

COMMONWEALTH OF PENNSYLVANIA



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July 15, 2020

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

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

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

Dear Secretary Chiavetta:

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

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

Respectfully submitted,

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Enclosures:

cc: The Honorable Marta Guhl (**email only**)
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Certificate of Service

*292128

CERTIFICATE OF SERVICE

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

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

Dated this 15th day of July 2020.

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Dated: July 15, 2020
*292127

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**EXCEPTIONS
OF THE
OFFICE OF CONSUMER ADVOCATE**

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Dated: July 15, 2020

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I. INTRODUCTION

On November 7, 2018, PECO Energy Company (PECO) filed with the Commission a Semiannual Adjustment to the Non-Bypassable Transmission (NBT) Service Charge in PECO Energy Electric Tariff No. 5, Supplement No. 76. Through this tariff supplement, PECO proposed to adjust the NBT to reflect the impact of the approved RTEP credits pursuant to the FERC Settlement Agreement. Under the FERC Settlement Agreement, the PECO zone is receiving a credit of \$49,567,831 for the historical period of June 2007 through December 2015. Through its filing, PECO proposed to retain \$5.5 million of that refund amount, which PECO states is the portion of RTEP charges that PJM billed to PECO from June 2007 through December 2010.¹ PECO proposed that the adjustment would become effective on December 1, 2018.² 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.³

On November 29, 2018, the OCA filed a Formal Complaint with the Commission challenging PECO's proposed semiannual adjustment to its NBT, specifically the proposal to retain \$5.5 million of FERC-ordered RTEP credits. In testimony and through briefs, the OCA provided a comprehensive discussion of PECO's proposal and the numerous reasons of law and

¹ PECO Nov. 7, 2018 Filing Letter.

² PECO Nov. 7, 2018 Filing Letter.

³ PECO Nov. 7, 2018 Filing Letter.

policy as to why PECO's proposal to retain the \$5.5 million must be rejected. A comprehensive procedural history of the case is found in the OCA's Main Brief.⁴

On June 25, 2020, the Office of Administrative Law Judge issued the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Marta Guhl. The ALJ found that the OCA's criticisms of PECO's calculation of the portion of the FERC settlement related to the 2007-2010 period does not provide a valid basis to require PECO to refund bill credits for the time period to customers.⁵ Moreover, the ALJ determined that the OCA "has not met its burden of proof in this matter."⁶

The OCA files these Exceptions on the basis that the ALJ erred in determining that the OCA has the burden of proof in this matter pursuant to 66 Pa. C.S. Section 332(a). Shifting the burden of proof of PECO's proposed retention of FERC credits to the OCA is contrary to Court and Commission precedent. As the party that made the tariff filing pursuant to a Section 1307 adjustment mechanism seeking a change in rates, the Company has the burden of proof to show by a preponderance of the evidence that its filing is legally supported. The OCA submits that the Company has not met its burden of proof to show that its proposal is consistent with the Public Utility Code, Court and Commission precedent, or that granting its request here would result in just and reasonable rates.

Moreover, through testimony and exhibits, the OCA provided substantial evidence which showed that PECO's proposed retention of \$5.5 million in FERC credits was unreasonable, inviolate of public policy and legally unsustainable. PECO seeks to retain \$5.5 million in credits for the 2007 through 2010 period, even though the Court determined that the methodology

⁴ See OCA M.B. at 3-6.

⁵ I.D. at 28.

⁶ I.D. at 28.

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

The ALJ erred in accepting arguments forwarded by the Company that the OCA had the burden of proof in relation to PECO's proposal to retain FERC-ordered credits. In proceedings involving a 1307 adjustment mechanism effecting rates, the Company retains the burden of proof. Moreover, the ALJ also erred when determining that the FERC credits could not be refunded to ratepayers due to the Commission-made rates doctrine. The U.S. Court of Appeals for the Seventh Circuit determined that a transmission charge was unreasonable and PECO's ratepayers paid PECO's transmission rate during the time period at issue.

Additionally, the Initial Decision errs by making a factual finding that PECO never had the opportunity to include RTEP charges for recovery charged to customers. The OCA submits that PECO had many opportunities to take action. Importantly, the Initial Decision mischaracterizes the OCA's position by determining that the OCA challenged PECO's calculation of the pre-2011 Settlement credits when the OCA explicitly accepted PECO's calculations of the credits.

The OCA submits that the pre-2011 Settlement credits resulted from a finding of unjust and unreasonable rates by the Seventh Circuit. As such, the credits belong to ratepayers and should

not be retained by PECO. For the reasons set forth below and in the OCA's Main Brief and Reply Brief, the OCA respectfully requests that the Commission grant the OCA's Exceptions, reject PECO's proposal to retain \$5.5 million in RTEP credits, and instead order PECO to return all FERC-ordered credits to the ratepayers.

II. EXCEPTIONS

Exception No. 1: The ALJ Erred By Determining That The OCA Has The Burden Of Proof. I.D. at 17- 18, 28 OCA M.B. at 6-9; OCA R.B. at 10-11.

