

Morgan Lewis

Kenneth M. Kulak

Partner

+1.215.963.5384

ken.kulak@morganlewis.com

July 27, 2020

VIA eFILING

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

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

Dear Secretary Chiavetta:

Enclosed for filing in the above-referenced matters is the **Replies of PECO Energy Company to the Exceptions of the Office of Consumer Advocate to the Initial Decision of Administrative Law Judge Marta Guhl**. Copies have been served on all parties of record as indicated on the attached Certificate of Service.

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

Very truly yours,



Kenneth M. Kulak

KMK/tp
Enclosures

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

Morgan, Lewis & Bockius LLP

1701 Market Street
Philadelphia, PA 19103-2921
United States

T +1.215.963.5000
F +1.215.963.5001

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Replies of PECO Energy Company to the Exceptions of the Office of Consumer Advocate to the Initial Decision of Administrative Law Judge Marta Guhl** on the following persons in the manner specified in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL

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

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

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

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



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

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

Dated: July 27, 2020

Counsel for PECO Energy Company

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	:	C-2019-3010737
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	:	
PECO ENERGY COMPANY	:	

**REPLIES OF
PECO ENERGY COMPANY**

**To The Exceptions Of The Office Of Consumer Advocate To
The Initial Decision Of Administrative Law Judge Marta Guhl**

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

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

Dated: July 27, 2020

Counsel for PECO Energy Company

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I. INTRODUCTION

PECO Energy Company (“PECO” or the “Company”) files these Reply Exceptions in response to the Exceptions filed on July 15, 2020 by the Office of Consumer Advocate (“OCA”) to the Initial Decision of Administrative Law Judge Marta Guhl (“ALJ”) issued on June 25, 2020 (“Initial Decision”). The ALJ found and determined that the Complaints filed by the OCA against PECO’s semi-annual adjustments to its Non-Bypassable Transmission Charge (“NBT”)¹ are not supported by substantial – or, indeed, any – evidence, seek relief that is prohibited by the Pennsylvania Public Utility Code² and well-established appellate court precedent, and, therefore, should be denied. The ALJ has provided a thorough and detailed analysis of the record and of the controlling law to support her Initial Decision, which the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) should adopt without modification.

For the most part, the OCA’s Exceptions repackaged arguments advanced in its Main and Reply Briefs to argue in favor of a retrospective reduction in PECO’s previously-approved base rates for the period June 1, 2007 through December 31, 2010 and, thereby, force PECO to refund \$5.5 million to customers. As the Initial Decision found, the OCA is demanding that PECO refund transmission-related costs that had not been included in PECO’s base rates in effect during the period relevant to this case.³ In addition to being fundamentally inequitable, the

¹ The OCA filed its first Complaint, at Docket Nos. M-2018-3005860 and C-2018-3006242, on November 28, 2018, against the semi-annual adjustment to PECO’s NBT Charge that the Company filed on November 7, 2018, for the six-month period commencing December 1, 2018. The OCA filed its second Complaint, at Docket Nos. M-2019-3010032 and C-2019-30010737, on June 13, 2019, against the semi-annual adjustment to PECO’s NBT Charge that the Company filed on May 15, 2019 for the six-month period commencing June 1, 2019. By order issued November 29, 2019, the ALJ granted the OCA’s request to consolidate its Complaints for hearings and decision. *See* Initial Decision (“I.D.”) at 5-7.

² 66 Pa.C.S. §§ 101 et seq. Hereafter, references to a “section” will be to a section of the Pennsylvania Public Utility Code (“Code”) unless stated, or the context indicates, otherwise.

³ I.D. at 14-15 (Findings of Fact Nos. 41-45). *See also* OCA Exceptions (“Exc.”) at 15 (acknowledging that PECO did not have a reconcilable adjustment clause in effect to recover transmission costs prior to January 1,

OCA's refund demand is a clear violation of the principle established by Pennsylvania appellate courts and enshrined in Section 316 that the Commission is barred from ordering retrospective changes in rates that it previously adjudicated to be just and reasonable (i.e., "commission-made" rates).⁴

As evidenced by the detailed summary of the parties' positions in the Initial Decision, the OCA's arguments were addressed and comprehensively refuted in PECO's Initial Brief filed on January 14, 2020 and Reply Brief filed on February 13, 2020. In view of the twenty-five page limit on Reply Exceptions, the Commission is urged to review the Company's Initial and Reply Briefs. These Reply Exceptions will focus upon the principal errors of law and misstatements of record evidence underlying the OCA's Exceptions.

II. BACKGROUND

The OCA's Complaints allege that PECO's calculations of its NBT that became effective on December 1, 2018 and June 1, 2019 were erroneous because PECO did not reduce its current-period transmission costs to reflect certain bill credits issued by PJM Interconnection L.L.C. ("PJM"). The credits at issue, totaling approximately \$5.5 million, do not relate to current-period transmission service. Rather, they are credits to bills PJM issued for transmission service that PECO obtained more than ten years ago (from June 1, 2007 through December 31, 2010). The credits were issued pursuant to a settlement of a decade-long dispute at the Federal Energy Regulatory Commission ("FERC") over the proper method of allocating Regional Transmission Expansion Plan ("RTEP") costs⁵ among transmission zones (the "Settlement").

