

COMMONWEALTH OF PENNSYLVANIA



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February 13, 2020

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
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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 Reply 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".

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Enclosures:

cc: The Honorable Marta Guhl, ALJ  
Office of Special Assistants (email only: [ra-OSA@pa.gov](mailto:ra-OSA@pa.gov))  
Certificate of Service

\*283684

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 Reply 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:

Dated this 13<sup>th</sup> day of February 2020.

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Dated: February 13, 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	:	

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**REPLY BRIEF  
OF THE  
OFFICE OF CONSUMER ADVOCATE**

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## I. INTRODUCTION

On January 14, 2020, the Office of Consumer Advocate (OCA) filed its Main Brief (M.B.) in opposition to the PECO Energy Company (PECO) proposal to retain \$5.5 million in Federal Energy Regulatory Commission (FERC) ordered refunds of Regional Transmission Expansion Plan (RTEP) charges. The OCA submits that its Main Brief provides the Administrative Law Judge (ALJ) and the Pennsylvania Public Utility Commission (Commission) with a comprehensive discussion of PECO's proposal and the numerous reasons of law and policy as to why PECO's proposal to retain the \$5.5 million must be rejected.

For the time period of 2007 through 2010 in which PECO seeks to retain RTEP refunds, PECO had a retail transmission base rate that was based upon a FERC stated transmission base rate. Through a series of appeals, the United States Court of Appeals for the Seventh Circuit determined that the postage-stamp methodology that was the underlying basis for allocating RTEP charges was unreasonable. As a result, the establishment of a reasonable methodology for RTEP charges was remanded to FERC once, and then once again, in order to reach an allocation methodology that would result in just and reasonable rates. The resulting hybrid DFAX methodology was agreed upon by the settling parties, and as a result of the unreasonable allocation methodology, FERC ordered refunds to some PJM members to remedy a portion of excessive transmission rates that were found to have been established through the improper allocation methodology.

PECO received this refund as PECO was over-allocated RTEP charges under the postage-stamp method that was found to be unreasonable by the Court for assignment of cost responsibility and revenue requirement purposes. 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. PECO, however, seeks to retain some of this refund, even though the Court already determined that the methodology underlying PECO's transmission rate that was charged to Pennsylvania retail customers was unreasonable.

As noted by both PECO and the OCA, there was no dollar-for-dollar automatic recovery mechanism of the RTEP charges for the years 2007 through 2010. Instead, during the period of June 2007 through 2010, PECO's retail distribution and transmission charges included charges for transmission service for customers receiving default Provider of Last Resort (PLR) service. PECO tries to argue that its retail transmission rate did not include the RTEP charges since these charges were instituted after the retail transmission rate was established. This argument is contrary to the general nature of base rates. Many costs change after base rates are set – some increase, some decrease, some start, and some end. There is no presumption, as PECO makes here, that a specific line item is not recovered in the absence of an action by the utility.

The OCA's Main Brief discusses the multiple actions PECO could have taken to recover RTEP charges had PECO determined that its transmission revenues that were being collected from ratepayers were insufficient to cover the RTEP expense. Similar to any other expense between base rate cases, costs change over time and it is the Company's responsibility to determine whether to make a filing if it believes that it is not realizing a sufficient return. PECO took no action and produced no evidence in this proceeding to show that its retail transmission rate collected from ratepayers was insufficient in the historical period at issue. PECO cannot now be heard to claim these ratepayer dollars for its shareholders.

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 FERC order reduces the amount of RTEP expense that PECO could collect from its ratepayers through that rate, hence the

refund. Similar to any other case where there is a finding of an unreasonable rate, the Commission refunds customers for unreasonable charges. The refund of these unreasonable transmission charges belongs to ratepayers.

