BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

INITIAL DECISION

Before
Marta Guhl
Administrative Law Judge

INTRODUCTION

This initial decision dismisses the formal Complainants of the Office of Consumer Advocate (OCA) as it was not able to meet its burden of establishing that the rates of PECO Energy Company (PECO or Company) are unjust or unreasonable, in retaining a portion of the settlement funds that were issued in the settlement related to the Federal Energy Regulatory Commission (FERC) and Regional Transmission Expansion Plan (RTEP) of PJM Interconnections, LLC (PJM).

BACKGROUND

PECO is a load serving entity (LSE). As an LSE, PECO obtains transmission service to move electricity to its distribution system to serve retail customers. In addition, PECO

was, and is, the owner of transmission facilities that are used to move electricity on behalf of other entities, including other LSEs. PECO, in its capacity as an LSE, acquires transmission service provided by others to serve its retail customers. Under its 1998 Commission-approved Restructuring Plan, PECO had the obligation to offer and furnish "Provider Of Last Resort" (POLR) generation service, as required by Section 2807(e)(1) of the Public Utility Code, to customers that did not, or could not, shop with an electric generation supplier. To fulfill its statutory obligation, PECO had to obtain and furnish transmission service to deliver the electricity it supplied to PECO's PJM-designated transmission zone (PECO Zone), where that electricity could then be distributed by PECO to POLR customers' premises. Because PECO's retail rates had been unbundled, the cost of providing POLR service included two components: a generation price, which remained capped until January 1, 2011, and a transmission component, to recover the cost of bringing that generation to the PECO Zone. PECO's "price to compare" (PTC) for POLR service was the sum of the generation and transmission components.

PJM has been approved by FERC as the Regional Transmission Operator for its members' transmission systems in all or parts of thirteen states and the District of Columbia. PJM's annual Regional Transmission Expansion Plan (RTEP) identifies transmission system upgrades and enhancements to provide for operational, economic, and reliability requirements of the bulk power system under PJM's operational control.

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

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

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

The instant proceeding relates to a settlement agreement approved by 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 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

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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).

of newly built or projected 500-kV transmission lines that were mainly located in the eastern portion of PJM.[5]

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 assigned to responsible customers based on the "solution-based DFAX method"

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5 Id. at **6-7.

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

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 (of which the PECO zone was one) 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 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]

HISTORY OF THE PROCEEDING

On November 7, 2018, PECO filed with the Pennsylvania Public Utility Commission (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 Service Charge to reflect the impact of the approved RTEP credits pursuant to 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 2007 through December 2010. PECO proposed that the adjustment would become effective on December 1, 2018. 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.

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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.

On November 29, 2018, OCA filed a Formal Complaint, at Docket No. C-2018-3006242, 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 OCA's Formal Complaint contained insufficient specificity for a pleading. On December 31, 2018, OCA filed an Answer to the Preliminary Objection. The matter was referred to the Office of Administrative Law Judge and was assigned to me.

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, I issued an Order denying PECO's Preliminary Objection and directing PECO to file an Answer to OCA's Complaint. On February 28, 2019, PECO filed an Answer to OCA's Complaint.

A prehearing conference was held on April 26, 2019 in which counsel for 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. Through this proposed semiannual adjustment, PECO again indicated its proposal to retain $5.5 million of FERC-ordered RTEP credits.

OCA filed an additional Formal Complaint, at Docket No. C-2019-3010737, on June 13, 2019, raising the same issues that were previously raised in OCA's initial Complaint. Additionally, 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 of Joseph A. Bisti on June 5, 2019. On August 5, 2019, OCA submitted the Direct Testimony of Dr. Karl Richard Pavlovic. PECO submitted Rebuttal Testimony of Mr. Bisti on October 4, 2019. On October 24, 2019, OCA submitted the Surrebuttal Testimony of Dr. Pavlovic. PECO submitted Rejoinder Testimony of Mr. Bisti on November 8, 2019. OSBA did not submit any testimony in this matter.

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.

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

On November 27, 2019, I issued an order granting OCA's request to consolidate docket numbers M-2018-3005860 and C-2018-3006242 with docket numbers M-2019-3010032 and C-2019-3010737, in which OCA filed a Complaint against PECO's subsequent Semiannual Adjustment to the NBT on the same grounds as its initial Complaint.

On January 14, 2020, OCA and PECO filed their Main Briefs in this matter. On February 13, 2020, OCA and PECO filed their Reply Briefs. OSBA did not file a Main or Reply Brief in this matter. The record closed on February 13, 2020 when I received the parties' Reply Briefs.