2011, that PECO recovered its transmission-related costs (if at all) in base rates, and, therefore, the focus of the OCA's refund demand is the rates "contained in PECO's tariff during the time period at issue."

⁴ I.D. at 24-26.

⁵ As the Regional Transmission Operator for its members' transmission systems in all or parts of thirteen states and the District of Columbia, PJM develops an annual RTEP to identify transmission system upgrades and

The Company, as an LSE within PJM, acquires transmission service provided by others to serve its retail customers. After the Commission approved PECO's 1998 Restructuring Plan, Section 2807(e)(1) obligated the Company to furnish "Provider Of Last Resort" ("POLR") generation service to customers that did not, or could not, shop with an electric generation supplier.⁶ To fulfill that obligation, PECO obtained transmission service from PJM to bring electricity to its PJM-designated transmission zone ("PECO Zone"), where that power could then be distributed to POLR customers. 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 generation to the PECO Zone.⁷ PECO's "price to compare" ("PTC") for POLR service was the sum of the generation and transmission components. I.D. at 8-9 (Findings of Fact Nos. 3-8); PECO St. No. 1-R, pp. 4-5.

PJM first began to impose RTEP charges on PECO on June 1, 2007 to recover the costs of transmission facilities that are outside the PECO zone and owned by other transmission service providers. Accordingly, the RTEP charges billed to PECO were incurred for transmission service PECO obtained from others in its capacity as an LSE in order to serve its own retail customers. Therefore, the RTEP charges at issue in this case were recoverable (if at

enhancements needed to meet the operational, economic, and reliability requirements of the bulk power system under its control. PJM, on behalf of transmission owners, charges RTEP costs to load serving entities ("LSEs") in the transmission zones that are assigned cost responsibility for the applicable RTEP projects. I.D. at 9 (Findings of Fact Nos. 9-11); PECO St. No. 1, pp. 10-11.

⁶ After its 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) and the PUC's regulations at 52 Pa. Code §§ 54.181-54.189. I.D. at 8 n.18; PECO St. No. 1, pp. 7-8.

⁷ The statutory caps on PECO's transmission and distribution rates had been extended twice pursuant to settlements of proceedings for approval of PECO's Restructuring Plan and the PECO/Unicom merger. As extended, the transmission and distribution rate caps expired on December 31, 2006. See I.D. at 16 (Findings of Fact Nos. 54-56).

all) only from PECO's PUC-jurisdictional retail customers and not through FERC-jurisdictional wholesale transmission rates. I.D. at 9-10 (Findings of Fact Nos. 3-8) and 15-16 (Findings of Fact Nos. 50-52); PECO St. Nos. 1, pp. 7, 11-12, and 1-R, pp. 10-11.

Prior to January 1, 2011, PECO recovered the costs it incurred as an LSE to acquire transmission service to serve its retail customers solely through its base rates – specifically the unbundled generation and transmission components of its base rates that constituted its PTC. Those base rates had been adjudicated in PECO's 1989 base rate case at Docket No. R-891364, in which the Commission, by final order entered on May 16, 1990, found those rates to be just and reasonable. The Commission's just and reasonable determination was reaffirmed when the PUC approved PECO's unbundled base rates in its 1998 Restructuring Order. The base rates established in PECO's 1989 rate case remained in effect until January 1, 2011, i.e., during the entire period (2007-2010) relevant to this case. *See* I.D. at 10-11 (Findings of Fact Nos. 20-21) and 15 (Findings of Fact No. 44).

PECO filed an electric distribution base rate case in March 2010 based on a future test year ending December 31, 2010. In that case, PECO's pro forma revenue requirement included estimates of PJM transmission charges (including RTEP charges) that PECO expected to incur prospectively in its capacity as an LSE to serve its retail customers.⁸ In parallel with its requested base rate increase, PECO proposed a bypassable, fully-reconcilable Transmission Service Charge ("TSC") under Section 1307 of the Code "as an alternative cost recovery method" for the "transmission costs" PECO had included, on a pro forma basis, in developing its proposed base rates. The Commission approved PECO's TSC proposal as part of a settlement of

⁸ I.D. at 11 (Findings of Fact Nos. 24-25); *Pa. P.U.C. v. PECO Energy Co. – Elec. Div.*, Docket No. R-2010-2161575, PECO St. No. 9 – Direct Testimony of Alan B. Cohn (Mar. 31, 2010), p. 24, submitted for the record as OCA Exh. No. KRP-4SR.

PECO's rate case. The base rates and TSC approved by the Commission became effective on January 1, 2011. As a result, on January 1, 2011, PECO began to recover PJM transmission-related costs, including RTEP charges, from default service customers, on a dollar-for-dollar basis, through the TSC. As previously explained, before it implemented its TSC, PECO had not included RTEP charges for recovery costs in any of the rates it charged to customers. I.D. at 15 (Findings of Fact Nos. 46-49); PECO St. No. 1, pp. 7-9; PECO Exh. Nos. JAB-1 and JAB-2.

PECO's NBT was implemented on June 1, 2015, to comply with the Commission's directive in the Company's third default service proceeding that certain PJM charges, including RTEP charges, should be recovered on a non-bypassable basis from all distribution customers rather than through PECO's bypassable TSC, which is billed only to default service customers. Accordingly, the NBT was established as a Section 1307 mechanism to provide for reconcilable, dollar-for-dollar recovery of the categories of transmission costs that the PUC ordered to be recovered on a non-bypassable basis, which included RTEP charges. I.D. at 11-12 (Findings of Fact No. 26); PECO St. No. 1, pp. 9-10.

