Post & Schell P.C.
ATTORNEYS AT LAW

17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Main Fax
www.postschell.com

Garrett P. Lent

glent@postschell.com
717-612-6032 Direct
717-731-1985 Direct Fax
File #: 209803

October 23, 2026

VIA ELECTRONIC FILING

Matthew Homsher, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Letter Of Notification Of PPL Electric Utilities Corporation, Filed Pursuant To 52 Pa. Code Chapter 57 Subchapter G, For Approval To Rebuild Approximately 1.1 Miles Of New Parallel Double Circuit 230 kV Transmission Taps That Are Needed to Connect the Existing Susquehanna-Harwood #1 & #2 Transmission Lines on the New Tomhicken 230 kV Switchyard That Are Respectively Located in Luzerne County, Pennsylvania.
Docket No. A-2025-3059443

Dear Secretary Homsher:

Attached for filing is PPL Electric Utilities Corporation's ("PPL Electric") Reply Brief in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Garrett P. Lent

GPL/sll
Attachment

cc: The Honorable Erin L. Gannon (*via email; w/attachment)*
The Honorable John Coogan (*via email; w/attachment)*
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 57.72(d)(3).

VIA E-MAIL

Jacob Guthrie
Josiah B. Harmar
Melanie Joy El Atieh
PA Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923
JGuthrie@paoca.org
JHarmar@paoca.org
melatieh@paoca.org
(*Counsel for OCA)*

Erika Cook
38 Red Rock Road
Sugarloaf, PA 18249
Elcook33@gmail.com

John Zola
17 Dagostin Road
Sugarloaf, PA 18249
zolajj@gmail.com

Dated: October 23, 2026

Garrett P. Lent

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Letter of Notification of PPL Electric Utilities Corporation, Filed Pursuant to 52 Pa. Code Chapter 57 Subchapter G, For Approval to Build Approximately 1.1 Miles of New Parallel Double Circuit 230 kV Transmission Taps that are Needed to Connect the Existing Susquehanna-Harwood #1 & #2 Transmission Lines to the New Tomhicken 230 kV Switchyard that are Respectively Located in Luzerne County, Pennsylvania	:	Docket No. A-2025-3059443

REPLY BRIEF OF PPL ELECTRIC UTILITIES CORPORATION

Michael J. Shafer (I.D. # 205681)
PPL Services Corporation
645 Hamilton Street, Suite 700
Allentown, PA 18101
Voice: 610-774-2599
Fax: 610-774-4102
E-mail: mjshafer@pplweb.com

Garrett P. Lent (I.D. # 321566)
David B. MacGregor (I.D. # 28804)
Lindsay A. Berkstresser (I.D. # 318370)
Megan E. Rulli (I.D. # 331981)
Hayley E. Wilburn (I.D. # 336055)
Post & Schell, P.C.
17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
Voice: 717-731-1970
Fax: 717-731-1985
E-mail: glent@postschell.com
E-mail: dmacgregor@postschell.com
E-mail: lberkstresser@postschell.com
E-mail: mrulli@postschell.com
E-mail: hwilburn@postschell.com

Date: October 23, 2026

Attorneys for PPL Electric Utilities Corporation

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I. INTRODUCTION

PPL Electric Utilities Corporation ("PPL Electric" or the "Company") hereby submits this Reply Brief in response to the Main Briefs submitted by the Office of Consumer Advocate ("OCA"), Ms. Erika Cook, and Mr. John Zola. In its Main Brief, PPL Electric explained that the Pennsylvania Public Utility Commission ("Commission") should approve the above-captioned Letter of Notification (the "LON"). The LON requests approval under 52 Pa. Code Ch. 57, Subch. G for the Company to construct approximately 1.1 miles of new double-circuit 230 kilovolt ("kV") transmission taps ("Tap Lines") that are needed to connect the existing Susquehanna-Harwood #1 &#2 230 kV Transmission Lines to the new Tomhicken 230 kV Switchyard ("Tomhicken Switchyard"), as well as two new double circuit 0.1 mile long 230 kV transmission lines ("Connecting Lines") from the Tomhicken 230 kV Switchyard to a new customer-owned 230-34 kV substation (collectively, the "Tomhicken 230 KV Switchyard Project" or the "Project").

As explained in PPL Electric's Main Brief, no party disputes that PPL Electric's proposal to construct the high-voltage ("HV") transmission lines qualifies for review and approval through a letter of notification, under the Commission's regulations. PPL Electric has also carried its burden of proving each of the essential elements in 52 Pa. Code § 57.76(a) for the Commission to approve its request to site and construct the proposed HV transmission lines. Nevertheless, the OCA, Mr. Cook and Ms. Zola oppose the LON. PPL Electric anticipated and addressed many of the arguments raised by these parties in their respective Main Briefs, and further responds to those arguments in this Reply Brief.

For the reasons set forth below, and in PPL Electric's Main Brief and testimony, PPL Electric requests that the Administrative Law Judges Erin L. Gannon and John M. Coogan (the "ALJs"): (a) find that the Tomhicken 230 kV Switchyard Project, as set forth in the above-captioned LON and associated testimony and exhibits, satisfies the requirements of the applicable

statutes and regulations, and (b) approve the LON.

II. COUNTER STATEMENT OF LEGAL STANDARDS

At the outset, PPL Electric addresses the legal standards advanced by the opposing parties in this matter. While Ms. Cook and Mr. Zola aver that PPL Electric "must prove that the Project is paramount and necessary for the health, safety, and welfare of the Public,"[1] this is not correct. PPL Electric does bear the burden of proof in this proceeding.[2] However, it is not required to show that the proposed HV transmission lines proposed by the LON are "paramount and necessary." Rather, in order to approve a request to site and construct proposed HV transmission lines, the Commission's regulations state that it must find and determine that: (1) is a need for the HV line, (2) that the HV line will not create an unreasonable risk of danger to the health and safety of the public, (3) that the HV line is in compliance with applicable statutes and regulations, providing for the protection of the natural resources of this Commonwealth, and (4) that the HV line will have minimum adverse environmental impact, considering the electric power needs of the public, the state of the available technology, and the available alternatives.[3]

For its part, the OCA exhibits a continued reliance on the Commonwealth Court's decision in *Transource Pa., LLC v. Pa. PUC*, 278 A.3d 942 (Pa. Cmwlth. 2022) ("*Transource 2022*"), as well as upon the Commission's decision below in that case, i.e., *Transource 2021*.[4] While the OCA relies upon these two cases as precedent for its interpretation of the need criterion in transmission line proceedings, as well as to justify the Commission's consideration of possible

[1] Cook Main Brief ("MB"), p. 10 (emphasis added); Zola MB, p. 10 (emphasis added).
[2] 66 Pa. C.S. § 332(a).
[3] 52 Pa. Code § 57.76(a).
[4] *Application of Transource Pennsylvania, LLC for approval to acquire a certain portion of the lands of various landowners in York and Franklin Counties, Pennsylvania for the siting and construction of the 230 kV Transmission Line associated with the Independence Energy Connection East and West Projects as necessary or proper for the service, accommodation, convenience, or safety of the public*, 2021 Pa. PUC LEXIS 143 (Order entered May 20, 2021), *affirmed by Transource 2022* ("*Transource 2021*").

harms of the Project,[5] it fails to disclose subsequent, federal appellate precedent that calls into question the value of both *Transource 2022* and *Transource 2021*. Indeed, in subsequent proceedings before federal courts, the U.S. Court of Appeals for the Third Circuit affirmed the decision of the U.S. District Court for the Middle District of Pennsylvania and concluded that the Commission's rejection of the underlying siting application in *Transource 2021* violated the Supremacy Clause of the United States Constitution, and determined that the Commission is pre-empted from second-guessing the need determinations made by PJM Interconnection, LLC ("PJM") for a transmission line project selected pursuant to PJM's baseline regional transmission planning authority.[6] OCA's Main Brief at no point discloses this subsequent authority and, therefore, paints an incomplete and inaccurate picture of the precedent it asserts is applicable to the Commission's review of this Project.

For the reasons set forth herein, the ALJs and the Commission should consider and apply the legal standards set forth in PPL Electric's Main Brief and determine that Tomhicken 230 kV Switchyard Project satisfies existing law.[7]

III. SUMMARY OF ARGUMENT

The LON should be approved without modification or condition, and the Protests of the OCA, Mr. John Zola, and Ms. Erika Cook should be denied. The primary dispute raised in these parties' briefs is that PPL Electric has not demonstrated "a need" for the Project. In addition, the OCA raises further arguments regarding the Project's "risks" to the health and safety of the public. The OCA, Mr. Zola, and Ms. Cook also attempt to invoke the Environmental Rights Amendment to the Pennsylvania Constitution, as well as the Supreme Court of Pennsylvania's decision in *Pa.*

[5] OCA MB, pp. 7, 19, 33, 42, 49.
[6] *Transource Pa., LLC v. DeFrank*, 156 F. 4th 351, 382 (3d Cir. 2025), *affirming Transource Pa., LLC v. DeFrank*, F. Supp. 3d 266 (M.D. Pa. 2023) ("*Transource v. DeFrank*").
[7] 52 Pa. Code § 57.71.

Environmental Defense Foundation v. Com. Of Pa., 161 A.3d 911 (Pa. 2017) ("*PEDF*"). None of the arguments raised in these parties' Main Briefs have any merit.

As to need, no real dispute regarding the need for this Project exists. PPL Electric must site and construct the HV transmission lines proposed in the LON to interconnect the Customer and comply with its obligation to serve customers who desire to obtain service from PPL Electric under the terms and conditions of its existing, Commission-approved tariff. The evidence shows that the Customer will adhere to the terms and conditions of the Company's existing, Commission-approved tariff. None of the parties dispute these realities.

For its part, OCA acknowledged a need for this Project exists through binding admissions from its witnesses. OCA nevertheless attempts to avoid these admissions by misapplying existing legal standards and attempting to create a new legal standard to argue that no need for the proposed HV transmission lines exists. OCA's positions are not supported by its own evidence and are not supported by the "existing law" that PPL Electric must demonstrate compliance with for approval of the LON.[8]

The OCA, Mr. Zola, and Ms. Cook also claim that the need for the Project is uncertain, due to ongoing litigation surrounding the Customer's land use and zoning approvals. However, the status of this litigation has been significantly overstated; the litigation has not ended, and nothing in the record suggests that the Customer will not be successful in obtaining the necessary land use and zoning approvals. Moreover, the existence of this litigation is not a sufficient basis to reject the instant LON. PPL Electric repeatedly affirmed that it will only proceed with construction if a need persists, and the Commission can impose reasonable conditions to enforce this commitment if it deems such conditions necessary.

[8] 52 Pa. Code § 57.71 ("… upon approval of the application by the Commission first had and obtained, and upon compliance with existing laws, it shall be lawful for a public utility to commence construction of the HV transmission line…" (emphasis added)).