A. PECO Bears The Burden Of Proof For Its Section 1307 Tariff Change

In the burden of proof discussion, the ALJ articulates the appropriate standard, as described in the OCA's Main Brief.⁷ The standard set forth in Section 315(a) of the Public Utility Code (Code) and bears repeating here:

- (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.⁸

Nevertheless, the ALJ determined that, based on the arguments presented by the OCA challenging PECO's proposal, the OCA has the burden of proof in this proceeding.⁹ The ALJ stated as follows:

While the OCA argue that PECO has the burden of proof in this matter under Section 315(a) of the Public Utility Code to establish that its rates are reasonable in this case, it is clear from the arguments that the OCA extends in its briefs that it is challenging the already Commission approved tariff 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

⁷ I.D. at 17; OCA M.B. at 6.

⁸ 66 Pa. C.S. § 315(a).

⁹ I.D. at 17.

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).¹⁰

The OCA's Complaint, however, was filed against PECO's semiannual adjustments to its NBT, which is a proposed change in tariffed rates filed by PECO.¹¹ PECO acknowledges as much in its filing, which states as follows:

As discussed with the Commission this past October, PECO will retain \$5.5 million of the total credits over the NBT filing periods from December 1, 2018 through November 30, 2019. Retaining this credit permits recovery of overpaid RTEP costs previously absorbed by PECO from 2007 through 2010. As a result, PECO will refund approximately \$74M to customers through 2025.

Should the Commission need to initiate any related proceeding, PECO requests that the NBT tariff rates specified in this filing not be suspended by the Commission, but rather that such rates be placed into effect, subject to refund.¹²

The NBT is a fully-reconcilable Section 1307(a) automatic adjustment clause.¹³ Section 1307(a) states:

(a) General rule.--Any public utility, except common carriers and those natural gas distributors with gross intrastate annual operating revenues in excess of \$40,000,000 with respect to the gas costs of such natural gas distributors, may establish a sliding scale of rates or such other method for the automatic adjustment of the rates of the public utility as shall provide a just and reasonable return on the rate base of such public utility, to be determined upon such equitable or reasonable basis as shall provide such fair return. A tariff showing the scale of rates under such arrangement shall first be filed with the commission, and such tariff, and each rate set out therein, approved by it. The commission may revoke its approval at any time and fix other rates for any such public utility if, after notice and hearing, the commission finds the existing rates unjust or unreasonable.¹⁴

¹⁰ I.D. at 17.

¹¹ See PECO Nov. 7, 2018 Filing Letter.

¹² PECO Nov. 7, 2018 Filing Letter.

¹³ See PECO St. No. 1 at 4.

¹⁴ 66 Pa. C.S. § 1307(a).

The utility bears the burden of proof in establishing that the Company's semiannual adjustment to its surcharge is consistent with the Public Utility Code and its corresponding regulations.¹⁵ The Commonwealth Court stated as follows in regard to 1307 filings:

66 Pa. C.S. § 315(a). Applying this Section here results in the placement of the burden on UGI to establish that its proposed interest calculation methodology was consistent with the Code, especially Section 1307(f), and its corresponding regulations.¹⁶

Additionally, in a recent case involving the Distribution System Improvement Charge (DSIC) surcharge mechanism, the Commission determined as follows in regard to the utility's burden of proof:

The burden of proof does not shift to parties challenging a requested rate surcharge. Rather, the burden of proof remains with the public utility throughout the course of the rate proceeding.¹⁷

The ALJ erred by not applying the appropriate burden of proof to PECO to demonstrate that its proposal to retain \$5.5 million in FERC-ordered credits was just and reasonable. The affirmative burden of proving the justness and reasonableness of the proposed semi-annual adjustment, including PECO's decision to retain \$5.5 million in FERC-ordered credits, remains on the utility, PECO, and not the OCA. While this matter is not a base rate proceeding, PECO's semiannual adjustment to its NBT surcharge still has the effect of changing the rates that are charged to customers.

Importantly, the ALJ did not acknowledge that the burden of proof differs from the burden of going forward. The Commission has stated that the utility's burden of proof as to establishing

¹⁵ See UGI Utils. v. Pa. P.U.C., 863 A.2d 144, 148 (Pa. Commw. Ct. 2004).

¹⁶ UGI Utils. v. Pa. P.U.C., 863 A.2d 144, 148 (Pa. Commw. Ct. 2004).

