[30] Moreover, even if Dr. Pavlovic were correct that additional data might facilitate a more precise calculation of pre-2011 Settlement billing credits – an assumption that PECO rejects and the evidence does not support – the Commission has never insisted that mathematical certitude is necessary before approving allocations or other adjustments that need to be made to establish reasonable rates. To the contrary, reasonable estimates and projections are necessary – and expressly permitted – to establish just and reasonable rates. Indeed, the Commission regularly relies upon estimates and projections to determine revenue requirements for future test years and, since the adoption of Act 11 of 2012, fully projected future test years.[31] Where a utility uses a reasonable approach to estimate and allocate costs, the resulting values merit Commission approval. Neither the Commission nor Pennsylvania's appellate courts has insisted on a degree of mathematical precision that the subject matter, i.e., setting just and reasonable rates, does not admit:

> There is ample authority for the proposition that the power to fix 'just and reasonable' rates imports a flexibility in the exercise of a complicated regulatory function by a specialized decision-making body and that the term 'just and reasonable' was not intended to confine the ambit of regulatory discretion to an absolute or mathematical formulation . . . .[32]

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[30] The FERC approved the Settlement and, as previously noted, Dr. Pavlovic admits that the FERC found PJM's estimates to be a reasonable basis for calculating the RTEP credits to the PECO Zone. *See* note 28, *supra*. Because the transmission rates at issue are within the exclusive jurisdiction of the FERC, state regulatory authorities, including this Commission, are preempted by federal law from ignoring or countermanding the FERC's determination. *See New York v. FERC*, 535 U.S. 1, 18-19 (2002) ("the [Federal Power Act] gives FERC jurisdiction over the transmission of electric energy in interstate commerce"); *Mississippi Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 371 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates."). *See also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). In short, federal law prohibits Dr. Pavlovic's attempt to second-guess the FERC's determination of the reasonableness of the Settlement's time-segmented distribution of RTEP charges that PECO relied upon to determine pre-2011 RTEP credits.

[31] *See* 52 Pa. Code § 53.56(a). *See also Use of Fully Projected Future Test Year – 52 Pa. Code Chapter 53*, Docket No. L-2012-2317273 (Advance Notice of Proposed Rulemaking Order entered Dec. 22, 2017).

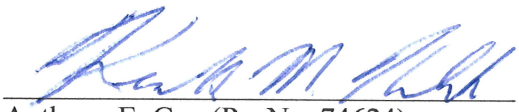
[32] *Pa. P.U.C. v. Pa. Gas & Water Co.*, 424 A.2d 1213, 1219 (Pa. 1980). *See also U.S. Steel Corp. v. Pa. P.U.C.*, 456 A.2d 686, 691 (Pa. Cmwlth. 1983).

Accordingly, Dr. Pavlovic's criticisms of PECO's calculation of the portion of the Settlement related to the 2007-2010 period do not provide a valid basis to require the Company to refund those bill credits to customers.

IV. CONCLUSION

For the reasons set forth above, the Commission should deny and dismiss, with prejudice, the Complaints of the Office of Consumer Advocate.

Respectfully submitted,



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Dated: January 14, 2020

APPENDIX A

Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs

PROPOSED FINDINGS OF FACT

I. BACKGROUND

1. During the period at issue in this case, PECO was (and continues to be) a load serving entity ("LSE"). As an LSE, PECO obtains transmission service from PJM Interconnection, L.L.C. ("PJM") to move electricity to its distribution system to serve retail customers. PECO St. Nos. 1, p. 11 & 1-R, pp. 10-11.