As to the Project's risks to the health and safety of the public, zero credible evidence exists in the record that the proposed HV transmission lines will result in an "unreasonable risk" to the health and safety of the public. Rather, the arguments advanced by OCA rely upon (a) an apples-to-oranges comparison of the LON facilities' (also referred to as the "Phase 1" facilities) ability to safely accommodate future anticipated load (referred to as the "Phase 2" load) that will be accommodated by the facilities proposed in a separate (now stayed) *Sugarloaf Full Siting Application*,[9] and (b) an unsubstantiated chain of general concerns and assumptions that speculate regarding unquantified hypothetical impacts of unquantified hypothetical operating conditions over the proposed HV transmission lines that are not tethered to the specific facilities, load, and/or service at issue in this LON. These arguments do not constitute substantial evidence and provide no basis to support OCA's claims that the specific HV transmission lines proposed in this LON to serve the Customer's Phase 1 load, will create an "unreasonable risk" to the health and safety of the public while serving the Customer's Phase 1 load.

As to the Project's environmental impacts, the Company fully rebutted the generalized concerns raised by Ms. Cook and other members of the public in its testimony and Main Brief. Indeed, the Company has demonstrated that it will comply with all applicable statutes and regulations related to the protection of the environment, and that the proposed HV transmission lines will have minimum adverse environmental impacts. While OCA attempts to latently invoke the Environmental Rights Amendment in its Main Brief, this invocation is premised solely upon lay-witness testimony at public input hearings raising concerns about the environmental impacts

[9] *Application of PPL Electric Utilities Corporation, Filed Pursuant to 52 Pa. Code Chapter 57 Subchapter G, for Approval to (1) Bifurcate and Rebuild 4.4 Miles of the Existing Sunbury-Susquehanna #1 230 kV Transmission Line; (2) Construct 0.9 Miles of New Transmission Line Tap for Future 230 kV Double Circuit Operation; (3) Raise Approximately 0.5 Miles of the Sunbury-Susquehanna 500 kV Transmission Line; and (4) Construct 11.2 Miles of New Double-Circuit 230 kV Transmission Line for Future Double-Circuit 500 kV Capacity, Located in Black Creek, Hazle, Hollenback, Nescopeck, and Sugarloaf Townships in Luzerne County, Pennsylvania*, Docket Nos. A-2026-3061547 *et al.*, (Application filed Apr. 7, 2026) (the "*Sugarloaf Full Siting Application*").

of primarily the proposed Phase 2 HV transmission lines, which are not at issue in this LON. OCA's experts did not opine on environmental issues, and PPL Electric's expert witness rebutted the general claims raised by lay witnesses.

Every element under 52 Pa. Code § 57.76(a) has been satisfied by PPL Electric in this proceeding. The Company again emphasizes that the proper scope of this proceeding does not involve a finding or determination regarding transmission costs, cost allocation and cost recovery; the also Company acknowledges that these matters are the subject of a number of ongoing, not-yet-final proceedings before the Federal Energy Regulatory Commission ("FERC") and this Commission. Thus, any concerns or policy preferences advanced by OCA related to issues of transmission costs, cost allocation and cost recovery would not be foreclosed by granting the specific approval sought by PPL Electric in this proceeding: the approval to site and construct the proposed HV transmission lines.

For these reasons and as more fully explained below, PPL Electric requests that the ALJs and the Commission approve the Company's LON, which is necessary to permit the prompt construction of the HV transmission lines proposed by the Tomhicken 230 kV Switchyard Project.

IV. ARGUMENT

A. AN UNDISPUTED NEED FOR THE PROPOSED HV TRANSMISSION LINES EXISTS

The primary issue raised in the Main Briefs of OCA, Mr. Zola, and Ms. Cook focuses on whether PPL Electric demonstrated that "a need" for the Project exists. As explained in PPL Electric's Main Brief, and re-iterated below, "a need" for the Project exists that no party has rebutted. Specifically, the Project is needed to address the Customer's request to interconnect with the grid and obtain transmission level service from PPL Electric in accordance with the terms and conditions of PPL Electric's Commission-approved tariff. Under these circumstances, PPL Electric has an obligation to serve this Customer, like any other customer that requests service

from the Company. The arguments offered by the other parties against this unrebutted need should be rejected.

1. OCA admits that "a need" for the Project exists

Despite its arguments to the contrary, OCA's Main Brief and the testimony of its witnesses admit that a need for the proposed HV transmission lines exists. In its Main Brief, OCA explicitly acknowledges that the proposed HV transmission lines are needed to interconnect and serve the Customer requesting transmission-level service from PPL Electric.[10] None of the arguments presented by OCA or its witnesses dispute that the need driver of the HV transmission lines is the Customer's interconnection request.[11] Moreover, at no point does OCA assert that the Customer will not adhere to the terms and conditions of obtaining such service, embodied in the Company's Commission-approved tariff. Under these facts, PPL Electric has a legal obligation to serve the Customer, just as it does to serve any other customer requesting service in accordance with its tariff.[12] Indeed, "the Supreme Court of Pennsylvania established that where there is a right by a customer to receive public utility service, there is a duty on the part of the utility to serve . . ."[13]

[10] *See* OCA MB, p. 19 (admitting that the OCA's witnesses did not contest the fact that the Phase I facilities are needed to connect and serve the Customer); *see also* OCA MB, pp. 1, 8-9, 10, 14, 20, 21, 22, and 46.
[11] *See* PPL Electric MB, pp. 29-30.
[12] *See* 66 Pa.C.S. §§ 1303, 1501, and 1502; *see also PPL Elec. Utils. Corp. v. City of Lancaster*, 125 A.3d 837, 842 n.7 (Pa. Cmwlth. 2015) ("A tariff has the force of law and is binding on the utility and its customers") (citing *Penn. Elec. Co. v. Pa. PUC*, 663 A.2d 281, 284 (Pa. Cmwlth. 1995); *Kossman v. Pa. PUC*, 694 A.2d 1147, 1151 (Pa. Cmwlth. 1997) ("Once approved, the tariff provisions are legally binding on both the utility and its customers.")
[13] *Application of Pennsylvania Power & Light Company for authorization to locate and construct a 138,000 volt electric transmission line and associated facilities between its existing Tinker 138/69 kV tap line located in Clifford Township and the proposed Elk Mountain substation site located in Herrick Township, both in Susquehanna County, Pennsylvania and Application of Pennsylvania Power & Light Company under the act of the General Assembly, approved May 5, 1933, P.L. 364, as amended, 15 P.S. Section 1322, for findings and determinations that the service to be furnished by Applicant through its proposed exercise of the power of eminent domain to acquire rights-of-way for the construction, operation and maintenance of electric lines and related facilities over and across the land of: (1) Moore Motors, Inc. in Herrick Township; and (2) John Priblo in Herrick Township is necessary or proper for the service, accommodation, convenience or safety of the public*, Docket Nos. A-110500F040; A-110500F061; A-110500F062, 1990 Pa. PUC LEXIS 43, at *10-11 (Order dated Aug. 31, 1990) (citing and quoting *Jacobs v. Clearview Water Supply Company*, 220 Pa. 388, 69 A.2d 870 (Pa. 1908)). Although Commission's order and the Supreme Court of Pennsylvania in *Jacobs* discussed these principles in the context of an eminent domain issue, the right of a customer to receive service, and the duty of the utility to provide such serve are fundamental principles of public utility law.

Rather than disputing the stated "need"[14] for the proposed HV transmission lines, OCA instead tries to construct a new standard of review for this LON and raises a number of ancillary concerns and issues regarding the end use of the Customer that PPL Electric is obligated to serve.[15] OCA's arguments are not supported by the law or the facts, and should be rejected.

2. OCA's attempt to construct a new "net benefits" standard and then apply its new standard to this Project should be rejected

As explained in the Company's Main Brief, an electric utility can demonstrate "a need" for a transmission line project under 52 Pa. Code § 57.76(a)(1) where the project resolves violations of the utility's internally developed planning and reliability criteria.[16] Further, the Commission has previously approved letters of notification in which the necessity has arisen from a large load customer's request to take transmission-level service,[17] consistent with a utility's obligation and right to provide service to customers pursuant to the terms and conditions of its existing,

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[14] *See Hess v. Pa. PUC*, 107 A.3d 246, 262-263 (Pa. Cmwlth. 2014), *appeal denied*, 632 Pa. 678, 117 A.3d 1282 (Pa. 2015) ("*Hess*"); *Application of PPL Electric Utilities Corporation filed Pursuant to 52 Pa. Code Chapter 47, Subchapter G, for Approval of the Siting and Construction of the North Lancaster Honey Brook # 1 & # 2 138/69 kV Transmission Lines in Lancaster County, Pennsylvania*, Docket Nos. A-2014-2430565, *et al*., 2015 Pa. PUC LEXIS 77, at *49 (Initial Decision issued Feb. 27, 2015) *adopted without modification* (Order entered Apr. 23, 2015) ("*PPL North Lancaster-Honey Brook*") (holding that a project which alleviates violations of an electric utility's own planning criteria provides sufficient evidence to support a finding of need).

[15] *See, e.g.*, OCA MB, pp. 19-50.

[16] *See* PPL Electric MB, p. 10. *See also Hess* at 262-263; *Application of PPL Electric Utilities Corporation filed Pursuant to 52 Pa. Code Chapter 47, Subchapter G, for Approval of the Siting and Construction of the North Lancaster Honey Brook # 1 & # 2 138/69 kV Transmission Lines in Lancaster County, Pennsylvania*, Docket Nos. A-2014-2430565, *et al*., 2015 Pa. PUC LEXIS 77, at *49 (Initial Decision issued Feb. 27, 2015) *adopted without modification* (Order entered Apr. 23, 2015) ("*PPL North Lancaster-Honey Brook*") (holding that a project which alleviates violations of an electric utility's own planning criteria provides sufficient evidence to support a finding of need).

[17] *Letter of Notification of PPL Electric Utilities Corporation for approval to construct the Susquehanna 230 kV and 500 kV Transmission Line Project in Conyngham and Salem Townships in Luzerne County, Pennsylvania, Petition for Waiver of Certain Provisions of the Commission's Regulations for Commission Review of Siting and Construction of Electric Transmission Lines set forth at 52 Pa. Code § 57.71 et seq.*, Docket Nos. A-2025-3056806, *et al.*, at 6-7, 9 (Final Order entered September 25, 2025) ("PPL Electric submits that construction of the Susquehanna 230 kV and 500 kV Transmission Line Project is necessary to provide 230 kV and 500 kV service to a new PPL Electric customer. . . . Additionally, PPL Electric submits that the customer's initial load is approximately 120 MW and will increase in stages to approximately 1,440 MW by 2030 . . . Finally, PPL Electric submits that the project was presented at PJM Interconnection LLC's Transmission Expansion Advisory Committee meetings and assigned supplemental project number s3706.")