FINDINGS OF FACT

1. The Complainant is OCA.

2. The Respondent is PECO, a public utility that provides electrical and gas service.

3. PECO is a load serving entity (LSE). PECO St. Nos. 1, p. 11 & 1-R, pp. 10-11.

4. As an LSE, PECO obtains transmission service from PJM Interconnection, L.L.C. (PJM) to move electricity to its distribution system to serve retail customers. PECO St. Nos. 1, p. 11 & 1-R, pp. 10-11.

5. Under its 1998 Restructuring Plan,[17] PECO had the obligation to offer and furnish "Provider Of Last Resort" (POLR) generation service, as required by Section 2807(e)(1) of the Public Utility Code, to customers that did not, or could not, shop with an electric generation supplier.[18]

6. To fulfill its statutory obligation, PECO had to obtain transmission service to deliver POLR electricity supplies to the Company's PJM-designated transmission zone (PECO Zone), where that electricity could then be distributed by PECO to POLR customers' premises. PECO St. Nos. 1, p. 11 & 1-R, pp. 10-11.

7. The cost of providing POLR service included two components: a generation price, which remained capped until January 1, 2011, and a transmission component, to recover the cost of bringing that generation to the PECO Zone.[19]

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

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

[19] The statutory caps on PECO's transmission and distribution rates that had initially been extended pursuant to its Restructuring Plan and further extended in the PECO/Unicom merger settlement expired on December 31, 2006. See Application of PECO Energy Co. for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code et al., Docket Nos. R-00973953 and P-00971265 (Opinion and Order entered May 14, 1998)

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

9. PJM has been approved by FERC as the Regional Transmission Operator (RTO) for its members' transmission systems, which encompass all or parts of thirteen states and the District of Columbia. PECO St. No. 1, pp. 10-11.

10. Each year, PJM prepares a Regional Transmission Enhancement Plan (RTEP) that identifies transmission system upgrades and enhancements needed to satisfy the operational, economic, and reliability requirements of the bulk power system under PJM's operational control. PECO St. No. 1, pp. 6-7, 10-12.

11. PJM, on behalf of its member transmission owners, charges the cost to implement its RTEP to LSEs in the transmission zones that are assigned cost responsibility for the applicable RTEP projects. PECO St. No. 1, pp. 6-7, 10-12.

12. The manner in which RTEP costs were allocated was disputed at the FERC and was resolved by a settlement (Settlement) the FERC approved on May 31, 2018. PECO St. No. 1, pp. 6-7, 10-12.

13. PJM first began to impose RTEP charges in the PECO Zone on June 1, 2007. PECO St. No. 1, pp. 7, 11.

14. The RTEP costs imposed on PECO were designed to recover the costs of transmission facilities owned by other transmission service providers outside the PECO Zone. PECO St. No. 1, pp. 7, 11.

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

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

16. PECO is the owner of transmission facilities that are used to move electricity on behalf of other entities, including other LSEs. PECO St. Nos. 1, p. 10 & 1-R, pp. 4-5, 10.

17. The costs that PECO incurs for that service, including the fixed costs of PECO-owned transmission facilities, are recovered in PECO's wholesale network integration transmission service (NITS) rate (which is filed with and approved by FERC) from the entities that receive that service. PECO St. Nos. 1, p. 10 & 1-R, pp. 4-5, 10.

18. PECO's NITS rate in effect during the 2007-2010 period was fixed at $20,942 per megawatt-year based on a black box settlement approved by FERC at Docket No. ER97-3189-000 (1998 Settlement). PECO St. Nos. 1, p. 10, 1-R, pp. 9-10 and 1-RJ, pp. 4-6; PECO Exh. Nos. JAB-1RJ to JAB-4RJ.

19. In implementing the 1998 Settlement, PJM's Open Access Transmission Tariff adopted PECO's revenue requirement established in a prior proceeding based on costs recorded by PECO in 1994. PECO St. Nos. 1, p. 10, 1-R, pp. 9-10 and 1-RJ, pp. 4-6; PECO Exh. Nos. JAB-1RJ to JAB-4RJ.

20. PECO's retail base rates in effect during the 2007-2010 period were established in the Company's 1989 base rate proceeding, which was concluded with a final Order of the Commission entered on May 16, 1990 at Docket No. R-891364 approving those rates for service rendered on and after April 20, 1990. Pa. Pub. Util. Comm'n v. Philadelphia Elec. Co., Docket No. R 891364, 1990 Pa. PUC LEXIS 155 (May 16, 1990).

21. On January 1, 1999, PECO's 1989 base rates were unbundled into distribution, transmission and generation components pursuant to the Restructuring Order. PECO Restructuring Order, pp. 3-4, 7-11.