2. Under its 1998 Restructuring Plan,[1] PECO had the obligation to offer and furnish "Provider Of Last Resort" ("POLR") generation service, as required by Section 2807(e)(1) of the Public Utility Code, to customers that did not, or could not, shop with an electric generation supplier.[2] To fulfill its statutory obligation, PECO had to obtain transmission service to deliver POLR electricity supplies to the Company's PJM-designated transmission zone ("PECO Zone"), where that electricity could then be distributed by PECO to POLR customers' premises. Because PECO's post-restructuring retail rates had been unbundled, the cost of providing POLR service included two components: a generation price, which remained capped until January 1, 2011, and a transmission component, to recover the cost of bringing that generation to the PECO

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1 *Application of PECO Energy Co. for Approval of Its Restructuring Plan Under Section 2806 of the Public Utility Code et al.*, Docket Nos. R-00973953 and P-00971265 (Joint Petition for Settlement filed Apr. 29, 1998) ("Restructuring Plan"), p. 11. The Restructuring Plan was approved by the Pennsylvania Public Utility Commission (the "Commission") in its Order and Opinion entered on May 14, 1998 ("PECO Restructuring Order").

2 After PECO's generation rate caps expired on January 1, 2011, PECO began to furnish "default service" to non-shopping customers under a "commission-approved competitive procurement plan" pursuant to Section 2807(e)(3.1) of the Code and the Commission's regulations on default service (52 Pa. Code §§ 54.181 – 54.189) instead of POLR service at the capped generation price established by its Restructuring Plan. PECO's Transmission Service Charge ("TSC") was implemented at the same time PECO began to provide default service under its first Commission-approved default service program at generation prices that were no longer subject to the generation rate cap. PECO St. No. 1, pp. 7-8.

Zone.[3] PECO's "price to compare" ("PTC") for POLR service was the sum of the generation and transmission components. PECO St. No. 1-R, pp. 4-5.

3. PJM has been approved by the Federal Energy Regulatory Commission ("FERC") as the Regional Transmission Operator ("RTO") for its members' transmission systems, which encompass all or parts of thirteen states and the District of Columbia. Each year, PJM prepares a Regional Transmission Enhancement Plan ("RTEP") that identifies transmission system upgrades and enhancements needed to satisfy the operational, economic, and reliability requirements of the bulk power system under PJM's operational control. PJM, on behalf of its member transmission owners, charges the cost to implement its RTEP to LSEs in the transmission zones that are assigned cost responsibility for the applicable RTEP projects. The manner in which RTEP costs were allocated was disputed at the FERC. After prolonged litigation, that dispute was resolved by a settlement (the "Settlement") the FERC approved on May 31, 2018. The Settlement was the genesis of the PJM bill credits that are the subject of this proceeding.[4] PECO St. No. 1, pp. 6-7, 10-12.

4. PJM first began to impose RTEP charges in the PECO Zone on June 1, 2007. The RTEP costs imposed on PECO were designed to recover the costs of transmission facilities owned by other transmission service providers outside the PECO Zone. Consequently, RTEP

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[3] The statutory caps on PECO's transmission and distribution rates that had initially been extended pursuant to its Restructuring Plan and further extended in the PECO/Unicom merger settlement expired on December 31, 2006. *See Application of PECO Energy Co. for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code et al.*, Docket Nos. R-00973953 and P-00971265 (Opinion and Order entered May 14, 1998) ("PECO Restructuring Order"), pp. 3-4, 8; *Application of PECO Energy Co. Pursuant to Chapters 11, 19, 21, 22 and 28 of the Pub. Util. Code for Approval of (1) a Plan of Corporate Restructuring, Including the Creation of a Holding Company and (2) the Merger of the Newly Formed Holding Company and Unicom Corp.*, Docket No. A-00110550F0147 (Opinion and Order entered June 22, 2000), pp. 8, 26.

[4] *PJM Interconnection, L.L.C.*, Order on Contested Settlement, 163 FERC ¶ 61,168 (2018).

costs represented a cost incurred by PECO associated with the transmission service it obtained in its capacity as an LSE to serve its own retail customers. PECO St. No. 1, pp. 7, 11.

5. In addition, PECO was, and is, the owner of transmission facilities that are used to move electricity on behalf of other entities, chiefly other LSEs. The costs that PECO incurs for that service, including the fixed costs of PECO-owned transmission facilities, are recovered in PECO's wholesale network integration transmission service ("NITS") rate from the entities that receive that service. PECO's NITS rates are filed with and approved by the FERC. PECO St. Nos. 1, p. 10 & 1-R, pp. 4-5, 10.