Commission-approved tariff.[18] Ignoring this precedent, OCA instead attempts to introduce a new and heightened standard for review of HV transmission line applications, which would require utilities to demonstrate that a proposed utility facility will produce quantifiable "net benefits" for new or existing customers to establish need.[19] OCA's suggested need standard is not founded in existing law[20] and so cannot reasonably be relied upon to deny this LON.[21]

First, OCA's proposed "net benefits" standard inappropriately encompasses any utility facilities[22] associated with proposed HV transmission lines. However, it is well settled that a public utility must decide in the first instance what facilities are needed and where to locate those facilities; unless the public utility acted in an arbitrary or capricious manner, its decision should remain undisturbed.[23] OCA's proposed standard would flip this precedent on its head by requiring utilities to affirmatively show benefits of any new utility facilities prior to construction. Non-HV transmission line facilities are not within the scope of review or approvals sought by PPL Electric under Ch. 57, Subch. G, which consistently reference "the proposed HV line" and the showings that utilities must make regarding the proposed HV line, not other utility facilities.[24] OCA ignores

[18] *See, e.g.*, 66 Pa.C.S. §§ 1103, 1501, 2802(12); 52 Pa. Code § 57.19; *Popowsky v. Pa. PUC*, 910 A.2d 38, 48-56 (Pa. 2006); *Pa. Gas Co. v. Pub. Serv. Comm'n*, 83 Pa. Super. 557, 565-66 (1924); *Philadelphia Transp. Co. v. Pa. PUC*, 37 A.2d 138, 147 (Pa. Super. 1944); *Application of Leatherstocking Gas Co., LLC, for Approval to Supply Natural Gas Serv. to the Pub. in N. Susquehanna Cnty., in the Twps. of Bridgewater, Forest Lake, Great Bend, Harmony, New Milford, and Oakland, and in the Boroughs of Great Bend, Hallstead, Lanesboro, Montrose, New Milford, Oakland and Susquehanna*, Docket No. A-2011-2275595, 2012 Pa. PUC LEXIS 1391, at *22 (Order entered Aug. 30, 2012).

[19] *See* OCA MB, p. 16 (claiming that there is not a need for the Project because "PPL Electric did not demonstrate that the benefits outweigh the harms.")

[20] 52 Pa. Code § 57.71 (requiring Commission approval and "compliance with existing laws" in order for a utility to lawful commence construction of an HV transmission line).

[21] *See Application of PPL Electric Utilities Corporation Filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the Pennsylvania Portion of the Proposed Susquehanna-Roseland 500 kV Transmission Line in Portions of Lackawanna, Luzerne, Monroe, Pike and Wayne Counties, Pennsylvania*, Docket Nos. A-2009-2082652, *et al.*, 2010 Pa. PUC LEXIS 434, at *79 (Opinion and Order entered Feb. 12, 2010), *aff'd*, 25 A.3d 440 (hereafter "*Susquehanna-Roseland Commission Order*").

[22] 66 Pa.C.S. § 102 (defining "facilities"). An "HV transmission line" is just one type of "facility," and the specific facility that is the focus of the Commission's siting and construction review under 52 Pa. Code Ch. 57, Subch. G.

[23] *See e.g., Lower Chichester* Township *v. Pa. PUC*, 119 A.2d 674 (Pa. Super. 1956); *Abbington Electric Co. v. Pa. PUC*, 198 A. 901 (Pa. Super. 1938).

[24] In contrast, in Section 619 zoning exemption proceedings, the Commission does look past the proposed HV lines to determine whether proposed utility "buildings" are reasonably necessary for the convenience or welfare of the public and, therefore, exempt from local zoning ordinances. *Del-AWARE Unlimited, Inc. v. Pa. PUC*, 513 A.2d 593,

this precedent and impermissibly asks the Commission to determine need for HV transmission lines, in part, based on ancillary utilities facilities that the Commission's siting authority does not encompass.

Second, OCA misrepresents applicable case law for HV transmission lines driven by an engineering need. The Commonwealth Court has established that utilities are not required to show a project is "absolutely necessary" from an engineering perspective, stating:

> Nowhere in any of the ... statutory or regulatory provisions, nor in any other regulations promulgated under the Code, is there a requirement that the necessity which must be shown by a public utility corporation, such as PP&L, seeking to construct a transmission line, is that of necessity from an engineering perspective as concluded by the PUC.[25]

This precedent makes clear that "necessity from an engineering perspective" is not a necessary condition to satisfying the need requirement of Section 57.76(a)(1).[26] OCA commits logical error by incorrectly claiming that these cases hold that an engineering need cannot be a sufficient condition to satisfy the need requirement.[27] For example, OCA claims that the Commonwealth Court has "instruct[ed]" the Commission to "consider factors beyond 'necessity from an engineering perspective.'"[28] OCA's interpretation is incorrect. In the cases OCA relies upon, the Commonwealth Court held that the Commission cannot condition approval on a showing of absolute necessity from an engineering perspective—the cases OCA cites decidedly do not contain language stating that an engineering need alone is insufficient to justify approval of proposed HV

596 n.4 (Pa. Cmwlth. 1986), *allowance for appeal denied*, 527 A.2d 547 (Pa. 1987). *See also Twp. of Marple v. Pa. PUC*, 352 A.3d 1144, 1147 (Pa. Cmwlth. 2026) (recognizing that Section 619 does not grant municipalities an implied right to zone with regard to public utility facilities other than buildings).

[25] *Pa. Power & Light Co. v. Pa. PUC*, 696 A.2d 248, 250 (Pa. Cmwlth. 1997) ("*Pa. Power & Light*"); *see also Hess*, 107 A.3d at 261-62.

[26] *Pa. Power & Light*, 696 A.2d at 250.

[27] *See* OCA MB, pp. 19-20 (incorrectly claiming that "the Commonwealth Court has previously found that 'necessity from an engineering perspective' is not determinative of whether need is established," and that "the Commission cannot mechanically apply the 'need' determination to examine *only* the need for additional facilities to interconnect Customer One, but must, instead, consider whether the benefits of approving the LON outweigh the costs") (emphasis in original).

[28] OCA MB, p. 49 (citing *Pa. Power & Light*, 696 A.2d at 250).

transmission lines.[29] Further, the Commission has approved letters of notification based on the showing of engineering need triggered by a single customer's interconnection or upgrade request.[30] In this LON, PPL Electric can and has fulfilled the need requirement of Section 57.76(a)(1) by demonstrating that both an engineering need and a service obligation for the proposed HV transmission lines exists, i.e., that the HV transmission lines are required to interconnect and provide requested service to the Customer.[31]

Third, OCA errs by claiming that the Commission cannot accept an engineering need for the Project to satisfy the requirement of Section 57.76(a)(1) "but must, instead, consider whether the benefits of approving the LON outweigh the costs."[32] Here, OCA presents a faulty analysis of inapplicable case law, that errs in at least two respects: first by claiming that a cost-benefit analysis is required in a case without an economic-based need driver, and second by ignoring the federal courts' decisions regarding the Transource project, which determined the Commission's cost-benefit evaluation was federally preempted.[33]

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[29] *See Pa. Power & Light*, 696 A.2d at 250 ("Nowhere in any of the foregoing statutory or regulatory provisions, nor in any other regulations promulgated under the Code, is there a requirement that the *necessity* which must be shown by a public utility corporation, such as PP&L, seeking to construct a transmission line, is that of necessity from an engineering prospective [sic] as concluded by the PUC.") (emphasis in the original).

[30] *See Letter of Notification of PPL Electric Utilities Corporation for Approval to Construct new 138 kV Transmission Lines in East Lampeter Township, Lancaster County, Pennsylvania*, Docket No. A-2026-3062201, 2026 Pa. PUC LEXIS 257 (Order entered Aug. 6, 2026) (approving LON needed to serve a requested load increase for single existing customer); *Letter of Notification of Mid-Atlantic Transmission, LLC for approval to construct the Farmers Valley-Ridgway 115 kV Interconnection Project in Sergeant Township, McKean County, Pennsylvania*, Docket No. A-2026-3060524, 2026 Pa. PUC LEXIS 89 (Order entered Mar. 26, 2026) (finding the LON was needed to provide transmission-level service to a new single customer's proposed solar photovoltaic generation plant); *Letter of Notification of Mid-Atlantic Interstate Transmission, LLC for approval to construct the Middletown Junction – Smith Street 115 kV Transmission Line Tap located in East Manchester Township, York County, Pennsylvania*, Docket No. A-2023-3043841, 2024 Pa. PUC LEXIS 8 (Order entered Jan. 18, 2024) (approving LON needed provide transmission-level service to single existing customer at proposed customer-owned substation); *Letter of Notification of Mid-Atlantic Interstate Transmission, LLC for approval to construct the Bear Rock-Johnstown 230 kV Transmission Line Loop located in Portage Township, Cambria County, Pennsylvania* (approving LON needed to provide transmission-level service to a new single customer's proposed solar photovoltaics generation plant); *Letter of Notification of Pennsylvania Electric Company pursuant to 52 Pa. Code § 57.72(d) to install the East-Towanda Mansfield 115 kV Transmission Line Tap to the Tennessee Gas Pipeline Substation located in Troy Township, Bradford County, Pennsylvania*, Docket No. A-110400F0045, 2006 Pa. PUC LEXIS 726 (Order entered Feb. 6, 2006) (approving LON needed to provide new transmission-level service to single existing customer).

[31] PPL Electric MB, Section V.B.

[32] OCA MB, p. 20 (emphasis added).

[33] *See* OCA MB, pp. 19-20.

The Commission's cost-benefit evaluations in *Transource 2021* and the *TrAILCo PUC Order*[34] are not applicable to the need determination in this LON. In *Transource 2021* and the *TrAILCo PUC Order*, the need for the proposed HV transmission lines depended on economic analyses presented using PJM's FERC-approved benefit-cost methodology and framework, in part due to the fact that those projects crossed multiple states and were designed to address regional issues that would impose regional costs to obtain regional benefits.[35] As such, the Commission's evaluation of need in those cases included an examination of PJM's cost-benefit framework as it impacted Pennsylvania ratepayers. The Commission did not independently require the utilities to present cost-benefit analyses to justify approval in either *Transource 2021* or *the TrAILCo PUC Order*, rather, the Commission's cost-benefit evaluation resulted from the need case presented by the utilities in the first instance. Nothing in the Commission's decisions in *Transource 2021* or *the TrAILCo PUC Order* states or implies that cost-benefit analyses are appropriate or required in HV transmission line applications where the affirmative case for need is based upon a request for service by a customer, as is the case here.