In 2007, the FERC issued Order No. 494, which adopted a methodology for allocating RTEP costs among the PJM zones of PJM transmission owners, who, in turn, would have to recover those costs from other entities – principally LSEs.⁹ The entry of FERC Order No. 494 initiated a decade of litigation in which certain owners of transmission within PJM, including PECO, contested the RTEP cost allocation methodology the FERC had adopted. The FERC proceedings generated appeals decided by the United States Court of Appeals for the Seventh

⁹ *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007).

Circuit in 2009 and 2014.¹⁰ In its 2014 opinion,¹¹ the Seventh Circuit concluded that FERC's allocation method was not reasonable nor was it supported by the record evidence and, therefore, remanded the case to the FERC. The remand was resolved by the Settlement, which the FERC approved on May 31, 2018.¹² I.D. at 11 (Findings of Fact Nos. 22-23); PECO St. No. 1, pp. 11-12.

The Settlement implements a schedule of adjustments to PJM's prior-period billings for RTEP charges. These billing adjustments are based on a hybrid method of allocating costs for RTEP transmission enhancements that differs from the method used to calculate the bills PJM originally issued to comply with FERC Order No. 494. The total net bill credits generated by the Settlement are adjustments to RTEP charges PECO paid between June 1, 2007 and June 30, 2018. I.D. at 12 (Findings of Fact No. 22); PECO St. No. 1, pp. 12-13; PECO Exh. Nos. JAB-3 and JAB-4.

Under the Settlement, the differences between the prior allocation method and the Settlement allocation method are tracked for a "transitional period" (January 1, 2016 to June 30, 2018) and an "historical period" (from the initiation of RTEP charges in 2007 to January 1, 2016). For the transitional period, PJM tracked the aggregate differences, plus interest, between the previous RTEP charges and the Settlement allocations and published a summary of those adjustments by transmission zone on July 31, 2018. For the "historical period," which includes the period relevant to this case, the amounts reallocated in accordance with the Settlement and

¹⁰ See I.D. at 3-4 (detailing the proceedings before the FERC and the Seventh Circuit).

¹¹ *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 (7th Cir. 2009); *Ill. Commerce Comm'n v. FERC*, 756 F.3d 556 (7th Cir. 2014).

¹² *PJM Interconnection, L.L.C.*, Order on Contested Settlement, 163 FERC ¶ 61,168 (2018).

the corresponding billing adjustments were based on a “black box” settlement. I.D. at 12 (Findings of Fact Nos. 28-30); PECO St. No. 1, pp. 12-13; PECO Exh. No. JAB-3.

PECO will receive approximately \$83 million in total net credit adjustments to prior bills for both the transitional period and the historical period. Of that total, PECO will return to customers \$77.5 million, reflecting bill credits for RTEP charges imposed from and after January 1, 2011. I.D. at 13 (Findings of Fact Nos. 31-32); PECO St. No. 1, pp. 13-14.¹³

PECO’s NBT rate calculations did not reflect Settlement credits of \$5.5 million related to PECO’s payments of RTEP charges that had been included in bills from PJM for transmission service during the 2007-2010 period. Those credits, and the RTEP charges to which they apply, relate to the period that elapsed *before* PECO implemented its TSC and NBT adjustment clauses under Section 1307 that, for the first time, included a component to recover RTEP charges on a dollar-for-dollar, fully-reconcilable basis. I.D. at 13 (Findings of Fact No. 36). During the 2007-2010 period, the PJM RTEP charges were not included in PECO’s rates, and PECO did not collect revenues from its customers related to those charges. If the PJM RTEP charges had been properly calculated in 2007-2010, PECO would have received the full benefit of those reduced charges at that time. Under the Settlement, the difference between the charges PECO actually paid and the reduced charges it should have paid are just now being returned to PECO via the \$5.5 million net credit adjustment that is allocable to 2007-2010. *See* I.D., p. 26.

¹³ The NBT in effect from December 1, 2018 to June 1, 2019 included a reduction of \$63.2 million to the NBT costs otherwise recoverable by PECO to reflect PJM bill credits for the post-2010 period. This reduction consisted of credits PECO anticipated receiving by November 30, 2019. Post-2010 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 calculations of its NBT. In fact, approximately \$6.3 million of the \$14.3 million has already been returned to customers in PECO’s calculation of its NBT for the six-month period from June 1, 2019 to December 1, 2019, filed at Docket No. M-2019-3010032. *See* I.D. at 13 (Findings of Fact Nos. 33-34); PECO St. No. 1, pp. 15-19; PECO Exh. Nos. JAB-7 to JAB-10.

III. REPLIES TO OCA'S EXCEPTIONS

The OCA has lodged four exceptions to the Initial Decision.

In Exception No. 1, the OCA alleges that the ALJ erred by finding that the OCA – as the acknowledged Complainant in this case – bore the burden of proof. In addition to misstating the plain language of Section 315(a), the OCA's argument ignores the fact that, as the Initial Decision's detailed findings demonstrate, PECO presented evidence that would have carried the burden of proof even if it had been assigned to the Company. The burden of proof issue is procedural in nature and tangential to the principal arguments advanced in OCA Exception Nos. 2 and 3. For those reasons, the defects in the OCA's burden of proof argument are better understood if OCA Exception Nos. 2 and 3 are addressed first, as the Company does below.