## II. SUMMARY OF REPLY ARGUMENT

PECO proposes to retain \$5.5 million of a FERC-ordered refund for RTEP expenses incurred in 2007 through 2010 that was issued as a result of a finding of an unjust and unreasonable allocation methodology by the Court. PECO claims that it is entitled to retain a portion of the refund of FERC-ordered RTEP credits for the period of 2007 through 2010 as PECO allegedly never had an opportunity to include RTEP charges in base rates. PECO, however, has made no showing that these charges were not covered by the retail transmission base rate. In fact, the retail transmission base rate was approximately \$40 million higher than the transmission revenue requirement in that time period. A decade after its 2010 base rate case, however, PECO argues that its transmission rate from 2007 through 2010 was insufficient to recover PECO's transmission expense even though PECO took no steps to recover the 2007 through 2010 RTEP expense from ratepayers during the time the expense was incurred.

PECO also argues that the Commission is barred from rejecting PECO's proposal to retain \$5.5 million in FERC-ordered credits under the Commission-made rate doctrine. The Commission-made rate doctrine applies to rates found to be just and reasonable. The RTEP charges at issue in this proceeding, however, were found to be unjust and unreasonable by the Court, and were modified by FERC following judicial review to comply with the Court's order.

PECO has failed to meet its burden of proof as the moving party requesting that the Commission allow PECO to retain \$5.5 million in FERC-ordered RTEP credits. PECO presented no evidence showing that it was not collecting sufficient transmission revenues to meet all of its

obligations to PJM, including RTEP obligations. PECO has also not provided substantial evidence supporting PECO's claim that its shareholders absorbed any RTEP charges or did not receive a sufficient return on their investment.

PECO's proposal to retain \$5.5 million of FERC-ordered RTEP credits, intended to remedy an unjust and unreasonable allocation methodology for RTEP charges, is contrary to the Public Utility Code, legal precedent, and public policy. The Commission should reject PECO's proposal to retain \$5.5 million in RTEP credits.

### III. REPLY ARGUMENT

#### A. PECO's Contention That It Would Be Unfair To Credit The Full RTEP Refund To Customers Because PECO Paid For The Charges Incurred Prior To January 1, 2011 Is Contrary To The Law, Contrary To The Evidence And Would Represent Unsound Public Policy.

PECO argues that its base rates prior to January 1, 2011 did not include an allowance for recovery of RTEP charges because those charges were set in 1989 and the RTEP charges did not begin until 2007.<sup>1</sup> PECO notes that the RTEP charges incurred during the period in question were not subject to dollar-for-dollar reconciliation that was subsequently provided for RTEP charges via the Transmission Service Charge (TSC) and later the Non-Bypassable Transmission Service Charge (NBT).<sup>2</sup> PECO claims that it never had the opportunity to include RTEP charges in its base rates for recovery from customers.<sup>3</sup> According to PECO, providing its ratepayers the full RTEP refund is "unfair and contrary to sound ratemaking principles."<sup>4</sup>

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<sup>1</sup> PECO M.B. at 12.

<sup>2</sup> PECO M.B. at 12.

<sup>3</sup> PECO M.B. at 12.

<sup>4</sup> PECO M.B. at 12.

PECO's argument is without merit. While PECO claims that it never had an opportunity to include RTEP charges in its base rates, PECO had multiple opportunities and avenues through which it could have specifically recovered 2007 through 2010 RTEP charges from ratepayers if it believed that such action was necessary at that time.<sup>5</sup> For approximately 20 years, PECO's stated transmission rate was considered to be sufficient by PECO up until 2010, when PECO filed a base rate case. The OCA further notes that PECO's 1989 base rates were "unbundled" into distribution, transmission and generation components pursuant to a May 14, 1998 Commission Order.<sup>6</sup> Now, a decade after its 2010 base rate case PECO argues that its transmission rate from 2007 through 2010 was insufficient to recover PECO's RTEP expense. As discussed in the OCA's Main Brief, utilities experience new or changing expenses regularly between base rate cases and when such expenses are viewed within the lens of the utility's total revenues and expenses, management can decide to take steps to recover them, such as filing a base rate case or seeking deferred accounting treatment if management finds such action necessary.<sup>7</sup> There is no basis to assume that, as any other expense changes between base rate cases, shareholders are specifically paying an expense.

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

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<sup>5</sup> OCA M.B. at 13.

<sup>6</sup> See OCA St. 1-SR at 12.

