

COMMONWEALTH OF PENNSYLVANIA



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January 14, 2020

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

Re: Office of Consumer Advocate
v.
PECO Energy Company
Docket Nos. M-2018-3005860
C-2018-3006242

Office of Consumer Advocate
v.
PECO Energy Company
Docket Nos. M-2019-3010032
C-2019-3010737

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Main Brief in the above-referenced proceedings.

Copies have been served on the parties as indicated on the enclosed Certificate of Service.

Very truly yours,

A handwritten signature in blue ink, appearing to read "H. Breitman", with a long horizontal stroke extending to the right.

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Enclosures:

cc: The Honorable Marta Guhl, ALJ
Certificate of Service

*282043

CERTIFICATE OF SERVICE

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

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

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Dated: January 14, 2020
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

MAIN BRIEF
OF THE
OFFICE OF CONSUMER ADVOCATE

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I. INTRODUCTION

A. Background

The instant proceeding relates to a settlement agreement approved by the Federal Energy Regulatory Commission (FERC) in FERC Docket EL05-121 regarding certain FERC transmission-related charges to be refunded to customers.¹ Initially, FERC allocated the expense of new transmission facilities that operate at and above 500 kV across all the PJM utilities, east or west, in proportion to each utility's respective sales.² This method of allocating transmission expense was referred to as the "postage-stamp" methodology because, just as the price of sending a letter anywhere in the United States is the same, the expense that an electric utility must contribute to a 500-kV line was considered to be independent of the utility's location relative to the location of the transmission line.³

Numerous parties took exception to FERC's original decision to apply these Regional Transmission Expansion Plan (RTEP) charges across the entire PJM footprint on a postage-stamp basis, and sought various appeals.⁴ The main issue on appeal was the extent to which members of PJM in PJM's western region would be required to contribute to the expense of newly built or projected 500-kV transmission lines that were mainly located in the eastern portion of PJM.⁵

¹ PJM Interconnection, L.L.C., 2018 FERC LEXIS 713 (F.E.R.C. May 31, 2018) (FERC Settlement Agreement).

² Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961, at **9-10 (7th Cir. 2014) (7th Circuit 2014 Remand). Unless otherwise specifically identified, the majority of the "Background" section here is taken from the Seventh Circuit's 2014 Opinion due to its accuracy and completeness.

³ Id.

⁴ See Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311 (7th Circuit 2009 Remand).

⁵ Id. at **6-7.

After review, the United States Court of Appeals for the Seventh Circuit remanded the case back to FERC in 2009, finding that FERC did not provide a reasonable basis for using the postage-stamp basis to allocate costs and thereby, set rates.⁶ After remand, FERC revisited the allocation method and eventually issued another Order as further support for the postage-stamp method.⁷ Once again, numerous parties sought review of this Order with the Seventh Circuit. In 2014, the Seventh Circuit decided this second appeal on the postage-stamp method and found that FERC's method was unreasonable and unsupported.⁸ The case was again remanded to FERC for the purpose of creating a reasonable basis for allocating RTEP charges.⁹

After the second remand, settlement talks began among the large number of parties involved in this matter and eventually an accord was reached.¹⁰ The FERC Settlement Agreement resolved the dispute regarding the method of the allocation of RTEP charges for two periods: (1) the "historical period" defined as the period of June 2007 through December 2015; and (2) the "going-forward period" defined as January 2016 onward.¹¹ For the "going-forward" period, the FERC Settlement Agreement provides that PJM will assign cost responsibility for the revenue requirement associated with each transmission enhancement through a hybrid method in which: (1) 50 percent of the cost responsibility is assigned to the responsible customer on an annual load-ratio share basis (in accordance with PJM's tariff); and (2) 50 percent of the cost responsibility is

⁶ See 7th Circuit 2009 Remand.

⁷ 7th Circuit 2014 Remand at **9.

⁸ Id. at **27-28.

⁹ Id.

¹⁰ See FERC Settlement Agreement.

¹¹ Id. at **11-12

assigned to responsible customers based on the “solution-based DFAX method” contained in PJM’s tariff.¹² For the “historical period” of June 2007 through December 2015, the FERC Settlement Agreement provides that the PJM zones that were over-allocated (i.e. charged too much) RTEP charges are to receive an RTEP credit (i.e. a refund).¹³

PECO was over-allocated RTEP charges under the postage-stamp method that was found to be unreasonable by the Court for assignment cost responsibility for revenue requirement purposes.¹⁴ The PECO zone is receiving a credit of \$49,567,831 for the historical period of June 2007 through December 2015, of which PECO seeks to retain \$5,560,416 for RTEP charges during the historical period at issue from June 2007 through December 2010.¹⁵ The remaining amount is being refunded to customers.¹⁶

B. Procedural History

On November 7, 2018, PECO filed with the Commission a Semiannual Adjustment to the Non-Bypassable Transmission (NBT) Service Charge in PECO Energy Electric Tariff No. 5, Supplement No. 76. Through this tariff supplement, PECO proposed to adjust the NBT to reflect the impact of the approved RTEP credits pursuant to the FERC Settlement Agreement. Under the FERC Settlement Agreement, the PECO zone is receiving a credit of \$49,567,831 for the historical period of June 2007 through December 2015. Through its filing, PECO proposed to retain \$5.5 million, which PECO states is the portion of RTEP charges that PJM billed to PECO from June

¹² Id.

¹³ Id. at **12-13.

¹⁴ 7th Circuit 2014 Remand at **27-28.

¹⁵ OCA St. No. 1 at 5.

¹⁶ PECO St. No. 1 at 3.