In its Exception No. 2, the OCA misstates black-letter law in an attempt to circumvent the principle of finality embodied in Section 316 and the commission-made rate doctrine, which precludes retrospective adjustments to rates the Commission has determined are just and reasonable. The core of this argument is the OCA's erroneous contention that a 2014 decision of the U.S. Court of Appeals for the Seventh Circuit, which vacated a *FERC* decision, should be construed as a reversal of the *PUC*'s final (and unappealed) orders in PECO's 1989 base rate case and 1998 Restructuring proceeding holding that the Company's base rates – the same rates in effect between 2007 and 2010 – were just and reasonable.

In Exception No. 3, the OCA takes another tack in its attempt to evade the mandates of Section 316 and the commission-made rate doctrine. Irrefutable record evidence establishes that the RTEP charges imposed between 2007 and 2010 had not – indeed, could not – have been reflected in establishing PECO's 1989 base rates in effect during that period.¹⁴ Nonetheless, the

¹⁴ I.D. at 15-16 (Findings of Fact Nos. 47-56).

OCA makes the unprecedented and legally defective argument that PECO's approved rates should not be considered "commission-made" simply because PECO had "the opportunity" to ask for an increase in those rates to recover the admittedly unrecognized RTEP charges. There is no such exception to the preclusive effect of Section 316 and the commission-made rate doctrine. Exception No. 3 also conflates PECO's PUC-jurisdictional retail rates (the only rates in which PECO could recover RTEP charges it incurred as an LSE to serve its retail load)¹⁵ with its FERC-jurisdictional Network Integration Transmission Service ("NITS") rates. PECO charges its FERC-approved NITS rates *to other LSEs*, and those rates are not designed or intended to recover transmission charges, including RTEP charges, that PJM imposes on PECO in its capacity *as an LSE*.¹⁶

In Exception No. 4, the OCA explicitly acknowledges that it is abandoning an issue it previously made a key element of its case, namely, that the calculation of \$5.5 million of pre-2011 RTEP credits was not accurate or supported by record evidence. Nonetheless, the OCA unjustifiably criticizes the ALJ for addressing this issue. In so doing, the OCA tries to divert attention from the fact that it had vigorously and repeatedly contested the credit calculation throughout the evidentiary phase of this proceeding. The OCA did not address the issue at all in its Main Brief. Only in its Reply Brief did the OCA note in passing this major concession on its part. Given the OCA's belated acknowledgment that its prior position was indefensible, it is understandable that the ALJ would want to review the evidence and set forth findings and conclusions for the PUC's consideration. As the ALJ correctly found, the OCA's argument was unsustainable, unsupported and legally defective.¹⁷

¹⁵ I.D. at 9-10 (Findings of Fact Nos. 13-15).

¹⁶ I.D. at 10 (Findings of Fact Nos. 16-18) and 15-16 (Findings of Fact Nos. 50-53).

¹⁷ I.D. at 15 (Findings of Fact No. 57), 27-28 and 31 (Conclusion of Law No. 14).

A. The Seventh Circuit’s Opinion Upon Appeal Of FERC Order No. 494 Did Not Reverse The PUC’s Final Orders Finding That PECO’s Base Rates In Effect Between 2007 And 2010 Were Just And Reasonable And, Therefore, Were “Commission-Made” Rates (OCA Exc. 2)

The OCA filed Complaints at the Company’s NBT dockets that purported to challenge the Company’s calculations of its NBT for the six-month application periods beginning December 1, 2018 and June 1, 2019. The gravamen of the Complaints is that PECO’s NBT calculations should have included \$5.5 million of RTEP Settlement credits related to bills PJM issued for transmission service PECO obtained prior to January 1, 2011.

It is undisputed that neither the TSC nor the NBT was in effect until January 1, 2011. Accordingly, the billing periods to which the pre-2011 Settlement credits relate were never within any of the application or reconciliation (i.e., “e-factor”) periods of either PECO’s TSC or NBT. For that reason, the credits PJM issued for pre-2011 RTEP charges were not captured by any element of the PUC-approved formulas for calculating either the TSC or NBT set forth in PECO’s tariff.¹⁸ That is exactly what the PUC said in its Secretarial Letters issued on November 28, 2018 and May 30, 2019 where it found that the NBT charges calculated by PECO “are consistent with [PECO’s] tariff.” Significantly, the record evidence also shows that prior to January 1, 2011, PECO recovered transmission costs (if they were recovered at all) 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. Indeed, the OCA concedes all of the foregoing points:

¹⁸ PECO would note that it has taken a consistent approach in the application of reconcilable adjustment clauses. Thus, when PECO filed the quarterly adjustment to its Generation Supply Adjustment (“GSA”) for the period June 1, 2020 through August 31, 2020, it did not include for recovery \$941,000 in PJM back-billings for transmission line losses that occurred in March 2009, which was prior to PECO having implemented a GSA. *See Re PECO Energy Co. Generation Supply Adjustment*, Supplement No. 29 to PECO Tariff Electric No. 6, Docket No. P-2016-2534980 (Apr. 15, 2020).