<sup>7</sup> See OCA M.B. at 13.

under Section 205 of the Federal Power Act, which a transmission utility may do at a time of its own election.<sup>8</sup>

PECO took neither action.<sup>9</sup> Moreover, PECO did not file for a deferral when the RTEP charges were being incurred. PECO also chose to wait until 2010 to file a base rate case requesting a reconcilable surcharge that included RTEP expense. Additionally, PECO acknowledges that a statutory cap on its transmission and distribution rates expired in 2006.<sup>10</sup>

There was no bar in place preventing PECO from taking action to specifically recover RTEP expense before 2010, had PECO elected to take this step. During the time period in question, PECO had a retail transmission base rate that was based upon a FERC base rate, which was paid for by ratepayers. The methodology underlying PECO's stated transmission rates was determined to be unjust and unreasonable, as such, customers are owed a refund. The lack of an automatically adjusting surcharge designed to provide a full and complete recovery of RTEP expense during the time-period in question, such as the TSC or NBT, does not support PECO's argument that it is entitled to retain \$5.5 million of FERC-ordered refunds for this transmission expense. The record is clear that PECO's claim that it never had the opportunity to recover RTEP charges is unsupported.

B. The Commission Is Not Barred From Rejecting PECO's Proposal To Retain \$5.5 Million In FERC-Ordered Credits.

PECO argues that the Commission cannot order a refund of any base rate revenues that PECO collected during a prior period under their then-current, PUC-approved tariff.<sup>11</sup> PECO

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<sup>8</sup> OCA M.B. at 13 (internal citations omitted).

<sup>9</sup> OCA M.B. at 16.

<sup>10</sup> PECO M.B. at 3, fn. 3.

<sup>11</sup> PECO M.B. at 13-16.

further argues that the doctrine of Commission-made rates bars the Commission from mandating refunds regardless of whether RTEP charges were actually included in PECO's rates.<sup>12</sup>

It is important to note in consideration of this argument that the FERC-ordered allocation of RTEP charges in FERC Opinion No. 494 was appealed to the U.S. Court of Appeals for the Seventh Circuit.<sup>13</sup> The Court determined that the methodology previously utilized by FERC to allocate RTEP charges was unreasonable.<sup>14</sup> As a result, PECO received FERC-ordered RTEP credits to provide a remedy for the over-collection of transmission expense under an unreasonable allocation method.<sup>15</sup> Simply put, the Court found the allocation, and thereby the resulting rates and charges, to be unjust and unreasonable.<sup>16</sup>

In PECO's argument regarding the Commission-made rate doctrine, PECO cites to C & D Technologies, Inc. v. Pa. Power & Light Co., and notes that the Commission held as follows:

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.Comm.w. 421, 552 A.2d 342 (1989); *Cheltenham & Abington Sewerage Co. v. PA Public Utility Comm'n*, 344 Pa. 366, 25 A.2d 334 (1942).<sup>17</sup>

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<sup>12</sup> PECO M.B. at 15-16.

<sup>13</sup> PJM Interconnection, L.L.C., 2018 FERC LEXIS 713 (May 31, 2018) (FERC Settlement Agreement).

<sup>14</sup> See Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311 (7<sup>th</sup> Circuit 2009 Remand); see also Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961 (7<sup>th</sup> Cir. 2014) (7<sup>th</sup> Circuit 2014 Remand).

<sup>15</sup> OCA M.B. at 15-16.

<sup>16</sup> See Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311; see also Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961 (7<sup>th</sup> Cir. 2014).

<sup>17</sup> PECO M.B. at 15 citing C & D Technologies, Inc. v. Pa. Power & Light Co., Docket Nos. C-00992119 *et al.*, 2004 Pa. PUC LEXIS 57, at \*\*28-29 (June 25, 2004) (emphasis added).

In contrast to the above-referenced case, however, the Court has already determined that the underlying methodology for allocating RTEP charges was unjust and unreasonable.<sup>18</sup>

PECO also cites to Zucker v. Pa. P.U.C. in order to reference 66 Pa. C.S. Section 316, which states as the follows:

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.**<sup>19</sup>

In Zucker, the Commonwealth Court determined that a customer did not meet his burden of proof in showing that a charge on his telephone bill was unjust and unreasonable.<sup>20</sup> In the current proceeding, however, the Court determined that the methodology for allocating RTEP charges was unjust and unreasonable.<sup>21</sup> As such, the allocation methodology underlying PECO's RTEP expense was set aside, annulled, and modified under judicial review.