¹⁷ Petition of Metropolitan Edison Co. for Approval of a Distribution System Improvement Charge, 2018 Pa. PUC LEXIS 147, *25 (Apr. 19, 2018) (internal citations omitted).

that its rate request is just and reasonable does not shift to the party challenging the utility's request in a rate proceeding.¹⁸ In Pa. PUC v. Breezewood Telephone Co., the Commission provided:

With respect to rate proceedings before the Commission, Section 315 of the Public Utility Code, 66 Pa. C.S. § 315, provides that the burden of proof shall be upon the utility. Clearly, although the burden of going forward with the evidence may shift, the burden of proof does not shift to an intervenor challenging a requested rate increase. However, the Commission has indicated that where a party proposes an adjustment to a ratemaking claim of a utility, the proposing party does bear the burden of presenting some evidence or analysis tending to demonstrate the reasonableness of the adjustment.¹⁹

With regard to the burden of going forward, the Commission has stated that, upon the utility's establishment of a *prima facie* case, the burden of going forward can shift.²⁰ The intervenor must sustain the burden of going forward if it proposes a rate design that differs from the rate design proposed by the utility.²¹ The burden of going forward is satisfied by presenting some evidence or analysis of the reasonableness of the proposal.²²

The ALJ should have put the burden of proof on PECO to demonstrate that retaining credits related to recovery of RTEP costs incurred from 2007 through 2010 results in just and reasonable rates. As discussed in the below exceptions, the evidence presented by the OCA demonstrates that PECO's retention of credits related to the 2007 through 2010 period were inconsistent with the Commission's regulations and Public Utility Code. PECO has failed to satisfy its burden of proof

¹⁸ See Pa. P.U.C. v. Aqua Pennsylvania, Inc., 2004 Pa. PUC LEXIS 39 at *8-9 (Aug. 5, 2004) (Section 315 reveals a legislative intent that the utility carries the burden of proving the justness and reasonableness of both proposed and existing rates).

¹⁹ 1991 Pa. PUC LEXIS 45 at *9-10 (Jan. 31, 1991) (Breezewood).

²⁰ Pa. P.U.C. v. Superior Water Co., Inc., 2009 Pa. PUC LEXIS 1055 at *19-20 (Feb. 5, 2009).

²¹ Id.

²² Id. at 18 (citing Breezewood at *10).

to demonstrate that its proposed retention of \$5.5 million in FERC-ordered credits is just and reasonable and consistent with the Commission regulations and the Public Utility Code.

B. The ALJ Erred in Determining That The OCA Bears the Burden Of Proof As The OCA Did Not Challenge A Previously-Approved Tariff Provision.

The ALJ's reliance on a burden of proof standard regarding challenges to existing tariff language is in error because the OCA did not challenge a previously-approved tariff provision.

The Initial Decision incorrectly determines that the OCA is challenging PECO's Commission-approved, tariffed rates for service for a prior period of time. The ALJ cited to Schellhammer v. Pa. P.U.C. to support the following:

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.²³

The facts in Schellhammer, however, are inapposite to the facts in the instant proceeding. In Schellhammer, a ratepayer filed a letter objecting to a rate increase subsequent to a Commission investigation of a rate increase, and an issuance of a Commission order approving the rate increase as just and reasonable.²⁴ The Court determined that the ratepayer's letter did not constitute a formal complaint requiring notice and the opportunity to be heard.²⁵ The Court held that as there was already a Commission Order issued which determined that the Company's proposed rates were just and reasonable and, as Schellhammer's letter did not constitute a formal complaint, the

²³ I.D. at 17 citing Schellhammer v. Pa. P.U.C., 629 A.2d 189 (Pa.Cmwlt. 1993) (Shellhammer); 66 Pa.C.S. §§315(a), 332(a) and 1301.

²⁴ Schellhammer v. Pa. P.U.C., 157 Pa. Commw. 86, 88-91, 629 A.2d 189, 190-91 (1993).

²⁵ Schellhammer v. Pa. P.U.C., 157 Pa. Commw. 86, 92-94, 629 A.2d 189, 192-93 (1993).

ratepayer had the burden of proof to show that the rates were no longer reasonable.²⁶ By contrast, the OCA notes that when a utility files a semiannual adjustment to change the rates contained in a rider, there is no PUC prior approval of those new rates and the utility bears the burden of proving by a preponderance of the evidence that its rates are just and reasonable.

The OCA submits that a utility's semiannual adjustment to its surcharge typically updates the surcharge. In the instant proceeding, however, there was no antecedent approval of PECO's proposal to retain \$5.5 million in FERC-credits. Instead, the FERC-ordered credits were a result of a U.S. Court of Appeals for the Seventh Circuit determination that transmission rates were unreasonable. Existing rates which at one time were reasonable may become unreasonable due to changed circumstances and are subject to re-evaluation by the Commission.²⁷

The OCA submits that the burden of proof does not shift when a party files a complaint in response to a Company's tariff supplement to change its rates. The ALJ correctly stated as follows:

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).²⁸

The ALJ then determined that the OCA has the burden of proof as the OCA opposes a proposal presented by PECO. The Commission, however, has previously determined as follows:

²⁶ The OCA notes that in the instant proceeding, as stated in Finding of Fact No. 38, the Commission issued a Secretarial Letter on November 28, 2018 finding that the NBT rates were permitted to become effective as filed. The OCA further notes that directly following PECO's discussion of its retention of FERC credits, PECO's filing stated as follows: "Should the Commission need to initiate any related proceeding, PECO requests that the NBT tariff rates specified in this filing not be suspended by the Commission, but rather that such rates be placed into effect, subject to refund." See PECO Nov. 7, 2018 Filing Letter. As the instant proceeding relates to PECO's NBT filing, the NBT rates placed into effect were not just and reasonable as a result of a Commission Order and are subject to refund as filed.