OCA's analysis is also flawed because it fails to even attempt to grapple with the federal courts' decisions subsequent to the Commission's order in *Transource 2021* and the Commonwealth Court's order in *Transource 2022.* In *Transource v. DeFrank*, the Third Circuit soundly rejected the Commission's second-guessing of PJM's cost-benefit evaluation in *Transource 2021*, finding that it inappropriately "substitute[d] the PUC's own determination of what would be just and fair for that of FERC."[36] The Third Circuit further found that the Commission's determinations on these issues violated the Supremacy Clause of the U.S.

[34] *In re: Application of Trans-Allegheny Interstate Line Co.*, 2008 Pa. PUC LEXIS 35 (Nov. 13, 2008), *aff'd, Energy Conservation Council of Pa. v. Pa. PUC*, 995 A.2d 465 (Pa. Cmwlth. 2010) ("*TrAILCo PUC Order*").
[35] *Transource 2021* at *54-69; *TrAILCo PUC Order* at *49-51.
[36] *Transource v. DeFrank* at 377 (internal quotations omitted).

Constitution because they: (1) "pose[d] an obstacle to accomplishing federal objectives"; (2) "second-guess[ed] the FERC-approved benefit-cost methodology"; and (3) "impermissibl[y] re-balanc[ed PJM's] considerations."[37] The Commission's *Transource 2021* decision has been rejected on the very grounds that OCA relies upon it for in this case. Therefore, it does not provide a proper basis for OCA's claims in this LON.

Given the Third Circuit's decision in *Transource v. DeFrank*, OCA's reliance on the *TrAILCo PUC Order* is also questionable. OCA claims that the *TrAILCo PUC Order* provides the ALJs and Commission with a valid basis to "examine 'federal policy and national issues revolving around the transmission grid, as well as 'the potential costs of green house emissions, DSM and energy efficiency alternatives and whether the proposal was built to facilitate west-to-east transfers of generation' when making its 'need' determination under Section 1501 of the Public Utility Code and Section 57.76(a)(1) of the Commission's regulations."[38] However, the basis for examining those federal policy issues in *TrAILCo* was to examine whether the proposed project was suited to address the regional reliability needs as identified and selected by PJM. The Third Circuit's holding in *Transource v. DeFrank*, at a minimum, calls into question whether such an analysis continues to be appropriate. For these reasons, the Commission should reject OCA's assertions that the decisions in *Transource 2021*, *Transource 2022*, and the *TrAILCo PUC Order* provide a valid legal basis to change the standard of review for the need determination in this case.

Further, Pennsylvania law does not require a utility to demonstrate that a proposed facility, let alone a proposed HV transmission line, will produce "net benefits" to new or existing customers. Indeed, in a HV transmission line siting case decided shortly after the *TrAILCo PUC Order* and before *Transource 2021*, the Commission expressly rejected an attempt to inject a cost-

[37] *Transource v. DeFrank*, 156 F.4th at 375-76, 382 (internal quotations omitted).
[38] OCA MB, p. 8 (citing *TrAILCo PUC Order* at 47-48).

benefit standard into the Section 57.76(a)(1) analysis in the absence of an economic-based need. In *Susquehanna-Roseland*, the Commission adopted the ALJ's recommendation to reject a proposal by the Office of Trial Staff ("OTS") to review need using a cost-benefit analysis for a project designed to resolve reliability issues. As the Commission stated:

> The ALJ found that the OTS' recommendation would impose a new requirement to be met by a utility seeking approval to site a high voltage transmission line. Without determining the merits of the recommendation, this recommendation itself must fail in this case. The requirements which must be met by an applicant must be in effect at the time that the application is filed. The regulations which govern this proceeding were subject to the rigorous, albeit time-consuming rulemaking process which is designed to ensure that no Commonwealth agency can arbitrarily impose requirements across the board without undergoing the scrutiny of the Office of Attorney General, and the General Assembly, as well as the participation of the governed industry and the general public, all of which have an opportunity to comment publicly prior to the ultimate approval process by the Independent Regulatory Review Commission (IRRC). While the OTS may recommend that the Commission begin this process in order to propose that a cost-benefit analysis become routine in HV transmission line siting cases, this proposal may not be applied as a requirement in an on-going case. The ALJ concluded by stating this is about reliability, not economics.[39]

PPL Electric further notes that OCA's argument should be rejected as poor public policy because, if adopted, it could have severe and unintended consequences that undermine basic precepts of public utility regulation. In particular, if a utility was required to show "net benefits" to a new customer and existing customers to justify the extension of any facilities to a new customer, a utility's obligation to serve would be boiled down to a strict economic test. Such a test is inconsistent with the long-standing principles that have required utilities to extend service to customers under reasonable terms and conditions (*see* 66 Pa.C.S. §§ 1501 and 1502) and facilitated such extensions of service, in particular to customers in rural areas not proximally located near existing utility facilities.

[39] *Susquehanna-Roseland Commission Order* at *125-26 (emphasis added and internal citations omitted).

The need analysis for this LON is straightforward. The Customer is requesting transmission-level service and interconnection from the Company. This Project originated as a PJM supplemental project, not as the result of PJM-driven regional reliability concerns or market efficiency analyses, as was the case in the *TrAILCo PUC Order* and *Transource 2021*, respectively. Under the Commission's holding in *Susquehanna-Roseland*, requiring PPL Electric to meet OCA's new "net benefits" standard to show need in this proceeding would not only be inapplicable but also contrary to the Commission's regulatory process. Moreover, the Commission did not require the utilities in either *Transource 2021* or the *TrAILCo PUC Order* to demonstrate that the projects would result in "net benefits" to customers as a condition of approval.[40] As addressed below, OCA cites to a number of active proceedings addressing the policy, legal, and regulatory developments concerning large load customers. These pending proceedings make clear that none of those developments are currently "existing law" or legally binding.[41] OCA's proposed "net benefits" standard is not based in existing law or supported by applicable precedent and, therefore, should be rejected.

3. OCA's unquantified, general resource adequacy concerns do not provide a valid basis for rejecting this specific LON or these specific proposed HV transmission lines

OCA's unquantified, general resource adequacy concerns do not provide a valid basis for determining that there is not a need for the proposed HV transmission lines. OCA claims that "PPL Electric failed to present evidence that it had conducted sufficient due diligence to ensure that the construction of the Phase One facilities and subsequent interconnection of Customer One will not degrade the reliability of its transmission system through resource inadequacy" and

[40] *See TrAILCo PUC Order* at 50-51 (evaluating reliability need for project); *Transource 2021* at *53-69 (examining need for project to alleviate market congestion and perceived impacts to Pennsylvania ratepayers).
[41] *See* 52 Pa. Code 57.71.

recommends denial of the LON on this basis.[42] However, OCA's stated resource adequacy concerns are purely speculative and OCA provides no tangible support for its contention that its generalized "resource adequacy" concerns offer a reasonable basis on which to deny this LON.

Importantly, OCA's resource adequacy concerns are not based in any quantitative analysis of PJM's interstate transmission system, PPL Electric's transmission system as modified with the proposed HV lines contemplated by this LON, or the ability of either to accommodate the anticipated load of the Customer. In its Main Brief, OCA claims that "[a]pproval of Phase One will create the potential for resource inadequacy and, therefore, reliability risks to existing PPL Electric customers."[43] OCA Witness Dr. Felder's testimony on this issue, which OCA claims supports its position, was equally hypothetical. While Dr. Felder articulated general concerns regarding resource adequacy issues within the PJM system as a whole, his testimony lacks any actual analysis of the impact that interconnecting this Customer will have on PJM's transmission system, PPL Electric's system, or the reliability of PPL Electric's existing service.[44] Instead, Dr. Felder makes broad statements couched in hypotheticals. For example, Dr. Felder states:

> Regarding reliability, if large loads are added to the electric power system without sufficient new supply to serve them or without meaningful policies to curtail their electricity consumption during times of supply shortages, then the reliability, specifically the resource adequacy, of the system will be degraded. This degradation could result in mandatory load shedding of ordinary ratepayers, such as residential customers. As more load is added to PJM that is not sufficiently supplied or curtailable, the frequency, magnitude, and duration of potential mandatory load-shedding events increase.[45]

Dr. Felder confirmed at the hearings that the full extent of his analysis was to: (1) consider the state of resource adequacy on PJM's system generally; and (2) perform the "mental math" that if

[42] OCA MB, pp. 24-25.
[43] OCA MB, p. 24 (emphasis added).
[44] Tr. 634-35.
[45] OCA St. 1 at 8 (internal citations omitted) (emphasis added).

additional load is added to the system, then his resource adequacy concerns would be exacerbated.[46] However, Dr. Felder also confirmed that although he has professional experience performing risk analyses that quantify the probability of a specific consequence occurring, he performed no such risk analysis in this case. Thus, his "mental math" claims that interconnecting the Customer would exacerbate resource adequacy concerns generally *or* that the resultant "increased risk" would degrade reliability on PPL Electric's system are completely unsubstantiated and lack the requisite analysis that Dr. Felder admits is normally conducted and that he has conducted in the past.[47] Unspecified and unsubstantiated "mental math" is not an adequate substitute for substantial evidence, and OCA fails to support its resource adequacy or reliability concerns with anything else.

Thus, without any specific supporting data or analysis, OCA asks the ALJs and the Commission to conclude that interconnecting this Customer and approving this LON creates the risk of degraded reliability. Nowhere in its Main Brief or testimony does OCA actually state that the interconnection of this Customer will adversely impact resource adequacy, or that the PJM lacks sufficient generation or capacity to serve this Customer's demand. Neither does OCA explain why it is this Customer's interconnection to PJM's interstate grid or PPL Electric's proposed facilities that triggers "reliability risks for PPL Electric's existing customers."[48] Therefore, not only is OCA's "mental math" analysis fundamentally lacking, but it is also not specific to the subject matter of this LON.[49]

[46] Tr. 634-35.
[47] Tr. 634-35.
[48] OCA MB, p. 31.
[49] PPL Electric questions whether the non-specificity of this analysis is by design. It appears that, if adopted, OCA's unquantified, non-specific analysis could subsequently be cited or used in other proceedings involving different HV transmission line proposals and facts and circumstances involving large load customers to attempt to halt the interconnection of those customers. The ALJs and the Commission should, therefore, be wary of and reject the analysis presented by OCA.

Perhaps recognizing the failure to present an actual analysis demonstrating that interconnecting the Customer will lead to or exacerbate any extant resource inadequacy conditions on PJM's interstate transmission grid, OCA instead seeks to argue that PPL Electric must prove a negative to meet its burden of proof in this case. Specifically, OCA argues that "[a]bsent a showing from PPL Electric that the interconnection of Customer One will not adversely impact regional resource adequacy, approval of the LON would compromise the reliability of PPL Electric's system."[50] Setting aside that PJM conducted and completed a DNH analysis applicable to this Project and determined that the proposed facilities and interconnection of the Customer would not harm the transmission grid,[51] OCA commits the classic logical fallacy *argumentum ad ignorantiam*,[52] which draws the faulty conclusion that because something has not been proven false (i.e., OCA's assertion that PPL Electric has not proven that interconnection will not negatively impact resource adequacy), it therefore must be true (i.e., OCA's erroneous conclusion that interconnecting the customer will negatively impact resource adequacy). Thus, OCA improperly asks the ALJs and the Commission to make a factual finding based on a logical fallacy.