The Commission-made rate doctrine does not apply to rates found to be unjust and unreasonable. On the contrary, interstate power rates and allocation methodologies fixed by FERC are to be given binding effect by the Commission in determining interstate rates under the "filed rate" doctrine and the Commonwealth Court has stated as follows:

On review, the Supreme Court first observed that FERC has exclusive jurisdiction over interstate wholesale power rates pursuant to 16 U.S.C. § 824(b). The Court noted that the "filed rate" doctrine holds in pertinent part that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates. Tracing the origin of that doctrine to the

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<sup>18</sup> See Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311; see also Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961 (7th Cir. 2014).

<sup>19</sup> PECO M.B. at 13, note 4, citing Zucker v. Pa P.U.C., 43 Pa. Commw. 207, 210, 401 A.2d 1377, 1380 (1979) (Zucker); 66 Pa. C.S. § 316 (emphasis added).

<sup>20</sup> Zucker v. Pa. P.U.C., 43 Pa. Commw. 207, 210-11, 401 A.2d 1377, 1380 (1979).

<sup>21</sup> See Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311; see also Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961 (7th Cir. 2014).

case of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951), the Court noted that the doctrine is not a rule of administrative law but rather a matter of enforcing the Supremacy Clause of the Constitution. Further, the Court stated that the doctrine was not limited to rates per se, but was also involved where, as in the case before it, FERC's allocation, of the amount of low-cost power that a utility could obtain, directly affected interstate rates, and FERC had ordered the company to file rates in accordance with that allocation.<sup>22</sup>

As a result of extensive litigation between numerous parties at FERC, a settlement was reached in which an unjust and unreasonable allocation methodology used to calculate RTEP expense, the postage-stamp methodology, was replaced with the hybrid DFAX methodology.<sup>23</sup> As such, FERC ordered refunds to some PJM members to remedy a portion of excessive transmission rates that were found to have been established through the improper allocation methodology.<sup>24</sup> FERC's re-allocation of RTEP expense is given binding effect under the filed-rate doctrine. Refunds are authorized in the event that rates received by the utility are found to be unjust and unreasonable.<sup>25</sup>

It is clear from the record that PECO's customers were paying the PECO retail transmission rate which was based on PECO's FERC stated transmission rate. 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.<sup>26</sup> In fact, transmission revenues received during the period in question exceeded PECO's transmission revenue requirement more than enough to make up for the RTEP charges.<sup>27</sup> Providing a full refund to the ratepayers does not result in a reduction to pre-2011 base

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<sup>22</sup> Pa. Power Co. v. Pa. P.U.C., 127 Pa. Commw. 97, 110, 561 A.2d 43, 50 (1989).

<sup>23</sup> PJM Interconnection, L.L.C., 2018 FERC LEXIS 713 (May 31, 2018).

<sup>24</sup> PJM Interconnection, L.L.C., 2018 FERC LEXIS 713 (May 31, 2018).

<sup>25</sup> Nat'l Fuel Gas Distribution Corp. v. Pa. P.U.C., 76 Pa. Commw. 102, 139-40, 464 A.2d 546, 564 (1983).

<sup>26</sup> OCA M.B. at 13; OCA St. 1 at 6-9.

<sup>27</sup> OCA M.B. at 12; OCA St. 1 at 8.

rates. PECO's argument that the Commission is barred from denying PECO's proposal to retain \$5.5 million in RTEP credits is without merit.