²⁷ See Pa. P.U.C. v. UGI Penn Natural Gas, Inc. 1307(f), 2012 Pa. PUC LEXIS 1523, *31-32 (Sept. 12, 2012)

²⁸ I.D. at 18.

There is no presumption of reasonableness, which attached to a utility's claim, at least none which survives the raising of credible issues regarding a utility's claims. A utility's burden is to affirmatively establish the reasonableness of its claim. It is not the burden of another party to disprove the reasonableness of a utility's claims.²⁹

Additionally, Commission precedent further establishes that the Commission may place the burden of proof on the utility to support the validity of existing provisions.³⁰ 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 the utility throughout the course of the proceeding.³¹ Thus, PECO has the burden of proof to show that its proposal to retain \$5.5 million in RTEP credits is legally sustainable and would result in just and reasonable rates.

The OCA has not raised a new issue; it has challenged the Company's proposed retention of a portion of FERC-ordered credits. The OCA filed its Complaint in response to a proposed change in rates by PECO, and PECO has the burden of proof to show that the rate is just and reasonable pursuant to Section 315(a).³² The Company is the party seeking affirmative relief in the form of Commission approval of the Company's retention of FERC credits for the period of 2007 through 2010. As such, PECO proposed to retain \$5.5 million in order to account for costs of the PECO's 2007 through 2010 RTEP expense.³³

²⁹ OCA M.B. at 7; Pa. P.U.C. v. Equitable Gas Co., 57 Pa. PUC 423, 444 (fn. 37), 1983 Pa. PUC LEXIS 33 (July 8, 1983).

³⁰ OCA M.B. at 7; Pa. P.U.C., et al. v. Equitable Gas Co., 1997 Pa. PUC LEXIS 139, *18-19 (Oct. 8, 1997).

³¹ OCA M.B. at 8; Pa. P.U.C. v. Columbia Gas of Pennsylvania, Inc. 2014 Pa. PUC LEXIS 691, *11 (Oct. 23, 2014) ("The burden of proof does not shift to a statutory party or individual party (whether an entity or an individual) which challenged the requested Rider. Instead, the utility's burden, to establish the justness and reasonableness of every component of its request, is an affirmative one and remains with the public utility throughout the course of the proceeding.").

³² 66 Pa. C.S. § 315(a).

³³ See PECO Nov. 7, 2018 Filing Letter.

Exception 2: The Initial Decision Erred In Its Discussion Of The Commission-Made Rates Doctrine As The FERC Transmission Rates Underlying PECO's Transmission Rates Were Determined To Be Unjust and Unreasonable By The Seventh Circuit. I.D. at 23-27; OCA M.B. at 1-3, 15-15; OCA R.B. at 7-9.

In the Initial Decision, the ALJ determines that the doctrine of Commission-made rates prohibits the Commission from ordering refunds in relation to PECO's proposal to retain \$5.5 million in FERC credits.³⁴ The Initial Decision states as follows:

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.³⁵

The ALJ then proceeds to cite to C & D Technologies, Inc. v. Pa. Power & Light Co., and notes that the Commission held as follows:

The doctrine of Commission-made rates prohibits the Commission from ordering refunds of amounts collected by a public utility under and pursuant to tariff provisions that the Commission, by formal administrative action, **found to be just and reasonable**. *Toll Brothers, Inc. v. Pennsylvania-American Water Company*, 1994 Pa PUC LEXIS 122 *33. See, also, *Philadelphia Electric Co. v. PA Public Utility Comm'n*, 122 Pa.Comm. 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

In contrast to the above-referenced case, however, a Court has already determined that the underlying methodology for allocating RTEP charges was unjust and unreasonable.³⁷ As discussed in the OCA's Main and Reply Briefs, the FERC-ordered allocation of RTEP charges in

³⁴ I.D. at 23-27.

³⁵ I.D. at 23.

³⁶ I.D. at 25 citing C & D Technologies, Inc. v. Pa. Power & Light Co., Docket Nos. C-00992119 *et al.*, 2004 Pa. PUC LEXIS 57, at **28-29 (June 25, 2004) (emphasis added).

³⁷ See Ill. Commerce Comm'n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311; see also Ill. Commerce Comm'n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961 (7th Cir. 2014).

