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June 29, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company for Approval of its Default Service Program for the
Period from June 1, 2020 Through May 31, 2025 – Docket No. P-2020-3019290

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Electric Supplier Coalition's Answer to Motion to Compel of PECO Energy Company with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Karen O. Moury
Karen O. Moury

KOM/lww
Enclosure

cc: Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the Electric Supplier Coalition's Answer to Motion to Compel of PECO Energy Company upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: June 29, 2020

Karen O. Moury

Karen O. Moury

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for :
Approval of its Default Service Program :
for the Period from June 1, 2021 through : Docket No. P-2020-3019290
May 31, 2025 :
:

**ANSWER OF ELECTRIC SUPPLIER COALITION
TO MOTION TO COMPEL OF PECO ENERGY COMPANY**

I. INTRODUCTION

Pursuant to Section 5.342(g)(1) of the Commission's regulations, 52 Pa. Code § 5.342(g)(1), NRG Energy, Inc., Direct Energy Services LLC, Interstate Gas Supply, Inc. d/b/a IGS Energy, Vistra Energy Corp., Shipley Choice LLC, ENGIE Resources LLC and WGL Energy Services, Inc. (collectively, the "Electric Supplier Coalition" or "Coalition" or "ESC") hereby responds to the Motion to Compel of PECO Energy Company ("PECO") relating to Interrogatories, Set I, Nos. 2, 4, 5 and 6. As is clear from PECO's Motion, it is engaged in nothing but an effort to interfere with the ESC from advancing legitimate proposals aimed at improving the default service structure in Pennsylvania. The prices that the ESC's competitive supply customers pay their selected electric generation suppliers ("EGSs") in the retail market and how many retail customers that ESC's members serve, on aggregate, have nothing to do with PECO's Commission--regulated default service proposal that is under scrutiny here. Notably, PECO's Motion to Compel wholly overlooks the irrelevance of its Interrogatories, which inquire about the Coalition members' activities selling generation service to shopping customers in the competitive retail market while this proceeding is focused on the sale of generation service by PECO to non-shopping customers. No "relevance" link exists to justify a compelled disclosure

of the sought-after price and other highly confidential information from an entirely different environment. Through its objectionable Interrogatories, PECO is trying to construct yet another barrier to EGSSs participating in the market by arguing that their price to admission – for even the limited purpose of advancing policy arguments designed to improve the default service framework – is to present details about their own businesses that are irrelevant and that no other party is expected to reveal. Imposing artificial barriers – *i.e.* you must pay this toll before you get to have your policy arguments heard – would act as a fundamental preclusion of the ESC’s due process in this proceeding where it is entitled to a right to be heard on its positions concerning the default service plan proposals presented by PECO.

A. Background

1. On March 13, 2020, PECO filed the Petition for Approval of its Default Service Program for the Period from June 1, 2021 Through May 31, 2025 (“DSP V Plan”). PECO was required to file the DSP V Plan as the default service provider (“DSP”) for customers on its distribution system who do not receive generation service from electric generation suppliers (“EGSSs”) in the retail competitive market established by the Electricity Generation Customer Choice and Competition Act (“Competition Act”).¹ The DSP, which can be another entity approved by the Commission,² continues to be the incumbent electric distribution company (“EDC”) until the Commission changes the DSP.³

2. The DSP must file its proposed plan at least 12 months prior to the conclusion of the currently effective default service program and the plan is required to include various

¹ 66 Pa.C.S. §§ 2801 et seq.

²² 66 Pa.C.S. § 2807(e)(3.1).

³ 52 Pa. Code § 54.183.

elements including a procurement plan, implementation plan and contingency plan.⁴ All reasonable costs incurred to provide default service must be recovered on a full and current basis through a reconcilable automatic adjustment clause.⁵

3. The Electric Supplier Coalition filed a Petition to Intervene in PECO’s DSP V proceeding specifically highlighting the importance of “the terms and conditions under which PECO will acquire electric supply to serve its Default Service load from June 1, 2021 through May 31, 2025 and thus, the rates against which ESC members must compete to sell electricity to retail customers in the PECO’s service territory.”⁶ In its Prehearing Memorandum, the ESC further explained its interest in the “effectiveness of PECO’s default service plan to promote retail market development for the benefit of consumers.”⁷

4. Administrative Law Judge (“ALJ”) Eranda Vero granted the Coalition’s Petition to Intervene by Prehearing Order dated May 8, 2020.⁸

B. Electric Supplier Coalition Testimony

5. Consistent with the Prehearing Order dated May 8, 2020, the Coalition served the Direct Testimony of Travis Kavulla, ESC Statement No. 1, on June 16, 2020. By this Direct Testimony, Mr. Kavulla did exactly what the Coalition said it would during the intervention, including a review of whether PECO’s DSP V Plan is consistent with the development of the competitive retail market.