C. PECO Has Failed To Carry Its Burden Of Proof.

PECO argues that it established by a preponderance of substantial evidence that there is no valid basis for refunding customers pre-2011 RTEP credits.<sup>28</sup> PECO also attempts to shift the burden of proof to the OCA by arguing that the OCA is a proponent of a rule or order.<sup>29</sup> According to PECO, "the OCA had the burden to prove that PECO's pre-2011 base rates were unjust and unreasonable."<sup>30</sup> Finally, PECO argues that the OCA did not carry its burden of proof and that the OCA's positions are unsupported by the record evidence.<sup>31</sup>

PECO has failed to meet its burden of proof and instead attempts to shift the burden of proof to the OCA to require the OCA to provide substantial evidence to show that rates charged by PECO over a decade ago were unjust and unreasonable. The Court, however, has already reached a determination that the underlying methodology for allocating RTEP charges was, in fact, unjust and unreasonable. The current proceeding arose through a finding of an unreasonable allocation method for RTEP charges, a finding that a refund was required to remedy this issue, and PECO's subsequent decision to retain \$5.5 million of the full refund.

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.<sup>32</sup> The utility bears

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<sup>28</sup> PECO M.B. at 16.

<sup>29</sup> PECO M.B. at 16.

<sup>30</sup> PECO M.B. at 19.

<sup>31</sup> PECO M.B. at 16.

<sup>32</sup> OCA M.B. at 6.

the burden of proof in establishing the justness and reasonableness of tariff supplement proposals under the Code.<sup>33</sup> As noted in the OCA's Main Brief, the burden of proof does not shift to a statutory party challenging a utility.<sup>34</sup> On the contrary, the utility's burden of proof to establish the justness and reasonableness of its request is an affirmative one that remains with the public utility throughout the course of the proceeding.<sup>35</sup>

The OCA's Complaint was filed against PECO's 2018 and 2019 semiannual adjustments to its NBT, which is a proposed change in rates filed by PECO.<sup>36</sup> 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."<sup>37</sup> The OCA filed a Complaint in response to a proposed change in rates by PECO, and PECO has the burden of proof to show that the rate is just and reasonable pursuant to Section 315(a).<sup>38</sup>

PECO presented no evidence showing that it was not collecting sufficient transmission revenues to meet all of its obligations to PJM, including RTEP obligations. PECO has also not provided substantial evidence to support PECO's claim that its shareholders absorbed any RTEP charges or did not receive a sufficient return on their investment. Additionally, PECO has not

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<sup>33</sup> See e.g., Pa. P.U.C., et al. v. Columbia Gas of Pa., 2005 Pa. PUC LEXIS 14, \*33 (Nov. 4, 2005) ("The Code places the burden of establishing the justness and reasonableness of tariff proposals on the utility. 66 Pa. C.S. §§ 315(a) and 1301.")

<sup>34</sup> OCA M.B. at 8.

<sup>35</sup> OCA M.B. at 8, note 37 citing Pa. P.U.C. v. Columbia Gas of Pa., 2014 Pa. PUC LEXIS 691, \*11 (Oct. 23, 2014).

<sup>36</sup> See PECO Nov. 7, 2018 Filing Letter.

<sup>37</sup> PECO Nov. 7, 2018 Filing Letter.

<sup>38</sup> 66 Pa. C.S. § 315(a).

demonstrated that it has a legal right to recover 2007-2010 RTEP charges by retaining a portion of a FERC-ordered refund. 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. 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 Commission precedent, or that granting its request here would result in just and reasonable rates.

D. Dr. Pavlovic Correctly Analyzed PECO's Alleged Distinction Between The Transmission Costs PECO Incurs In Its Capacity As A Load Serving Entity (LSE) And The Transmission Costs It Incurs In Its Capacity As A Transmission Owner.

PECO argues that Dr. Pavlovic errs in blurring the distinction between transmission costs PECO incurs in its capacity as a Load Serving Entity (LSE) and the transmission costs it incurs in its capacity as a transmission owner.<sup>39</sup> PECO also argues that Dr. Pavlovic 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.<sup>40</sup> PECO further argues that it could not recover RTEP costs recorded in Account No. 561.8 during the 2007-2010 period through its NITS rates because the NITS rates was established by the 1998 settlement, which occurred before PJM began imposing RTEP charges and before FERC created Account No. 561.8.<sup>41</sup>

PECO's criticisms of Dr. Pavlovic's analysis are without merit. The transmission costs that PECO incurs in obtaining transmission service for default Provider of Last Resort (PLR) service customers and providing transmission service to other entities and LSEs are the same.<sup>42</sup>

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<sup>39</sup> PECO M.B. at 18.