FERC Opinion No. 494 was appealed to the U.S. Court of Appeals for the Seventh Circuit.³⁸ The Court determined that the methodology previously utilized by FERC to allocate RTEP charges was unreasonable.³⁹ As a result, FERC-ordered RTEP credits were issued to provide a remedy for the over-collection of transmission expense under an unreasonable allocation method.⁴⁰ Simply put, the Court found the allocation, and thereby the resulting rates and charges, to be unjust and unreasonable.⁴¹

The Commission-made rates doctrine is simply inapplicable because the underlying FERC transmission rates were immediately appealed and found to be unjust and unreasonable by the Seventh Circuit. The Commission-made rate doctrine does not apply to rates found to be unjust and unreasonable.⁴² On the contrary, interstate power rates and allocation methodologies fixed by FERC are to be given binding effect by the Commission in determining interstate rates under the “filed rate” doctrine and the Commonwealth Court has stated as follows:

On review, the Supreme Court first observed that FERC has exclusive jurisdiction over interstate wholesale power rates pursuant to 16 U.S.C. § 824(b). The Court noted that the “filed rate” doctrine holds in pertinent part that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates. Tracing the origin of that doctrine to the case of *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951), the Court noted that the doctrine is not a rule of administrative law but rather a matter of enforcing the Supremacy Clause of the Constitution. Further, the Court stated that the doctrine was not limited to rates

³⁸ OCA R.B. at 7 citing PJM Interconnection, L.L.C., 2018 FERC LEXIS 713 (May 31, 2018) (FERC Settlement Agreement).

³⁹ See OCA M.B. at 1-2 citing Ill. Commerce Comm’n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311 (7th Circuit 2009 Remand); see also Ill. Commerce Comm’n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961 (7th Cir. 2014) (7th Circuit 2014 Remand).

⁴⁰ See OCA M.B. at 15-16.

⁴¹ See Ill. Commerce Comm’n v. FERC, 576 F.3d 470, 2009 U.S. App. LEXIS 18311; see also Ill. Commerce Comm’n v. FERC, 756 F.3d 556, 2014 U.S. App. LEXIS 11961 (7th Cir. 2014).

⁴² OCA R.B. at 8-9.

per se, but was also involved where, as in the case before it, FERC's allocation, of the amount of low-cost power that a utility could obtain, directly affected interstate rates, and FERC had ordered the company to file rates in accordance with that allocation.⁴³

As the transmission rate was already determined to be unjust and unreasonable by the U.S. Court of Appeals for the Seventh Circuit, the ALJ erred by determining that the OCA challenged Commission-made rates. As noted by the ALJ, the Pennsylvania Supreme Court held as follows in Cheltenham & Abington Sewerage Co. v. Pa. P.U.C.:

[A] commission-made rate furnishes the applicable law for the utility and its customers until change is made by the commission.⁴⁴

The ALJ further noted as follows:

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.⁴⁵

In Cheltenham, a complaint was filed with the Commission to recover reparations for damages alleged to be sustained as a result of rates contained in a previously approved tariff.⁴⁶ The Commission determined that reparations should be awarded as the rates in the previously-approved tariff were unjust and unreasonable.⁴⁷ On appeal, the Cheltenham Court determined that the Commission-made rates contained in the previously-approved tariff were binding on the utility

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

⁴⁴ Cheltenham & Abington Sewerage Co. v. Pa. P.U.C., 344 Pa. 366, 371, 25 A.2d 334, 337 (1942) (Cheltenham).

⁴⁵ I.D. at 24.

⁴⁶ Cheltenham & Abington Sewerage Co. v. Pa. P.U.C., 344 Pa. 366, 368-69, 25 A.2d 334, 336 (1942).

⁴⁷ Cheltenham & Abington Sewerage Co. v. Pa. P.U.C., 344 Pa. 366, 368, 25 A.2d 334, 336 (1942).

and the customer until the Company filed a new tariff.⁴⁸ As such, Cheltenham Court further determined that the Commission could not retroactively apply a Commission order to prior Commission orders.⁴⁹

Cheltenham is inapposite to the facts in the instant proceeding. The OCA is not requesting retroactive application of a Commission Order to a previously approved tariff filing. The FERC credits at issue in this proceeding resulted from appeals to the Seventh Circuit, where it was determined that the RTEP expenses previously charged were unjust and unreasonable. The OCA submits that PECO's proposal to retain \$5.5 million in FERC-ordered credits does not constitute a Commission-made rate and that the ALJ's reliance on Cheltenham to determine that PECO's proposal to retain \$5.5 million constitutes Commission-made rates is misplaced.

In a subsequent decision to Cheltenham, which determined that a fuel cost adjustment provision did not represent a Commission-made rate, the Commonwealth Court stated as follows:

It is true that in *Cheltenham & Abington Sewerage Co.* the Supreme Court reversed a Commission decision ordering reparations or refunds for certain years, even though the Commission had found the rates for those years to be unreasonable. However, the basis for the Court's reversal was that the rates for the years in question had been previously approved by the Commission itself. When the Supreme Court spoke of rates that were "Commission-made," it was referring to rates stamped with antecedent Commission approval; it was such rates that were held to be immune from retroactive alteration. In the instant case there was no prior Commission proceeding or action [***7] giving antecedent approval of the specific surcharges collected by Met-Ed in 1974 pursuant to its fuel cost adjustment provision. Therefore, the concept [***80] of a "Commission-made rate" has no application to the present case; and, thus, Met-Ed could not validly expect that the surcharges in issue were insulated from retroactive modification by the Commission.⁵⁰

⁴⁸ Cheltenham & Abington Sewerage Co. v. Pa. P.U.C., 344 Pa. 366, 373-74, 25 A.2d 334, 338 (1942).