The Commission has dismissed a similar request in a HV transmission line siting case where the protestants argued that, in response to their concerns regarding EMF, the utility had the burden to show that EMF would not result in adverse health effects on their horses, stating:

> In essence, the Hempts expect PP&L to "prove a negative" and to do so in a manner that completely allays any "concerns" that may

[50] OCA MB, pp. 24-25.

[51] PPL Electric further addresses this issue in Section IV.B.1, *infra*.

[52] As the U.S. District Court for the Eastern District of Pennsylvania has observed, it is the logical fallacy *argumentum ad ignorantiam* to rely on an absence of evidence of defect as support for the proposition that a defect exists.. *Guinan v. A.I. Dupont Hosp. for Children*, 597 F. Supp. 2d 485, 511-512 (E.D. Pa. 2009), reversed in part on other grounds, *M.G. v. A. I. Dupont Hosp. for Children*, 2010 U.S. App. LEXIS 17711 (3d Cir. 2010). "An argument from ignorance is 'the mistake that is committed whenever it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true.'" *Ala. Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1257 (11th Cir. 2007) (citing Irving M. Copi & Carl Cohen, *Introduction to Logic* 93 (8th ed. 1990)). *See also Matkovich v. Verizon North LLC*, Docket No. C-2020-3022369, 2022 Pa. PUC LEXIS 259, *32-33 (Order entered Aug. 25, 2022) (discussing the logical fallacy of *argumentum ad ignorantiam* and holding that "the Complainant has the burden of proving her claims, and she cannot satisfy that burden by arguing Verizon failed to prove they did not occur.").

> exist in their minds. If this approach were adopted, Commission approval of needed transmission facilities would have to be withheld whenever a protestant harbors subjective "concerns" about the "risks" of a line. That kind of "proof" standard is clearly inconsistent with the criteria for approval set forth in the Commission's Chapter 57 regulations; with the Commission's application of those regulations in other transmission line siting cases; and with common sense.[53]

The same analysis holds true here. The Commission should reject OCA's attempts to use its generalized resource adequacy concerns to impose a new evidentiary burden on PPL Electric, as doing so would be "clearly inconsistent with the criteria for approval set forth in the Commission's Chapter 57 regulations; with the Commission's application of those regulations in other transmission line siting cases; and with common sense."[54] It is OCA's responsibility to support its claims with sufficient evidence to support a factual finding, not PPL Electric's burden to prove the absence of evidence for the assumptions underlying OCA's unsupported assertions.

Moreover, OCA's demands for "resource adequacy assurances" are not valid and ignore the existing law, the Company's existing Commission-approved tariff, and the existing ESA in place with the Customer.[55] Although the Commission's HV transmission line siting regulations contemplate projects designed and constructed to serve a single customer,[56] they do not require applicants to affirmatively demonstrate that sufficient generation capacity exists prior to interconnecting a new customer or upgrading a customer's service.[57] The Commission specifically

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[53] *Certification Application of Pennsylvania Power & Light Company Filed Pursuant to 52 Pa. Code Chapter 57 with Respect to the Proposed Line Replacement of the Existing West Shore-Carlisle 69 kV Transmission Line with a West Shore-Carlisle 138/69 kV Transmission Line, to be Located, Constructed, Operated and Maintained in the Boroughs of Carlisle and Mechanicsburg And In North Middletown, Middlesex, and Silver Spring Townships, Cumberland County, Pennsylvania Including Applications to Exercise the Power of Eminent Domain*, Docket Nos. A-110400F0196, *et al*., 1994 Pa. PUC LEXIS 65, *44 (Initial Decision dated Oct. 21, 1994) (emphasis added).

[54] *Id.*

[55] OCA MB, pp. 32-33.

[56] *See* 52 Pa. Code § 57.72(d)(1)(iii) (allowing for the use of a letter of notification in lieu of a full siting application when the proposed HV transmission line "is proposed to be located entirely within applicant's existing transmission line right-of-way and the property of the sole customer to be served by the line, so long as the size, character, design or configuration of the proposed HV line does not substantially alter the right-of-way") (emphasis added).

[57] *See* 52 Pa. Code §§ 57.71, *et seq.*

declined to adopt a "'bring your own generation requirement,' [that would] require large load customers to demonstrate access to generation resources, or condition service on a showing that sufficient existing supply was available to serve the new load" in its recent Interconnection and Tariffs for Large Load Customers proceeding.[58] The Commission also declined to require large load customers to take interruptible service because "requiring such programs only to a certain class of customers may be considered discriminatory."[59] The ongoing federal and Commission proceedings cited by OCA remain pending—with one proposal already rejected by FERC[60]—and so are not binding on PPL Electric and do not form a legal basis to condition or deny this LON.[61] OCA also fails to reconcile its request with the Company's existing ESA with the Customer and its Commission-approved tariff, which obligate PPL Electric to provide non-discriminatory service to the Customer. Indeed, imposing additional, extra-legal requirements on the Customer's interconnection places PPL Electric at risk that the Customer will take legal action against the Company to enforce these previously agreed-upon terms of service.

For these reasons, the Commission should reject OCA's objections to the LON that are based on vague resource adequacy concerns, are unsupported by facts or analysis in the record, and contradict existing law, the Company's tariff, and the applicable ESA.

4. The HV transmission lines and associated facilities contemplated by the LON will not result in reliability risks to existing customers and OCA has presented no credible evidence to the contrary

Building on its unsupported allegations that interconnecting the Customer will result in reliability risks to existing customers, OCA argues that the Company has not demonstrated a need

[58] PPL Electric St. No. 5-R, p. 54.
[59] *Interconnection and Tariffs for Large Load Customers*, Docket No. M-2025-3054271, at 92 (Order entered May 12, 2026).
[60] *See Order Accepting Tariff Revisions in Part and Rejecting Tariff Revisions in Part*, Docket No. ER26-3515-000, 197 FERC ¶ 61,019 (Oct. 9, 2026) (rejecting PJM's Interim Resource Adequacy Service ("IRAS") proposal) ("*FERC IRAS Order*").
[61] *See* OCA MB, pp. 43-44; PPL Electric MB, p. 45.

for the Project because the Phase 1 facilities are not designed to accommodate the ultimate load anticipated to be served by the *Sugarloaf Full Siting Application*, i.e., the Phase 2 load.[62] Here, OCA relies on the potential consequences of a hypothetical scenario under which the Customer interconnects with the Phase 1 facilities and the Phase 2 project is not approved, but PPL Electric allows the Customer to operate its facilities at a load level that the Phase 1 facilities cannot support. The Commission should reject OCA's attempts to challenge the LON's necessity through this strained and unlikely hypothetical scenario. As more fully explained in Section IV.B, below, as well as in the Company's Main Brief, PPL Electric has fully demonstrated that the proposed HV transmission lines and associated facilities will not result in reliability risks to existing customers and that the Company's existing tariff and ESA already safeguard against the reliability issues that OCA claims could unfold.[63]

Initially, the Company notes that OCA inappropriately attempts to graft the safety requirements of Section 57.76(a)(2) into the need analysis. Demonstrating need is "the threshold issue which must be proven before the rest of the case is evaluated,"[64] an analysis that is completed prior to and separate from the Commission's Section 57.76(a)(2) analysis of whether proposed HV transmission lines "will create an unreasonable risk of danger to the health and safety of the public."[65] The Commonwealth Court confirmed the focused scope of the need review when it rejected attempts by an environmental party to graft the requirements of Section 57.76(a)(4) (regarding minimum adverse environmental impact) into the Commission's need analysis in another transmission line proceeding. As the Commonwealth Court explained:

> ECC's allegations of error are based on an incorrect reading of Section 57.76(a)(1), which only requires that there be a need for the proposed HV line. Here, ECC attempts to graft language contained

[62] *See, e.g.*, OCA MB, pp. 33-34.
[63] *See* PPL MB, pp. 40-50.
[64] *See Susquehanna-Roseland Commission Order* at *35.
[65] 52 Pa. Code § 57.76(a)(2).

> in Section 57.76(a)(4), which includes the phrase "minimum adverse environmental impact," onto Section 57.76(a)(1), which contains no such modifying language. According to ECC's interpretation, this would require the PUC to consider environmental factors when determining whether there is a need for the project, here, the 502 Facilities (not the TrAIL Project as a whole). The rules of statutory construction and interpretation, which also apply to regulations, Presock v. Department of Military and Veterans Affairs, 855 A.2d 928, 931 (Pa. Cmwlth. 2004), state that the object of all interpretation is to ascertain and effectuate the intention of the General Assembly or, in this instance, the PUC. Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(a). When the words of the regulation are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa. C.S. § 1921(b). ECC's "form over substance" argument requests the Court to ignore the clear and unambiguous language of Sections 57.76(a)(1) and (4) so that the regulation's spirit may be met. However, as Section 1921(b) of the Statutory Construction Act of 1972 makes clear, such requests should not be entertained. Moreover, the balancing of the environmental impact of the HV lines with the need for the HV lines is to be done as described in Section 57.76(a)(4) after the need for the lines has been shown in Section 57.76(a)(1).[66]

The clear language of Section 57.76(a)(1) is limited to an analysis of whether a need for the proposed HV transmission lines exist, and the Commission should reject OCA's attempts to merge subsequent analyses under Section 57.76(a)(2) or otherwise into this threshold inquiry.[67] OCA cannot manufacture a dispute over need by inserting its witness's testimony regarding safety risks into the Commission's need analysis.

OCA's arguments regarding the Customer's projected load and potential NERC violations rely on two unsupported assumptions. These arguments first assume that the ability of the Phase 1 facilities to serve a portion of the Customer's load was not reviewed by PJM as part of its do no

[66] *Energy Conservation Council of Pa. v. Pa. PUC*, 995 A.2d 465, 482-83 (Pa. Cmwlth. 2010) (emphasis in original) ("*TrAILCo*-ECC"). The Company notes that in its Main Brief, PPL Electric referred to this Commonwealth Court decision as "*TrAILCo*," and has changed the short cite in this Reply Brief because it is referencing both the Commission and the Commonwealth Court decisions related to this case.