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.¹⁹

For the foregoing reasons, the OCA's Complaints are not – nor could they be – a challenge to PECO's NBT. To the contrary, the OCA's Complaints ask the PUC to order PECO to flow through to customers pre-2011 Settlement credits related to RTEP charges that were not recovered – indeed, could not have been recovered – in either the TSC or NBT. During the relevant period, PECO recovered its transmission costs (if at all) in its base rates, not under any form of reconcilable adjustment clause.

In sum, the OCA's Complaints ask the PUC to do something that both Section 316²⁰ and well-established Pennsylvania appellate precedent prohibits – namely, to adjust previously approved, Commission-made rates to retroactively refund a portion of the revenues PECO billed and collected under those rates a decade or more ago. As the ALJ correctly determined,²¹ the relief the OCA seeks – a refund based on a retrospective reduction of previously-approved base rates – is prohibited by the commission-made rate doctrine that was established by the Pennsylvania Supreme Court in *Cheltenham & Abington Sewerage Co. v. Pa. P.U.C.*,²² reinforced by the Pennsylvania Superior Court in *West Penn Power Co. v. Pa. P.U.C.*,²³ and

¹⁹ OCA Exc., p. 15. Further on the same page, the OCA reiterated its concession, stating that there was a “lack of an automatically adjusting surcharge designed to provide full and complete recovery of RTEP expense during the time-period in question.”

²⁰ Section 316 enshrines the commission-made rate doctrine in the Code by providing in pertinent part as follows: “Whenever the commission shall make any . . . finding, determination or order, the same . . . shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” See Section 1309 (providing that even where the Commission finds an existing rate unjust and unreasonable, a change in that rate can be effective prospectively only).

²¹ I.D. at 23-26.

²² 25 A.2d 334, 337 (Pa. 1942).

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

repeatedly applied by the Commission itself.²⁴ The unfairness of retroactively adjusting base rates that the PUC found to be just and reasonable is compounded in this case because the bill credits at issue apply to RTEP charges that were never included in the revenue requirement used to establish the base rates the Company charged to customers during the 2007-2010 period.

The OCA acknowledges, as it must, that the doctrine of commission-made rates prohibits retroactive adjustments to base rates that the Commission found and determined to be just and reasonable.²⁵ The OCA also does not dispute the ALJ's finding that PECO's pre-2011 base rates were established in 1989, by a final Order, in which the PUC found and determined that those rates were just and reasonable.²⁶ The OCA contends, however, that the commission-made rate doctrine does not apply to PECO's pre-2011 base rates because the Seventh Circuit's 2014 decision found that the RTEP cost allocation method the *FERC* used to establish *FERC*-jurisdictional rates was unreasonable.²⁷

The OCA's argument is untenable on its face. The Seventh Circuit did not find PECO's base rates to be unjust and unreasonable – only the PUC or a Pennsylvania appellate court reviewing a PUC decision can do that. Thus, Section 316 provides that a Commission “finding, determination or order . . . shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” Section 316 clearly makes the Commission's

²⁴ See, e.g., *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) (“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 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).”).

²⁵ See OCA Exc., pp. 11-12.

²⁶ See *id.* at 16.

²⁷ *Id.* at 12-13.

“finding, determination or order” the antecedent of “unless set aside, annulled or modified on judicial review.” In other words, the Commission’s “finding, determination or order” (in this case the PUC’s final orders approving PECO’s base rates in 1989 and 1999) remains “conclusive upon all parties affected thereby” unless a court sets aside, annuls or modifies *that* finding, determination or order.

The PUC, not the Seventh Circuit or the FERC, has exclusive subject-matter jurisdiction to adjudicate the justness and reasonableness of PECO’s rates.²⁸ And that is what the Commission did in its 1989 and 1999 final orders, which no court ever set aside, annulled or modified and which remained in effect until January 1, 2011. The Seventh Circuit, in 2014, did not even purport to set aside, annul or modify any order of the PUC, let alone Commission orders entered a decade or more earlier that found PECO’s base rates in effect between 2007 and 2010 to be just and reasonable. Moreover, PECO’s base rates during the relevant period were established long before PJM ever began to impose RTEP charges and, therefore, could not have included those charges. Thus, it defies logic to assert that the Seventh Circuit, by invalidating the FERC’s method of allocating RTEP costs, could undermine the justness and reasonableness of PECO’s base rates that never reflected any of those costs.

The OCA also tries to support its argument by reference to *Pennsylvania Power Co. v. Pa. P.U.C.*²⁹ In that decision, the Commonwealth Court simply acknowledged U.S. Supreme Court precedent that a state public utility commission cannot deny a utility’s request to recover charges imposed under a FERC-established “filed rate” for wholesale power purchases if that

²⁸ *County of Chester v. Phila. Elec. Co.*, 218 A.2d 331, 332-33 (Pa. 1966) (the General Assembly granted the PUC “all-embracing regulatory jurisdiction” over public utilities that encompasses rates, service and rules of service); *York Water Co. v. York*, 95 A.2d 396, 396-97 (Pa. 1915) (“[T]he legislative intention was to make the Public Service Act the supreme law of the State in the regulation and supervision of public service corporations . . .”).