22. In 2007, FERC issued Order No. 494, which adopted a methodology for allocating RTEP costs among the PJM-designated zones of transmission owners, who, in turn, would have to recover those costs from other entities, including LSEs.[20]

23. The entry of Order No. 494 initiated litigation at FERC in which certain owners of transmission within PJM, including PECO, contested the RTEP cost allocation methodology FERC had adopted, which was resolved by the Settlement. PECO St. No. 1, pp. 11-12.

24. PECO filed an electric distribution base rate case in March 2010. In that case, PECO's pro forma revenue requirement included estimates of the PJM transmission charges (including RTEP charges) PECO expected to incur during the future test year (calendar year 2010) as an LSE to serve its retail customers. PECO St. Nos. 1, pp. 7-9 & 1-RJ, pp. 8-9; PECO Exh. Nos. JAB-1 and JAB-2.

25. PECO also proposed a bypassable, reconcilable TSC under Section 1307 of the Public Utility Code,[21] which the Commission approved along with the base rates and became effective on January 1, 2011.[22] PECO St. Nos. 1, pp. 7-9 & 1-RJ, pp. 8-9; PECO Exh. Nos. JAB-1 and JAB-2.

26. PECO's Non-Bypassable Transmission Charge (NBT) was implemented on June 1, 2015. The Commission directed that certain PJM charges, including RTEP charges,

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

21 66 Pa.C.S. § 1307.

22 Pa. Pub. Util. Comm'n v. PECO Energy Co. – Elec. Div., Docket No. R-2010-2161575 (Opinion and Order entered Dec. 21, 2010), p. 9.

should be recovered on a non-bypassable basis from all distribution customers rather than through PECO's bypassable TSC that was billed only to default service customers.[23] PECO St. No. 1, pp. 9-10.

27. The Settlement implements a schedule of adjustments to PJM's prior-period billings for RTEP charges and the total net bill credits generated by the Settlement are adjustments to RTEP charges PECO paid between June 1, 2007 and June 30, 2018. PECO St. No. 1, pp. 12-13; PECO Exh. Nos. JAB-3 and JAB-4.

28. Under the Settlement, there are two periods designated for tracking the differences between the prior allocation method and the Settlement allocation method – the transitional period (January 1, 2016 to June 30, 2018) and the historical period (from the initiation of RTEP charges in 2007 to January 1, 2016). PECO St. No. 1, pp. 11-12; PECO Exh. No. JAB-4.

29. For the transitional period, PJM was charged with tracking and accumulating the aggregate differences, plus interest, between the previous RTEP charges and the revised allocations approved by FERC. PJM published a summary of the transitional period billing adjustments in each transmission zone on July 31, 2018. PECO St. No. 1, pp. 11-12; PECO Exh. No. JAB-4.

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

[23] Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2015 Through May 31, 2017, Docket No. P-2014-2409362 (Order entered Dec. 4, 2014), p. 46.

31. PECO will receive approximately $83 million in total net credit adjustments to prior bills for both the transitional period and the historical period.[24] PECO St. No. 1, pp. 13-14.

32. Of that total, PECO will refund to customers $77.5 million, reflecting bill credits for RTEP charges imposed from and after January 1, 2011. PECO St. No. 1, pp. 13-14.

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

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

35. PECO's NBT rate calculations do not reflect Settlement credits related to PECO's overpayment of RTEP charges during the 2007-2010 period because that period elapsed before PECO implemented its reconcilable TSC and NBT that, included a component for the recovery of RTEP charges. PECO St. No. 1, pp. 14-15.

36. The credits for those pre-2011 billing adjustments when PECO paid all RTEP costs total approximately $5.5 million and are based on time-segmented black box RTEP reallocation amounts for the PECO Zone that PJM provided during the settlement negotiations in the proceeding at FERC Docket No. EL05-121-009. PECO St. No. 1, pp. 14-15.

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

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

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

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

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

41. Under PECO's Commission-approved 2007-2010 base rates, approximately $5.5 million of the PJM bill credits for RTEP charges were paid by PECO prior to January 1, 2011. PECO St. Nos. 1, pp. 7-11, 1-R, pp. 7-13 & 1-RJ, pp. 3-8.

42. These PJM bill credits related to RTEP charges that were never passed through to customers and which PECO never had the opportunity to include for recovery in any rates it charged to customers. PECO St. Nos. 1, pp. 7-11, 1-R, pp. 7-13 & 1-RJ, pp. 3-8.

43. During the 2007-2010 period, PJM RTEP charges were not included for recovery in any rate charged by PECO for either retail service or FERC-regulated transmission service. PECO St. Nos. 1, pp. 7-11, 1-R, pp. 7-13 & 1-RJ, pp. 3-8.