[67] OCA may be attempting to shoehorn the safety analysis into the evaluation of need to overcome the admissions of its own transmission planning witnesses, Mr. Konidena, who did not contest the need for the Project. *See* PPL Electric Cross Exh. No. 17; *see also* Tr. 755-59.

harm analysis, and also assume that PPL Electric would allow the Customer to take service in excess of what PPL Electric's facilities can safely or reliably handle. These assumptions are more fully rebutted in Section IV.B.3, below, but it bears emphasizing here that OCA's claims are based on hypothetical scenarios raised for the first time during cross-examination of PPL Electric Witness Lookup.[68] OCA Witness Konidena, however, admitted that PJM's do no harm analysis considered the projected load level for Phase 1,[69] and criticized PPL Electric for designing the Tomhicken Switchyard to accommodate the customer's ultimate requested load from a cost-allocation perspective.[70] Neither OCA witness analyzed the need for the Project under the strained hypothetical scenario presented in OCA's Main Brief. Mr. Konidena did analyze it under the actual facts of the case and confirmed that the facilities are designed to safely accommodate the Phase 1 load.[71]

Second, OCA assumes that PPL Electric would allow a customer with a known load ramping schedule to increase its load beyond the capacity of the transmission system, even though it has fully designed and proposed the facilities necessary to accommodate that eventual load in a separate full siting application that has been submitted to the Commission for approval.[72] PPL Electric Witness Mr. Lookup explained that this scenario is not only unlikely, but also that the Company has sufficient protections and authority in its existing ESA to prevent this hypothetical scenario from playing out. In reference to the on-the-record data request admitting into evidence as PPL Electric Hearing Exhibit No. 3, Mr. Lookup was asked directly whether the Customer could receive service above the capacity of the Phase 1 facilities:

[68] *See* Tr. 442-78.
[69] *See* OCA St. 2, p. 15.
[70] *See* OCA St. 2, p. 15.
[71] *See* OCA St. 2, pp. 16, 45-46.
[72] *See Sugarloaf Full Siting Application.*

> Q. There the fifth bullet referenced Schedule D, which provides the phase two work is within the scope of work. So does - does that mean - should we be reading your response here to say that the customer cannot exceed 400 megawatts unless and until the phase two of the project is completed?
>
> A. Correct.[73]

The Company has maintained from the start of this proceeding that Phase 2 facilities are required to serve the Customer at its eventual, projected load, which is why those facilities have been designed and proposed in a separate proceeding.[74] Missing from the record is any indication that (a) the Customer will take service at a level that places the Company's or the Customer's facilities at risk, (b) the Customer would increase its load beyond the capacity of PPL Electric's system, and/or (c) PPL Electric lacks the power as the transmission owner to prevent such scenarios from occurring or would allow them to occur. The only thing that OCA has shown is that neither the Company's tariff nor its ESA expressly addresses the specific, hypothetical scenario posed by OCA. As explained in Section IV.B.4, below, maintaining operational flexibility is a feature, not a bug, of the Company's ESA and tariff, and OCA's attempts to frame this construction as deficient should be rejected.

Finally, OCA's reliability claims once again inappropriately attempt to litigate issues related to Phase 2 in this proceeding, which only concerns Phase 1.[75] Despite the ALJs' appropriate denial of both of OCA's Motions to consolidate the two proceedings, OCA continues to attempt to advance arguments that approval of Phase 1 should be conditioned upon approval of Phase 2, and that the Phase 1 facilities are not adequate based on the scope of Phase 2 and the

[73] Tr. 51.
[74] PPL MB, pp. 31-32.
[75] *See* PPL Electric MB, p. 25.

Customer's projected load.[76] The ALJs should reject OCA's continued backdoor attempts to force its twice-rejected consolidation of separate proceedings.

5. OCA's concerns regarding transmission costs, transmission cost allocation, and cost recovery do not provide a valid basis for denying the proposed HV transmission lines

OCA also contests the need for the subject HV transmission lines based upon issues of cost, cost allocation, and cost recovery. As explained in the Company's Main Brief, these cost-based claims do not alter the fact that an undisputed need for the HV transmission lines exists.[77]

At the outset, there are significant legal flaws with OCA's position. Issues of transmission cost allocation are under the exclusive jurisdiction of the FERC.[78] In addition, OCA fails to acknowledge the wealth of Commission precedent that makes clear that cost allocation determinations are not made in siting application proceedings,[79] or that approval of a letter of notification does not foreclose a party's attempt to challenge transmission costs, cost allocation, or recovery in the appropriate venue.[80]

Even setting aside these legal flaws, PPL Electric's testimony also rebutted the factual and policy bases for OCA's claims. OCA's primary opposition to the proposed allocation is that PPL Electric's application of its existing cost allocation policy does not assign 100% of the Project costs to the Customer, as contemplated in the "but for" test proposed in the Commission's Model Large Load Tariff.[81] However, PPL Electric Witness Lookup explained that the Company's cost allocation policy, as applied to the Tomhicken Project, appropriately assigns costs for customer-

[76] The Company notes that OCA conveniently includes Phase 2 in its analysis of potential harms of Phase 1 of the Project while also asking the Commission to disregard any ratepayer benefits that will be realized in Phase 2. *Compare* OCA MB, pp. 33-41 (arguing that the Phase 1 facilities are inadequate based on the anticipated load that the Phase 2 facilities are designed to address), *with* OCA MB, p. 46 (". . . the Commission should assign little weight to the speculative reliability benefits which are contingent on approval of Phase Two.").
[77] PPL Electric MB, p. 35.
[78] 16 U.S.C. §§ 824(b), 824e(a); *see also Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 153 (2016).
[79] *See* PPL Electric MB, p. 37, n.138.
[80] *See* PPL Electric MB, p. 38-39; PPL Electric St. No. 5-RJ, p. 23.
[81] OCA MB, pp. 47-48

specific investments to the Customer and costs for network upgrades to transmission rate base.[82] PPL Electric Witness Taylor also testified that the Company's cost allocation policy and its application to this Project is reasonable and in line with FERC policy, stating:

> The Company uses a project-specific engineering and functional analysis to determine the allocation between facilities that primarily serve the Customer and facilities that provide broader transmission system benefits pursuant to PPL Electric's Policy on Cost Allocation for Large Customer Interconnections.
>
> ***
>
> In general, the analysis evaluates the purpose and function of individual project elements to determine whether they are appropriately assigned directly to the Customer or treated as transmission infrastructure that supports the operation of the transmission system. The resulting allocation reflects the Company's engineering analysis regarding the respective benefits of the facilities. The allocation will be finalized based on final costs, and any amount allocated to the transmission system will be incorporated into the Company's annual FERC formula rate filing for review and inclusion in transmission rates.
>
> To the extent any portion of the project is ultimately proposed for recovery through transmission rates, the appropriateness of that treatment remains subject to review through the applicable FERC jurisdictional processes discussed above.[83]

Further, PPL Electric Witness Johnson presented unrebutted testimony demonstrating that the addition of large load customers to transmission rates actually lowers transmission rates.[84] As Ms. Johnson explained:

> Second, data centers do impact the transmission system and transmission rates. Because these large customers are interconnecting at least 69 kV, upgrades to the transmission system may be required for either equipment to serve the customer specifically or also upgrades to other parts of the transmission system that provide benefits to all customers. On its face, this may sound like this increases costs to all customers-- but remember the FERC Transmission Formula Rate. The FERC Transmission Formula Rate Network Service Charge is calculated by taking the

[82] PPL Electric St. No. 1-R, pp. 19-22.
[83] PPL Electric St. No. 5-R, p. 22.
[84] PPL Electric St. No. 6-R, pp. 11-12.

> Net Revenue Requirement divided by the single coincident peak. These large load customers are anticipated to run 24x7 and therefore would impact that peak. PPL Electric's analysis, as shown in PPL Electric Exhibit BLJ-3R, has shown that approximately $38.4 million of transmission capital investment (assumed to be recovered over 42 years) for a 12-MW data center, results in approximately $4.6 million incremental annual revenue requirement. PPL Electric's Network Service Rate at the time of the analysis had a starting point of $889,895,496 revenue requirement divided by a single coincident peak of 8,057.0 MW equaling a rate of $110,450/MW-Yr. If you add the $4,644,187 million/year incremental revenue requirement, you now have $894,539,683 divided by 8,069.0 MW, which equals a rate $110,861/MW-Yr. While the revenue requirement itself increases, the increase in the peak load offsets that, and when adjusted for timing and cost allocation to PPL Electric's customer groups, versus the transmission service charge effective as of January 1, 2026, residential customers may see a decrease in their bill of approximately $5/year.
>
> ***
>
> This is why data centers are expected to reduce the FERC Transmission Formula Rate. Taken a step further, recall that the FERC Transmission Formula Rate is charged to LSEs. PJM will charge this lower rate to LSEs for their respective load. PPL Electric, as an LSE for default service customers, will be charged this lower rate for its same amount of default service load (assuming the data center shops). Therefore, the total costs it passes through the Transmission Service Charge to its default service customers will be less.[85]

The testimony of PPL Electric witnesses rebutted OCA's claims and demonstrated that (a) the Company's allocation practices comply with applicable FERC policy and precedent, and (b) adding this Customer's load to the system will reduce transmission rates even accounting for the additional transmission rate base associated with this Project being added to rates.

Finally, PPL Electric reiterates that no determinations made in this proceeding foreclose OCA's ability to continue to advocate for its policy preferences in the number of ongoing proceedings involving proposed regulations and policies that are either unfinalized, rejected, or

[85] PPL Electric St. No. 6-R, pp. 11-12.

non-binding.[86] As explained above, this LON must be reviewed and determined based on existing law, under the plain language of the Commission's regulations and prior Commission orders.[87] Asking to the Commission to reject this LON, and deny interconnection and service to a new customer based upon developing policies that are not yet codified in the law would be unlawful.

6. OCA's requests for relief make clear that it seeks a second bite at the apple with respect to the proposed HV transmission lines

OCA requests three versions of relief in its Main Brief. Primarily, it asks the Commission to deny approval of the LON.[88] As a first alternative, it asks the Commission to condition approval on several criteria, including that the Customer either brings its own generation or accepts service on an interruptible rate, the Commission reviews and approves the Phase 2 Sugarloaf full siting application, the Company modifies either the ESA or its existing tariff to incorporate a specific provision addressing service interruption at a certain load level, and the Customer pays 100% of the Project costs.[89] As a second alternative, OCA asks the Commission to instruct PPL Electric to refile the LON "with evidence that [these] criteria have been satisfied," which in practice would require PPL Electric to refile and consolidate the LON with the pending *Sugarloaf Full Siting Application*.[90]

OCA's requested relief is unsupported in the record. Section 57.76(a) requires PPL Electric to demonstrate the following in order for the LON to be approved:

> (1) That there is a need for it.
>
> (2) That it will not create an unreasonable risk of danger to the health and safety of the public.
>
> (3) That it is in compliance with applicable statutes and regulations, providing for the protection of the natural resources of this

[86] OCA MB, pp. 43-44; PPL Electric MB, pp. 21, 38-39.
[87] 52 Pa. Code § 57.71; *Susquehanna-Roseland Commission Order* at *125-26.
[88] OCA MB, p. 49.
[89] Here the OCA again references the interim resource adequacy service proposed by PJM that has been rejected by FERC. *See FERC IRAS Order.*
[90] *See* OCA MB, pp. 49-50.