²⁹ 561 A.2d 43, 50 (Pa. Cmwlth. 1989). *See* OCA Exc., p. 24.

power is needed to serve the utility's retail customers. The OCA tries to use *Pennsylvania Power* to stretch the "filed rate" doctrine beyond recognition by arguing that a "filed-rate" is effectively self-implementing. According to the OCA, without any independent action by a state commission, the "filed rate" doctrine could automatically convert state-jurisdictional utility rates from just and reasonable to unjust and unreasonable if the FERC (or an appellate court reviewing a FERC order) changes a variable that arguably had been used to establish the revenue requirement underlying the utility's retail rates.

The OCA is wrong. The "filed rate" doctrine does not give the FERC (or federal courts reviewing FERC orders) plenary authority to decide the justness and reasonableness of retail rates that are within the jurisdiction of a state regulatory commission. The best authority for that proposition is the holding of *Pennsylvania Power* itself. In that case, the Commonwealth Court *rejected* the utility's claim that it was entitled to recover the cost of power purchased at a FERC-approved wholesale rate. The Court agreed with the Commission that there was a valid state law basis for *not* automatically imposing the FERC's decision on the PUC.³⁰

Furthermore, in *Cheltenham*, the Pennsylvania Supreme Court rejected the fundamental premise for the OCA's argument, namely, that because one variable underlying a Commission rate determination may have changed, PUC-approved rates automatically cease to be just and reasonable and lose their status as "commission-made" rates:

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

³⁰ In *Pennsylvania Power*, the Court applied Commonwealth Court and U.S. Supreme Court precedent holding that the "filed rate" doctrine does *not* preempt a state commission's right to determine if a utility made a prudent decision to purchase power from a particular seller, even if the seller was charging a "filed rate." 561 A.2d at 50-51. In short, some state action is required.

variable and may not stand a pragmatic test, a situation which is always implied.³¹

Notably, the OCA's premise, which *Cheltenham* categorically rejects, is entirely inapplicable to this case, in any event. The Seventh Circuit's decision vacating FERC Order No. 494's method of allocating RTEP costs could not have affected any variable underlying PECO's base rates charged between 2007 and 2010. Those rates were established before PJM ever began imposing RTEP charges and, therefore, as the ALJ correctly determined, RTEP charges were never reflected in any element of PECO's rates before January 1, 2011.³²

In summary, notwithstanding the dockets at which they were filed, the OCA's Complaints challenge PECO's base rates in effect between 2007 and 2010. Those rates are "commission-made" and, as such, cannot be reduced retroactively as the OCA is seeking by demanding that PECO "refund" \$5.5 million of after-the-fact reductions to PECO's pre-2011 bills for RTEP charges. Accordingly, the ALJ properly concluded that the Commission cannot lawfully grant the relief requested in the OCA's Complaints and the PUC should deny OCA's Exception No. 2.

B. PECO Is Not Seeking To Recover A Deficiency In Its Pre-2011 Base Rates As The OCA Contends And, Therefore, The OCA's Claim That PECO "Had The Opportunity To Recover RTEP Charges During The 2007-2010 Period" Is Not Relevant To Any Issue In This Case (OCA Exc. 3)

OCA Exception No. 3 distorts the facts and seriously mischaracterizes PECO's position. PECO is not seeking to adjust prior-period rates to make up for any alleged deficiency in

³¹ *Cheltenham*, 25 A.2d at 337.

³² See I.D. at 15-16 (Findings of Fact Nos. 41-48), 26 and 31 (Conclusions of Law No. 16).

recovery of RTEP charges, as the OCA erroneously contends.³³ As a consequence, whether or not PECO had “the opportunity” to increase its rates during the 2007-2010 period is not relevant to any issue in this case and, more importantly, does not allow the OCA to bypass the prohibition against retrospective adjustments of PECO’s PUC-approved pre-2011 base rates imposed by Section 316 and the commission-made rate doctrine.

As previously explained, PECO did not have a TSC or NBT in effect prior to January 1, 2011, and the base rates PECO charged between 2007 and 2010 were established in 1989 based on a revenue requirement that did not include PJM’s RTEP billings. The credits at issue in this case apply to transmission service PECO obtained prior to 2011. Therefore, it would be entirely inappropriate to refund credits related to charges that were not reflected in the rates customers paid. Moreover, that outcome is mandated by the principle of finality embodied in Section 316 and the commission-made rate doctrine, which categorically prohibit the retrospective reduction of rates the Commission previously found to be just and reasonable. Indeed, Section 316 and the commission-made rate doctrine exist to avoid embroiling the Commission and parties in disputes about what may or may not have been recovered in rates charged to customers in the past if those rates (like PECO’s 2007-2010 base rates) had previously been determined to be just and reasonable.

As the evidence clearly shows, the theory underlying the OCA’s refund demand is that the PUC-approved base rates PECO charged between 2007 and 2010 were made retroactively unjust and unreasonable by the Seventh Circuit’s 2014 remand and the FERC’s 2018 approval of the RTEP Settlement. That position is wrong as a factual matter because, as the record shows,

³³ See OCA Exc., p. 18 (characterizing PECO’s position as an attempt to impose costs on customers today, through the NBT, because its base rates during the 2007-2010 period were “insufficient to recover PECO’s RTEP expense”).

