

generation suppliers (“EGS”) about their electric supply prices and contracts with EGS are unlawful; and directing PPL to immediately cease sending these communications.

On December 8, 2022, the Office of Consumer Advocate (“OCA”) filed a Notice of Intervention and Public Statement. The OCA filed an Answer to the Petition on December 15, 2022. In its Answer, OCA requested that the Commission deny the Petition and asserted that the communications from PPL to supply customers of EGS were not illegal or otherwise in violation of Commission orders.

On December 20, 2022, PPL filed its Answer to the Petition. In its Answer, PPL requested that the Commission deny the Petition and asserted that its communications to supply customers of EGS were not illegal or otherwise in violation of Commission orders.

Separately on December 20, 2022, the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (“CAUSE-PA”) filed its Answer in Opposition and Petition to Intervene of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania. In its Answer, CAUSE-PA requested that the Commission deny the Petition and asserted that the communications from PPL to supply customers of EGS were not illegal or otherwise in violation of Commission orders.

Additionally, on December 20, 2022, Duquesne Light Company (“DLC”) filed its Petition to Intervene and Preliminary Position of Issues of Duquesne Light Company. In its response, DLC asserts that the Petition does not demonstrate that PPL’s communications are at odds with prior Commission orders.

On January 20, 2023, PECO Energy Company (“PECO”) filed a Petition to Intervene in this proceeding.

On April 18, 2023, an Initial Call-In Telephonic Prehearing Conference Notice was issued setting a Prehearing Conference for May 11, 2023 at 9:00 a.m. and assigning Deputy

Chief Administrative Law Judge Christopher P. Pell and Administrative Law Judge Chad Allensworth as the presiding officers.

On April 25, 2023, we issued a Prehearing Conference Order setting forth various rules that would govern the Prehearing Conference.

The Prehearing Conference was held as scheduled on May 11, 2023. Counsel for RESA/NRG, PPL, OCA, CAUSE-PA, DLC and PECO participated. During the Prehearing Conference, the parties agreed to a litigation schedule. The litigation schedule was subsequently memorialized in our Prehearing Order #1 issued on May 19, 2023.

In accordance with the litigation schedule, on July 25, 2023, RESA/NRG served the Direct Testimony of Joseph Olikier, RESA/NRG St. No. 1.

On August 28, 2023, NRG filed its Petition of NRG Energy, Inc. for Leave to Withdraw (“Withdrawal Petition”), leaving RESA as the sole Petitioner in this matter. In its Withdrawal Petition, NRG asserted that it no longer desires to pursue the Petition due to shifting corporate priorities and a desire to conserve resources that would otherwise be incurred to litigate this case.

On September 7, 2023, both PPL and CAUSE-PA filed their respective Answers in opposition to NRG’s Withdrawal Petition. In PPL’s Answer to the Withdrawal Petition, PPL asserted that NRG failed to establish that its withdrawal would be in the public interest and would not substantially prejudice other parties. PPL further claimed that allowing NRG to withdraw would deny parties the right to engage in meaningful and relevant discovery.

In its Answer to the Withdrawal Petition, CAUSE-PA asserted that allowing NRG to withdraw will hamper the ability to investigate, analyze and respond to the allegations after already diverting CAUSE-PA’s resources to this matter. However, CAUSE-PA did assert that it would support a joint request from both RESA and NRG to withdraw the Petition in its entirety.

On September 8, 2023, OCA filed a Letter of Support of the Answers filed by PPL and CAUSE-PA in opposition to NRG's Withdrawal Petition. PPL, CAUSE-PA, and the OCA all requested that the current litigation schedule be suspended pending final disposition of NRG's Withdrawal Petition. Additionally, by email received on September 11, 2023, RESA/NRG advised that it did not object to the proposal to hold this matter in abeyance pending a Commission ruling on NRG's Withdrawal Petition.

On September 12, 2023, we issued an order suspending the litigation schedule set forth in our Prehearing Order #1, dated May 19, 2023, pending final disposition of NRG's Withdrawal Petition. The order further provided that upon final disposition of NRG's Withdrawal Petition, a second prehearing conference will be convened to establish a revised litigation schedule.

As discussed below, the Petition of NRG Energy, Inc. for Leave to Withdraw will be granted.

FINDINGS OF FACT

1. Petitioners in the underlying action are Retail Energy Supply Association, which is an association of diverse competitive energy suppliers and NRG Energy, Inc. which is an electricity supply retailer. (Petition ¶¶ 9-10).
2. Petitioners sell electric generation services to retail customers via electric supply contracts. (Petition ¶¶ 9-10).
3. PPL Electric Utilities is an electric distribution company, which delivers electricity to all customers on its distribution systems and also provides default service to customers who do not purchase electric generation services elsewhere. (Petition ¶ 11).