Commonwealth.

> (4) That it will have minimum adverse environmental impact, considering the electric power needs of the public, the state of the available technology and the available alternatives.[91]

However, the regulations also make clear that a letter of notification is an abbreviated filing that does not require the same information to be provided as a full siting application.[92]

OCA Witnesses Dr. Felder and Mr. Konidena have admitted that a need for the proposed HV transmission lines exists, in satisfaction of 57.76(a)(1).[93] OCA Witness Mr. Konidena, admitted that he does not believe that the Project will create an unreasonable risk of danger to the health and safety of the public based on his transmission planning expertise.[94] OCA presented no affirmative evidence of its own related to the environmental impacts of the Project, OCA's witnesses admitted that their testimony did not opine on these environmental issues, and OCA did not oppose the LON on those grounds prior to filing its Main Brief.[95] Now, after admitting that PPL Electric either satisfied the applicable regulatory requirements or choosing not to present evidence on an issue, OCA asks that the LON be rejected and refiled as a full siting application with additional information meeting its preferred criteria. This is a clear request for a second bite at the apple, and appears to be an attempt by OCA to develop a different record for the Tomhicken Project from OCA presented here. The ALJs and the Commission should deny this attempt to re-litigate matters already fully litigated in this case.

OCA's requested relief is also indirectly inconsistent with representations made in OCA's Answer to the Company's Motion to Strike, which indicated that OCA would not be seeking relief

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[91] 52 Pa. Code § 57.76(a) (emphasis added).
[92] *See* PPL MB, p. 14; 52 Pa. Code § 57.72(d).
[93] PPL MB, p. 29.
[94] PPL Electric MB, pp. 42-43.
[95] *See* PPL Electric Cross Exhibit Nos. 19 and 20.

based on its witnesses' out-of-scope recommendations.[96] On page 48 of its Main Brief, OCA states that it "does not recommend that the Commission make adjustments to PPL Electric's retail electric distribution tariff in this proceeding; rather, the Commission can appropriately deny the LON, consistent with the Commission's regulations, and require additional evidence of customer protection at such time as when PPL Electric resubmits its siting application for the Phase One Project."[97] However, in its Answer to PPL Electric's Motion to Strike, OCA represented that it "will not ask the Commission in its briefs to make determinations regarding PPL Electric's transmission rates, cost allocation, cost recovery, or tariff provisions."[98] OCA further represented that "[t]o the extent [its witnesses' objected to] testimony identifies ongoing federal or state proceedings, policy developments, or regulatory considerations, that information is offered as evidence relevant to the Commission's evaluation of the Project, not as an independent request that the Commission adjudicate those proceedings or establish binding law through this LON,"[99] and that it "is not asking the Commission to establish or modify a FERC-jurisdictional transmission rate."[100] The relief OCA seeks in its Main Brief is inconsistent with these representations, because it asks that PPL Electric's LON be rejected and re-filed to include the very items it stated it would not seek as relief in this matter, which boil down to OCA's policy preferences that are not reflected in existing law.

[96] *See* OCA Answer to Motion to Strike, p. 8 ("The OCA is not requesting that the Commission make a determination on the reasonableness and prudency of PPL Electric's transmission costs, rates, allocation, and/or cost recovery, nor is OCA requesting that the Commission make changes to PPL Electric's tariff in this proceeding.").
[97] OCA MB, p. 48.
[98] OCA Answer to PPL Electric's Motion to Strike, p. 12.
[99] OCA Answer to PPL Electric's Motion to Strike, p. 13.
[100] OCA Answer to PPL Electric's Motion to Strike, p. 14.

7. OCA's proposed conditions upon approval of the LON are not necessary

OCA asks the Commission to approve the LON only if the Company satisfies its five proposed criteria.[101] OCA's conditions are not necessary and should be rejected, and the LON should be approved without condition or modification.

First, OCA asks the Commission to condition approval on "[r]egulatory and land-use approvals that Customer One may operate its facilities consistent with its ESA."[102] This condition would require the Customer to obtain all necessary approvals to operate its facilities prior to the Commission's approval. As stated in the Company's Main Brief, to the extent that the Commission is concerned about pending land use litigation in this instance, the Commission could condition its approval and PPL Electric's commencement of the construction of the subject HV lines upon the Customer obtaining all necessary permits.[103]

Second, OCA asks the Commission to condition approval of the LON on the submission of "[e]vidence that Customer One has (1) satisfied PJM's "bring your own new capacity" requirement or (2) will take service subject to an interruptible rate, either PJM's interim resource adequacy service construct or its functional equivalent."[104] As explained above, this LON must comply with existing law, and conditioning approval based on policies that are neither final nor binding would be contrary to the Commission's regulations. These requirements are also inconsistent with the Company's Commission-approved tariff, which makes interruptible service voluntary and contains no bring-your-own generation requirement.[105] As such, complying with

[101] OCA MB, p. 50.
[102] OCA MB, p. 50.
[103] PPL Electric MB, p. 40.
[104] OCA MB, p. 50.
[105] *See* OCA MB, p. 28.

this condition would inappropriately require modification of the Company's distribution tariff and/or its existing ESA with the customer.

Third, OCA asks the Commission to condition approval of the LON on "Commission review and approval of the Phase Two siting application, where such approval would prevent potential NERC violations associated with Customer One fulfilling the contracted-for load ramp."[106] This condition appears to require the Company to secure approval of Phase 2 before Phase 1 could be approved, which would grant OCA the consolidation it twice sought and was twice denied and impose a stay of this matter pending resolution of the *Sugarloaf Full Siting Application*.[107] . OCA's backdoor attempt to consolidate these proceedings despite rejection of its prior two attempts should be rejected. PPL Electric presented ample evidence that the Phase 1 facilities do not depend on Phase 2 facilities to be constructed in order to be operated safely.[108]

Fourth, OCA asks the Commission to condition approval of the LON on "[m]odification for Customer One's ESA and/or PPL Electric's retail electric distribution tariff, evidencing that Customer One's service can be interrupted if its load exceeds the amount necessary to cause NERC reliability violations."[109] This requirement is unnecessary because PPL Electric already fully possesses the ability to address any load-related NERC reliability violations and the Customer is prohibited from operating its facilities in this manner.[110]

Fifth, OCA asks the Commission to condition approval of the LON on "[m]odification of Customer One's retail electric distribution service [] on Customer One paying for 100% of the but-for costs of its interconnection and service."[111] The Company's proposed cost allocation is not

[106] OCA MB, p. 50.
[107] Order Denying Motion for Consolidation, Docket No. A-2025-3059443 (Order entered June 18, 2026); Order Denying Renewed Motion to Consolidate, Docket No. A-2025-3059443 (Order entered Sep. 8, 2026).
[108] *See* PPL Electric MB, pp. 30-31; PPL Electric St. No. 1-R, p. 18.
[109] OCA MB, p. 50.
[110] *See* Section IV.B.4, *infra*.
[111] OCA MB, p. 50.

within the Commission's jurisdiction, the Company's proposed allocation is consistent with applicable FERC policy, and the Company's existing tariff and ESA do not condition the Customer's interconnection on these terms. Directing the Company to amend its proposed cost-allocation policy would directly conflict with FERC's jurisdiction over PPL Electric's transmission rates, as it is the entity tasked with determining whether the Project costs are reasonable.[112] Imposing this condition would interfere with FERC's exclusive jurisdiction over transmission rates and contradict prior Commission orders approving letters of notification, which specifically noted that no decisions were being made about project costs or accounting.[113]

In sum, conditioning the LON as the OCA suggests would force the Company to re-litigate the merits of this LON, thereby providing OCA a second bite at the proverbial apple. It would also require amendment of the Company's tariff and ESA, which OCA previously represented it would not ask the Commission to modify in this proceeding.[114] Finally, it would impose extra-legal conditions based on ongoing policy matters and/or areas outside the scope of the Commission's jurisdiction. For these reasons, OCA's proposed conditions should be rejected.

8. Other parties' concerns regarding the status of the Customer's land use and zoning approvals are inaccurate, and easily resolved

OCA and Protestants Ms. Cook and Mr. Zola argue that the need for the Project is speculative because the Customer has not yet obtained certain zoning and land use approvals for its development.[115] As explained in the Company's Main Brief, PPL Electric recognizes that litigation related to the Customer's land use and zoning approvals is ongoing. To the extent that the Commission is concerned about pending land use litigation in this instance, the Commission

[112] *Transource v. DeFrank* at 376 (internal quotations and citations omitted).
[113] See PPL Electric MB, p. 37, n.138.
[114] *See* OCA Answer to Motion to Strike, p. 8 (". . . nor is OCA requesting that the Commission make changes to PPL Electric's tariff in this proceeding.")
[115] *See, e.g.*, OCA MB, pp. 16, 21-22; Cook MB, p. 11; Zola MB, pp. 10-11.

could condition its approval and PPL Electric's commencement of the construction of the subject HV lines upon the Customer obtaining all necessary permits. Ms. Cook and Mr. Zola's position overstates the current posture of the Customer's land use appeal. The Luzerne County Court did not permanently prohibit the proposed data center. Rather, it affirmed the denial of Customer's land development plan because the required special exception had not been obtained and remanded the matter to the Zoning Hearing Board expressly permitting the Customer to apply for a special exception and obtain further determinations.[116] Nothing in the record suggests that the Customer will not ultimately be successful in obtaining special exception approval to allow the data center use.

The other parties' arguments that the need is speculative ignore the undisputed fact that the Customer has requested service that PPL Electric is obligated to provide. PPL Electric has made clear that it will only proceed with construction of these facilities so long as a need persists.[117] While the other parties dispute the status of Customer's proposed development, they do not dispute that the Customer has requested service, has executed the appropriate agreements, and has agreed to obtain service from PPL Electric under its Commission approved tariff.[118] The Commission regularly approves LONs driven by the need to interconnect or upgrade service to a single customer without conditioning approval on completion of the underlying customer facilities that triggered the request for service.[119] Thus, an undisputed need for the proposed HV transmission lines exists and is supported by the record evidence in this proceeding.

[116] *See* Cook MB, Appendix A (Opinion and Order of Luzerne County Court of Common Pleas).
[117] PPL Electric MB, p. 21.
[118] *See, e.g.*, Zola Direct, Public Input Hearing Tr. 202-04; Cook Direct, p. 7.
[119] *See* note 30, *supra*.