PECO's pre-2011 rates were established long before PJM began imposing RTEP charges. It is also foreclosed as a matter of law by Section 316 and the commission-made rate doctrine. The ALJ succinctly captured these defects in the OCA's position, as follows:

[I]f 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. Simply because the [FERC] 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.³⁴

Faced with PECO's complete defense to its Complaints, the OCA tries to turn the facts on their head by suggesting that PECO, by opposing the OCA's refund demand, is now trying to retroactively adjust its 2007-2010 base rates to recover a deficiency created by the absence of RTEP charges from the revenue requirement used to establish those rates. Thus, the OCA's argument is that PECO should give customers credits against RTEP charges simply because it "had the opportunity" to recover those charges by seeking an increase in its rates before January 1, 2011. However, even if one accepts at face value the OCA's contention that PECO "had the opportunity" to raise its rates before January 1, 2011, it is undisputed that PECO did not increase its base rates or implement its TSC until January 1, 2011. And, as the OCA tacitly acknowledges by contending that PECO "had the opportunity" to seek recovery of RTEP charges before 2011, PECO's rates in effect during the 2007-2010 period were not designed to recover those charges.

³⁴ I.D. at 26.

Thus, the OCA's argument comes full circle. In short, the OCA is proposing that PECO refund to customers \$5.5 million of "credits" against bills that were paid by PECO but had not been reflected in rates charged to customers during the period to which those credits relate. Whether PECO "had the opportunity" to raise rates before January 1, 2011 is irrelevant to the issues in this case and, in any event, does not preclude the application of Section 316 and the commission-made rate doctrine to prohibit the retrospective adjustment of PECO's pre-2011 base rates that OCA is proposing as the basis for its refund demand.

In its Exception No. 3 (p. 18), the OCA quotes the testimony of its witness suggesting that PECO had the "opportunity" to recover RTEP charges through its FERC jurisdictional NITS rates. That assertion is entirely incorrect. PECO charges its FERC-approved NITS rates *to other LSEs* to recover the costs of PECO's transmission facilities within the PECO Zone that PECO uses to furnish transmission service to others. PECO's NITS rates are not designed or intended to recover RTEP charges that PJM imposes on PECO in its capacity *as an LSE* to recover the costs of transmission facilities owned and operated by other transmission owners to furnish service to PECO.³⁵ Those charges are recoverable only from PECO's retail customers, on whose behalf those charges are incurred.³⁶

³⁵ I.D. at 10 (Findings of Fact Nos. 16-18) and 15-16 (Findings of Fact Nos. 50-53).

³⁶ Although the OCA did not argue the point anywhere in Exception Nos. 1-4, its "Introduction" (p. 3) avers that PECO's FERC jurisdictional (i.e., NITS) revenues exceeded its FERC-jurisdictional revenue requirement by a large enough margin to compensate PECO for RTEP charges PECO did not recover in its PUC-jurisdictional retail rates prior to 2011. The OCA's averment is wrong for several reasons: (1) it is based on a comparison of 1994 FERC revenue requirement to 2007-2010 FERC revenues – an obvious "apples-to-oranges" comparison; (2) FERC did not find PECO's FERC revenues excessive during the 2007-2010 period; and (3) as a matter of law, FERC-jurisdictional revenues cannot be appropriated to compensate a utility for costs it incurs to furnish state-jurisdictional service. *See* PECO Main Brief, pp. 20-22; PECO Reply Brief, pp. 7-9; I.D. at 26-27.

C. The ALJ Properly Assigned The Burden Of Proof To The OCA (OCA Exc. 1)

As previously established, the OCA's Complaints, although filed at the Company's NBT dockets, challenge the justness and reasonableness of PECO's base rates in effect during the 2007-2010 period. Consequently, the OCA's contention that it does not bear the burden of proof is contradicted by the plain language of Sections 315(a) and 332(a).

Under Section 315(a),³⁷ a utility has the burden of proof to establish the justness and reasonableness of its *existing* rates if – and only if – the Commission has initiated an investigation of those rates.³⁸ The Commission did not initiate any investigation of PECO's base rates in effect between 2007 and 2010. The OCA's Complaints are directed against PECO's then-existing base rates, as even the OCA was forced to concede in its Exceptions (p. 15), where it acknowledged that “there was no NBT or TSC in effect from 2007 to 2010.” Consequently, Section 315(a) does not assign the burden of proof to PECO. Rather, the OCA, as “the proponent of a rule or order” bears the burden of proof under Section 332(a). All of the cases cited by the OCA involved Commission-initiated investigations of proposed and existing rates. The OCA did not cite a single case where the burden of proof was placed upon a utility in a complaint proceeding challenging an existing rate where the PUC did not initiate an investigation.

³⁷ Section 315(a) provides in pertinent part: “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.”

³⁸ See James H. Cawley & Norman J. Kennard, *A Guide To Utility Ratemaking Before The Pennsylvania Public Utility Commission* (2018), p. 48: “Regarding rate proceedings, it is important to distinguish between proposed rates (i.e., when a utility files for a rate increase) and existing rates (i.e., rates contained in already approved tariffs). If the Commission on its own motion questions the justness and reasonableness of any rate, the utility has the burden of proving that the rate is just and reasonable under both circumstances. If anyone other than the Commission complains about a rate, the utility has the burden of proof only if the rate is a proposed one. If the rate is an existing rate (i.e., Commission made), the complainant has the burden of proof.”

The OCA's Exception No. 1 is incorrect. Just as it did in its Exception No. 3, the OCA tries to turn the facts on their head by alleging that PECO has the burden of proof because it is "proposing" to "retain" bill credits that, according to the OCA, should be returned to customers. That is clearly not the case here.

