

Morgan Lewis

Kenneth M. Kulak

Partner

+1.215.963.5384

ken.kulak@morganlewis.com

February 13, 2020

VIA eFILING

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

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

Dear Secretary Chiavetta:

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

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

Very truly yours,



Kenneth M. Kulak

KMK/tp
Enclosure

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

Morgan, Lewis & Bockius LLP

1701 Market Street
Philadelphia, PA 19103-2921
United States

T +1.215.963.5000
F +1.215.963.5001

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

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

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Administrative Law Judge Marta Guhl
Pennsylvania Public Utility Commission
801 Market Street, Suite 4063
Philadelphia, PA 19107
mguhl@pa.gov
धारvell@pa.gov

Richard Kanaskie
Bureau of Investigation & Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Second Floor
Harrisburg, PA 17120
rkanaskie@pa.gov

Erin K. Fure
Assistant Small Business Advocate
Commonwealth of Pennsylvania
Office of Small Business Advocate
Forum Place
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
efure@pa.gov

Darryl A. Lawrence
Harrison W. Breitman
Office of Consumer Advocate
Forum Place, 5th Floor
555 Walnut Street
Harrisburg, PA 17101-1923
dlawrence@paoca.org
hbreitman@paoca.org



Anthony E. Gay, Jr. (Pa. No. 74624)
Jack R. Garfinkle (Pa. No. 81892)
Ward Smith (Pa. No. 47670)
PECO Energy Company
2301 Market Street
Philadelphia, PA 19103
215.841.5974 (dir)
215.568.3389 (fax)
anthony.gay@exeloncorp.com
jack.garfinkle@exeloncorp.com
ward.smith@exeloncorp.com

Kenneth M. Kulak (Pa. No. 75509)
Anthony C. DeCusatis (Pa. No. 25700)
Brooke E. McGlinn (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
215.963.5384 (dir)
215.963.5001 (fax)
ken.kulak@morganlewis.com
anthony.decusatis@morganlewis.com
brooke.mcglinn@morganlewis.com

Dated: February 13, 2020

Counsel for PECO Energy Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

REPLY BRIEF OF RESPONDENT PECO ENERGY COMPANY

**Before Administrative Law Judge
Marta Guhl**

Anthony E. Gay (Pa. No. 74624)
Jack R. Garfinkle (Pa. No. 81892)
Ward L. Smith (Pa. No. 47670)
PECO Energy Company
2301 Market Street
Philadelphia, PA 19103

Kenneth M. Kulak (Pa. No. 75509)
Anthony C. DeCusatis (Pa. No. 25700)
Brooke E. McGlinn (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921

Dated: February 13, 2020

Counsel for PECO Energy Company

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	5
A. The OCA’s Attempt To Show That PECO Actually Recovered RTEP Charges From Retail Customers Prior To January 1, 2011 Is Entirely Unsupported And Contrary To Substantial Record Evidence.....	5
B. The OCA’s Complaints Should Be Dismissed As A Matter Of Law.....	9
III. CONCLUSION.....	12
APPENDIX A – OCA Proposed Findings of Fact and Conclusions of Law Contested by PECO Energy Company	

I. INTRODUCTION

This case was initiated by Complaints filed by the Office of Consumer Advocate (“OCA”) against rates that PECO Energy Company (“PECO” or the “Company”) calculated, and the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) authorized PECO to bill to customers, under the Company’s Non-Bypassable Transmission (“NBT”) charge established under Section 1307 of the Public Utility Code (“Code”). Specifically, the OCA’s Complaints allege that PECO’s calculations of the NBT charges, effective on December 1, 2018 and June 1, 2019, were erroneous because PECO did not reduce its current-period transmission costs to reflect certain bill credits issued by PJM Interconnection L.L.C. (“PJM”).

The credits at issue, totaling \$5.5 million, do not relate to current-period transmission service. Rather, they are credits to bills that PJM issued for transmission service that PECO obtained more than ten years ago (from June 1, 2007 through December 31, 2010). These credits were issued pursuant to a settlement of a decade-long dispute at the Federal Energy Regulatory Commission (“FERC”) over the proper method of allocating Regional Transmission Expansion Plan (“RTEP”) costs among transmission zones (the “Settlement”), which – during the 2007-2010 period – were paid by PECO and not included in the rates that customers were charged.