6. PECO's NITS rate in effect during the 2007-2010 period was fixed at $20,942 per megawatt-year based on a "black box" settlement approved by the FERC at Docket No. ER97-3189-000 ("1998 Settlement"). That proceeding was initiated to restructure PJM, establish PJM as an Independent System Operator and provide PJM operational control of the regional transmission system. In implementing the 1998 Settlement, PJM's Open Access Transmission Tariff adopted PECO's revenue requirement established in a prior proceeding based on costs recorded by PECO in 1994. PECO St. Nos. 1, p. 10, 1-R, pp. 9-10 and 1-RJ, pp. 4-6; PECO Exh. Nos. JAB-1RJ to JAB-4RJ.

7. PECO's retail base rates in effect during the 2007-2010 period at issue in this proceeding were established in the Company's 1989 base rate proceeding, which was concluded with a final Order of the Commission entered on May 16, 1990 at Docket No. R-891364 approving those rates for service rendered on and after April 20, 1990. That Order found and determined that PECO's rates, as modified by the Order, were just and reasonable. *Pa. P.U.C. v. Philadelphia Elec. Co.*, Docket No. R-891364, 1990 Pa. PUC LEXIS 155 (May 16, 1990).

8. On January 1, 1999, PECO's 1989 base rates were functionally "unbundled" into distribution, transmission and generation components pursuant to the Restructuring Order, and, once again, the Commission determined that PECO's rates were just and reasonable. PECO Restructuring Order, pp. 3-4, 7-11.

9. In 2007, the FERC issued Order No. 494, which adopted a methodology for allocating RTEP costs among the PJM-designated zones of transmission owners, who, in turn, would have to recover those costs from other entities, including LSEs.[5] The entry of Order No. 494 initiated more than a decade of litigation at the FERC in which certain owners of transmission within PJM, including PECO, contested the RTEP cost allocation methodology the FERC had adopted. That litigation was resolved by the Settlement. PECO St. No. 1, pp. 11-12.

10. PECO did not file another electric distribution base rate case until March 2010. In that case, PECO's pro forma revenue requirement included estimates of the PJM transmission charges (including RTEP charges) PECO expected to incur during the future test year (calendar year 2010) as an LSE to serve its retail customers. In parallel with its requested base rate increase, PECO proposed a bypassable, reconcilable TSC under Section 1307 of the Public Utility Code[6] "as an alternative cost recovery method" for the "transmission costs" PECO had included, on a pro forma basis, in developing its proposed base rates. The Commission approved PECO's proposal, and the base rates and TSC approved by the Commission in the 2010 base rate case became effective on January 1, 2011.[7] PECO St. Nos. 1, pp. 7-9 & 1-RJ, pp. 8-9; PECO Exh. Nos. JAB-1 and JAB-2.

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5 *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007).

6 66 Pa.C.S. § 1307.

7 *Pa. P.U.C. v. PECO Energy Co. – Elec. Div.*, Docket No. R-2010-2161575 (Opinion and Order entered Dec. 21, 2010), p. 9.

11. PECO's Non-Bypassable Transmission Charge ("NBT") was implemented on June 1, 2015, in accordance with the Commission's directive in the Company's third default service proceeding. In that proceeding, the Commission directed that certain PJM charges, including RTEP charges, should be recovered on a non-bypassable basis from all distribution customers rather than through PECO's bypassable TSC that was billed only to default service customers.[8] PECO St. No. 1, pp. 9-10. Like the TSC, the NBT recovers eligible costs on a dollar-for-dollar basis and is fully reconcilable.

12. The Settlement implements a schedule of adjustments to PJM's prior-period billings for RTEP charges. These billing adjustments are based on a hybrid method of allocating costs for RTEP transmission enhancements that differs from the method used to calculate the bills PJM originally issued to comply with FERC Order No. 494. The total net bill credits generated by the Settlement are adjustments to RTEP charges PECO paid between June 1, 2007 and June 30, 2018. PECO St. No. 1, pp. 12-13; PECO Exh. Nos. JAB-3 and JAB-4.