⁴⁹ Cheltenham & Abington Sewerage Co. v. Pa. P.U.C., 344 Pa. 366, 374, 25 A.2d 334, 339 (1942).

⁵⁰ Metro. Edison Co. v. Pa. P.U.C., 62 Pa. Commw. 460, 465, 437 A.2d 76, 79-80 (1981).

Even if the Commission-made rates doctrine applies to the instant proceeding, the OCA submits that PECO's retention of \$5.5 million in FERC-ordered credits violates the Commission-made rates doctrine just as the ALJ concluded that the OCA's position does. The Commission-made rates doctrine would prevent PECO from changing the prior rates that were effective from 2007 through 2010. By retaining credits for the 2007 through 2010 period, however, the Company is essentially determining that retail transmission rates should have been higher in 2007 through 2010 and that retaining credits for the 2007 through 2010 period is compensatory in relation to RTEP charges. As can be seen, the ALJ's reliance on the Commission-made rates doctrine is circular. The fact of the matter is that the Commission-made rates doctrine does not apply.

During the time period in question, PECO had a retail transmission base rate that was based upon a FERC transmission rate, which was paid for by ratepayers. The Initial Decision appears to require that the OCA prove that the 2007 to 2010 rates were unjust and unreasonable as the rates were approved by a Commission Order. The methodology underlying PECO's stated transmission rates, however, was determined to be unjust and unreasonable by the Seventh Circuit. As such, customers are owed a refund.

As there was no NBT or TSC in effect from 2007 to 2010, the transmission rates were the rates which were contained in PECO's tariff during the time period at issue. The lack of an automatically adjusting surcharge designed to provide a full and complete recovery of RTEP expense during the time-period in question, such as the TSC or NBT, does not support PECO's argument that it is entitled to retain \$5.5 million of FERC-ordered refunds for this transmission expense. Finding of Fact No. 35 correctly states the following fact:

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. 14-15.⁵¹

As such, PECO's decision to retain the 2007 through 2010 portion of the FERC-ordered credits would be equally contrary to the Commission-made rates doctrine under the ALJ's analysis, as the TSC and NBT were not in effect as a result of a Commission Order during the period of 2007 through 2010. Indeed, Finding of Fact No. 20 states as follows:

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).⁵²

As can be seen, the Commission-made rate doctrine simply cannot be squared with the situation here where the Federal Court has found charges to be unjust and unreasonable. Similar to any other case where there is a finding of an unreasonable rate, the Commission refunds customers for unreasonable charges. The same result must obtain here.

The OCA further submits that the ALJ incorrectly determined that the OCA requested that the Commission permit "retrospective ratemaking" in this case.⁵³ The OCA's opposition to PECO's proposal to retain FERC-ordered credits based on a finding of unjust and unreasonable rates does not constitute a request for the Commission to permit retroactive ratemaking. On the contrary and as discussed in the OCA's Main Brief, PECO is attempting to retain credits related to RTEP expenses that was based on an unreasonable methodology by arguing that PECO should

⁵¹ I.D. at 13 (Finding of Fact No. 35).

⁵² I.D. at 13 (Finding of Fact No. 20); see also I.D. at 23-24.

⁵³ I.D. at 23.

be compensated for RTEP costs that were incurred over a decade ago.⁵⁴ Even in 2010, when PECO filed its base rate case and established its TSC to recover transmission costs through an automatic surcharge on a going-forward basis, PECO made no attempt to include RTEP charges incurred between 2007 and 2010.

The finding of the Seventh Circuit means that PECO's transmission rates during the 2007 through 2010 period were unjust and unreasonable, and PECO's retention of credits cannot be sustained. The OCA respectfully requests that the Commission apply the Seventh Circuit's determination unjust and unreasonable transmission rates, which included transmission rates from the period of 2007 through 2010, and require PECO to refund the 2007 through 2010 FERC credits to the ratepayers.

Exception No. 3: The ALJ Erred In Finding That PECO Never Had The Opportunity to Recover RTEP Charges During The 2007-2010 Period. I.D. at 14; OCA M.B. at 11-19; R.B. at 4-6.

The OCA submits that the ALJ erred in making a factual finding that PECO never had the opportunity to recover RTEP charges incurred during 2007 through 2010. The OCA respectfully requests that the following Finding of Fact No. 42 not be adopted by the Commission:

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. 3-8.⁵⁵

As discussed in the OCA's briefs, the Company had multiple opportunities to include RTEP charges for recovery in rates that it charged to customers.⁵⁶ For approximately 20 years,

⁵⁴ OCA M.B. at 19.

⁵⁵ I.D. at 14 (Finding of Fact No. 42).

⁵⁶ See OCA M.B. at 11-10; OCA R.B. at 4-6.