PECO is not proposing to retain anything to which it is not entitled. As previously explained, the credits at issue relate to periods that preceded the implementation of both the TSC and the NBT. Thus, neither the application period nor the reconciliation ("e-factor") period of either of those Section 1307 clauses included the years 2007-2010 to which PJM's RTEP credits relate. In other words, applying the TSC and NBT exactly as they are written and appear in PECO's tariff, there is no element of the TSC or NBT formulas that would capture any of the pre-2011 RTEP credits. And for precisely that reason, the PUC's Secretarial Letters concluded that PECO's NBT calculations "are consistent with the tariff." As even the OCA acknowledges (*see* OCA Exc., p. 15), it is challenging PECO's base rates in effect during the 2007-2010 period, which were both "existing" and "commission-made" rates. For that reason, the case discussed by the OCA on page six of its Exceptions³⁹ is inapplicable. That decision adjudicated a challenge to a utility-proposed Section 1307 automatic adjustment clause, not a complaint against existing, commission-made base rates unaccompanied by any PUC investigation, as is the case here.

In the final analysis, however, PECO presented far more than the preponderance of evidence⁴⁰ needed to support its position on contested factual issues even if it bore the burden of proof. This is evident from the summary of the evidence provided in the Initial Decision and

³⁹ *See Petition of Metropolitan Edison Co. for Approval of a Distribution Sys. Improvement Charge*, Docket Nos. P-2015-2508942 et al., 2018 Pa. PUC LEXIS 147 at *24-27 (Apr. 19, 2018).

⁴⁰ *See* I.D. at 17.

from the significant concessions made by the OCA itself, which have been discussed previously in these Replies. Accordingly, while the ALJ was entirely correct in assigning the burden of proof to the OCA, the record evidence shows that PECO would prevail even if it were forced to carry the burden of proof in this case.

D. The OCA Vigorously Litigated The Accuracy Of PECO's Calculation Of RTEP Credits Attributable To The 2007-2010 Period, And The ALJ Was Correct To Review The Evidence On This Issue In The Initial Decision Notwithstanding The OCA's Belated Abandonment Of Its Original Position (OCA Exc. 4)

In its Exception No. 4, the OCA criticizes the ALJ for addressing the accuracy of PECO's calculation of \$5.5 million of pre-2011 RTEP bill credits because the OCA "did not challenge PECO's calculation of the portion of the Settlement refunds related to the 2007 through 2010 period."⁴¹ The OCA's criticism is not justified.

The OCA's Exception fails to mention that the OCA vigorously contested the accuracy of PECO's calculation throughout the evidentiary phase of the case and, for that reason, PECO addressed this matter at length in its testimony and Main Brief (pp. 25-27). The OCA did not discuss the issue in its Main Brief. Instead, it waited until the Reply Brief-stage to abandon its earlier position and note that "the OCA accepts PECO's use of time-segmented data provided by PJM as a basis for calculating RTEP charges for the period 2007-2010."⁴² Despite the OCA's attempt to minimize its importance, this was a major concession on a disputed issue that, until filing its Reply Brief, the OCA decided to keep in play. Under these circumstances and given the OCA's belated abandonment of its position, the ALJ was clearly correct to go the extra mile

⁴¹ OCA Exc., p. 21.

⁴² *Id.*

to review the record evidence, analyze applicable law and offer a well-reasoned and well-supported recommendation for the PUC's consideration.

Despite conceding this issue, the OCA complains that the ALJ allegedly treated PECO and the OCA inconsistently.⁴³ Specifically, the OCA highlights the ALJ's determination that the OCA's hyper-technical critique of PECO's calculation of pre-2011 RTEP credits sought a degree of "mathematical certitude" that is not required for reasonable decision-making on rate-related issues.⁴⁴ The OCA does not identify any error in this aspect of the Initial Decision. Instead, it claims that the ALJ applied a different standard to the OCA by allegedly requiring greater "mathematical certitude" to support the OCA's position.⁴⁵ The ALJ did no such thing.

As the Initial Decision makes clear, the ALJ observed – correctly – that at the same time the OCA was questioning the accuracy of PECO's calculation, it did not offer an alternative: "OCA did not propose any alternative approach to what could be considered a reasonable amount of Settlement credits related to the 2007-2010 period."⁴⁶ The ALJ was not holding the parties to inconsistent standards. She was simply identifying the actual positions of the parties. PECO presented a reasonable calculation of pre-2011 RTEP bill credits. The OCA argued that PECO's calculation should be rejected because it was allegedly imprecise. Yet the OCA did not do its own calculation, suggest a different calculation methodology or offer advice on how PECO's calculation could be refined. Thus, despite the OCA's protestations, the ALJ was correct that the OCA was, in fact, arguing that because PECO's calculation, while reasonable, was not as precise as the OCA's witness desired, that calculation should simply be discarded

⁴³ *Id.*, pp. 22-23.

⁴⁴ *Id.* See also I.D. at 27-28.

⁴⁵ OCA Exc., p. 22.

⁴⁶ I.D. at 27.

notwithstanding the absence of any plausible alternative. The ALJ understandably rejected the OCA's position and the Commission should as well.

IV. CONCLUSION

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

Respectfully submitted,



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

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

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Counsel for PECO Energy Company