As the record evidence makes clear, neither the NBT nor PECO’s Transmission Service Charge (“TSC”) – the Section 1307 adjustment charge that preceded the NBT – was in effect until January 1, 2011. Prior to that date, PECO recovered transmission costs (if they were recovered at all) through the Price-to-Compare (“PTC”) component of its base rates that the Commission found and determined to be just and reasonable in PECO’s 1989 base rate case – a decision reaffirmed in PECO’s 1999 restructuring proceeding. Thus, the OCA’s Complaints are not – nor could they be – a challenge to PECO’s NBT charges. To the contrary, although

facially directed to PECO's NBT, the OCA's Complaints, in reality, ask the PUC to order PECO to pay credits to customers for PECO's overpayment of RTEP costs that were not included in base rates or passed through an automatic adjustment clause to customers.

In sum, the OCA's Complaints ask the PUC to do something that well-established Pennsylvania appellate precedent prohibits – namely, to adjust previously approved, Commission-made rates to retroactively refund a portion of the revenues PECO billed and collected under those rates a decade or more ago. The unfairness of retroactively adjusting base rates that the PUC found to be just and reasonable is compounded because the bill credits at issue relate only to RTEP charges that were never included in the base rates the Company charged to customers during the 2007-2010 period that those credits cover.

It is undisputed that the base rates PECO charged to retail customers during the relevant period were established in 1989 – long before PJM began to impose RTEP charges. Moreover, during the 2007-2010 period, RTEP charges were also not included in PECO's FERC-approved wholesale transmission rate.¹ Nevertheless, the OCA's witness, Karl Richard Pavlovic, Ph.D., asserted that PECO's NITS rate, in effect between 2007 and 2010, should *be deemed* to have included RTEP charges because: (1) RTEP charges are currently recorded in FERC Account 561.8 (a subaccount of Account 561); and (2) FERC Account 561.8 is classified as a transmission expense account.

Those assertions misrepresent historical facts. As PECO's witness, Joseph A. Bisti, explained in his rejoinder testimony, during the 2007-2010 period, PECO's NITS rate recovered a revenue requirement established in 1994 – thirteen years before PJM began to impose RTEP

¹ As explained in PECO's Main Brief (pp. 4-5), PECO's stated rate for wholesale network integration transmission service ("NITS"), in effect from 2007 through 2010, was established by a settlement approved by the FERC in 1998 ("1998 Settlement") that, in turn, was based upon PECO's FERC-established 1994 revenue requirement.

charges. Moreover, the revenue requirement used in setting PECO's rates did not include any costs recorded in Account 561 because the terms of the 1998 Settlement required all such costs to be eliminated from PECO's revenue requirement.² Astonishingly, the OCA's Main Brief never even mentions Mr. Bisti's rejoinder testimony, which totally undercuts Dr. Pavlovic's position.

All of the legal and factual analysis summarized above was set forth in detail in PECO's Main Brief filed on January 14, 2020. In addition to presenting its affirmative case for dismissing the OCA's Complaints, PECO identified, discussed and refuted every one of the principal contentions advanced by Dr. Pavlovic in his direct and surrebuttal testimony.³

The OCA pursued a different course. While PECO's Main Brief engaged all of the evidence and arguments that had been developed on the record, the OCA elected to simply reproduce its own witness's testimony, as if PECO had not presented rebuttal and rejoinder testimony.⁴ For that reason, the OCA's Main Brief creates the false impression that critical elements of the OCA's case had not been rebutted and should be accepted at face value. Nothing is further from the truth. All of the OCA's arguments and their underlying factual and legal

² PECO St. No. 1-RJ, pp. 3-6; *see also* PECO Exhibit No. JAB-2RJ (showing that the entire amount recorded by PECO in FERC Account 561 in 1994 was \$2,766,069, which is the same amount PECO removed from its NITS rate pursuant to the 1998 Settlement).

³ *See* PECO Main Brief, pp. 16-27.