⁴ 52 Pa. Code § 54.185.

⁵ 52 Pa. Code § 54.187(b).

⁶ ESC Petition to Intervene, Para. 7.

⁷ ESC Prehearing Memorandum, p. 3.

⁸ Prehearing Order dated May 8, 2020, Ordering Para. No. 7.

6. Based on his analysis, Mr. Kavulla made observations about the shortcomings of the competitive market and offered several recommendations for changes to the DSP V Plan, to include future considerations by the Commission regarding the flaws of PECO's default service that are highlighted by many of PECO's proposals.

C. PECO's Objectionable Interrogatories

7. Consistent with its rights under the Prehearing Order dated May 8, 2020, and the Commission's regulations, PECO served Interrogatories, Set I, on the Coalition, on June 19, 2020.

8. The four PECO Interrogatories that are the subject of this dispute seek: (i) total sales and revenue data for the members of the Electric Supplier Coalition;⁹ (ii) the aggregate number of residential customers served by members of the ESC, as well as prices charged by them;¹⁰ (iii) actions filed with the Commission or in a court the past 10 years concerning prices the ESC members have charged;¹¹ and (iv) the long-term contracts that members of the ESC have signed with large commercial and industrial customers in PECO's service territory.¹²

9. Not a single one of the objectionable Interrogatories makes any attempt to link PECO's requests with Mr. Kavulla's observations regarding the competitive market in PECO's service territory – in contrast to PECO's characterization of the competitive market in an entirely different light – or in the context of the suggested changes to PECO's proposals and a

⁹ PECO-ESC-I-2.

¹⁰ PECO-ESC-I-4. PECO modified its request for individual to “aggregate” supplier information during a telephone call on the discovery dispute on June 23, 2020, which the Coalition will explain made no difference to its objections.

¹¹ PECO-ESC-I-5.

¹² PECO-ESC-I-6.

consideration of whether alternative default service frameworks may provide a better solution going forward. In fact, none of the commercially sensitive information about the ESC companies sought by Requests 2, 4 and 6 is available to Mr. Kavulla (because each ESC member is a competitor of the others) and, therefore, was not relied upon by Mr. Kavulla to support his testimony or inform his opinions. This further demonstrates the lack of relevancy of the requests and their inability to lead to any admissible evidence.

10. Besides lacking relevance to Mr. Kavulla's Direct Testimony, PECO's Interrogatories essentially seek to have the Coalition reveal information about its members' business practices in order to unlock the ability to set forth its own policy arguments about default service in Pennsylvania and in PECO's service territory. These efforts effectively seek to deny the Coalition of due process to which it is entitled in this proceeding. Moreover, they would compromise the disclosure of highly commercial sensitive data of the Coalition's members' proprietary businesses for no valid reason.

11. Mr. Kavulla relied on publicly available information about the state of the competitive market to make his recommendations. This information includes statistics on the overall number of shopping customers the use of the SOP program, and a recently published treatise on the design of retail markets provide a fuller perspective on the realities of the retail competitive market in any case. While the ESC is a broad coalition, it does not encompass all EGSs.

12. The Coalition respectfully requests that ALJ Vero deny PECO's Motion to Compel.

II. THE COALITION SHOULD NOT BE REQUIRED TO PROVIDE THE INFORMATION REQUESTED BY THE OBJECTIONAL INTERROGATORIES.

A. Discovery Requests Must Be Relevant

13. It is well-settled under the Commission’s rules that a party may only seek discovery that is relevant to the subject matter involved in the pending action and which appears reasonably calculated to lead to the discovery of admissible evidence.¹³ The standard for discovery is relevance, not curiosity.¹⁴

14. Despite the Coalition’s objection to PECO’s Interrogatories, Set I, Nos. 2, 4, 5 and 6, on the basis of lack of relevance, PECO’s Motion makes no effort to provide any link between these requests made by these Interrogatories and the subject matter involved in the pending action. To the contrary, PECO seemingly makes an assumption – albeit a faulty one – that because both its DSP V Plan and the Coalition’s Direct Testimony relate to “default service” that any PECO questions regarding the Coalition’s observations and recommendations with respect to the DSP V Plan are fair game for discovery.

15. This is an inappropriate leap in the area of relevance because the Coalition and PECO are referring to two entirely different topics. While the Coalition’s Direct Testimony is focused on PECO’s DSP V Plan, and whether it is consistent with the Competition Act for purposes of PECO providing default service to non-shopping customers, PECO’s objectionable Interrogatories seek information about the activities of the Coalition’s members in serving shopping customers – i.e. those customers who have opted to purchase their electric generation

¹³ 52 Pa. Code §5.321(c). *See Application of Laurel Pipe Line Company, L.P.*, Docket No. A-2016-2575829 (Order Regarding Motions to Compel dated March 8, 2017 at 2) (Motion to Compel granted when information was irrelevant to the issues to be addressed in the proceeding and not likely to lead to the discovery of admissible evidence).