44. PECO's base rates in effect at the time PJM initiated RTEP charges had been established in PECO's 1989 base rate case and were subsequently unbundled effective January 1, 1999. PECO St. Nos. 1, pp. 7-9 & 1-R, pp. 4-7.

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

46. Pursuant to the Commission's final Order in the Company's 2010 base rate case, PECO implemented a TSC (and as of June 1, 2015, an NBT) to recover PJM transmission-related costs, including RTEP, on a dollar-for-dollar and reconcilable basis as of January 1, 2011. PECO St. Nos. 1, pp. 7-9, 1-R, pp. 4-7 & 1-RJ, pp. 8-9.

47. PECO's base rates in effect prior to January 1, 2011 had been established before PJM began imposing RTEP charges and did not include any provision for recovery of PJM RTEP costs. PECO St. Nos. 1, pp. 7-9, 1-R, pp. 4-7 & 1-RJ, pp. 8-9.

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

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

50. PECO incurred RTEP charges during the 2007-2010 period in its capacity as an LSE to provide transmission service to POLR customers. PECO St. No. 1, p. 11-12 & 1-R, pp. 10-11.

51. Those charges were imposed to recover the cost of transmission facilities outside the PECO Zone owned and operated by other transmission providers. PECO St. No. 1, p. 11-12 & 1-R, pp. 10-11.

52. RTEP charges could not be a part of PECO's NITS rate charged to other entities using Company-owned transmission facilities in the PECO Zone. PECO St. No. 1, p. 11-12 & 1 R, pp. 10-11.

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

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

55. The transmission rate cap exception applied for the term of PECO's combined transmission and distribution (T&D) rate cap, which expired on December 31, 2006. PECO St. Nos. 1, p. 7 & 1-R, pp. 4-5; OCA St. No. 1-SR p. 12; OCA Exh. No. KRP-9SR, p. 14.

56. PECO did not seek an increase in base rates until March 2010, after the combined T&D rate cap expired. PECO St. Nos. 1, p. 7 & 1-R, pp. 4-5; OCA St. No. 1-SR p. 12; OCA Exh. No. KRP-9SR, p. 14.

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

DISCUSSION

While OCA argues that PECO has the burden of proof in this matter under Section 315(a) of the Public Utility Code[25] to establish that its rates are reasonable in this case, it is clear from the arguments that OCA extends in its briefs that it is challenging the already Commission approved tariffed rates that PECO has in place. There is nothing in the record to establish that PECO is seeking to increase its rates as OCA contends. Therefore, the Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, OCA has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a). To the extent that OCA challenge PECO's Commission-approved, tariffed rates for service, OCA has the burden of proving by a preponderance of the evidence that the rates are unjust, unreasonable or in violation of a Commission regulation or order. Schellhammer v. Pa. Pub. Util. Comm'n, 629 A.2d 189 (Pa.Cmwlth. 1993); 66 Pa.C.S. §§315(a), 332(a) and 1301.

Such a showing must be by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600, 602 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. Mill v. Pa. Pub. Util. Comm'n, 447 A.2d 1100 (Pa.Cmwlth. 1982); Edan Transportation Corp. v. Pa. Pub. Util. Comm'n, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Compensation Bd. of Review, 194 Pa.Super. 278, 166 A.2d 96 (1960); Murphy v. Pa. Dep't of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

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[25] "(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. The commission shall give to the hearing and decision of any such proceeding preference over all other proceedings, and decide the same as speedily as possible." 66 Pa.C.S. § 315(a).

Upon the presentation by the Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, the Complainant has not satisfied his burden of proof. The Complainant would be required to provide additional evidence to rebut the evidence of the Respondent. Burleson v. Pa. Pub. Util. Comm'n, 443 A.2d 1373 (Pa.Cmwlth. 1982), aff'd, 461 A.2d 1234 (Pa. 1983).

While the burden of persuasion 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. Milkie v. Pa. Pub. Util. Comm'n, 768 A.2d 1217 (Pa.Cmwlth. 2001).

OCA's Position

During the period from June 2007 through December 31, 2010, OCA argues that PECO was charging ratepayers for transmission service through a retail transmission base rate based on its stated FERC transmission rate. OCA notes that the Courts found 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, OCA indicates that 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. (OCA MB at 10).

OCA asserts that PECO 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. OCA contends that 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. OCA maintains that 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. OCA argues that 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. (OCA MB at 10).