⁴ The Commission's regulations (52 Pa. Code § 5.501(a)(3)) prohibit the OCA from "sandbagging" PECO by staying silent on the fundamental unfairness of its position or the doctrine of Commission-made rates and then making its arguments in its Reply Brief to which PECO could not respond. Should the OCA endeavor to take this approach, any such arguments should be disregarded. *See, e.g., Application of Interstate Energy Co.*, Docket No. A-00140200, 1994 WL 932289, at **5-7 (Initial Decision issued Aug. 11, 1994) (striking portions of reply brief that raised arguments that the party could have – and should have – presented in its Main Brief); *Petition of West Penn Power Co. d/b/a Allegheny Power for Approval of Its Energy Efficiency & Conservation Plan, Approval of Recovery of Its Costs Through A Reconcilable Adjustment Clause & Approval of Matters Relating to the Energy Efficiency & Conservation Plan*, Docket No. M-2009-2093218 (Opinion and Order entered Oct. 23, 2009) (noting that "parties should not be permitted to introduce new arguments at the reply brief stage of a proceeding"), p. 69.

premises were vigorously contested and, in fact, decisively refuted by the testimony and other evidence presented by PECO.

The OCA's entire case rests upon a single proposition: the Commission should order PECO to refund to customers a portion of RTEP charges during the 2007-2010 period that had not been included in the rates PECO charged to its customers at that time.⁵ To deflect attention from the fundamental unfairness of its request, the OCA either ignores or mischaracterizes the record evidence. However, the OCA's claims boil down to the following arguments, which the evidence shows are clearly erroneous.

First, the OCA contends that PECO was compensated for RTEP charges it paid between 2007 and 2010 through its wholesale transmission rates. However, the OCA failed to show that PECO's wholesale rates were unjust or unreasonable (or, in the OCA's language were "more than enough").⁶ The OCA's argument, in addition to lacking factual support, is legally defective. As a matter of law, wholesale transmission revenues cannot be appropriated to augment revenues produced by PUC-regulated rates.

Second, and notwithstanding its claims that PECO allegedly recovered pre-2011 RTEP charges in its wholesale transmission rates, the OCA inconsistently argues that PECO recovered those charges in its PUC-jurisdictional rates.⁷ Yet, the very testimony from PECO's 2010 rate case, which the OCA purports to rely upon, shows exactly the opposite. That testimony was referring to PECO's *future recovery* in proposed rates and proposed TSC – where PECO would

⁵ See OCA's Main Brief, p. 15 (arguing that the Commission should simply ignore the fact that PECO did not have a mechanism in place to recover RTEP charges until January 1, 2011).

⁶ See *id.*, p. 12.

⁷ See *id.*, pp. 14-15.

reflect RTEP charges in rates to PECO's customers for the first time after January 1, 2011 – and was not describing cost-recovery under PECO's historic pre-2011 rates.

Third, the OCA claims that not including 2007-2010 RTEP bill credits in PECO's 2018 and 2019 NBT calculations somehow amounts to impermissible "retroactive ratemaking." But it is the OCA that is asking the PUC to engage in impermissible retroactive ratemaking by seeking refunds of revenues that PECO billed to customers during the 2007-2010 period under Commission-made base rates that, as the evidence shows, were established before PJM began to impose RTEP charges and, therefore, could not have reflected those charges.

Simply put, for the foregoing principal reasons, the OCA's request should be denied and its Complaints dismissed. Because the OCA's Main Brief simply repeats the testimony of its witness, the balance of PECO's Reply Brief will identify and correct key errors and misstatements in the OCA's Main Brief.

II. ARGUMENT

A. **The OCA's Attempt To Show That PECO Actually Recovered RTEP Charges From Retail Customers Prior To January 1, 2011 Is Entirely Unsupported And Contrary To Substantial Record Evidence**

In its Main Brief (p. 11), the OCA concedes that PECO did not institute a reconcilable rate adjustment mechanism (the TSC) for PJM transmission charges until January 1, 2011. The OCA also appears to accept that PJM RTEP costs did not even exist in 1989, when PECO's retail base rates in effect between 2007 and 2010 were established. Nonetheless, the OCA reiterates Dr. Pavlovic's contention that pre-2011 Settlement credits should be refunded to retail customers through PECO's reconcilable NBT rate because "PECO has failed to show that it did not

adequately recover its RTEP charges during the [2007-2010] period in question.”⁸ The OCA offers two purported reasons to include pre-2011 bill credits in PECO’s NBT rate calculations: (1) PECO recovered pre-2011 RTEP charges through its NITS rate that retail customers, in turn, allegedly paid as “a retail transmission base rate”; and (2) “PECO had more than enough transmission revenue from its retail customers to cover RTEP expenses for the years 2007 through 2010.”⁹ Neither argument is correct, as explained below.