¹⁴ *See Pennsylvania Public Utility Commission, et al. v Pennsylvania American Water Company*, Docket No. R-2011-2232243 (Order on Motion to Compel dated July 21, 2011 at 21-22).

service from EGSSs rather than doing nothing and receiving default service from PECO. Through their participation in the competitive retail market, the Coalition's Members are in direct competition with PECO's default service provided in its DSP role. Therefore, these are two distinctly different types of service with no link between them for purposes of discovery in this proceeding.

16. The four PECO Interrogatories and PECO's Motion to Compel predominantly refer to the Direct Testimony of Mr. Kavulla on pages 6-14. These portions of Mr. Kavulla's Direct Testimony contain his general observations about the competitive retail market that exists in PECO's service territory, which are directly responsive to the information presented by PECO, and his theories – with references to a key industry report – as to why the shortcomings exist. Using that information as a backdrop, Mr. Kavulla identifies specific improvements that he recommends to address the concerns he discussed.¹⁵ In the next section of his testimony, Mr. Kavulla explains how removal of an EDC from the DSP role can address many of the flaws that are highlighted during a review of PECO's DSP V Plan.¹⁶

17. Nothing about the Coalitions' prices, numbers of customers, volumes of sales, or specific contract provisions with large commercial and industrial customers, have any bearing on the ESC's fundamental observations about the competitiveness of PECO's default service market or whether the Commission should consider the status of that market as it decides whether PECO's proposed DSP V Plan meets the objectives of the Competition Act and whether certain elements of the Plan may be interfering with the Commission's statutory obligations to ensure

¹⁵ ESC Statement No. 1 at pp. 6-10.

¹⁶ ESC Statement No. 1 at pp. 10-14.

the development of a competitive generation market.¹⁷ In fact, Mr. Kavulla does not have access to this competitively sensitive information and, therefore, it did not form the basis for Mr. Kavulla's testimony further demonstrating the information's lack of relevance to this proceeding.

18. For example, whether the Coalition's members serve a small or large percentage of residential customers in the competitive retail market is not relevant to the issues presented by PECO's DSP V Plan that is designed to provide generation service to the remaining residential customers. Moreover, the prices that the Coalition's members charge residential customers in the competitive retail market are not relevant to the proposals advanced by PECO in its DSP V Plan, which will govern how non-shopping customers' generation supply is procured, structured and priced.

19. As PECO's objectionable Interrogatories that are the subject of this discovery dispute are not relevant to the issues being addressed in this proceeding and will not lead to admissible evidence related to its proposals for furnishing generation service to customers who do not purchase their electricity from the Coalition's members, the Coalition should not be required to respond to them.

B. To Require the Coalition Members to Reveal their Own Business Practices in Order to Present Policy, Factual or Legal Arguments Concerning PECO's Default Service Plans Would Violate Due Process

20. As an administrative body, the Commission is bound by the due process provisions of constitutional law and by fundamental principles of fairness.¹⁸ It is well-settled that administrative agencies, such as the Commission, are required to provide due process to the

¹⁷ 66 Pa.C.S. § 2802 (12).

¹⁸ *Pittsburgh v. Pa. P.U.C.*, 171 Pa. Super. 391, 395, 90 A.2d 850 (1952).

parties appearing before them. Due process entitles parties in administrative proceedings to notice and an opportunity to appear and be heard.¹⁹

21. Importantly, due process requires a meaningful opportunity to be heard, which entails a full hearing, including the development of a record and a decision by the Commission based on that hearing with full findings.²⁰ In short, having a meaningful opportunity to be heard entails the ability to present evidence on an issue.²¹

22. As an Intervenor in this proceeding, the Electric Supplier Coalition is entitled to raise policy, factual and legal arguments about the shortcomings of PECO's DSP V Plan. However, PECO is essentially abusing the Commission's discovery process in an effort to obtain irrelevant and highly confidential information about the business practices of the members of the ESC in the competitive retail generation market as part of this participation. By demanding data regarding the Coalition members' prices charged and number of customer served in the retail market, as part of presenting the Coalition's views on the appropriateness of PECO's proposals in the DSP V Plan, PECO is improperly seeking to have the ESC members reveal their highly sensitive commercial practices as a prerequisite or as part and parcel of exercising their fundamental due process rights as a party in this proceeding.

23. Just the same as every other party in the proceeding, the Electric Supplier Coalition has the fundamental due process right to present its views on how PECO's DSP V Plan stacks up against the requirements of the Competition Act. Merely because PECO does not like the

¹⁹ *Schneider v. Pa. P.U.C.*, 83 Pa. Cmwlth. 306, 479 A.2d 10 (1984).