4. The Intervenors are the Office of Consumer Advocate, the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania, the Duquesne Light Company and PECO Energy Company.

5. Petitioners aver that, on November 2, 2022, they became aware of PPL sending communications to shopping EGS customers about their electric supply prices in June 2021, November 2021, October 2022 and November 2022. (Petition ¶ 1; Appendixes A, B, and C).

6. On November 30, 2022, Petitioners filed a Petition for a Declaratory Order seeking a determination that communications sent by PPL to supply customers of EGS about their electric supply prices and contracts are unlawful, and directing PPL to immediately cease sending these communications.

7. On December 15, 2022, OCA filed its Answer in opposition to the Petition for Declaratory Order.

8. On December 20, 2022, PPL and CAUSE-PA filed their respective Answers in opposition to the Petition for Declaratory Order.

9. On May 11, 2023, RESA/NRG, PPL, OCA, CAUSE-PA, DLC and PECO participated in a Prehearing Conference and agreed to a litigation schedule.

10. On July 25, 2023, in accordance with the litigation schedule, RESA/NRG served the Direct Testimony of Joseph Olikier, RESA/NRG St. No. 1.

11. On August 28, 2023, NRG filed a Petition for Leave to Withdraw as Petitioner, which asserted that NRG no longer desired to pursue the Petition for Declaratory Order due to shifting corporate priorities and a desire to conserve resources that would otherwise be incurred to litigate this case.

12. RESA did not oppose nor support NRG's Withdrawal Petition.

13. On September 7, 2023, both PPL and CAUSE-PA filed their respective Answers in opposition to NRG's Withdrawal Petition.

14. On September 8, 2023, OCA filed a Letter of Support of the Answers filed by PPL and CAUSE-PA in opposition to NRG's Withdrawal Petition.

DISCUSSION

Section 5.94(a) of the Commission's regulations provides that a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon other parties. 52 Pa. Code § 5.94(a). Section 5.94 further provides that the petition must set forth the reasons for the withdrawal and that a party may object to the petition to withdraw within ten days. *Id.* Finally, Section 5.94 also provides that, after considering the petition, any objection thereto, and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted. *Id.*

In this case, Petitioners asked the Commission to declare that communications sent by PPL to supply customers of EGS about their electric supply prices and contracts with EGS are unlawful, and to direct PPL to immediately cease sending these communications. Specifically, Petitioners assert that PPL's communications violate the Commission's prior Order dated December 17, 2020 in *Petition of PPL Electric Utilities Corporation for Approval of its Default Service Plan for the Period June 1, 2021 Through May 31, 2025*, Docket No. P-2020-3019356 (Opinion and Order entered Dec. 17, 2020) ("PPL DSP 5 Order"). The PPL DSP 5 Order rejected a proposal by PPL to modify its customer referral Standard Offer program to implement a new, two-step communication process, which was intended to inform customers about their shopping options after expiration of a customer's Standard Offer Program Contract.

In its Withdrawal Petition, NRG argued that it no longer desires to pursue the Petition for Declaratory Order due to shifting corporate priorities and a desire to conserve

resources that would otherwise be incurred to litigate this case.² NRG claimed that: (a) it should not be required to expend resources to remain in a proceeding that was jointly filed with another entity; (b) the proceeding will not be harmed by its withdrawal because RESA remains a Petitioner; and (c) other parties who believe PPL’s communications are a violation are free to file their own petitions.^{3, 4}

Multiple parties contest NRG’s Withdrawal Petition in this case. In its answer opposing NRG’s Withdrawal Petition, PPL asserted that allowing NRG to withdraw would substantially prejudice other parties and would not be in the public interest.⁵ Specifically, PPL argued that NRG’s lone reason provided for withdrawal listed as “shifting of corporate priorities and a desire to conserve the resources that would otherwise be incurred to litigate this proceeding” is insufficient. PPL also claimed that allowing NRG to withdraw would affect the entire proceeding as PPL does not believe that RESA would have standing to continue the current litigation on its own.⁶

PPL further cited that NRG’s withdrawal should be denied because it would deny parties meaningful and relevant discovery that could be used to defend PPL’s communications with shopping customers.⁷ In support of these averments, PPL points to the fact that NRG filed the Withdrawal Petition after serving deficient and non-responsive answers to PPL’s discovery, and PPL would have to obtain subpoenas to obtain the necessary information and documents from NRG if it is allowed to withdraw as a party.⁸ Finally, PPL stated that it is too late into the

² Withdrawal Petition ¶ 8.