As a threshold matter, the Commission should reject the OCA’s efforts to shift the burden of proof to PECO.¹⁰ The OCA admits that the bill credits that it seeks to refund to customers relate to PECO’s overpayment of RTEP charges between 2007 and 2010 – a period that elapsed before PECO implemented its reconcilable TSC and NBT.¹¹ Prior to January 1, 2011, PECO recovered the transmission costs it incurred as a load serving entity (“LSE”) to serve its retail customers through the transmission component of base rates.¹² The OCA’s Complaints, therefore, are directed against existing rates that are not the subject of a Commission investigation. Accordingly, as explained in PECO’s Main Brief (p. 16), the OCA has the burden of proof to establish that PECO’s pre-2011 base rates were unjust and unreasonable and that applicable legal precedent would validate a refund of revenues billed under Commission-made rates. The OCA fails on both counts.

Contrary to the impression left by the OCA, there is no evidentiary or other basis for the Commission to find that retail customers are entitled to PJM bill credits that apply to

⁸ OCA Main Brief, p. 10; *see also id.*, pp. 8-9, 13.

⁹ *See id.*, pp. 12-15.

¹⁰ *See id.*, pp. 6-9.

¹¹ *See id.*, pp. 11, 15-16 (agreeing that PECO did not have an automatic adjustment clause in place to recover RTEP charges during the 2007-2010 period at issue).

¹² *See* PECO Main Brief, pp. 2-3, 11.

transmission service obtained by PECO prior to January 1, 2011.¹³ As the testimony of PECO witness Bisti confirms, this case involves only RTEP charges (and subsequent bill credits) imposed by PJM on PECO in its capacity as an LSE.¹⁴ PECO could recover those charges, if at all, only in the rates charged to retail customers. During the 2007-2010 period at issue, the only rates charged to PECO's retail customers were base rates. Indeed, PECO's pre-2011 base rates were established nearly two decades before PJM began imposing RTEP charges and were not subject to reconciliation like the TSC and NBT.¹⁵ Unable to refute this record evidence that confirms PECO absorbed all pre-2011 RTEP charges without reflecting those transmission costs in its retail base rates, the OCA simply ignores it.

At several points in its Main Brief, the OCA also seriously mischaracterizes the record in this case. For example, the OCA asserts that RTEP charges are part of PECO's FERC-approved NITS rate that recovers the costs that PECO incurs to provide transmission service to other entities to move power on their behalf using Company-owned facilities.¹⁶ In fact, Mr. Bisti's testimony demonstrated exactly the opposite.¹⁷ PJM RTEP charges are imposed on PECO in its capacity as an LSE to recover the cost of transmission facilities owned and operated by transmission service providers other than PECO. Moreover, PECO's NITS rate in effect during the 2007-2010 period was established in 1998 (based on a 1994 revenue requirement) well before PJM began imposing RTEP charges. Therefore, RTEP charges could not be a part of PECO's wholesale NITS rate during that period, as the OCA erroneously contends. In fact, Mr.

¹³ See *id.*, pp. 11-12, 16-24.

¹⁴ See PECO St. Nos. 1, pp. 10-11 & 1-R, pp. 4-5.

¹⁵ See PECO Main Brief, pp. 5-6, 11.

¹⁶ See OCA Main Brief, pp. 13 and 15.

¹⁷ See PECO Main Brief, pp. 2-5, 18-19.

Bisti's rejoinder testimony definitively established this fact with clear objective evidence from PECO's FERC Form 1 for the applicable period.¹⁸

Deep factual flaws reside in the OCA's additional claim that "PECO itself acknowledged in its 2010 base rate case that the RTEP charges at issue here were part of its transmission base rates."¹⁹ The record tells a very different story. Mr. Cohn's testimony, which the OCA purports to rely upon, addresses estimated PJM transmission charges that PECO was claiming for *future* recovery in its *proposed* base rates.²⁰ The OCA simply ignores the portions of Mr. Cohn's testimony explaining that the amounts PECO was "removing" were not costs embedded in PECO's existing 2010 base rates.