PECO's stated transmission rate was considered to be sufficient by PECO up until 2010, when PECO filed a base rate case at the Commission. The OCA further notes that PECO's 1989 base rates were "unbundled" into distribution, transmission and generation components pursuant to a May 14, 1998 Commission Order.⁵⁷ Now, a decade after its 2010 base rate case PECO argues that its transmission rate from 2007 through 2010 was insufficient to recover PECO's RTEP expense.

As discussed in the OCA's Main Brief, utilities experience new or changing expenses regularly between base rate cases and when such expenses are viewed within the lens of the utility's total revenues and expenses, management can decide to take steps to recover them, such as filing a base rate case or seeking deferred accounting treatment if management finds such action necessary.⁵⁸ There is no basis to assume that, as any other expense changes between base rate cases, shareholders are specifically paying an expense.

OCA witness Pavlovic testified that, as a ratemaking matter, there are two appropriate courses of action that a utility can take when a transmission rate generates insufficient revenues to recover a utility's transmission capital costs or operating expenses:

(1) a utility can construct a transmission revenue requirement that includes all current costs and apply to the FERC for approval of a new stated transmission rate that will recover its transmission costs; or (2) a utility can apply to the FERC for approval of a transmission formula rate that on an annual basis will adjust rates to recover all its costs. In either case, all that is required is an application to the FERC under Section 205 of the Federal Power Act, which a transmission utility may do at a time of its own election.⁵⁹

⁵⁷ See OCA St. 1-SR at 12.

⁵⁸ See OCA M.B. at 13.

⁵⁹ OCA M.B. at 13 (internal citations omitted).

PECO took neither action.⁶⁰ Moreover, PECO did not file for a deferral when the RTEP charges were being incurred, when the Company could have done so at any time during the 2007 through 2010 period. Instead, PECO chose to wait until 2010 to file a base rate case requesting a reconcilable surcharge that included RTEP expense. Additionally, PECO acknowledges that a statutory cap on its transmission and distribution rates expired in 2006.⁶¹

It is axiomatic that substantial evidence is required to support Commission findings of fact.

The Commission has determined as follows:

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence.⁶²

A factual finding that PECO “never had the opportunity” to include recovery of RTEP charges in any rates charged to customers is simply incorrect. There was no bar in place preventing PECO from taking action to specifically recover RTEP expense from 2007 to 2010, had PECO elected to take this step.⁶³ Similar to other Electric Distribution Companies, PECO had many opportunities to take action. For example, PPL Electric Utilities Corp. (PPL) received authorization from the Commission to establish a TSC applicable to transmission services purchased from PJM under the OATT to provide service to PPL’s POLR customers in 2004.⁶⁴ Additionally, the FirstEnergy Companies received authorization from the Commission to establish their TSC, designed to include all transmission service-related costs incurred to meet the

⁶⁰ OCA M.B. at 16.

⁶¹ PECO M.B. at 3, fn. 3.

⁶² Pa. P.U.C. v. Columbia Gas, Inc., 2009 Pa. PUC LEXIS 1586, *6 (July 28, 2009) (internal citations omitted).

⁶³ See OCA R.B. at 4-6.

⁶⁴ See Pa. P.U.C. v. PPL, 2004 Pa. PUC LEXIS 40, *104-107 (Dec. 22, 2004).

Companies' POLR obligations, in early 2007.⁶⁵ The OCA further notes that when the Commission authorized the FirstEnergy Companies to establish a TSC, the Commission approved a request from the FirstEnergy Companies to recover deferred 2006 transmission expenses.⁶⁶ As PECO was not under a transmission rate cap for the 2007 through 2010 time-period at issue⁶⁷, PECO had similar opportunities to specifically recover RTEP charges before 2010.

The OCA's briefs discussed the multiple actions PECO could have taken to recover RTEP charges had PECO determined that its transmission revenues that were being collected from ratepayers were insufficient to cover the RTEP expense.⁶⁸ Similar to any other expense between base rate cases, costs change over time and it is the Company's responsibility to determine whether to make a filing if it believes that it is not realizing a sufficient return. Instead, PECO took no action to recover RTEP charges incurred from 2007 through 2010 until PECO filed its semiannual adjustment in November 2018 and produced no evidence in this proceeding to show that its retail transmission rate collected from ratepayers was insufficient in the historical period at issue. The record is clear that a factual finding that PECO never had the opportunity to recover RTEP charges incurred in 2007 through 2010 is unsupported.

As such, the OCA respectfully requests that the Commission not adopt Finding of Fact No. 42 and reject the Initial Decision's determination that the OCA asked the Commission to permit retroactive ratemaking in this case.

⁶⁵ See Pa. P.U.C. v. Met-Ed, et al., 2007 Pa. PUC LEXIS 5, *94-97 (Jan. 11, 2007).

⁶⁶ See Pa. P.U.C. v. Met-Ed, et al., 2007 Pa. PUC LEXIS 5, *106 (Jan. 11, 2007).