2007 through December 2010.¹⁷ PECO proposed that the adjustment would become effective on December 1, 2018.¹⁸ As a part of its filing, PECO submitted a one-page explanation to the Commission regarding its reasoning for the NBT adjustment and the Company's proposal to retain \$5.5 million in FERC-ordered credits to ratepayers.¹⁹

On November 29, 2018, the OCA filed a Formal Complaint with the Commission challenging PECO's proposed semiannual adjustment to its NBT, specifically the proposal to retain \$5.5 million of FERC-ordered RTEP credits. On December 19, 2018, PECO filed a Preliminary Objection alleging that the OCA's Formal Complaint contained insufficient specificity for a pleading. On December 31, 2018, the OCA filed an Answer to the Preliminary Objection. The proceeding was referred to the Office of Administrative Law Judge and was further assigned to Administrative Law Judge (ALJ) Marta Guhl. On January 4, 2019, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention, Public Statement, Appearance, and Verification. On February 8, 2019, ALJ Guhl issued an Order denying PECO's Preliminary Objection and directing PECO to file an Answer to the OCA's Complaint. On February 28, 2019, PECO filed an Answer to the OCA's Complaint.

A prehearing conference was held on April 26, 2019 in which counsel for the OCA, PECO, and OSBA participated. On May 1, 2019, Prehearing Order No. 1 was issued, which established the procedural schedule for this proceeding.

On May 15, 2019, PECO filed a semiannual adjustment to the NBT in PECO Energy Electric Tariff No. 6, Supplement No. 13, effective June 1, 2019.²⁰ Through this proposed

¹⁷ Id.

¹⁸ Id.

¹⁹ PECO Nov. 7, 2018 Filing Letter.

²⁰ PECO May 15, 2019 Filing Letter.

semiannual adjustment, PECO again indicated its proposal to retain \$5.5 million of FERC-ordered RTEP credits.²¹ The OCA filed an additional Formal Complaint on June 13, 2019, raising the same issues that were previously raised in the OCA's initial Complaint. Additionally, the OCA requested that the proceeding regarding PECO's May 15, 2019 semiannual adjustment be consolidated with the proceeding docketed at Docket Nos. M-2018-3005860 and C-2018-3006242.

PECO submitted Direct Testimony on June 5, 2019. On August 5, 2019, the OCA submitted the Direct Testimony of Dr. Karl Richard Pavlovic,²² OCA Statement No. 1. PECO submitted Rebuttal Testimony on October 4, 2019. On October 24, 2019, the OCA submitted the Surrebuttal Testimony of Dr. Pavlovic, OCA Statement No. 1-SR. PECO submitted Rejoinder Testimony on November 8, 2019.

Prehearing Order No. 2 was issued on November 7, 2019, which both modified the procedural schedule by cancelling a previously scheduled hearing date and excused OSBA witness Mr. Kalcic from the remaining hearing date. An evidentiary hearing was held on November 14, 2019, at which the parties submitted evidence into the record but waived cross-examination of all witnesses. On November 27, 2019, ALJ Guhl issued an order granting the OCA's request to

²¹ Id.

²² Dr. Pavlovic is Managing Director of and Senior Consultant with PCMG and Associates LLC. PCMG is an association of experts in economics, accounting, finance, and utility regulation and policy, with over 75 years of collective experience providing assistance to counsel and expert testimony regarding the regulation of electric, gas, water, and wastewater utilities. Dr. Pavlovic has assisted as an expert and/or expert witness in a variety of matters before state and federal regulatory agencies, including the Federal Communications Commission, the Federal Energy Regulatory Commission, the Alaska Public Utilities Commission, the Alberta Utilities Commission, the Corporation Commission of the State of Kansas, the Delaware Public Service Commission, the Maryland Public Service Commission, the Massachusetts Department of Public Utilities, the Illinois Commerce Commission, the North Dakota Public Service Commission, the Maine Public Utilities Commission, and the Public Service Commission of the District Columbia. OCA Exhibit KRP-1 summarizes Dr. Pavlovic's qualifications and experience. OCA St. No. 1 at 1-2.

consolidate docket numbers M-2018-3005860 and C-2018-3006242 with docket numbers M-2018-3005860 and C-2019-3010737, in which the OCA filed a Complaint against PECO's subsequent Semiannual Adjustment to the NBT on the same grounds as its initial Complaint.

The OCA hereby provides this Main Brief in support of its positions in this proceeding.

C. Burden of Proof

As the moving party requesting that the Commission allow PECO to retain \$5.5 million in FERC-ordered RTEP credits, PECO has the burden of proof in this proceeding.²³ As set forth in Section 315(a) of the Public Utility Code (Code):

(a) Reasonableness of rates. – In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.²⁴

The Pennsylvania Supreme Court has ruled that the party with the burden of proof has a formidable task to show that the Commission may lawfully adopt its position. As stated by the Pennsylvania Supreme Court:

[t]he appellants did not have the burden of proving that the plant additions were improper, unnecessary, or too costly; on the contrary, that burden is, by statute, on the utility to demonstrate the reasonable necessity and cost of the installations.²⁵

Moreover, the Commission has determined as follows:

[t]here is no presumption of reasonableness, which attached to a utility's claim, at least none which survives the raising of credible issues regarding a utility's claims.

²³ See William Towne v. Great American Power, LLC, 2013 Pa. PUC LEXIS 617, *4 (Pa. P.U.C. October 18, 2013) (“While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission.”) citing Milkie v. Pa. PUC, 768 A.2d 1217 (Pa. Commw. Ct. 2001).

²⁴ 66 Pa. C.S. § 315(a).

²⁵ Berner v. Pa PUC, 382 Pa. 622, 631, 1955 Pa. LEXIS 439 (1955).