<sup>40</sup> PECO M.B. at 18-19.

<sup>41</sup> PECO M.B. at 18-19.

<sup>42</sup> OCA St. 1-SR at 11.

Any electric supplier providing electricity to retail customers in the PECO zone is an LSE.<sup>43</sup> As the default service provider in the PECO zone, PECO is an LSE.<sup>44</sup>

During the 2007-2010 period, PECO provided transmission service to retail default PLR service customers under its unbundled base rates.<sup>45</sup> Dr. Pavlovic explained the retail base rate tariff provision under which PECO recovered transmission service costs during the 2007-2010 period as follows:

PECO's retail base rates were unbundled in its 1998 restructuring proceeding pursuant to a 4/29/98 Joint Petition for Settlement (JPS) subsequently approved by the Commission in its 5/14/98 Final Order. The JPS unbundled the base rates into five cost components: Transmission, Distribution, Competitive Transition Charge/Intangible Transition Charge, Shopping Credit and Generation. The transmission and distribution components were subject to a combined cap until 12/31/2006 and the generation rate was capped until January 1, 2011. While the transmission and distribution components were subject to a combined cap, the transmission component was allowed to increase, in which case the increase would be offset by a corresponding decrease in the distribution component. Regarding the transmission cost component, the settlement stated explicitly that it was calculated and used only for the purposes of unbundling rates, because the "Pennsylvania Public Utility Commission does not regulate the rates for transmission service." The Commission did not have the authority to set a retail transmission rate. In recognition of this fact, rather than stating a transmission rate, the compliance base rate tariff contained the following statement.

"TRANSMISSION SERVICE FOR CUSTOMERS RECEIVING DEFAULT PLR SERVICE: Unless such a customer is able to obtain transmission service on its own, PECO Energy will provide transmission service, and will impose charges on such a customer for such transmission service."

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.<sup>46</sup>

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<sup>43</sup> OCA St. 1-SR at 11.

<sup>44</sup> OCA St. 1-SR at 11.

<sup>45</sup> OCA St. 1-SR at 11.

<sup>46</sup> OCA St. 1-SR at 12-13 (internal citations omitted).

Moreover, Dr. Pavlovic's analysis did not err in noting that how costs are recorded for accounting purposes determines how they are recovered for ratemaking purposes. Dr. Pavlovic 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.<sup>47</sup>

PECO's claims to the contrary are unsupported and there is no showing of substantial evidence that Dr. Pavlovic's analysis is incorrect.

Additionally, in regard to Account 561.8 and its relation to PECO's revenue requirement and rates, Dr. Pavlovic testified as follows:

Account 561.8 is a subaccount of the Account 561 referenced in the 1998 transmission settlement. In 2005, the FERC issued Order 668 which made a number of revisions to the FERC Uniform System of Accounts (USoA). One of those sets of revisions disaggregated the costs or expenses recorded in Account 561 into eight subaccounts:

- 561.1 Load Dispatch-Reliability;
- 561.2 Load dispatch- Monitor and operate transmission system;
- 561.3 Load Dispatch-Transmission Service and scheduling;
- 561.4 Scheduling, system control and dispatching services;
- 561.5 Reliability, planning and standard development;
- 561.6 Transmission service studies;
- 561.7 Generation Interconnection studies;
- 561.8 Reliability, planning and standard development services.

As can be seen, the Scheduling, System Control and Dispatching costs excluded from the NITS and Point-to-Point rates were disaggregated into Account 561.4. Thus costs recorded in Account 561.8 would not be excluded from the NITS and Point-to-Point revenue requirements and rates.<sup>48</sup>

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<sup>47</sup> OCA St. 1-SR at 8.

<sup>48</sup> OCA St. 1-SR at 9-10 (internal citations omitted).