³ *Id.* at ¶¶ 13-15.

⁴ RESA did not support or oppose NRG’s Withdrawal Petition.

⁵ *See* Answer of PPL Electric Utilities Corporation in Opposition to NRG Energy, Inc’s Petition for Leave to Withdraw as a Petitioner (“PPL Answer to Withdrawal Petition”), p.1. PPL asserted that withdrawal of the entire Petition by both RESA and NRG would be in the public interest. *See* PPL Answer to Withdrawal Petition ¶ 28-29.

⁶ *Id.* at ¶ 27.

⁷ *Id.* at ¶ 32.

⁸ *Id.* at ¶¶ 33, 40.

proceedings to allow NRG to withdraw, pointing to the Withdrawal Petition being filed 271 days after filing the initial Petition and 34 days after submission of RESA/NRG's Direct Testimony.⁹

In CAUSE-PA's answer opposing NRG's Withdrawal Petition, CAUSE-PA asserted that allowing NRG to withdraw would materially prejudice the other parties and would not be in the public interest.¹⁰ Specifically, CAUSE-PA argued that allowing NRG to withdraw will prevent it from being able to examine the veracity of NRG's assertions and RESA may not have the equivalent knowledge of the impact as the remaining Petitioner.¹¹ CAUSE-PA further asserted that NRG's attempt to withdraw seeks to prevent compelled disclosure of information that directly affects the issue in the case.¹² CAUSE-PA also claimed that NRG's attempt to withdraw this late into the proceeding is prejudicial to the parties, citing specifically to the need to assign resources to address the Withdrawal Petition during the limited window to investigate and analyze NRG's claims and draft direct testimony.¹³

The final response to NRG's Withdrawal Petition was a letter from OCA indicating that, based on the reasons presented by PPL and CAUSE-PA in their answers opposing the Withdrawal Petition, OCA opposes NRG's Withdrawal Petition as well.

NRG's Withdrawal Petition will be granted because, despite the stated opposition, it is in the public interest to allow NRG to withdraw as a petitioner in this proceeding, and the action will not unduly prejudice the parties.

⁹ *Id.* at ¶¶ 43-46.

¹⁰ *See* Answer of the Coalition for Affordable Energy Services and Energy Efficiency in Pennsylvania in Opposition to the Petition for Leave to Withdraw of NRG Energy, Inc. ("CAUSE-PA Answer to Withdrawal Petition"), p.1. CAUSE-PA asserted that withdrawal of the entire Petition by both RESA and NRG would be in the public interest. *See* CAUSE-PA Answer to Withdrawal Petition ¶ 17.

¹¹ *See* CAUSE-PA Answer to Withdrawal Petition ¶ 12.

¹² *Id.* at ¶¶ 13, 19.

¹³ *Id.* at ¶ 18.

The Commission recently addressed a situation where a Petition to Withdraw was contested. *Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network*, Docket No. P-2021-3025296 (Opinion and Order entered July 20, 2022) (“*DRIVE*”). In *DRIVE*, DRIVE filed a Petition for Declaratory Order seeking a Commission declaration that the expanded network infrastructure it intended to construct and operate in its expanded member counties’ borders, referred to by DRIVE as its “Expansion Project,” was not subject to, or in the alternative had complied with, Section 3014(h) of the Public Utility Code (“Code”), 66 Pa. C.S. § 3014(h), and that the Expansion Project would not subject it to the Commission’s jurisdiction as a public utility.¹⁴ Following DRIVE’s Petition, several Rural Local Exchange Companies (“RLEC”) filed an Answer in opposition to DRIVE’s Declaratory Petition covering the Expansion Project.¹⁵ The matter was subsequently assigned to the Office of Administrative Law Judge (“OALJ”) for disposition.