A utility's burden is to affirmatively establish the reasonableness of its claim. It is not the burden of another party to disprove the reasonableness of a utility's claims.²⁶

Additionally, Commission precedent further establishes that the Commission may place the burden of proof on the utility to support the validity of existing provisions.²⁷ While this matter is not a base rate proceeding, PECO's NBT Semiannual Adjustment still has the effect of changing the rates that are charged to customers. PECO acknowledges as much in its filing, which states that in any proceeding relating to its filing, "PECO requests that the NBT tariff rates specified in this filing not be suspended by the Commission, but rather that such rates be placed into effect, subject to refund."²⁸ As such, the OCA has filed a Complaint involving a proposed change in rates, and PECO has the burden of proof to show that the rate is just and reasonable pursuant to Section 315(a).²⁹

In addition to satisfying the burden of proof, a petitioner must provide substantial evidence in the record as support for its case before the Commission.³⁰ The term "substantial evidence" has been defined by the Pennsylvania Supreme Court, Superior Court and Commonwealth Court as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.³¹ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to

²⁶ Pa PUC v. Equitable Gas Co., 57 Pa. PUC 423, 444 (fn. 37), 1983 Pa. PUC LEXIS 33 (July 8, 1983).

²⁷ See e.g., Pa PUC, et al. v. Equitable Gas Co., 1997 Pa. PUC LEXIS 139, *18-19 (Oct. 8, 1997).

²⁸ PECO Nov. 7, 2018 Filing Letter.

²⁹ 66 Pa. C.S. § 315(a).

³⁰ 2 Pa. C.S. § 704.

³¹ Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 194 Pa. Super. Ct. 278, 166 A.2d 96 (1961); and Murphy v. Comm. Dept. of Public Welfare, White Haven Center, 85 Pa. Commw. 23, 480 A.2d 382 (1984).

be established.³² Even where a party has established a prima facie case, the party with the burden of proof must establish that “the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.”³³

Furthermore, it is well-established that the “degree of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of the evidence.”³⁴ In other words, PECO’s evidence must be more convincing than the evidence presented by the other parties.³⁵ Additionally, the evidence must be substantial and legally credible, and cannot be mere “suspicion” or a “scintilla” of evidence.³⁶ The utility’s burden of proof to establish the justness and reasonableness of every component of its request is an affirmative one and remains with PECO throughout the course of the proceeding.³⁷ Thus, PECO has the burden of proof to show that its proposal to retain \$5.5 million in RTEP credits is legally sustainable and would result in just and reasonable rates.

The OCA submits that PECO has not met its burden of proof to show that its proposal to retain \$5.5 million in RTEP credits is consistent with the Public Utility Code, Court and

³² Id.

³³ Burleson v. Pa. P.U.C., 501 Pa. 433, 437, 461 A.2d 1234, 1236 (1983) (Burleson).

³⁴ Lansberry v. Pa. P.U.C., 134 Pa. Commw. 218, 221-22, 578 A.2d 600, 602 (1990) (Lansberry).

³⁵ Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950).

³⁶ Lansberry at 602.

³⁷ See, Pa. P.U.C. v. Columbia Gas of Pennsylvania, Inc. 2014 Pa. PUC LEXIS 691, *11 (Oct. 23, 2014) (Columbia Gas 2014) (“The burden of proof does not shift to a statutory party or individual party (whether an entity or an individual) which challenged the requested Rider. Instead, the utility’s burden, to establish the justness and reasonableness of every component of its request, is an affirmative one and remains with the public utility throughout the course of the proceeding.”).

Commission precedent, or that granting its request here would result in just and reasonable rates.

As such, PECO's proposal must be rejected.

II. SUMMARY OF THE ARGUMENT

During the period in question, June 2007 through December 31, 2010, PECO was charging ratepayers for transmission service through a retail transmission base rate based on its stated FERC transmission rate. The Courts found, however, that the methodology to establish the stated FERC rate was unreasonable, resulting in PECO's stated transmission rate being set at an excessive level. As such, FERC ordered that RTEP credits were to be refunded to PECO and other Electric Distribution Companies to provide a remedy for the over-collection of transmission expense under an unreasonable allocation method.

PECO, however, seeks to retain some of this refund, even though the Court determined that the methodology underlying PECO's transmission rate that was charged to Pennsylvania retail customers was unreasonable. The Pennsylvania retail ratepayers paid PECO's transmission rate, and there is no evidence to the contrary indicating that PECO's transmission revenues were insufficient. Indeed, the evidence of record shows that during the period in question PECO's reported transmission revenues were well in excess of its transmission revenue requirement, sufficiently high enough to recover the PECO zone RTEP charges from the June 2007 through 2010 period as estimated by PJM in the EL05-121-009 settlement. Accordingly, PECO has failed to show that it did not adequately recover its RTEP charges during the period in question, and has no basis to retain credits that should properly be returned to Pennsylvania ratepayers.

Further, even if PECO provided substantial evidence here to show that the RTEP charges in question were never recovered from ratepayers (which it has failed to do), PECO's request here to recover these dollars from a time period that occurred over a decade ago represents impermissible retroactive ratemaking. To the extent that PECO was not adequately recovering its transmission expense through rates at that time, PECO had the option to seek recovery, and yet,

PECO took no actions in this regard until it filed its 2010 base rate case. Even then, PECO took no action in regards to what it is now claiming was an under recovery of RTEP charges from June 2007 through December 2010. In accord with the evidence of record and Court and Commission precedent, PECO's proposal to retain \$5.5 million of the RTEP credits must be rejected.