The OCA also errs in asserting that PECO's FERC-approved rate for an entirely different category of service (wholesale NITS) produced "excess" revenues during the 2007-2010 period. First, the OCA's assertion is internally inconsistent. On the one hand, the OCA contends that utilities experience many changes to expenses following a base rate case.²¹ At the same time, the OCA attempts to compare PECO's 1994 transmission revenue requirement for providing NITS to revenues under PECO's FERC transmission rates billed from 2007 to 2009.²² The OCA then makes the quantum leap from this apples-to-oranges comparison to conclude that the Company's "transmission revenue from its retail customers" was "more than enough" to recover the RTEP charges PECO paid from 2007 through 2010.²³ As PECO explained in its Main Brief, Dr. Pavlovic did not present a scintilla of evidence to show that there is any reasonable basis to

¹⁸ See PECO St. No. 1-RJ, pp. 3-6; PECO Exhibit No. JAB-2RJ.

¹⁹ OCA Main Brief, p. 14.

²⁰ See PECO Main Brief, pp. 5-6, 22-24.

²¹ See OCA Main Brief, pp. 11-12.

²² See *id.*, p. 12.

²³ *Id.*

assume that a 1994 calculation of revenue requirement could properly be compared to revenues in 2007-2010 before leaping to the conclusion that PECO was recovering more than its actual cost of providing NITS service.²⁴ Additionally, for the reasons discussed in PECO's Main Brief (pp. 19-22), the OCA's analysis improperly commingles revenues from two different kinds of transmission service, contrary to the jurisdictional separation required in ratemaking.

In sum, the record evidence shows that the OCA's attempt – based on demonstrably counterfactual assertions – to force PECO to refund PJM bill credits that apply to transmission service periods before customers began to pay reconcilable TSC and NBT charges on January 1, 2011 is unfair and contrary to established ratemaking principles. Moreover, as discussed in the Company's Main Brief (pp. 13-16) and Section II.B below, the Commission cannot lawfully grant the OCA's relief requested in this case.

B. The OCA's Complaints Should Be Dismissed As A Matter Of Law

The OCA contends, in the alternative, that even if substantial record evidence demonstrates (as it clearly does here) that PECO never included pre-2011 RTEP charges in rates, PECO's "request to recover" those costs "more than a decade after they were incurred" constitutes impermissible retroactive ratemaking.²⁵ The OCA further argues that RTEP charges to which the Settlement credits apply do not qualify for the exception to the rule for "extraordinary" and "non-recurring" expenses.²⁶ According to the OCA, PECO's decision not to seek recovery of its pre-2011 RTEP expenses as they were incurred justifies the retrospective

²⁴ PECO Main Brief, p. 21. As PECO also explained, if PECO's NITS rates were producing "excess" revenues of the magnitude the OCA alleges, those rates would have been subject to challenge by FERC (or by transmission customers at FERC), and no such challenge was ever made. *Id.*

²⁵ OCA Main Brief, p. 20; *see also id.*, pp. 10-11, 15-19.

²⁶ *See id.*, pp. 18-19.

reduction to PECO's previously approved base rates that the OCA urges the Commission to make.²⁷ The OCA's theory must fail for several reasons.

First, the OCA fails to recognize the legal significance of the January 1, 2011 effective date of PECO's Section 1307 mechanism²⁸ to provide dollar-for-dollar recovery from customers of PJM transmission charges including, for the first time, RTEP costs. The OCA does not dispute that PECO's pre-2011 base rates were established in 1989, by a final Order in which the PUC found and determined that those rates were just and reasonable. As explained in the Company's Main Brief (pp. 13-16), solid, long-standing law prohibits the Commission from requiring a utility to refund revenues that are collected pursuant to a final Order establishing Commission-made rates. Thus, the Pennsylvania Commonwealth Court clearly articulated that the "general rule" under Pennsylvania law is that "there may be no line by line examination" of "particular items of expense or revenue," and, therefore, variations in "an isolated item of revenue or expense" alone cannot support "a Commission order of refund or recovery."²⁹ The Commission-made rates doctrine and associated prohibition against retroactive ratemaking do not apply to Section 1307 surcharges, but they unquestionably do apply to base rates. And it is now clear beyond question that the OCA's Complaints are directed against PECO's pre-2011 *base rates*.