As such, the costs recorded in Account 561.8 for reliability, planning and standard development services, which is the subaccount that RTEP charges are properly recorded under, was not excluded from revenue requirements and rates. Dr. Pavlovic concluded as follows:

I conclude that the PECO Scheduling, System Control and Dispatching costs excluded from the revenue requirement by the 1998 settlement were recorded in Account 561.4, while RTEP charges that PECO incurred for the period June 2007 through December 2010 were properly recorded in Account 561.8, which costs were not excluded from the revenue requirement.<sup>49</sup>

PECO has not demonstrated that it is entitled to such withholding of a refund for a period that occurred over a decade ago. There is no evidence that ratepayers were not paying the full transmission cost under the retail transmission base rate and there is no evidence that the rate was not recovering enough revenue to pay for RTEP charges for the period of 2007 through 2010. The OCA submits that PECO's criticisms of Dr. Pavlovic's analysis are without merit and do not support PECO's argument that it is entitled to retain \$5.5 million of a FERC-ordered credit for an unreasonable allocation methodology given that PECO's customers paid PECO's transmission rate.

E. Dr. Pavlovic's Analysis Did Not Improperly Commingle Revenues From Two Different Kinds Of Transmission Service.

PECO argues that Dr. Pavlovic improperly commingled revenues from two different kinds of transmission service.<sup>50</sup> PECO also argues that Dr. Pavlovic's comparison of transmission revenues reported on PECO's FERC Form 1 for the years 2007 through 2009 to PECO's transmission revenue requirement is flawed because the transmission revenue requirement was established in 1998.<sup>51</sup> PECO characterizes Dr. Pavlovic's comparison of transmission revenue to

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<sup>49</sup> OCA St. 1-SR at 10.

<sup>50</sup> PECO M.B. at 19-22.

<sup>51</sup> PECO M.B. at 19.

transmission revenue requirement as an “arithmetic exercise” that somehow shows that PECO’s revenues were sufficient to recover RTEP charges incurred in 2007 through 2010.<sup>52</sup> According to PECO, this is an apples-to-oranges comparison, as Dr. Pavlovic did not present sufficient evidence to show that there is any basis to conclude that PECO recovered more than its actual cost in providing NITS service.<sup>53</sup> Additionally, PECO argues that general rate increase filings must be made on a Pennsylvania jurisdictional basis only and requires that jurisdictional limitations imposed by federal and state law require each regulatory body to examine revenues and revenue requirement separately for the distinct forms of service each agency is authorized to regulate.<sup>54</sup>

PECO never contests the fact that starting January 1, 2007, PECO was able to file a base rate case or request an automatically adjusting surcharge to specifically recover RTEP expense on a reconcilable basis, if it was needed. Moreover, PECO never contests the fact that PECO was able to file a deferral for RTEP charges its shareholders were allegedly absorbing for the period of 2007 through 2010, but chose not to. PECO also does not contest the fact that its transmission revenues significantly exceeded its transmission revenue requirement for the years in question.

Dr. Pavlovic discussed the fact that PECO’s transmission revenues reported on PECO’s FERC Form 1 were well in excess of their transmission revenue requirement 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**

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<sup>52</sup> PECO M.B. at 19-20.

<sup>53</sup> PECO M.B. at 20. The OCA notes, however, that requiring Dr. Pavlovic to provide sufficient evidence to conclude that PECO recovered more than its actual cost in providing NITS service is an attempt to improperly shift the burden of proof from PECO to the OCA and Dr. Pavlovic.

<sup>54</sup> PECO M.B. at 21-22.

**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.<sup>55</sup>

The OCA submits that this is an important fact that should be considered by the Commission in evaluating whether PECO is entitled to retain \$5.5 million that was issued due to the Court's finding that an unreasonable allocation methodology was the basis of expenses charged to PECO.

As expenses change between rate cases, it is up to the utility to take action. A base rate is subject to variations in expenses and revenues between rate cases. This fundamental principle is not necessarily advantageous to a particular party, be they a utility or the utility's ratepayers and the underlying expenses and revenue are not re-examined since the rates are deemed just and reasonable, absent extraordinary circumstances. Here, however, the RTEP charges which were a component of PECO's transmission expense were excessive – not just and reasonable – and a refund was determined to be the appropriate remedy by the settling parties at FERC.<sup>56</sup>

Moreover, PECO mischaracterizes Dr. Pavlovic's testimony when PECO concluded as follows:

Thus, revenues produced by PECO's NITS rates during the 2007-2010 period cannot be used to reduce PECO's pre-2011 state-regulated rates, as Dr. Pavlovic proposed.<sup>57</sup>

Dr. Pavlovic did not testify that PECO's NITS rates for 2007-2010 could be used to reduce PECO's pre-2011 state-regulated rates. The RTEP credits at issue resulted from a FERC-ordered refund

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<sup>55</sup> OCA M.B. at 12-13; 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.