III. ARGUMENT

A. PECO's Transmission Revenues From the Years 2007 Through 2010 Adequately Recovered PECO's Transmission Revenue Requirement

The RTEP credits at issue in this proceeding were issued because the methodology previously used by FERC to allocate the costs of high voltage transmission projects was found to be unreasonable. As a result, a portion of PECO's total transmission expenses related to this misallocation of costs were ordered by FERC to be refunded to PECO. PECO's FERC transmission rate was charged to customers in retail base rates during the historical period of 2007 through 2010 at issue in this proceeding. The OCA agrees that in the historical period at issue, PECO did not have a separate dollar-for-dollar automatic surcharge mechanism specifically recovering RTEP costs. That fact, however, is immaterial to the resolution of this matter.

In ratemaking, many changes can occur to expenses following a base rate proceeding. As such, it is improper to assume, as PECO does, that a new expense is not covered by existing rates.

In A Guide to Utility Ratemaking, the following is provided:

In the period following a rate case during which the new rates are in effect – when costs or usage change, contrary to the best assumptions used in setting—the utility's financial bottom line is affected. Sometimes changes are offsetting, and the rate of return will remain adequate. At other times operating costs will increase without an adequately counterweighing increase in revenues. Or, revenues may decrease with no countervailing expense decrease. Significant events, such as placing new facilities into operation or a substantial drop in customer usage, will almost certainly cause a shortfall in net operating income, which deteriorates shareholder earnings.

The utility's decision to apply for higher rates is typically made for several basic reasons:

- New facilities have been placed in service and need to be incorporated into the company's rates
- Expenses have increased (e.g., increased labor costs, supplies, taxes).
- Sales (revenues) have diminished.
- The Cost of attracting needed capital has increased.³⁸

In the event that a new expense is not covered by existing rates, it is up to the utility to decide whether to take action. A stated rate, like any other base rate, is subject to variations in expenses and revenues. PECO's stated transmission rate during the period in question was first approved by FERC in 1999.³⁹ While the RTEP charges at issue here were implemented in June 2007, there is nothing that distinguishes the RTEP transmission expenses.⁴⁰

In fact, the evidence of record indicates that PECO had more than enough transmission revenue from its retail customers to cover RTEP expenses for the years 2007 through 2010. Dr. Pavlovic testified as follows:

The annual revenue requirement underlying PECO's \$20,924 per megawatt-year 1998 transmission rate referenced by Witness Bisti was \$151,703,000. The transmission revenues PECO reported in its FERC Form 1 Reports for 2007, 2008 and 2009 range from \$197,140,504 in 2007 to \$193,610,760 in 2009. **PECO's reported transmission revenues for each of those years were, thus, approximately \$40 million dollars more than its transmission revenue requirement.** This would have been more than enough to cover the PECO zone RTEP charges for that period as estimated by PJM in the EL05-121-009 settlement, the highest of which was approximately \$5.2 million in 2009.⁴¹

³⁸ James H. Cawley, Norman J. Kennard, A Guide to Utility Ratemaking (2018 Edition), 79 available at http://www.puc.pa.gov/General/publications_reports/pdf/Ratemaking_Guide2018.pdf (Guide to Utility Ratemaking).

³⁹ OCA St. 1SR at 5; see also Exh. KRP-6SR.

⁴⁰ Account 561.8 is functionalized in the FERC Uniform System of Accounts as a transmission operating expense. See OCA St. 1 at 6.

⁴¹ OCA St. 1 at 8 (internal citations omitted) (emphasis added).

Dr. Pavlovic further testified that while PECO did not report transmission revenues in its 2010 FERC Form 1, it seems unlikely that the 2010 transmission revenues would not have been sufficient to cover the 2010 PECO zone RTEP charges of approximately \$10.5 million as estimated by PJM.⁴²

Utilities experience new or changing expenses regularly between base rate cases and must either absorb them or take steps to recover them, such as filing a base rate case or seeking deferred accounting treatment. OCA witness Pavlovic testified that, as a ratemaking matter, there are two appropriate courses of action that a utility can take when a transmission rate generates insufficient revenues to recover a utility's transmission capital costs or operating expenses:

(1) a utility can construct a transmission revenue requirement that includes all current costs and apply to the FERC for approval of a new stated transmission rate that will recover its transmission costs; or (2) a utility can apply to the FERC for approval of a transmission formula rate that on an annual basis will adjust rates to recover all its costs. In either case, all that is required is an application to the FERC under Section 205 of the Federal Power Act, which a transmission utility may do at a time of its own election.⁴³

PECO took neither action.⁴⁴

It is clear from the record that PECO's customers were paying the PECO stated transmission rate, and PECO did not provide data that demonstrates that its transmission revenues were insufficient to recover all or a portion of its PECO zone RTEP charges.⁴⁵ On the contrary, according to the evidence of record, PECO was recovering tens of millions of dollars more than what was required to cover PECO's transmission revenue requirement during the June 2007

⁴² OCA St. 1 at 8.

⁴³ OCA St. 1 at 7.

⁴⁴ Id.

⁴⁵ OCA St. 1 at 6-9.

through December 2010 historical period.⁴⁶ The purpose of these transmission expense accounts is to recover transmission charges, including RTEP. Dr. Pavlovic testified as follows:

PECO records its PECO zone RTEP charges to FERC Account 561.8. Account 561.8 is functionalized in the FERC Uniform System of Accounts as a transmission operating expense. This means that PECO's transmission rate included a provision for RTEP charges as transmission operating expenses.⁴⁷

Moreover, PECO itself acknowledged in its 2010 base rate case that the RTEP charges at issue here were part of its transmission base rates. Dr. Pavlovic explained:

In its 2010 rate case proceeding that established the TSC, PECO Witness Cohn explained that PECO removed transmission costs from base rates and placed them in the TSC rider.