13. Under the Settlement, there are two periods designated for tracking the differences between the prior allocation method and the Settlement allocation method – the "transitional period" (January 1, 2016 to June 30, 2018) and the "historical period" (from the initiation of RTEP charges in 2007 to January 1, 2016). For the transitional period, PJM was charged with tracking and accumulating the aggregate differences, plus interest, between the previous RTEP charges and the revised allocations approved by the FERC. PJM published a summary of the transitional period billing adjustments in each transmission zone on July 31, 2018. PECO St. No. 1, pp. 11-12; PECO Exh. No. JAB-4.

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[8] *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.

14. For the "historical period," which includes the 2007-2010 period relevant to this case, the total amounts that were reallocated and the corresponding billing adjustments are based on a "black box" settlement. PECO St. No. 1, pp. 12-13; PECO Exh. No. JAB-3.

15. PECO will receive approximately $83 million in total net credit adjustments to prior bills for both the transitional period and the historical period.[9] Of that total, PECO will refund to customers $77.5 million, reflecting bill credits for RTEP charges imposed from and after January 1, 2011. PECO St. No. 1, pp. 13-14.

16. PECO's NBT charges in effect from December 1, 2018 to June 1, 2019 reflect a reduction of $63.2 million to the NBT costs that would otherwise be recoverable by PECO in order to reflect PJM bill credits for the post-2010 period that PECO anticipated receiving by November 30, 2019. PECO St. No. 1, pp. 15-19; PECO Exh. Nos. JAB-7 to JAB-10.

17. Post-2011 Settlement credits that PECO receives after November 30, 2019 (approximately $14.3 million) will be passed through to customers as reductions to PECO's NBT-recoverable costs in future semi-annual recalculations of PECO's NBT rate. PECO St. No. 1, p. 19.

18. PECO's NBT rate calculations do not reflect Settlement credits related to PECO's overpayment of RTEP charges during the 2007-2010 period because that period elapsed before PECO implemented its reconcilable TSC and NBT that, for the first time, included a component for the recovery of RTEP charges. The credits for those pre-2011 billing adjustments when PECO paid all RTEP costs total approximately $5.5 million and are based on time-segmented

[9] The sum of $83 million for both the "transitional period" and the "historical period" is an upward revision of the estimate of $79.5 million set forth in PECO's November 7, 2018 NBT filing. Even though the total PJM bill credits under the Settlement increased, PECO did not increase the $5.5 million portion that related to RTEP charges imposed on PECO prior to January 1, 2011. PECO St. No. 1, p. 14.

"black box" RTEP reallocation amounts for the PECO Zone that PJM provided during the settlement negotiations in the proceeding at FERC Docket No. EL05-121-009. PECO St. No. 1, pp. 14-15.

II. PROCEDURAL HISTORY

19. On November 7, 2018, PECO filed its semi-annual adjustment to the Company's NBT for the period from December 1, 2018 through May 31, 2019 as set forth in Supplement No. 76 to its Tariff Electric – Pa. P.U.C. No. 5 ("Supplement No. 76") with accompanying supporting schedules. In Supplement No. 76, PECO proposed to include post-2010 PJM bill credits totaling $77.5 million in its NBT calculations.

20. On November 28, 2018, the Commission issued a Secretarial Letter at Docket No. M-2018-3005860 finding that the NBT charges set forth in Supplement No. 76 "are consistent with the tariff and, accordingly, are permitted to become effective as filed" on December 1, 2018.

21. Later in the day on November 28, 2018, after the Commission had issued its Secretarial Letter, the OCA filed its Complaint initiating this proceeding ("2018 Complaint"). PECO St. No. 1, pp. 5-6.

22. On December 19, 2018, the Company invoked the provisions of 52 Pa. Code § 5.101(a)(3) to file a Preliminary Objection seeking a more specific pleading so that PECO could properly assess the factual and legal premises for the claims made by the OCA in the 2018 Complaint.

23. On December 31, 2018, the OCA filed an Answer in opposition to the Company's Preliminary Objection.

24. On January 4, 2019, the Office of Small Business Advocate filed a Notice of Intervention and Public Statement in response to the OCA's 2018 Complaint.