OCA also asserts that even if PECO provided substantial evidence here to show that the RTEP charges in question were never recovered from ratepayers, PECO's request here to recover these dollars from a time period that occurred over a decade ago represents impermissible retroactive ratemaking. OCA maintains that 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 took no actions in this regard until it filed its 2010 base rate case. OCA also contends that PECO took no action in regard to any alleged under recovery of RTEP charges from June 2007 through December 2010. OCA argues that 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. (OCA MB at 10-11).

OCA also contends that PECO has made no showing that these changes were not covered by the retail transmission base rate. OCA again maintains that the retail transmission base rate was approximately $40 million higher than the transmission revenue requirement in that time period. (OCA RB at 3).

OCA argues that the Commission-made rate doctrine applies to rates found to be just and reasonable. OCA notes that the RTEP charges at issue in this proceeding 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. (OCA RB at 3).

OCA maintains that 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. OCA argues that PECO presented no evidence showing that it was not collecting sufficient transmission revenues to meet all of its obligations to PJM, including RTEP obligations. OCA also contends that PECO has 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. (OCA RB at 3).

Lastly, OCA argues that 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 and should be rejected by the Commission. (OCA RB at 4).

PECO's Position

On the other hand, PECO notes that OCA is asking the Commission to require it to refund bill credits of approximately $5.5 million related to RTEP charges that PECO paid for transmission service obtained from PJM during the period 2007-2010. PECO asserts that these credits relate to charges that were never passed through to customers and which PECO never had the opportunity to include for recovery in any rates it charged to customers. PECO maintains that OCA wants to force it to refund dollars to customers that PECO paid. (PECO MB at 1).

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

PECO also contends that the net retrospective billing adjustments made by PJM that relate to periods when PECO had the opportunity to recover the underlying costs from customers on a reconcilable basis and imposed those charges on its customers are already flowing through to customers today. However, PECO maintains it should not be required to transfer to customers PJM bill credits related to costs that were never included in PECO's rates and which its customers never paid in the first place. (PECO MB at 1).

PECO also asserts that OCA's position is contrary to well-established law prohibiting the Commission from requiring a utility to refund revenues that it collected under

base rates that the Commission, by final Order, found and determined to be just and reasonable. PECO argues that this is the doctrine of "Commission-made rates," which has been affirmed by the Pennsylvania appellate courts and is contained in Section 316 of the Public Utility Code. (PECO MB at 2).

PECO notes that OCA, through its witness, Dr. Karl Pavlovic, contends that PECO should refund RTEP bill credits related to charges PJM imposed during the period 2007-2010, because PECO allegedly recovered all of the PJM-imposed RTEP costs through some combination of retail rates and/or wholesale transmission rates within the exclusive jurisdiction of FERC. PECO asserts that this is not the case and Dr. Pavlovic incorrectly stated the facts in this matter. (PECO MB at 2).

Further, PECO also asserts that 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 notes that it recovered transmission costs through the PTC component of its base rates that the Commission found and determined to be just and reasonable in PECO's 1989 base rate case, and was reaffirmed in PECO's 1999 restructuring proceeding. While PECO notes that OCA's Complaints are supposedly a challenge to PECO's NBT charges, PECO asserts that in reality OCA is asking the Commission 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. (PECO RB at 1-2).

PECO indicates that OCA is requesting that the Commission go against well-established Pennsylvania appellate precedent which prohibits adjustments to 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. PECO argues that the unfairness of retroactively adjusting base rates that the Commission 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. (PECO RB at 2).

Moreover, PECO maintains that it is undisputed that the base rates PECO charged to retail customers during the relevant period were established in 1989 before PJM began to impose RTEP charges. PECO also states that during the 2007-2010 period, RTEP charges were also not included in PECO's FERC-approved wholesale transmission rate.[26] PECO notes that Dr. Pavlovic 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. (PECO RB at 2).

However, PECO maintains that Dr. Pavlovic's assertions misrepresent historical facts. PECO notes that its 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 charges. PECO also contends that 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.[27] (PECO RB at 2-3).

PECO again asserts that OCA's case is that 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. PECO notes that OCA contends that it was compensated for RTEP charges it paid between 2007 and 2010 through its wholesale transmission rates. However, PECO argues that OCA failed to show that its wholesale rates were unjust or unreasonable.[28] PECO argues that as a matter of law, wholesale

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[26] 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. PECO St. Nos. 1, p. 10, 1-R, pp. 9-10 and 1-RJ, pp. 4-6; PECO Exh. Nos. JAB-1RJ to JAB-4RJ.

[27] 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).

[28] See Id., p. 12.

transmission revenues cannot be appropriated to augment revenues produced by Commission-regulated rates. (PECO RB at 4).