The transmission cost components removed from base rates are comprised of: (1) Network Service Costs, (2) RTEP Charges, (3) PJM Expansion Recovery Charge, (4) Transmission Cash Working Capital Cost, and (5) Gross Receipts Tax. The TSC was effective January 1, 2011. Subsequently, in its 2014 Default Service Program (DSP-III) proceeding, PECO removed the RTEP Charges and PJM Expansion Recovery Charge from the TSC and placed them in the Non-Bypassable Transmission Charge (NBT) rider.⁴⁸

PECO, through its Rebuttal Testimony, argues that Dr. Pavlovic's analysis of transmission accounts improperly assumes that cost accounting determines ratemaking.⁴⁹ Dr. Pavlovic, however, testified as follows:

My analysis correctly assumes that the costs recorded in PECO's regulatory accounts are the component building blocks of the revenue requirements that are the bases of PECO's rates. This is particularly the case with transmission rates, which are calculated purely on a cost basis by dividing the revenue requirement by peak demand without consideration of non-cost ratemaking policies and principals. For example, as discussed above, because regulatory cost accounts are the components of rates, PECO was able in 2010 to identify the RTEP charge

⁴⁶ Id.

⁴⁷ OCA St. 1 at 6.

⁴⁸ OCA St. 1SR at 6-7. See also OCA Exh. KRP-4SR; OCA Exh. KRP-5SR.

⁴⁹ See PECO St. 1R at 8-10.

component of its base rates and transfer that component to the TSC for recovery.⁵⁰

PECO also argues in its Rebuttal Testimony that Dr. Pavlovic ignored the differences in the kind of transmission costs that PECO incurred.⁵¹ As Dr. Pavlovic explained in detail, there is no difference between PECO zone transmission service costs and the costs of transmission service for PECO's default service PLR customers.⁵² Dr. Pavlovic summarized his testimony as follows:

Stated more succinctly, the costs of transmission service under PJM's OATT were passed through to PECO's default PLR service customers that did not obtain transmission service on their own.⁵³

Most importantly, Dr. Pavlovic testified as follows:

It is true that during the 2007-2010 period PECO incurred RTEP charges. It is also true that during the 2007-2010 period these RTEP charges were in PECO's unbundled retail base rates, as PECO explained in its 2010 rate case. It is decidedly false that during the 2007-2010 period RTEP charges were not part of PECO's network service rate.⁵⁴

The fact that PECO had no automatic surcharge mechanism in place from June 2007 through December 2010 is not a reasonable basis to retain a portion of a refund that was intended to provide a remedy for an unreasonable allocation methodology. Transmission costs assessed to PECO were being recovered through its FERC started transmission rate, which retail customers were paying as a retail transmission base rate. A portion of that rate was too high. As such, FERC

⁵⁰ OCA St. 1SR at 8.

⁵¹ PECO St. 1R at 8-11.

⁵² OCA St. 1SR at 10-13.

⁵³ Id. at 13.

⁵⁴ Id. at 11-12.

ordered a refund of these overcharges. Under Section 1301 of the Public Utility Code, all rates must be just, reasonable, and in conformity with the regulations of the Commission.⁵⁵

Nevertheless, PECO has essentially determined that it is entitled to a line-by-line examination of its retail transmission base rates from 2007-2010 in order to retain FERC-ordered RTEP credits. PECO, however, has not met its burden of proof to provide substantial evidence that PECO is entitled to such withholding of the refund. The OCA, however, has shown that transmission revenues from ratepayers covered even the charges that the Courts and FERC determined were excessive. PECO's proposal that it is now, over a decade later, entitled to retain \$5.5 million dollars because PECO had no automatic surcharge mechanism in place from June 2007 through December 2010 is unreasonable and is not supported by law or public policy as discussed below.

B. PECO's Proposal To Retain \$5.5 Million In RTEP Credits Is Effectively Impermissible Retroactive Ratemaking And Must Be Rejected

As discussed above, PECO will receive a total of approximately \$49.5 million in net billing adjustments under the FERC Settlement Agreement for the historical period.⁵⁶ PECO seeks to retain \$5.5 million of these RTEP credits relating to the period of June 2007 through December 2010 when it did not have a specific, dollar-for-dollar, reconcilable mechanism in place to recover these costs, but rather had a retail transmission base rate.

In essence, PECO claims that it should receive retroactive recovery of RTEP expenses even though PECO took no action at the time in which the RTEP expenses in question were incurred.

⁵⁵ 66 Pa. C.S. Section 1301.

⁵⁶ OCA St. 1 at 5.

Under Pennsylvania law, ratemaking is prospective.⁵⁷ In contrast, retroactive ratemaking is where a utility, in a subsequent proceeding, bases a claim for increased rates on past expense items that may have been greater than anticipated by the utility in its prior rate case.⁵⁸ Here, PECO is attempting to retain credits related to RTEP expense that was based on an unreasonable methodology, by arguing that PECO should be compensated for RTEP costs that were incurred over a decade ago.

It is axiomatic that the Commission is not to engage in a line-by-line examination of successes or failures regarding projections in previous rate cases and the Court has stated as follows:

The general rule is that there may be no line by line examination of the relative success or failure of the utility to have accurately projected its particular items of expense or revenue and an excess over the projection of an isolated item of [**728] revenue or expense may not be, without more, the subject of the Commission's order of refund or recovery, respectively, on the occasion of the utility's subsequent rate increase requests.⁵⁹

The prohibition against retroactive ratemaking has been reaffirmed in many cases since.⁶⁰

⁵⁷ See, e.g., Popowsky v. Pa. P.U.C., 164 Pa. Commw. 338, 343, 642 A.2d 648, 650-51 (1994) (Popowsky 1994), appeal denied, Popowsky v. Pa. P.U.C., 543 Pa. 733, 673 A.2d 338 (1996).