25. On January 8, 2019, this matter was assigned to Administrative Law Judge Marta Guhl (the "ALJ").

26. On February 8, 2019, the ALJ denied the Company's Preliminary Objection and directed PECO to file an Answer to the OCA's Complaint within twenty days.

27. On February 28, 2019, PECO filed an Answer and New Matter to the OCA's 2018 Complaint.

28. A Prehearing Conference was held on April 26, 2019 before the ALJ and a schedule was established for submitting written testimony, holding evidentiary hearings and filing briefs. *See* Prehearing Order #1 (May 1, 2019). Thereafter, written direct, rebuttal and surrebuttal testimony was submitted by the Company and the OCA on the dates previously established for each submission.

29. On May 15, 2019, PECO filed its semi-annual adjustment to its NBT rates for the period from June 1, 2019 through November 30, 2019 as set forth in Supplement No. 13 to PECO's Tariff Electric – Pa. P.U.C. No. 6 ("Supplement No. 13") at Docket No. M-2019-3010032.

30. On May 30, 2019, the Commission issued a Secretarial Letter finding that PECO's proposed NBT rates in Supplement No. 13 were consistent with its tariff and, therefore, permitting those rates to become effective as filed on June 1, 2019. PECO St. No. 1, pp. 17-19.

31. On June 13, 2019, the OCA filed a Complaint against PECO at Docket No. M-2019-3010032 disputing the Company's exclusion of pre-2011 PJM billing adjustments made under the Settlement from the NBT rates set forth in Supplement No. 13 ("2019 Complaint").

32. On June 14, 2019, the Commission issued a Secretarial Letter docketing the 2019 Complaint as a formal rate case complaint at Docket No. C-2019-3010737.

33. The 2018 and 2019 Complaints were subsequently consolidated for hearing and decision. *See* Order Granting Request to Consolidate (Nov. 27, 2019).

34. A telephonic evidentiary hearing was held on November 14, 2019 after the parties waived cross-examination of their respective witnesses. At the hearing, the written testimony and exhibits of PECO witness Bisti and OCA witness Pavlovic were admitted into evidence.

III. THE EVIDENCE SUPPORTS THE FOLLOWING FINDINGS OF FACT

35. In this case, the OCA seeks to require PECO to refund to customers a portion of the revenues collected under PECO's PUC-approved 2007-2010 base rates equal to approximately $5.5 million of the PJM bill credits for RTEP charges that PECO, not customers, paid prior to January 1, 2011. These PJM bill credits related to RTEP charges that were never passed through to customers and which PECO never had the opportunity to include for recovery in any rates it charged to customers. PECO St. Nos. 1, pp. 7-11, 1-R, pp. 7-13 & 1-RJ, pp. 3-8.

36. During the 2007-2010 period, PJM RTEP charges were not included for recovery in any rate charged by PECO for either retail service or FERC-regulated transmission service. *Id.*

37. PECO's base rates in effect at the time PJM initiated RTEP charges had been established in PECO's 1989 base rate case and were subsequently unbundled effective January 1,

1999. The 1989 base rates did not provide for the recovery of any RTEP charges because RTEP charges had not been created and PECO was not yet incurring those costs. PECO St. Nos. 1, pp. 7-9 & 1-R, pp. 4-7.

38. Pursuant to the Commission's final Order in the Company's 2010 base rate case, PECO implemented a TSC (and as of June 1, 2015, an NBT) to recover PJM transmission-related costs, including RTEP, on a dollar-for-dollar and reconcilable basis as of January 1, 2011. PECO's base rates in effect prior to January 1, 2011 had been established before PJM began imposing RTEP charges and, therefore, did not include any provision for recovery of PJM RTEP costs. PECO St. Nos. 1, pp. 7-9, 1-R, pp. 4-7 & 1-RJ, pp. 8-9.

39. Until PECO's reconcilable TSC was implemented on January 1, 2011, PECO recovered the cost of obtaining transmission service for POLR customers through the transmission component of its retail base rates reflected in the PTC charged to POLR customers. PECO St. No. 1-R, pp. 4-5.