The OCA has not even mentioned the protection afforded by the doctrine of Commission-made rates in its Main Brief. Instead, the OCA attempts to deflect attention from this legal precedent, which belies its position, by suggesting that PECO somehow is now

²⁷ See *id.*, pp. 11, 16, 18-19.

²⁸ See, e.g., OCA Main Brief, p. 11 ("The OCA agrees that in the historical period at issue, PECO did not have a separate surcharge mechanism specifically recovering RTEP costs. That fact, however, is immaterial to the resolution of this matter.").

²⁹ *Phila. Elec. Co. v. Pa. P.U.C.*, 502 A.2d 722, 727-728 (Pa. Cmwlth. 1985).

asserting a claim to recover, through its NBT, pre-2011 RTEP expenses by “withholding a refund properly owed to customers” contrary to the prohibition against retroactive ratemaking.³⁰ Despite the OCA’s attempt to spin the facts to its advantage, PECO did not make any such claim. Indeed, the OCA – not PECO – is seeking a retrospective line-by-line examination of PECO’s pre-2011 PUC-approved base rates to refund PJM bill credits related to transmission service PECO acquired from PJM during that period on behalf of retail customers. Consequently, the entire basis for the OCA’s “retroactive ratemaking” argument is invalid.

In addition, the cases cited by the OCA on pages 17-18 of its Main Brief involved proceedings in which a utility proposed after-the-fact adjustments to base rates to recover unanticipated expenses. That is not the case here. PECO is not seeking retroactive rate relief on account of a single expense item (PJM RTEP charges). More importantly, the cases the OCA relies upon for its argument confirm that the rule against retroactive ratemaking precludes refunds of revenues collected under rates previously in force even if an item of expense is or should have been less than anticipated and approved.³¹ That is exactly what the OCA is asking the Commission to do in this case. Stated simply, the Commission should apply the doctrine of Commission-made rates and prohibition against retroactive ratemaking and dismiss the OCA’s Complaints.

³⁰ OCA Main Brief, p. 19.

³¹ *See, e.g., Nat’l Fuel Gas Dist. Corp. v. Pa. P.U.C.*, 464 A.2d 546, 567 (Pa. Cmwlth. 1983) (holding that the PUC cannot lawfully order a utility to retroactively return to customers revenues it collected under PUC-approved rates based on a line-by-line examination of the expenses the utility actually incurred and the revenues it actually received under those rates).

III. CONCLUSION

For the reasons set forth above and in PECO's Main Brief, the Commission should deny and dismiss, with prejudice, the Complaints of the Office of Consumer Advocate.

Respectfully submitted,



Anthony E. Gay (Pa. No. 74624)
Jack R. Garfinkle (Pa. No. 81892)
Ward L. Smith (Pa. No. 47670)
PECO Energy Company
2301 Market Street
Philadelphia, PA 19103
215.841.6863 (bus)
215.568.3389 (fax)
ward.smith@exeloncorp.com

Kenneth M. Kulak (Pa. No. 75509)
Anthony C. DeCusatis (Pa. No. 25700)
Brooke E. McGlinn (Pa. No. 204918)
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921
215.963.5384 (bus)
215.963.5001 (fax)
ken.kulak@morganlewis.com
anthony.decusatis@morganlewis.com
brooke.mcglinn@morganlewis.com

Dated: February 13, 2020

Counsel for PECO Energy Company

APPENDIX A

**OCA Proposed Findings of Fact and Conclusions of Law
Contested by PECO Energy Company**

OCA Proposed Findings Of Fact And Conclusions Of Law Contested By PECO Energy Company

Several of the OCA's Proposed Findings of Fact and Conclusions of Law set forth in Appendix A accompanying its Main Brief in this proceeding ("OCA Appendix A") are unsupported and/or contrary to record evidence, as explained below. While this Appendix reproduces the entirety of OCA Appendix A, PECO is only providing responses to contested factual assertions and legal conclusions.

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.

PECO Response: PECO contests the averments of Paragraph No. 6 to the extent the OCA suggests that PECO’s NBT charges effective on December 1, 2018 and June 1, 2019 are unreasonable because PECO did not reduce its current-period transmission costs to reflect the approximately \$5.5 million of PJM bill credits at issue. Those credits that the OCA alleges PECO seeks to “retain” do not relate to current-period transmission service, but rather are credits to bills that PJM issued for transmission service that PECO obtained from June 1, 2007 through December 31, 2010. *See* PECO Main Brief, pp. 3-8, 11-12 and Appendix A, ¶¶ 12-15, 18; PECO Reply Brief, pp. 1, 5, 11-12.