⁵⁸ Columbia Gas of Pennsylvania, Inc. v. Pa. P.U.C., 149 Pa. Commw. 247, 613 A.2d 74 (1992) (Columbia Gas 1992); see also, Philadelphia Elec. Co. v. Pa. P.U.C., 93 Pa. Commw. 410, 502 A.2d 722 (1985) (PECO); Pike County Light and Power Co. v. Pa. P.U.C., 87 Pa. Cmwlth. 451, 487 A.2d 118 (1985) (Pike County).

⁵⁹ PECO, 93 Pa. Commw. at 422, A.2d at 727-728.

⁶⁰ See, e.g., Barasch v. Pa. P.U.C., 507 Pa. 496, 491 A.2d 94 (1985) (Barasch); PECO, 93 Pa. Commw. at 422, 502 A.2d at 727-28. The general prohibition in utility ratemaking against retroactive ratemaking is grounded in principles similar to "single-issue ratemaking." Single-issue ratemaking prohibits a line-by-line examination of particular expense or revenue items. See Pennsylvania Industrial Energy Coalition v. Pa. P.U.C., 653 A.2d 1336, 1350 (Pa. Commw. Ct. 1995) (PIEC); see also National Fuel Gas Dist. Corp v. Pa. P.U.C., 76 Pa. Commw. 102, 147, 464 A.2d 546, 567 (1983) (holding that the consideration of expense and revenue items in isolation could result in confiscatory rates); PECO, 93 Pa. Commw. at 422, 502 A.2d at 727-728 (holding that there should be no line-by-line examination of items in a rate case); Popowsky v. Pa. P.U.C., 683 A.2d 958 (Pa. Commw. Ct. 1996).

The Commonwealth Court utilizes a three pronged test to determine whether a utility meets the exception to impermissible retroactive ratemaking.⁶¹ The test requires that the costs are unanticipated, extraordinary, non-recurring, and claimed at the first reasonable opportunity.⁶²

The RTEP expenses PECO seeks to recover here are not extraordinary and nonrecurring, and thus cannot be recovered retroactively. As explained by the Commonwealth Court, “Extraordinary cannot mean merely unanticipated, because then every unexpected occurrence or failure to predict an item would be recoverable and the exception would overwhelm the rule, making test years meaningless.”⁶³ The RTEP expense is an ordinary transmission expense that PJM charges to its members.

Moreover, RTEP expenses are recurring expenses that have been charged to PECO for over a decade. PJM began billing PECO monthly for RTEP expenses in 2007 and those charges continued going forward.⁶⁴ These are not one-time charges but rather are regular, continuing expenses. Nothing prevented PECO from taking action to recover these recurring expenses through rates when they were first incurred if its rates were insufficient to recover the expense. In fact, PECO’s transmission revenues for the years 2007-2010 were sufficiently high enough to

⁶¹ Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008) (Met-Ed). In Met-Ed, utilities sought to retroactively recover transmission charges which the PUC previously granted deferral to in the prior year. The Court determined that a 450% increase in congestion costs in two years was significant and that the utilities met the three-pronged test for retroactive recovery.

⁶² Id.

⁶³ Id.

⁶⁴ It should be noted that when the OCA requested from PECO the RTEP charges billed to the PECO zone during the historical period, PECO responded that it did not have that information for the period of November 2007 through May 2008. See OCA St. 1 at 11. Moreover, the total amount of RTEP charges that were reallocated under the settlement were based on a black box settlement and “not actual PJM invoices provided by PECO and other LSEs in each PJM transmission zone.” PECO St. 1 at 14. PECO witness Bisti further testified that “[t]he Settlement does not furnish a detailed itemization by transmission owner that ties the related PJM billing adjustments back to the original PJM billing periods and associated line item charges, and it is not reasonable to expect such an itemization given the ‘black box’ nature of the Settlement.” Id. at 15

recover the PECO zone RTEP charges from the June 2007 through 2010 period as estimated by PJM in the EL05-121-009 settlement. The record is clear that PECO made no attempt to defer or otherwise seek to recover the 2007-2010 RTEP expenses.

Claims for retroactive rate recovery may also be rejected because they were not made in a timely manner.⁶⁵ PECO failed to take timely action to address these expenses when they were first incurred. PECO knew that it was being billed for RTEP charges beginning on June 1, 2007, yet PECO took no action to specifically recover RTEP expenses. At any time between 2007 and 2010, PECO could have filed a rate case, sought deferred accounting treatment, or taken other action to address these RTEP charges.

The Company chose not to take any steps to recover or defer these expenses for nearly three years. This was a business decision on PECO's part, and PECO cannot now attempt to recover those expenses over a decade later by withholding a refund properly owed to customers.

Waiting until late 2018 to attempt to recover expenses charged over 10 years earlier in 2007 through 2010 is far outside the bounds of what could be considered timely. Even in 2010, when PECO filed its base rate case and established its TSC to recover transmission costs through an automatic surcharge on a going-forward basis, PECO made no attempt to include RTEP charges incurred between June 2007 and December 31, 2010.⁶⁶ Instead, PECO chose not to take action to recover these costs as they were being incurred and now seeks to recover them more than a decade later, in violation of the Public Utility Code and legal precedent. The first reasonable opportunity for PECO to recover RTEP expenses from 2007-2010 has long passed.

⁶⁵ See Columbia Gas 1992; see also Met-Ed at 200.

⁶⁶ PECO is not entitled to full and current recovery of costs unless it had in place an automatic adjustment clause. It should also be noted that "full and current" recovery of costs requires the costs to be "current" as opposed to costs that were incurred over a decade ago.