<sup>56</sup> The OCA further notes that the refund was a result of two remands from the Seventh Circuit and there is no mention in the settlement of retention of refunds by the Electric Distribution Companies.

<sup>57</sup> PECO M.B. at 22.

and PECO argues that it should now be entitled to a dollar-for-dollar recovery of 2007 through 2010 RTEP charges even when no automatic adjustment mechanism is in place to retroactively recover RTEP expense incurred in 2007-2010.

F. Dr. Pavlovic Did Not Mischaracterize The Testimony Of PECO Witness Cohn In The Company's 2010 Rate Case.

PECO argues that Dr. Pavlovic mischaracterized PECO witness Cohn's testimony from the Company's 2010 rate case. PECO witness Cohn testified as follows:

- Q. Have you prepared an exhibit that shows the transmission costs that will be removed from base rates and recovered through the TSC?
- A. Yes, Exhibit ABC-7 shows, by category, the PJM-imposed costs that PECO will remove from base rates and recover through a TSC.

OCA Exh. KRP-4SR at 25. Exhibit ABC-7 lists PJM transmission costs, including "Regional Transmission Expansion Plan [C]harges Estimated 2010 [P]ayments." OCA Exh. KRP-4SR at Exh. ABC-7. As such, Dr. Pavlovic's interpretation of PECO's testimony and exhibit from its 2010 base rate case was that PECO's transmission expense, which was previously included in base rates, was removed from base rates and instead recovered through the TSC.<sup>58</sup>

The fact that PECO's tariff in effect during the 2007-2010 was silent in regard to RTEP charges does not support PECO's proposed retention of \$5.5 million of a refund. PECO's argument that Dr. Pavlovic mischaracterizes Mr. Cohn's testimony when noting that Mr. Cohn testified that transmission expense was being removed from base rates, does not support PECO's argument that a refund for unreasonably allocated RTEP charges that PECO allegedly absorbed over a decade ago should be retained by PECO.

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<sup>58</sup> OCA St. 1-SR at 6-7.

G. The OCA Agrees That PECO's Calculation Of Pre-2011 Settlement Billing Adjustments Based On Data Provided By PJM Is Acceptable Given PECO's Inability To Provide All Of The Actual RTEP Invoices From The Period In Question.

PECO notes that for the “historical period” of 2007-2016, the total amount of RTEP charges that were reallocated and the corresponding billing adjustments are based on a “black box” settlement, and not actual PJM invoices paid by PECO and other LSEs in each PJM transmission zone.<sup>59</sup> PECO used time-segmented amounts provided by PJM to calculate its retention of \$5.5 million for the period of 2007 through 2010.<sup>60</sup>

While the OCA questions the accuracy of time-segmented credits compared to the actual RTEP charges incurred by PECO during the period of 2007 through 2010, the OCA understands that the settlement at FERC was a “black box” settlement that was agreed upon between numerous parties to remedy an unreasonable allocation methodology. The OCA requested that PECO provide the RTEP charges billed to the PECO zone during the period in question and PECO stated that it did not have information for the period of November 2007 through May 2008.<sup>61</sup> As such, the OCA accepts PECO's use of time-segmented data provided by PJM as a basis for calculating RTEP charges for the period of 2007 through 2010, given the lack of evidence provided by PECO showing the actual RTEP charges that PECO incurred.

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<sup>59</sup> PECO M.B. at 25.

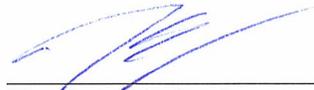
<sup>60</sup> PECO M.B. at 25.

<sup>61</sup> OCA St. 1 at 11.

IV. CONCLUSION

PECO's proposal to retain \$5.5 million of FERC-ordered RTEP credits is contrary to the Public Utility Code, legal precedent, and public policy. 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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