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.

PECO Response: PECO contests the averments of Paragraph No. 12 to the extent the OCA asserts that the manner in which PECO recorded RTEP charges for accounting purposes determines the manner in which they are recovered for ratemaking purposes. During the 2007-2010 period, PECO could not recover any RTEP costs through its FERC-approved transmission rate, regardless of whether the FERC functionalizes those costs as “transmission operating” expenses. PECO’s wholesale transmission rate in effect during the pre-2011 period at issue in this case recovered a revenue requirement established in 1994 – before PJM began to impose RTEP charges in 2007. *See* PECO Main Brief, pp. 5, 18-19 and Appendix A, ¶¶ 6, 44; PECO Reply Brief, pp. 2-3, 8-9.

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.

PECO Response: There is no credible record evidence that the revenues produced by PECO’s FERC-jurisdictional wholesale transmission rate during the 2007-2010 period recovered the RTEP costs PECO incurred in its capacity as an LSE to serve its own retail customers. The averments of Paragraph No. 13 are premised on an erroneous comparison of PECO’s 1994 wholesale transmission revenue requirement to revenues

under FERC-approved transmission rates billed from 2007 to 2010. In addition, the averments of Paragraph No. 13 are contrary to law requiring strict jurisdictional separation of wholesale transmission revenues and state-regulated transmission revenues in establishing retail rates. *See* PECO Main Brief, pp. 2-5, 19-22 and Appendix A, ¶¶ 1-2, 4-5, 45-46, 61; PECO Reply Brief, pp. 4-6, 10.

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.

PECO Response: The averments of Paragraph No. 15 are factually and legally defective for the reasons set forth in PECO's response to Paragraph No. 13.

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.

PECO Response: The averments of Paragraph No. 16 are factually and legally defective for the reasons set forth in PECO's response to Paragraph No. 13.

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.

PECO Response: PECO contests the averments of Paragraph No. 17 to the extent the OCA contends that, if PECO was not recovering RTEP charges as they were incurred from 2007 through 2010, it should have sought FERC approval either to increase its "stated" FERC rate or to implement a "formula" adjustment mechanism to reflect annual changes in its costs. Under either alternative, PECO would be asking the FERC for an increase in revenue requirement for the Company's FERC jurisdictional transmission service – not an increase in retail electric rates, which the FERC would be powerless to confer. *See* PECO Main Brief, p. 22 and Appendix A, ¶ 61.

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.

PECO Response: PECO contests the averments of Paragraph No. 20 to the extent the OCA asserts that PECO's FERC-approved transmission rate in effect between 2007 and 2010 must be deemed to have included RTEP charges recorded to FERC Account 561.8 (a subaccount of Account 561) for the reasons set forth in PECO's response to Paragraph No. 12. In addition, the revenue requirement used in setting PECO's wholesale transmission rates during that period did not include any costs recorded in Account 561. *See* PECO Main Brief, pp. 5, 18-19 and Appendix A, ¶¶ 6, 44; PECO Reply Brief, pp. 2, 9.

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.

PECO Response: The averments of Paragraph No. 21 seriously mischaracterize the record evidence in this case. It is undisputed that the base rates PECO charged to retail customers during the relevant period were established in 1989 – long before PJM began to impose RTEP charges. Nonetheless, the OCA contends that PJM transmission charges were “passed through” to PECO's retail customers and relies upon the combined rate cap on PECO's transmission and distribution (“T&D”) rates under the Company's Restructuring Plan. However, that rate cap expired on December 31, 2006 – before the period the OCA claims PECO actually recovered PJM transmission costs through retail base rates. Moreover, the OCA's interpretation of the combined T&D rate cap conflicts with the express language of the Joint Petition for Settlement of PECO's restructuring proceeding. *See* PECO Main Brief, pp. 3-6, 23 and Appendix A, ¶¶ 2-3, 8-10, 47-48; PECO Reply Brief, pp. 4, 6, 8-10.

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.