The OCA submits that it is impermissible for PECO to recover these costs more than a decade after they were incurred, which is the outcome of PECO's proposal. The recovery of non-deferred costs violates the general prohibitions against retroactive ratemaking. The expenses at issue here are not extraordinary or non-recurring expenses that would qualify for retroactive treatment.⁶⁷ Moreover, there was no prohibition against the Company seeking recovery of these costs from 2007 through 2010 as they were being incurred.⁶⁸

⁶⁷ See Popowsky v. Pa. P.U.C., 868 A.2d 606, 611-12 (Pa. Commw. Ct. 2004).

⁶⁸ Id.

IV. CONCLUSION

For the reasons set forth above, the Office of Consumer Advocate respectfully submits that the Commission should reject PECO's proposal to retain \$5.5 million in RTEP credits and instead order PECO to fully return those credits to ratepayers.

Respectfully Submitted,



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Dated: January 14, 2020
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**APPENDIX A:
Proposed Findings of Fact, Conclusions of Law,
and Ordering Paragraphs**

PROPOSED FINDINGS OF FACT

1. The instant proceeding relates to a settlement agreement approved by the Federal Energy Regulatory Commission (FERC) in FERC Docket EL05-121 regarding certain charges to be refunded to customers. PJM Interconnection, L.L.C., 2018 FERC LEXIS 713 (F.E.R.C. May 31, 2018).
2. Initially, FERC allocated the expense of new transmission facilities that operate at and above 500 kV across all the PJM utilities, east or west, in proportion to each utility's respective sales. Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 756 F.3d 556, 2014 U.S. App. LEXIS 11961, at **9-10 (7th Cir. 2014).
3. This method of allocating transmission expense was referred to as the "postage-stamp" methodology because, just as the price of sending a letter anywhere in the United States is the same, the expense that an electric utility must contribute to a 500-kV line was considered to be independent of the utility's location relative to the location of the transmission line. Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 756 F.3d 556, 2014 U.S. App. LEXIS 11961, at **9-10 (7th Cir. 2014).
4. Numerous parties took exception to FERC's original decision to apply these Regional Transmission Expansion Plan (RTEP) charges across the entire PJM footprint on a postage-stamp basis, and sought various appeals. Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311.
5. The main issue on appeal was the extent to which members of PJM in PJM's western region would be required to contribute to the expense of newly built or projected 500-kV transmission lines that were mainly located in the eastern portion of PJM. Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311 at **6-7.
6. The PECO zone is receiving a credit of \$49,567,831 for the historical period of June 2007 through December 2015, of which PECO seeks to retain \$5,560,416 for RTEP charges during the historical period at issue from June 2007 through December 2010. OCA St. No. 1 at 5.
7. The remaining amount is being refunded to customers. PECO St. No. 1 at 3.
8. PECO proposed an adjustment to its Non-Bypassable Transmission (NBT) charge related to this credit. PECO Nov. 7, 2018 Filing Letter.
9. As a part of its filing, PECO submitted a one-page explanation to the Commission regarding its reasoning for the NBT adjustment and the Company's proposal to retain \$5.5 million in FERC-ordered credits to ratepayers. PECO Nov. 7, 2018 Filing Letter.
10. On May 15, 2019, PECO filed a semiannual adjustment to the NBT to PECO Energy Electric Tariff No. 6, Supplement No. 13, effective June 1, 2019. PECO May 15, 2019 Filing Letter.

11. Through this proposed semiannual adjustment, PECO again indicated its proposal to retain \$5.5 million of FERC-ordered RTEP credits. PECO May 15, 2019 Filing Letter.
12. There is nothing that distinguishes the RTEP transmission expenses recorded in one of PECO's transmission expense accounts (Account 561.8) from the expenses recorded in PECO's other transmission operating accounts. OCA St. 1 at 6.
13. The evidence of record indicates that PECO had more than enough transmission revenue from its customers to cover RTEP expenses for the years 2007 through 2010. OCA St. 1 at 8.
14. The transmission revenues PECO reported in its FERC Form 1 Reports for 2007, 2008 and 2009 range from \$197,140,504 in 2007 to \$193,610,760 in 2009. OCA St. 1 at 8; OCA Exh. KRP-6, pages 2 and 3, PECO 2008 and 2009 FERC Form 1 Reports, page 300, line 22.
15. PECO's reported transmission revenues for each of those years were approximately \$40 million dollars more than its transmission revenue requirement. OCA St. 1 at 8.
16. This would have been more than enough to cover the PECO zone RTEP charges for that period as estimated by PJM in the EL05-121-009 settlement, the highest of which was approximately \$5.2 million in 2009. OCA St. 1 at 8; OCA Exh. KRP-2.
17. As a ratemaking matter, there are two appropriate courses of action that a utility can take when a transmission rate generates insufficient revenues to recover a utility's transmission capital costs or operating expenses: (1) a utility can construct a transmission revenue requirement that includes all current costs and apply to the FERC for approval of a new stated transmission rate that will recover its transmission costs; or (2) a utility can apply to the FERC for approval of a transmission formula rate that on an annual basis will adjust rates to recover all its costs. In either case, all that is required is an application to the FERC under Section 205 of the Federal Power Act, which a transmission utility may do at a time of its own election. OCA St. 1 at 7.
18. PECO records its PECO zone RTEP charges to FERC Account 561.8. OCA St. 1 at 6.
19. Account 561.8 is functionalized in the FERC Uniform System of Accounts as a transmission operating expense. OCA St. 1 at 6.
20. The costs recorded in PECO's regulatory accounts are the component building blocks of the revenue requirements that are the bases of PECO's rates. OCA St. 1SR at 8.
21. The costs of transmission service under PJM's OATT were passed through to PECO's default PLR service customers that did not obtain transmission service on their own. OCA St. 1SR at 13.