40. Unlike the TSC and NBT, the transmission component of PECO's retail base rates did not provide for dollar-for-dollar recovery of costs actually incurred and, therefore, was not subject to reconciliation to true-up costs incurred with revenues received. PECO St. Nos. 1, pp. 7-8, 20-21 & 1-R, pp. 8-13.

41. PECO's NBT rate calculations properly reflect all adjustments to post-2010 bills (totaling $77.5 million) that relate to transmission service PECO obtained from PJM during the period customers paid reconcilable TSC and NBT charges that included RTEP.

42. The OCA has not established that PECO actually recovered RTEP charges imposed before the PUC approved PECO's TSC as of January 1, 2011 through either its retail rates or wholesale transmission rates. PECO St. No. 1-R, pp. 8-13 & 1-RJ, pp. 3-9.

43. OCA witness Pavlovic erred by conflating the transmission costs PECO incurs as an LSE to provide transmission service to its own retail customers with the costs the Company incurs as a transmission owner to provide wholesale service to other entities, including other LSEs. PECO incurred RTEP charges during the 2007-2010 period in its capacity as an LSE to provide transmission service to POLR customers. Those charges were imposed to recover the cost of transmission facilities outside the PECO Zone owned and operated by other transmission providers. Therefore, RTEP charges could not be a part of PECO's NITS rate charged to other entities using Company-owned transmission facilities in the PECO Zone. PECO St. No. 1, p. 11-12 & 1-R, pp. 10-11.

44. PECO's FERC-jurisdictional wholesale transmission rates in effect during the pre-2011 period at issue in this case were established before PJM began imposing RTEP charges in the PECO Zone and before the FERC even created Account No. 561.8 of its Uniform System of Accounts. PECO St. Nos. 1-R, pp. 9-10 & 1-RJ, pp. 2-6.

45. There is no credible record evidence that the revenues produced by PECO's FERC-jurisdictional wholesale NITS rate during the 2007-2010 period recovered the RTEP costs PECO incurred in its capacity as an LSE. Dr. Pavlovic's contention that PECO's "transmission revenues" were sufficient to recover pre-2011 RTEP charges was based upon his comparison of the revenue requirement embodied in the 1998 Settlement (which in turn was derived from PECO's 1994 transmission rate case) with NITS revenues billed during the 2007-2010 period. The comparison of revenue requirement and revenues for periods separated by such a significant

time interval is not valid and does not support Dr. Pavlovic's contention. PECO St. Nos. 1-R, pp. 11-12 & 1-RJ, pp. 4-5.

46. Additionally, Dr. Pavlovic improperly commingled revenues from two different kinds of transmission service. *Id.* It is contrary to applicable legal principles to commingle revenues that PECO recovers under its FERC-approved wholesale NITS rate with the retail "transmission" component in the PTC that PECO charged to POLR customers in order to apply an alleged (but unproven) excess in FERC-rate revenue to offset a deficiency in PUC-jurisdictional retail revenue. Principles of Federal and Pennsylvania law set forth in the Conclusions of Law, *infra*, require a strict jurisdictional separation of FERC-jurisdictional and PUC-jurisdictional revenues in establishing retail rates.

47. The Joint Petition for Settlement of PECO's restructuring proceeding included a provision that allowed PECO to request PUC approval to exceed its transmission rate cap, but only if there was a corresponding reduction in its distribution rate. That provision also allowed other parties to oppose any request by PECO to exceed its transmission rate cap. OCA Exh. No. KRP-9SR, p. 14.