PECO Response: The averments of Paragraph No. 22 are incorrect for the reasons set forth in PECO's response to Paragraph No. 21. In addition, the OCA's claim is contradicted by Mr. Cohn's own testimony and exhibits. Indeed, Mr. Cohn explained that the amounts PECO proposed to “remove” from *proposed* rates were estimated future test year (2010) PJM transmission charges and not experienced costs embedded in PECO's existing base rates. *See* PECO Main Brief, pp. 5-6, 22-24 and Appendix A, ¶¶ 10, 36-42; PECO Reply Brief, pp. 4, 6, 8-10.

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.

PECO Response: PECO contests the averments of Paragraph No. 23 for the reasons set forth in PECO's response to Paragraph No. 22.

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.

PECO Response: The averments of Paragraph No. 24 inaccurately conflate the transmission costs PECO incurs to provide transmission service in its role as an LSE for retail customers with the costs the Company incurs as a transmission owner to provide wholesale service to other entities. PJM RTEP charges are imposed on PECO in its capacity as an LSE to recover the cost of transmission facilities owned and operated by transmission service providers other than PECO. In addition, RTEP charges could not be a part of PECO's whole transmission rates during the 2007-2010 period because those rates were established in 1998 (based on a 1994 revenue requirement) well before PJM began imposing RTEP charges. *See* PECO Main Brief, pp. 3-4, 18-19 and Appendix A, ¶¶ 1-5, 43; PECO Reply Brief, pp. 8-9.

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).

PECO Response: The OCA's Complaints seek to retroactively diminish revenue PECO recovered under PECO's pre-2011 base rates that the Commission found and determined to be just and reasonable. Thus, the OCA's Complaints are clearly directed against existing rates that are not the subject of a Commission investigation and the OCA bears the burden of proof in this case. *See* PECO Main Brief, pp. 16-17 and Appendix A, ¶¶ 59-60; PECO Reply Brief, pp. 1, 6, 8.

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).

PECO Response: PECO objects to Conclusion of Law No. 2 to the extent the OCA asserts that PECO has the burden of proof under Section 315(a) of the Public Utility Code for the reasons set forth in the Company's response to Conclusion of Law No. 1.

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).

PECO Response: PECO objects to Conclusion of Law No. 6 to the extent the OCA asserts that PECO is making an affirmative request and has the burden of proof in this case for the reasons set forth in the Company's response to Conclusion of Law No. 1.

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.

PECO Response: The OCA has the burden of proof to both establish that PECO's pre-2011 base rates were unjust and unreasonable and that a valid legal basis supports a refund of revenues billed under Commission-made rates for the reasons set forth in the Company's response to Conclusion of Law No. 1.

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).

PECO Response: PECO objects to Conclusion of Law No. 8 to the extent the OCA claims that not including 2007-2010 RTEP bill credits in PECO's 2018 and 2019 NBT calculations somehow amounts to impermissible "retroactive ratemaking." PECO is not making a claim to recover any pre-2011 RTEP expenses through its NBT rate. The OCA – not PECO – is seeking a retrospective line-by-line examination of PECO's pre-2011 base rates to refund bill credits related to 2007-2010 transmission service periods. The Commission-made rates doctrine and associated prohibition against retroactive ratemaking do not apply to automatic adjustment clauses (the TSC and NBT), but unquestionably do apply to base rates. This legal precedent precludes refunds of revenues collected under base rates previously in force, which is the very relief requested by the OCA. *See* PECO Main Brief, pp. 2, 13-16 and Appendix A, ¶¶ 7-8, 35, 54-58; PECO Reply Brief, pp. 2-5, 11-13.

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).

PECO Response: The relief the OCA is requesting in this case is legally barred for the reasons set forth in PECO's response to Conclusion of Law No. 8.

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).

PECO Response: PECO objects to Conclusion of Law No. 12 to the extent the OCA asserts PECO is making a claim to recover pre-2011 RTEP expenses through its NBT rate for the reasons set forth in the Company's response to Conclusion of Law No. 8.

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).

PECO Response: The relief the OCA is requesting in this case is legally barred for the reasons set forth in PECO's response to Conclusion of Law No. 8.

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).

PECO Response: The relief the OCA is requesting in this case is legally barred for the reasons set forth in PECO's response to Conclusion of Law No. 8.

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-20183005860, 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: _____, 2020

Administrative Law Judge Marta Guhl