22. In its 2010 rate case proceeding that established the TSC, PECO Witness Cohn explained that PECO removed transmission costs from base rates and placed them in the TSC rider. OCA St. 1SR at 6-7.
23. The transmission cost components removed from base rates are comprised of: (1) Network Service Costs, (2) RTEP Charges, (3) PJM Expansion Recovery Charge, (4) Transmission Cash Working Capital Cost, and (5) Gross Receipts Tax. OCA St. 1 at 7; OCA Exh. KRP-SR.
24. There is no difference between PECO zone transmission service costs and the costs of transmission service for PECO's default service PLR customers. OCA St. 1SR at 10-13.

PROPOSED CONCLUSIONS OF LAW

1. As the moving party requesting that the Commission allow PECO to retain \$5.5 million in FERC-ordered RTEP credits, PECO has the burden of proof in this proceeding. William Towne v. Great American Power, LLC, 2013 Pa. PUC LEXIS 617, *4 (Pa. P.U.C. October 18, 2013) citing Milkie v. Pa. PUC, 768 A.2d 1217 (Pa. Commw. Ct. 2001).
2. In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceedings upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility. 66 Pa. C.S. § 315(a).
3. The Pennsylvania Supreme Court has ruled that the party with the burden of proof has a formidable task to show that the Commission may lawfully adopt its position. Berner v. Pa PUC, 382 Pa. 622, 631, 1955 Pa. LEXIS 439 (1955).
4. Commission precedent further establishes that the Commission may place the burden of proof on the utility to support the validity of existing provisions. Pa PUC, et al. v. Equitable Gas Co., 1997 Pa. PUC LEXIS 139, *18-19 (Oct. 8, 1997).
5. In addition to satisfying the burden of proof, a petitioner must provide substantial evidence in the record as support for its case before the Commission. 2 Pa. C.S. § 704.
6. The utility's burden of proof to establish the justness and reasonableness of every component of its request is an affirmative one and remains with PECO throughout the course of the proceeding. Pa. P.U.C. v. Columbia Gas of Pennsylvania, Inc. 2014 Pa. PUC LEXIS 691, *11 (Oct. 23, 2014).
7. PECO has the burden of proof to show that its proposal to retain \$5.5 million in RTEP credits is legally sustainable and would result in just and reasonable rates.
8. It is axiomatic that the Commission is not to engage in a line-by-line examination of successes or failures regarding projections in previous rate cases. PECO v. Pa. P.U.C., 93 Pa. Commw. 410, 422, 502 A.2d 722, 727-28 (1985) (PECO).
9. The Commonwealth Court utilizes a three pronged test to determine whether a utility meets the exception to impermissible retroactive ratemaking. Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008).
10. The test requires that the costs are unanticipated, extraordinary, non-recurring, and claimed at the first reasonable opportunity. Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008).

11. Extraordinary cannot mean merely unanticipated, because then every unexpected occurrence or failure to predict an item would be recoverable and the exception would overwhelm the rule, making test years meaningless. Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008).
12. The RTEP expenses PECO seeks to recover here are not extraordinary and nonrecurring, and thus cannot be recovered retroactively. Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008).
13. The RTEP expenses are not non-recurring, but are instead an ongoing anticipated and recurring expense that has been charged to PECO for over a decade. Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008).
14. Claims for retroactive rate recovery may also be rejected because they were not made in a timely manner. Columbia Gas of Pennsylvania, Inc. v. Pa. P.U.C., 149 Pa. Cmwlth. 247, 613 A.2d 74 (1992); see also Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008).
15. PECO failed to take timely action to address these expenses. Columbia Gas of Pennsylvania, Inc. v. Pa. P.U.C., 149 Pa. Cmwlth. 247, 613 A.2d 74 (1992); see also Met-Ed Indus. Users Grp. v. Pa. PUC, 960 A.2d 189, 200 (Pa. Commw. Ct. 2008).
16. The expenses at issue here are not extraordinary or non-recurring expenses that would qualify for retroactive treatment. Popowsky v. Pa. P.U.C., 868 A.2d 606, 611-12 (Pa. Commw. Ct. 2004).
17. There was no prohibition against the Company seeking recovery of these costs from 2007 through 2010 as they were being incurred. Popowsky v. Pa. P.U.C., 868 A.2d 606, 611-12 (Pa. Commw. Ct. 2004).

PROPOSED ORDERING PARAGRAPHS

It is hereby ORDERED THAT:

1. PECO Energy Company shall not be permitted to retain \$5.5 million of RTEP credits as a result of the Settlement Agreement under FERC Docket No. EL05-121-009.
2. PECO Energy Company is hereby authorized to file tariffs, tariff supplements, or tariff revisions containing rates, provisions, rules and regulations, consistent with the findings herein, to refund its customers the entirety of the FERC-ordered RTEP credits.
3. PECO Energy Company shall file detailed calculations with its tariff filing, which shall demonstrate to this Commission's satisfaction that the filed rates comply with the proof of revenue, in the form and manner customarily filed in support of compliance tariffs.
4. PECO Energy Company shall comply with all directives, conclusions and recommendations contained in this Commission's Opinion and Order that are not the subject of individual ordering paragraphs as fully as if they were the subject of specific ordering paragraphs.
5. The Complaints filed by the various parties to this proceeding at Docket Numbers M-2018-3005860, C-2018-3006242, M-2019-3010032, and C-2019-3010737, are granted.
6. Upon acceptance and approval by the Commission of the tariff supplements and proof of revenues filed by PECO Energy Company consistent with this Order, this proceeding shall be marked closed.

DATE: _____

Administrative Law Judge Marta Guhl