²⁰ See *Popowsky v. Pa. P.U.C.*, 805 A.2d 637, 643 (Pa. Cmwlth. 2002), *appeals denied*, 820 A.2d 163 (Pa. 2003) and 847 A.2d 60 (Pa. 2004).

²¹ *Scott Paper v. Pa. P.U.C.* 126 Pa. Cmwlth. 111, 558 A.2d 914 (1989).

observations and recommendations of the Coalition concerning its proposals does not mean that it may interfere with those views being advanced by seeking to gain information regarding the practices of the Coalition's members in their interactions in the competitive market.

C. The Data Requested by PECO is Highly Commercially Sensitive and Should Not be Subject to Disclosure Even with the Existence of a Protective Order.

24. Most of the information sought by the objectionable Interrogatories is also highly commercially sensitive and should not be subject to disclosure even with the existence of a protective order. 52 Pa. Code § 5.361(a)(3). While a Protective Order has been issued in this proceeding, the potential harm of disclosing the information sought by PECO would be substantial and would cause members of the ESC unfair uneconomic or competitive damage. 52 Pa. Code § 5.365. The cost, volume, price and contract data requested by PECO is of such a highly commercially sensitive nature that members of the Coalition would not even exchange among themselves, let alone place in the public domain or even provide pursuant to a protective order.

25. Each Coalition Member has its own unique business model with its own pricing and contractual details. While these EGSs are able to come together as one party for purposes of offering factual, policy and legal arguments regarding PECO's DSP V Plan does not mean that they should be placed at risk of having their private business details disclosed to their competitors especially when there is no guarantee that aggregation will mask commercially sensitive data that could be harmful to their existing and future businesses.

26. Sharing the type of information among competitors that PECO is seeking to have Coalition members reveal here allows others to see market shares, identify strategies, determine which customer groups are being targeted and otherwise gives insights as to the priorities and objectives of each individual business. Even getting this data in the hands of EGS's vendors and

partners can be harmful to its business in terms of negotiating contacts for the day-to-day operations.

27. PECO's Motion to Compel is largely dismissive of the Coalition's claims regarding the highly commercial nature of the pricing, contractual and other information that is sought by the objectionable Interrogatories. PECO says that the information can be provided in the aggregate so as not to reveal individual member pricing and other data and refers to the Protective Order that is in place for this proceeding.

28. These arguments do not warrant disclosure of the information requested by the objectionable Interrogatories. Seven suppliers are part of the Coalition – compared to the 102 EGSs referenced by PECO as currently selling electricity to 423,414 customers on PECO's distribution system.²² How PECO can, with any confidence, suggest that the number of residential customers served by seven suppliers, when aggregated, will not reveal highly confidential data, is absurd. What PECO's assertion shows is a total lack of respect for the commercially sensitive nature of data in a competitive market. By contrast, the Commission's own regulations take measures to safeguard volume of sales information. While the Commission requires EGSs to report retail sale activity on an annual basis, the requirement is imposed on a statewide basis and then the Commission makes information available to the public on an aggregated basis information in reports that do "not disclose individual EGS market shares."²³

²² ESC Statement No. 1 at 7.

²³ 52 Pa. Code § 54.204.

29. Indeed, PECO wholly overlooked the significance of a March 15, 2012 Interim Order cited by the Coalition on the confidentiality of information in a competitive market.²⁴ The *Met-Ed Order* is important and supports ESC's position here because it refused to compel the disclosure of confidential information despite that information being relevant to the issues presented in that default service plan proceeding and notwithstanding the existence of a protective order. In that case, an association of energy suppliers sought to confirm certain factual assertions made by the utility regarding the default service auction – a fact that was central to the adjudication of the proceeding – and a protective order was in place. Yet, still the Motion to Compel was denied to protect the “integrity” of future auction processes. In the same way that suppliers were unable in the *Met-Ed Order* to overcome the existence of a protective order to compel disclosure of the data, the utility should likewise be unsuccessful here. Merely because a protective order exists does not protect the integrity of the Coalition members’ future pricing and other business strategies. Particularly when as here, the data sought to be obtained is not even relevant to whether PECO’s DSP V Plan comports with the requirements of the Competition Act, the Coalition urges ALJ Vero to take the necessary steps to protect the highly confidential nature of the business information of its members.

²⁴ *Joint Petition of Metropolitan Edison Co., et al. for Approval of Their Default Serv. Programs*, Docket Nos. P-2011-2273650 (Order dated March 16, 2012) (“*Met-Ed Order*”).

III. CONCLUSION

For the reasons explained above, the Electric Supplier Coalition respectfully requests that the Motion to Compel filed by PECO Energy Company be denied.

Respectfully submitted,

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