⁶⁷ PECO St. No. 1-R at 4.

⁶⁸ OCA M.B. at 11-19; R.B. at 4-6.

Exception No. 4: The ALJ Erred In Noting That The OCA Challenged PECO's Calculation Of The FERC Credits Applicable To The 2007 Through 2010 Time Period. I.D. at 26-28; OCA R.B. at 19.

In the Initial Decision, the ALJ stated that the OCA did not propose an alternative to what could be considered a reasonable amount of Settlement credits related to the 2007-2010 period and determined as follows:

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.⁶⁹

The OCA, however, did not challenge PECO's calculation of the portion of the Settlement refunds related to the 2007 through 2010 period. The OCA's Reply Brief explicitly stated as follows⁷⁰:

While the OCA questions the accuracy of time-segmented credits compared to the actual RTEP charges incurred by PECO during the period of 2007 through 2010, the OCA understands that the settlement at FERC was a "black box" settlement that was agreed upon between numerous parties to remedy an unreasonable allocation methodology. The OCA requested that PECO provide the RTEP charges billed to the PECO zone during the period in question and PECO stated that it did not have information for the period of November 2007 through May 2008.⁷¹ As such, the OCA accepts PECO's use of time-segmented data provided by PJM as a basis for calculating RTEP charges for the period of 2007 through 2010, given the lack of evidence provided by PECO showing the actual RTEP charges that PECO incurred.⁷²

The Initial Decision, however, determined as follows:

⁶⁹ I.D. at 27-28.

⁷⁰ This subsection of the OCA's Reply Brief has the following subheading: "The OCA Agrees That PECO's Calculation Of Pre-2011 Settlement Billing Adjustments Based On Data Provided By PJM Is Acceptable Given PECO's Inability To Provide All Of The Actual RTEP Invoices From The Period In Question."

⁷¹ OCA St. 1 at 11.

⁷² OCA R.B. at 19.

Therefore, federal law prohibits OCA's questioning the reasonableness of the Settlements' time-segmented distribution of RTEP charges that PECO relied upon to determine pre-2011 RTEP credits it was entitled to in this matter.⁷³

The Initial Decision's discussion of the OCA's position on this matter is contrary to what the OCA argued in brief. The OCA accepted PECO's calculation of RTEP credits for the time period at issue and the relevant issue here is whether those RTEP credits should be returned to ratepayers.

The OCA further submits that the ALJ's discussion of "mathematical certitude" is inapplicable to the instant proceeding.⁷⁴ The Initial Decision stated as follows:

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.⁷⁵

The ALJ's discussion of mathematical certitude is inapplicable as the OCA's briefs did not challenge PECO's calculation of FERC credits derived from the black box settlement at FERC. As such, the assertion that the OCA presented an argument requiring mathematical certitude should not be adopted by the Commission.

Additionally, the OCA notes that while the ALJ mischaracterizes the OCA's arguments as a demand for mathematical certainty in the calculation of FERC credits, the ALJ then seemingly demands such mathematical certainty from the OCA to prevail. The Initial Decision stated as follows:

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

⁷³ I.D. at 27.

⁷⁴ See I.D. at 28.

⁷⁵ I.D. at 28.

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.⁷⁶

As the OCA accepted PECO's calculation of the FERC credits, the OCA did not provide an alternative calculation of the credits. Moreover, the OCA never argued that the only alternative is for the Commission to assume that the Settlement credits related to pre-2011 PJM RTEP charges are zero.

The OCA's reasonable alternative to PECO's retention of FERC credits is to refund these credits, based on unjust and unreasonable transmission charges, to ratepayers. It is clear from the record that PECO's customers were paying the PECO stated transmission rate, and PECO did not provide data that demonstrates that its transmission revenues were insufficient to recover all or a portion of its PECO zone RTEP charges.⁷⁷ As noted in the OCA's briefs, OCA witness Pavlovic testified to the fact that PECO's transmission revenues reported on PECO's FERC Form 1 were well in excess of their transmission revenue requirement during this period.⁷⁸ It is also clear from the record that the OCA accepted PECO's calculation of the FERC-credits related to the pre-2011 PJM RTEP charges. As such, the OCA respectfully requests that the Commission not adopt the Initial Decision's discussion regarding the calculation of pre-2011 RTEP charges, as the calculation was not at issue in this proceeding.

⁷⁶ I.D. at 27.

⁷⁷ OCA St. 1 at 6-9.

⁷⁸ See OCA M.B. at 12-13; OCA R.B. at 16-17.

III. CONCLUSION

For the reasons set forth above and in the OCA's Main and Reply Briefs, the OCA respectfully files these Exceptions to the Initial Decision of ALJ Guhl. PECO's proposal to retain \$5.5 million of FERC-ordered RTEP credits is contrary to the Public Utility Code, legal precedent, and public policy. The Office of Consumer Advocate respectfully submits that the Commission should reject PECO's proposal to retain \$5.5 million in RTEP credits and instead order PECO to fully return those credits to ratepayers.

Respectfully Submitted,

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