The presiding Administrative Law Judge (“ALJ”) conducted a prehearing conference which was attended by DRIVE, the RLECs, the OCA, Verizon, and the United Telephone Company of Pennsylvania LLC d/b/a CenturyLink.¹⁶ None of the parties expected to call witnesses, and no party requested a hearing. At the request of the parties, the ALJ deferred establishing a hearing schedule to allow time for settlement discussions. DRIVE subsequently filed a status report indicating that settlement discussion had reached an impasse and notifying the ALJ that DRIVE would seek to withdraw the Petition for Declaratory Order. As indicated, DRIVE filed a Withdrawal petition, asserting that it no longer wished to pursue its Declaratory Order, and that it would be in the public interest to allow it to withdraw.¹⁷ Specifically, DRIVE argued that: (1) it no longer sought declaratory relief from the Commission because it did not wish to incur the additional expense of a trial, review and potentially subsequent litigation, (2) where a party ceases to ask for a declaratory order, an order granting or denying the declaration would be an ill-granted advisory opinion and (3) the petition was a voluntary filing and public

¹⁴ *Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network*, Docket No. P-2021-3025296 (Opinion and Order entered July 20, 2022) (“*DRIVE*”) at 2.

¹⁵ *DRIVE* at 3.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

interest favors permitting withdrawal to avoid discouraging parties from seeking declaratory relief.¹⁸

The RLECs subsequently filed an Answer in Opposition to DRIVE's Withdrawal Petition.¹⁹ Specifically, the RLECs argued that the issues raised would not go away with DRIVE's withdrawal and that avoidance of the issue raised in DRIVE's Petition was not in the public interest.²⁰

The ALJ issued a Decision granting Drive's Withdrawal Petition. Exceptions to the decision were filed. Upon review, the Commission considered the existing record, which included the pleadings and the transcript for two prehearing conferences. The Commission also examined several factors to determine whether to grant a contested petition to withdrawal. The five factors examined in *DRIVE* were: (1) whether the controversy remains unresolved upon granting the withdrawal, (2) administrative efficiency, (3) expected additional litigation expenses where the record is substantially made, (4) potential for wider participation by other parties in another proceeding, and (5) additional public policy considerations. The Commission concluded the weight of the public interest analysis fell against granting DRIVE's Withdrawal Petition. We will evaluate NRG's Withdrawal Petition pursuant to these same factors.²¹

Examining the first factor, which is whether the controversy remains unresolved upon granting the withdrawal, the current case differs from *DRIVE*. In *DRIVE*, the Commission opined that withdrawal is not in the public interest when the controversy remains after the withdrawal.²² Because *DRIVE* was the lone Petitioner in the declaratory action, permitting *DRIVE* to withdraw meant that the controversy would remain unresolved and unsettled, which in

¹⁸ *DRIVE* at 7.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 8-9.

²¹ *Id.* at 33-47.

²² *Id.* at 37.

turn would result in the issues needing to be regenerated in another proceeding.²³ In this case, it is clear that the controversy at issue will remain if the Commission grants NRG's request to withdraw, similar to the situation in *DRIVE*.²⁴ However, unlike in *DRIVE*, granting NRG's request to withdraw as a Petitioner will not prevent the Commission from resolving this issue. RESA will remain as a Petitioner, thereby allowing the Commission to still address and resolve the question raised. As such, we find that that this factor supports allowing NRG to withdraw from this proceeding.

Regarding the second factor, which is administrative efficiency, the Commission found in *DRIVE* that it would be an inefficient use of resources to require other parties to recreate a record in a new case when at least part of a record already existed.²⁵ The record in *DRIVE* included the initial pleadings, two prehearing conferences and a status report.²⁶ As such, the Commission found that allowing *DRIVE* to withdraw and end the case would constitute a waste of resources already expended. However, permitting the withdrawal of NRG at this stage in this proceeding is different. In this case, NRG and RESA jointly petitioned the Commission for a declaratory order, and the case will continue even if NRG is allowed to withdraw. As such, the resources that have been expended in the case to this point will not be wasted and may continue to be used in the ongoing litigation. Further, as NRG and RESA are Joint Petitioners and proffered the same witness for testimony, we see no basis to require both Petitioners to remain in the litigation. Additionally, the parties may file a request for a subpoena for any witnesses or evidence only available through NRG, if necessary. Therefore, we find that PPL's, CAUSE-PA's, and OCA's claims that allowing NRG to withdraw will significantly hinder discovery, that it is too late into the proceeding to withdraw, and that RESA may not have standing to proceed in this matter to be unpersuasive and speculative. Accordingly, we find that this factor supports allowing NRG to withdraw.

²³ *Id.* at 38.

²⁴ *DRIVE* at 46-47.

²⁵ *Id.* at 39-40.

²⁶ *Id.* at 3-4.