PECO also maintains that OCA's argument that PECO recovered those charges in its Commission-jurisdictional rates is incorrect.[29] PECO notes that its testimony from the 2010 rate case was referring to PECO's future recovery in proposed rates and proposed TSC in which it would reflect RTEP charges in rates to its customers for the first time after January 1, 2011. PECO asserts that it was not describing cost-recovery under PECO's historic pre-2011 rates. (PECO RB at 4-5).

Lastly, PECO disputes OCA's claims that not including 2007-2010 RTEP bill credits in PECO's 2018 and 2019 NBT calculations somehow amounts to impermissible retroactive ratemaking. But, PECO asserts that OCA is asking the Commission to engage in retroactive ratemaking by seeking refunds of revenues that PECO billed to customers during the 2007-2010 period under Commission-made base rates that were established before PJM began to impose RTEP charges and could not have reflected those charges. (PECO RB at 5).

Disposition

I disagree with OCA's contentions in this matter. A strong presumption exists that rates in a utility's Commission-approved tariff are just and reasonable. Popowsky v. Pa. Pub. Util. Comm'n, 669 A.2d 1029 (Pa.Cmwlth. 1995), rev'd in part on other grounds, 706 A.2d 1197 (Pa. 1997). I agree with PECO's assertions that OCA is asking the Commission to permit retrospective ratemaking in this case.

PECO's base rates in effect during the 2007-2010 period at issue in this proceeding were established in the Company's 1989 base rate proceeding, which was concluded with a final Order of the Commission entered on May 16, 1990 at Docket No. R-891364

[29] See Id., pp. 14-15.

approving those rates for service rendered on and after April 20, 1990. That Order found and determined that PECO's rates, as modified by the Order, were just and reasonable.[30] On January 1, 1999, PECO's 1989 base rates were functionally "unbundled" into distribution, transmission and generation components pursuant to a final Order of the Commission entered on May 14, 1998, and, once again, the Commission determined those rates to be just and reasonable.[31] Accordingly, PECO's pre-2011 base rates are "Commission-made" rates.[32] Zucker v. Pa. Pub. Util. Comm'n, 401 A.2d 1377 (Pa.Cmwlth. 1979); see also, 66 Pa.C.S. § 316. (PECO MB at 13).

In Cheltenham & Abington Sewerage Co. v. Pa. Pub. Util. Comm'n, the Pennsylvania Supreme Court held that "a commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission."[33] In that case, the Court reversed the decisions of the Pennsylvania Superior Court and the Commission that required the utility to refund amounts collected pursuant to a final order establishing Commission-made rates based on a subsequent order purporting to find, retroactively, that those rates were unjust and unreasonable. The Pennsylvania Supreme Court provided the following prescription, which has been consistently reaffirmed:

> Rates having in other respects the attributes of commission-made rates do not lose their effect as such by an indefinite expression of opinion that some of the factors on which they are based are variable and may not stand a pragmatic test, a situation which is always implied. To sustain the position of the Superior Court

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30 Pa. Pub. Util. Comm'n v. Phila. Elec. Co., Docket No. R-891364, 1990 Pa. PUC LEXIS 155 (May 16, 1990).

31 PECO Restructuring Order, pp. 3-4, 7-11.

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

33 25 A.2d 334, 337 (Pa. 1942).

> would be to give a retroactive effect to the order of August 30, 1935, without notice to the utility. The mere institution of an inquiry did not constitute notice that a departure would be made from the tariff established by the commission in its quasi-legislative capacity.[34]

This principle was applied in West Penn Power Co. v. Pa. Pub. Util. Comm'n, where the Pennsylvania Superior Court articulated further the dimensions of the prohibition against giving retroactive effect to Commission orders determining just and reasonable rates:

> Finally, the Commission, having approved the rates under tariff No. 30, could not summarily reverse its order of approval and apply such reversal retroactively by ordering refunds for the period between October 29, 1951 [the effective date of the October 26, 1951 order finding West Penn's rates just and reasonable], and April 14, 1953 [the date of an order denying rehearing of a February 16, 1953 order directing refunds of amounts billed under the approved rates back to October 29, 1951]. The order of October 26, 1951 amounted in law to formal Commission approval of the new rates filed by the Company under tariff No. 30, and rendered the rates in effect Commission-made rates. Consequently, after it had previously approved the rates, the Commission could not give retroactive effect to its order of February 16, 1953, and direct refunds to customers for charges made beginning October 29, 1951.[35]

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

> The doctrine of Commission-made rates prohibits the Commission from ordering refunds of amounts collected by a public utility under and pursuant to tariff provisions that the Commission, by formal administrative action, found to be just and reasonable. *Toll Brothers, Inc. v. Pennsylvania-American Water Company,* 1994 Pa. PUC LEXIS 122 *33. *See, also, Philadelphia Electric Co. v. PA Public Utility Comm'n*, 122 Pa.Commw. 421, 552 A.2d 342 (1989); *Cheltenham & Abington Sewerage Co. v. PA Public Utility Comm'n*, 344 Pa. 366, 25 A.2d 334 (1942).[36]

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34 Id. at 338-39.