48. Dr. Pavlovic contended that the transmission rate cap exception was equivalent to an automatic pass-through of any increase in transmission costs. However, the transmission rate cap exception applied only for the term of PECO's combined transmission and distribution ("T&D") rate cap. The rate cap exception expired with PECO's T&D rate cap on December 31, 2006. Thus, the provision Dr. Pavlovic relies upon became inoperative before the period (June 2007 through December 2010) he claims that provision provided the means for PECO to recover increases in PJM transmission costs. Additionally, Dr. Pavlovic's interpretation of the combined T&D rate cap exception is not supported by the express language of the Joint Petition for

Settlement, which required PECO to petition the PUC for approval of any such increase (subject to opposition by other parties) and left to the PUC's discretion whether such an increase should be granted. The record evidence clearly shows that PECO did not petition for such an increase during the period its T&D rate caps were in effect. PECO did not seek an increase in base rates until March 2010, after the combined T&D rate cap expired. PECO St. Nos. 1, p. 7 & 1-R, pp. 4-5; OCA St. No. 1-SR p. 12; OCA Exh. No. KRP-9SR, p. 14.

49. PECO's calculation of pre-2011 Settlement billing adjustments based on time-segmented amounts of RTEP reallocated costs provided by PJM is reasonable and is not a "highly speculative estimate" as Dr. Pavlovic contends. PECO's alternative calculation demonstrates that PECO could have claimed that it was entitled to retain as much as $8.1 million of the Settlement credits based on the available PJM invoices for 2008-2016. PECO St. Nos. 1, pp. 12-14 & 1-R, pp. 14-15; PECO Exh. No. JAB-4R.

50. Dr. Pavlovic concedes that the FERC found that the time-segmentation employed by the parties and PJM to negotiate the Settlement was reasonable. OCA St. No. 1-SR.

51. Dr. Pavlovic did not propose any alternative approach to try to discern what he would consider a "reasonable" amount of pre-2011 Settlement credits. OCA St. Nos. 1, pp. 3, 12 & 1-SR, p. 15.

52. It is not reasonable for the PUC to assume that the PJM bill credits related to pre-2011 RTEP charges are *zero* simply because the Settlement does not specify the underlying billing determinants for the agreed-upon annual billing adjustment amounts for each transmission zone. PECO St. No. 1-R, pp. 14-15.

53. PECO has established by a preponderance of substantial evidence that the OCA's claim that PECO should refund $5.5 million of PJM bill credits related to transmission service obtained by PECO for retail customers before they began to pay reconcilable TSC and NBT charges on January 1, 2011 is fundamentally unfair and contrary to sound ratemaking principles. Sustaining the OCA's Complaints would effectively require PECO to refund dollars that PECO paid but never had the opportunity to include in its base rates for recovery from customers.

IV. PROPOSED CONCLUSIONS OF LAW

54. PECO's pre-2011 base rates are "Commission-made" rates. *Zucker v. Pa. P.U.C.*, 401 A.2d 1377 (Pa. Cmwlth. 1979); *see also* 66 Pa.C.S. § 316 ("Whenever the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.").

55. In contrast to base rates approved by a final PUC Order, both the Commission and Pennsylvania appellate courts have held that charges imposed under automatic adjustment clauses are not "commission made rates." *See, e.g.*, *Metropolitan Edison Co. v. Pa. P.U.C.*, 437 A.2d 76, 79-80 (Pa. Cmwlth. 1983).

56. In the seminal case of *Cheltenham & Abington Sewerage Co. v. Pa. P.U.C.*, 25 A.2d 334, 337 (Pa. 1942), the Pennsylvania Supreme Court held that "a commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission." The Pennsylvania Supreme Court provided the following prescription, which has been consistently reaffirmed:

> Rates having in other respects the attributes of commission-made rates do not lose their effect as such by an indefinite expression of opinion that some of the factors on which they are based are

> variable and may not stand a pragmatic test, a situation which is always implied. To sustain the position of the Superior Court would be to give a retroactive effect to the order of August 30, 1935, without notice to the utility. The mere institution of an inquiry did not constitute notice that a departure would be made from the tariff established by the commission in its quasi-legislative capacity.

Id. at 338-39.