The third factor is whether allowing the filing party to withdraw a contested declaratory pleading primarily on the basis of expected future litigation costs serves the public interest. In *DRIVE*, none of the parties requested a hearing and the parties all agreed to resolution of the matter via judgment on the pleadings.²⁷ Thus, the Commission determined that *DRIVE*'s anticipation of potential additional litigation expenses was not realistic or likely to occur.²⁸ The Commission also found that a party is not free to walk away from a proceeding that it initiated based on litigation costs after engaging the resources of multiple parties including the Commission.²⁹ In this case, NRG's rationale for requesting permission to withdraw, i.e., the expenses of litigation, is similar to the rationale in *DRIVE*. However, the difference is that NRG is a Joint Petitioner with RESA whereas the Petitioner in *DRIVE* was a lone Petitioner. Because RESA will remain and the case will continue, the Commission's need to compel NRG to continue with the current litigation is not present. Thus, this factor also supports allowing NRG to withdraw.

The fourth factor is wider participation by other parties in another proceeding. Specifically, the Commission opined that it had provided declaratory relief regarding 66 Pa.C.S. § 3014(h) on a number of occasions and it never required further action.³⁰ Nor did it result in wider interest or participation beyond the parties affected by the municipal activity.³¹ Thus, the Commission found *DRIVE*'s argument that permitting withdrawal and closing the case would allow for potential wider participation in another proceeding to be unpersuasive.³² In the current case, neither NRG nor any other party raised this argument. Furthermore, we find that this factor is not applicable to the current analysis because RESA remains as a Petitioner and the

²⁷ *DRIVE* at 41.

²⁸ *Id.* at 41.

²⁹ *Id.* at 42.

³⁰ *Id.* at 43.

³¹ *Id.*

³² *Id.* at 43.

Commission will still have the opportunity to resolve the issue without need for subsequent litigation.

The final factor is additional public policy considerations. In *DRIVE*, the petition for declaratory relief addressed whether 66 Pa.C.S. § 3014(h) established a statutory requirement on political subdivisions before they undertake to provision broadband.³³ Based on the fact that *DRIVE* raised the issue before the Commission on three occasions and other parties contested *DRIVE*'s actions, the Commission concluded that allowing *DRIVE* to withdraw would shift the affirmative legal obligation of Section 3014(h) to a non-moving party.³⁴ The Commission in *DRIVE* also disagreed that prohibiting withdrawal would dissuade use of the declaratory order process.³⁵ To the contrary, the Commission determined that, at this stage in the proceedings, it would set a bad precedent to allow *DRIVE* to withdraw because it could encourage parties to test the waters and seek withdrawal if the outcome is uncertain or might result in a negative ruling.³⁶ As with the prior two factors, this rationale is not applicable to NRG's withdrawal because the current case will continue with RESA as the sole Petitioner.

For the aforementioned reasons, the Petition of NRG Energy, Inc. for Leave to Withdraw will be granted.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 331(f); 52 Pa. Code § 5.42.

³³ *DRIVE* at 46.

³⁴ *Id.*

³⁵ *Id.* at 46.

³⁶ *Id.* at 46-47.

2. A party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon other parties. 52 Pa. Code § 5.94(a).

3. A petition to withdraw a pleading in a contested proceeding must set forth the reasons for the withdrawal and that a party may object to the petition within ten days. 52 Pa. Code § 5.94(a).

4. After considering a petition to withdraw a pleading in a contested proceeding, any objection thereto and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted. 52 Pa. Code § 5.94(a).

5. Factors to consider when addressing a contested petition to withdraw include: (1) whether the controversy remains upon granting the withdrawal, (2) administrative efficiency, (3) additional litigation, (4) wider participation and (5) additional public policy considerations. Thus, we will now examine NRG's Withdraw Petition using these factors. *Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network*, Docket No. P-2021-3025296 (Opinion and Order entered July 20, 2022).

6. It is in the public interest to allow NRG Energy, Inc. to withdraw as a Petitioner in this matter. 52 Pa. Code 5.94(a); *Petition of DRIVE for a Declaratory Order Regarding the Expansion of its Community Broadband Network*, Docket No. P-2021-3025296 (Opinion and Order entered July 20, 2022).

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Petition of NRG Energy, Inc. for Leave to Withdraw filed at Docket No. P-2022-3036985 is hereby granted.

2. That NRG Energy, Inc. is removed as a Petitioning Party in the matter at Docket No. P-2022-3036985.

3. That the proceeding captioned as Petition for Declaratory Order of the Retail Energy Supply Association and NRG Energy, Inc. at Docket No. P-2022-3036985 shall continue with Retail Energy Supply Association as the lone Petitioner.

Date: November 15, 2023

/s/
Christopher P. Pell
Deputy Chief Administrative Law Judge

/s/
Chad Allensworth
Administrative Law Judge