35 100 A.2d 110, 114 (Pa.Super. 1953).

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

I agree with PECO's argument that the Settlement that required PJM to make retrospective billing adjustments to RTEP charges paid by PECO during the 2007-2010 period does not provide a valid basis for refunds of revenues collected under PECO's "Commission-made" base rates during that pre-2011 period. PECO's witness testified, if PJM's RTEP charges imposed on PECO had been in the correct amount from the outset, there would have been no cost-based justification to require PECO to reduce its pre-2011 base rates. I also agree that if PJM had overcharged PECO $5.5 million for transmission enhancements but discovered its error and issued a $5.5 million bill adjustment for those RTEP charges prior to January 1, 2011, there would not have been a legal basis to require PECO to reduce its pre-2011 base rates by $5.5 million.[37] Simply because the Settlement was approved after January 1, 2011 does not change the fact that the revenues PECO received prior to January 1, 2011 were the product of Commission-made rates and those revenues cannot lawfully be made subject to refunds. (PECO MB at 15).

The evidence clearly shows that PECO's rates during the 2007-2010 period did not include an allowance for recovery of the RTEP charges to which the PJM bill credits apply and I do not agree with OCA that PECO recovered more than enough revenue to cover these charges for the time period at issue.

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

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

[37] PECO St. No. 1, pp. 18-19.

> state and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority.[38]

The Commission has also concluded that jurisdictional limitations imposed by the dictates of federal and state law require each regulatory body to examine revenue and revenue requirement separately for the distinct forms of service that each agency is authorized to regulate.[39] Pa. Pub. Util. Comm'n v Bell Tel. Co. of Pa., 16 P.U.R.3d 207, 230 (1956). *See also*, 66 Pa.C.S. § 1311I; Pa. Pub. Util. Comm'n v. Metropolitan Edison Co., 55 Pa. P.U.C. 19, 21 (Apr. 2, 1981).

OCA did not propose any alternative approach to what could be considered a reasonable amount of Settlement credits related to the 2007-2010 period. The FERC-approved Settlement did not provide that data, and OCA argues that the only alternative is for the Commission to assume that the Settlement credits related to pre-2011 PJM RTEP charges are zero. I do not find that this is a reasonable position because the transmission rates at issue are within the exclusive jurisdiction of FERC; further, state regulatory authorities, including this Commission, are preempted by federal law from ignoring or countermanding FERC's determination. See New York v. FERC, 535 U.S. 1, 18-19 (2002) ("the [Federal PowerAct] gives FERC jurisdiction over the transmission of electric energy in interstate commerce"); Mississippi Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 371 (1988) ("FERC has exclusive authority to determine the reasonableness of wholesale rates."). See also Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986). Therefore, federal law prohibits OCA's questioning the reasonableness of the Settlement's time-segmented distribution of RTEP charges that PECO relied upon to determine pre-2011 RTEP credits it was entitled to in this matter.

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38 Smith v. Ill. Bell Tel. Co., 282 U.S. 133, 148-49 (1930).

39 "Because respondent's total plant and facilities are used for [both intrastate and interstate] services above described, and because our jurisdiction is limited to the services relating to Pennsylvania alone, it becomes necessary to 'separate' respondent's property, revenue and expenses between intrastate service and all other service furnished by respondent."

Moreover, even if OCA were correct that additional data might facilitate a more precise calculation of pre-2011 Settlement billing credits, the Commission has never insisted that mathematical certitude is necessary before approving allocations or other adjustments that need to be made to establish reasonable rates. To the contrary, reasonable estimates and projections are necessary to establish just and reasonable rates. Indeed, the Commission regularly relies upon estimates and projections to determine revenue requirements for future test years and, since the adoption of Act 11 of 2012, fully projected future test years.[40] Where a utility uses a reasonable approach to estimate and allocate costs, the resulting values merit Commission approval. Neither the Commission nor the Pennsylvania's appellate courts has insisted on a degree of mathematical precision that the subject matter, i.e., setting just and reasonable rates, does not admit:

> There is ample authority for the proposition that the power to fix 'just and reasonable' rates imports a flexibility in the exercise of a complicated regulatory function by a specialized decision-making body and that the term 'just and reasonable' was not intended to confine the ambit of regulatory discretion to an absolute or mathematical formulation . . . .[41]

Accordingly, OCA's criticisms of PECO's calculation of the portion of the Settlement related to the 2007-2010 period do not provide a valid basis to require the Company to refund those bill credits to customers. Based on all of the above, OCA has not met its burden of proof in this matter and its formal Complaints will be dismissed.