57. The principle established in *Cheltenham & Abington Sewerage Co*. was subsequently applied in *West Penn Power Co. v. Pa. P.U.C*, 100 A.2d 110, 114 (Pa. Super. 1953), where the Pennsylvania Superior Court articulated further the dimensions of the prohibition against giving retroactive effect to Commission orders determining just and reasonable rates:

> Finally, the Commission, having approved the rates under tariff No. 30, could not summarily reverse its order of approval and apply such reversal retroactively by ordering refunds for the period between October 29, 1951 [the effective date of the October 26, 1951 order finding West Penn's rates just and reasonable], and April 14, 1953 [the date of an order denying rehearing of a February 16, 1953 order directing refunds of amounts billed under the approved rates back to October 29, 1951]. The order of October 26, 1951, amounted in law to formal Commission approval of the new rates filed by the Company under tariff No. 30, and rendered the rates in effect Commission-made rates. Consequently, after it had previously approved the rates, the Commission could not give retroactive effect to its order of February 16, 1953, and direct refunds to customers for charges made beginning October 29, 1951.

58. The doctrine of Commission-made rates prohibits the Commission from ordering refunds of amounts collected by a public utility under and pursuant to tariff provisions that the Commission, by formal administrative action, found to be just and reasonable. *C & D Techs., Inc. v. Pennsylvania Power & Light Co.*, Docket Nos. C-00992119 et al., 2004 Pa. PUC LEXIS 57, at **28-29 (June 25, 2004). Accordingly, the Commission cannot lawfully grant the relief

the OCA is requesting in this case, namely, a reduction in PECO's revenues collected under pre-2011 retail base rates to "refund" after-the-fact reductions to PECO's historical PJM bills for RTEP charges.

59. The OCA is seeking a retrospective change (i.e., refunds) of PECO's PUC-approved 2007-2010 base rates outside of a Commission-initiated investigation and thus has the burden of proof. 66 Pa.C.S. §§ 315(a) and 332(a).

60. The record evidence does not support a finding that the OCA has carried its burden to establish a valid basis for the Commission to require PECO to refund bill credits to customers related to pre-2011 RTEP charges that were not included in PECO's retail base rates.

61. Both federal and Pennsylvania law requires a strict jurisdictional separation of FERC-jurisdictional and PUC-jurisdictional revenues in establishing retail rates. *Smith v. Ill. Bell Tel. Co.*, 282 U.S. 133, 148-49 (1930); *Pa. P.U.C. v Bell Tel. Co. of Pa.*, 16 P.U.R.3d 207, 230 (1956). *See also* 66 Pa.C.S. § 1311(c); *Pa. P.U.C. v. Metropolitan Edison Co.*, 55 Pa. P.U.C. 19, 21 (Apr. 2, 1981). Thus, revenues produced by PECO's FERC jurisdictional wholesale NITS rate during the 2007-2010 period cannot be used to reduce PECO's pre-2011 state-regulated rates, as OCA witness Pavlovic proposes.

62. The Commission is preempted by federal law from ignoring or reversing the FERC's determination of the reasonableness of the Settlement's time-segmented distribution of RTEP charges that PECO relied upon to determine the Settlement amounts related to the 2007-2010 period. *New York v. FERC*, 535 U.S. 1, 18-19 (2002). *See also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

63. Reasonable estimates and projections are necessary and permitted to establish just and reasonable rates. *Pa. P.U.C. v. Pa. Gas & Water Co.*, 424 A.2d 1213, 1219 (Pa. 1980). *See also U.S. Steel Corp. v. Pa. P.U.C.*, 456 A.2d 686, 691 (Pa. Cmwlth. 1983).

64. Dr. Pavlovic's criticisms of PECO's calculation of the portion of the Settlement related to the 2007-2010 period do not provide a valid basis to require the Company to refund those PJM bill credits to customers.

PROPOSED ORDERING PARAGRAPHS

1. The OCA's request to retrospectively diminish the revenues PECO collected pursuant to its PUC-approved base rates from 2007 through 2010 to refund to customers $5.5 million of Settlement credits that apply to RTEP charges paid by PECO – not customers – prior to January 1, 2011 is fundamentally inequitable and legally barred by the doctrine of Commission-made rates as discussed above.

2. The OCA is not entitled to the relief requested in its Complaints that have been consolidated at the above-referenced dockets.

3. The OCA's Complaints are hereby dismissed.

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