CONCLUSIONS OF LAW

1. The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. As the proponent of a rule or order, OCA has the burden of proof in this matter pursuant to 66 Pa.C.S. § 332(a).

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

[41] Pa. Pub. Util. Comm'n v. Pa. Gas & Water Co., 424 A.2d 1213, 1219 (Pa. 1980). See also, U.S. Steel Corp. v. Pa. Pub. Util. Comm'n, 456 A.2d 686, 691 (Pa. Cmwlth. 1983).

2. To the extent that OCA challenge PECO's Commission-approved, tariffed rates for service, OCA has the burden of proving by a preponderance of the evidence that the rates are unjust, unreasonable or in violation of a Commission regulation or order. Schellhammer v. Pa. Pub. Util. Comm'n, 629 A.2d 189 (Pa.Cmwlth. 1993); 66 Pa.C.S. §§315(a), 332(a) and 1301.

3. The party with the burden of proof must making a showing by a preponderance of the evidence. Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n, 578 A.2d 600, 602 (Pa.Cmwlth. 1990), alloc. den., 602 A.2d 863 (Pa. 1992).

4. Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. Mill v. Pa. Pub. Util. Comm'n, 447 A.2d 1100 (Pa.Cmwlth. 1982); Edan Transportation Corp. v. Pa. Pub. Util. Comm'n, 623 A.2d 6 (Pa.Cmwlth. 1993); 2 Pa.C.S. § 704.

5. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk and Western Ry. v. Pa. Pub. Util. Comm'n, 489 Pa. 109, 413 A.2d 1037 (1980); Erie Resistor Corp. v. Unemployment Compensation Bd. of Review, 194 Pa.Super. 278, 166 A.2d 96 (1960); Murphy v. Pa. Dep't of Public Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984).

6. A strong presumption exists that rates in a utility's Commission-approved tariff are just and reasonable. Popowsky v. Pa. Pub. Util. Comm'n, 669 A.2d 1029 (Pa.Cmwlth. 1995), rev'd in part on other grounds, 706 A.2d 1197 (Pa. 1997).

7. 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. Zucker v. Pa. Pub. Util. Comm'n, 401 A.2d 1377 (Pa.Cmwlth. 1979); see also 66 Pa.C.S. § 316.

8. That the Commission and Pennsylvania appellate courts have held that charges imposed under automatic adjustment clauses are not "commission made rates." See, e.g., Metropolitan Edison Co. v. Pa. Pub. Util. Comm'n, 437 A.2d 76, 79-80 (Pa.Cmwlth. 1983).

9. In Cheltenham & Abington Sewerage Co. v. Pa. Pub. Util. Comm'n, 25 A.2d 334, 337 (Pa. 1942), the Pennsylvania Supreme Court held that "a commission-made rate furnishes the applicable law for the utility and its customers until a change is made by the commission."

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

11. The doctrine of Commission-made rates prohibits the Commission from ordering refunds of amounts collected by a public utility under and pursuant to tariff provisions that the Commission, by formal administrative action, found to be just and reasonable. C & D Techs., Inc. v. Pennsylvania Power & Light Co., Docket Nos. C-00992119 et al., 2004 Pa. PUC LEXIS 57, at **28-29 (June 25, 2004).

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

13. Both federal and Pennsylvania law requires a strict jurisdictional separation of FERC-jurisdictional and PUC-jurisdictional revenues in establishing retail rates. Smith v. Ill. Bell Tel. Co., 282 U.S. 133, 148-49 (1930); Pa. Pub. Util. Comm'n v Bell Tel. Co. of Pa., 16 P.U.R.3d 207, 230 (1956). See also, 66 Pa.C.S. § 1311(c); Pa. Pub. Util. Comm'n v. Metropolitan Edison Co., 55 Pa. P.U.C. 19, 21 (Apr. 2, 1981).

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

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

16. OCA has failed to meet its burden to establish a valid basis for the Commission to require PECO to refund bill credits to customers related to pre-2011 RTEP charges that were not included in PECO's retail base rates.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaints filed by the Office of Consumer Advocate against PECO Energy Company, at Docket Nos. C-2018-3006242 and C-2019-3010737, are denied and dismissed.

2. That the dockets at Docket Nos. C-2018-3006242, C-2019-3010737, M-2018-3005860, and M-2019-3010032 be closed.

Dated: June 24, 2020

/s/
Marta Guhl
Administrative Law Judge