B. PPL ELECTRIC DEMONSTRATED THAT THE PROPOSED HV TRANSMISSION LINES WILL NOT CREATE AN UNREASONABLE RISK OF DANGER TO THE HEALTH AND SAFETY OF THE PUBLIC

The record in this proceeding establishes that the proposed HV transmission lines contemplated by the Tomhicken 230 kV Switchyard Project will not create an unreasonable risk of danger to the health and safety of the public.[120] PPL Electric presented unrebutted evidence that the proposed HV transmission lines will be "designed, constructed, operated, and maintained in a manner that meets or surpasses all applicable NESC minimum standards and all applicable legal requirements."[121] Moreover, PPL Electric demonstrated that the LON adequately considers and addresses electric and magnetic field mitigation.[122]

The crux of the dispute regarding PPL Electric's satisfaction of 52 Pa. Code § 57.76(a)(2) centers upon OCA's contention that the Project may potentially impact the safety and reliability of electric service.[123] As explained in PPL Electric's Main Brief and testimony, OCA's claims regarding possible impacts of the Project on safety and reliability are based upon generalized concerns and hypothetical operating conditions, and are not specific to the HV transmission lines proposed in this proceeding.[124] Rather, the record shows that OCA did not perform any quantitative analysis of the risks it claims are "unreasonable."[125] The record also shows that OCA has not rebutted the principal quantitative analysis of the risks of the proposed facilities upon grid safety and reliability, i.e., the PJM "Do No Harm," or DNH, analysis. Relatedly, OCA's claims regarding reliability risks conflate the function of the facilities to be constructed as a part of the

[120] PPL Electric MB, Section C.
[121] PPL Electric MB, p. 41 (citing PPL Electric Hearing Exhibit No. 2 – Letter of Notification, Attachment 4, p. 1).
[122] PPL Electric MB, Section C.2.
[123] *See* OCA MB, pp. 50-51. Ms. Cook and Mr. Zola also put forth arguments related to reliability. Specifically, they argue that there would be resource adequacy concerns in that insufficient generation capacity is available to serve the Customer. Zola MB, pp. 11-12; Cook MB, p. 13. These arguments are similar to the generalized arguments put forth by OCA regarding resource adequacy within the PJM region, and they fail for the same reasons.
[124] PPL Electric St. No. 1-R, pp. 22-24; PPL Electric St. No. 5-R, pp. 29, 46-47; PPL Electric MB, pp. 44-47.
[125] OCA MB, pp. 18, 50.

instant LON with the demand to be served only if the facilities contemplated by the "Phase 2" siting application, which are not the subject of this proceeding, are approved and constructed.[126]

Finally, OCA's arguments in favor of "additional measures" or "protections" to be incorporated into PPL Electric's tariff (1) ignores the Company's repeated establishment that its tariff provisions and ESA do, in fact, contain such protections and allow the Company to operate with reasonable flexibility, and (2) rest on the improper assumption that, without OCA's preferred tariff conditions, the Company will operate its facilities and provide service to the Customer in a manner that would violate its duties and obligations under the Public Utility Code, and also violate NERC and PJM requirements. This absurd assumption is not in evidence and provides no basis for OCA's claims and recommendations.

Therefore, and for the reasons explained in PPL Electric's Main Brief, the ALJs and the Commission should find and determine that PPL Electric has demonstrated the proposed HV transmission lines will not create an unreasonable risk of danger to the health and safety of the public, and reject OCA's claims to the contrary.

1. OCA's attempt to second guess PJM's DNH analysis should be rejected

At the outset, it appears that OCA is attempting to challenge the DNH analysis performed by PJM with respect to the subject facilities, without performing any quantitative analysis of its own. Proposed solutions for transmission needs are submitted to PJM and studied to ensure that these solutions will do no harm to the system by creating overloads, voltage violations, or other criteria violations.[127] The Tomhicken Project went through PJM's M-3 Supplemental Project Process, passed the DNH test performed by PJM, and was assigned supplemental project number S3528.[128] PJM's DNH analysis represents a quantitative evaluation of the risks of the proposed

[126] PPL Electric MB, p. 2.
[127] PPL Electric Hearing Exhibit No. 2 – Letter of Notification, Attachment 1 – Necessity Statement, pp. 4-5.
[128] PPL Electric Hearing Exhibit No. 2 – Letter of Notification, Attachment 1 – Necessity Statement, p. 5.

facilities required to serve the Customer, and a determination that those facilities are adequate and do not propose risks to the safety and reliability of the transmission grid.

OCA's attempt to dispute the Project's risk of danger to public health and safety (i.e., the safety and reliability of PPL Electric's service and facilities), appears to be an indirect attack on PJM's DNH analysis. However, OCA's claims regarding the risks of the Project upon health and safety are disconnected from this Project in two key ways.

First, OCA does not actually dispute that the DNH for the subject facilities and interconnection was performed or that it was valid. Thus, neither PJM's DNH analysis nor the Company's reliance upon this analysis has actually been rebutted.

Second, OCA's claims are not based upon a quantitative analysis of "risk."[129] Rather, OCA speculates that the interconnection of the customer "may" or "could" or "can" produce "potential" or "possible" adverse impacts to safety and reliability.[130] Yet, OCA supplies no analysis that quantifies the likelihood that these speculative adverse events will occur, or the likelihood of any impacts associated with such adverse events.

Instead, OCA offers a speculative and hypothetical parade of horribles from Dr. Felder regarding things that "may" happen to service reliability <u>if</u> large loads are <u>generally interconnected</u> to the grid, <u>if</u> PJM's generation and capacity shortfall continues, and <u>if</u> PJM and PPL Electric both fail to take the steps that are required of them to manage the grid. Dr. Felder's speculative arguments are addressed in more detail in Section IV.C.3, *infra*.

OCA also offers a separate speculative and hypothetical parade of horribles from Mr. Konidena which pertains to potential grid impacts <u>if</u> the Customer were to operate above the specified MW thresholds that necessitate Phase 2 of the Project, which, as has been reiterated ad

[129] *See*, Tr. 628:17, 629:2, 12-15, 632:4, 14.
[130] *See, e.g.*, OCA MB, pp. 8, 13-15, 21, 24, 28-29, 31-36, 40, 53.

nauseum, is not the subject of the instant proceeding.[131] This speculation addressed more fully in Section IV.C.2, *infra*. Critically, however, each "if" identified in the chain of assumptions made by OCA's witnesses is not quantified. Such bald assertions and speculation do not constitute substantial evidence.[132]

The disconnect between OCA's testimony and the actual DNH analysis performed by PJM demonstrates that the impacts of the Project upon the safety and reliability of the transmission grid have been adequately considered. OCA's testimony provides no concrete basis to second-guess this analysis because the arguments offered are based upon unquantified and speculative assumptions about things that "may" or "could" occur. Therefore, OCA's claims should be rejected.

2. PPL Electric demonstrated that the specific HV transmission lines proposed in this LON are adequate to provide safe and reliable service up to the demand the facilities are designed to accommodate

OCA argues that the approval of Phase 1 of the Project, absent safeguards and further assurance regarding Project construction, will create unreasonable risks to the public.[133] Specifically, OCA argues that (1) the addition of 965 MW of new customer load will exacerbate reliability concerns associate with an existing capacity resource shortfall in the PJM region and (2) that the Customer's load will "independently exceed the thresholds at which the transmission system experiences NERC reliability violations," in the form of thermal overload at a 400 MW increase and voltage violations at a 700 MW increase.[134] This argument incorrectly conflates two very separate issues.

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[131] *See, e.g.*, PPL Electric Hearing Exhibit No. 2 – Letter of Notification, p. 7; PPL Electric Hearing Exhibit No. 2 – Letter of Notification, Attachment 1 – Necessity Statement, p. 2; PPL Electric MB, p. 2.
[132] PPL Electric MB, p. 7, (citing *Mid-Atlantic Power Supply Ass'n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citation omitted) ("Mere bald assertions, personal opinions or perceptions do not constitute evidence.")).
[133] OCA MB, p. 51.
[134] OCA MB, pp. 51-52.

Specifically, OCA's argument refers to the facilities contemplated to be constructed within the Phase 1 scope, which is the appropriate scope of this LON.[135] However, it then argues that these facilities are inadequate to serve the load of the Customer justifying the Phase 2 scope, which is not within the scope of this LON but is instead the subject of the *Sugarloaf Full Siting Application*.[136] This apples to oranges comparison should be rejected for several reasons.

First, the Phase 1 facilities are adequate and sufficient to serve the Customer's initial demand, and up to 400 MW. This was clearly stated in PPL Electric's testimony,[137] and also acknowledged by OCA Witness Mr. Konidena.[138] Notably, OCA's testimony is devoid of any statement or claim that the Phase 1 facilities are inadequate to serve the Customer's Phase 1 demand, or that the Phase 1 facilities cannot safely and reliability serve the Customer's Phase 1 demand. Therefore, the record is clear that the facilities with the scope of the LON are adequate to serve the load of the Customer that is within the scope of the LON.

Second, OCA's argument is a continuation of its attempts to conflate this LON with the separate (now stayed) Phase 2 full siting application. This argument conflates the demands of two separate sets of facilities that are the subject of two separate proceedings, and appears to be an improper attempt to continue to litigate OCA's twice-denied requests to consolidate the LON and the full siting application.[139]

Third, OCA's argument that approval of the LON would lead to unreasonable risks to the public also rests upon the unfounded assumption that PPL Electric would allow the Customer to obtain service in excess of what PPL Electric's facilities can safely and reliably accommodate.[140]

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[135] OCA MB, pp. 51-52.
[136] OCA MB, p. 54.
[137] PPL Electric St. No. 1, pp. 3-5.
[138] OCA St. 2, pp. 20-23.
[139] Order Denying Motion for Consolidation, Docket No. A-2025-3059443 (Order entered June 18, 2026); Order Denying Renewed Motion to Consolidate, Docket No. A-2025-3059443 (Order entered Sep. 8, 2026).
[140] *See* OCA MB, p. 54.

This unfounded assumption ignores the plain language of PPL Electric's Commission-approved tariff and the ESA.

The Company's Commission-approved tariff, together with the ESA which is executed by customers taking service under Rate Schedule LP-6, contain binding terms and conditions of service that provide more-than-adequate protections.[141] Indeed, the tariff and the ESA allow the Company to respond to the needs of the grid and to manage the service provided to the Customer (and all customers) in a way that ensures the continued safety and reliability of PPL Electric's service and facilities.

OCA's argument is also premised upon OCA's assumption that PPL Electric would operate its facilities in violation of its tariff and the law. This ignores the fact that violating NERC requirements[142] and/or the Commission's requirements could subject PPL Electric to monetary and non-monetary penalties.[143] Having failed to point to any record evidence showing that PPL Electric would commit such violations—and no such evidence exists—OCA's assumptions to the contrary should be rejected.

Fourth, the OCA's attempts to re-write Mr. Lookup's testimony on cross to demonstrate that thermal overloads and voltage violations are possible ignores all context and, therefore, is misleading.[144] Critically, the cited testimony is based on hypothetical scenarios pertaining to hypothetical, possible future operating circumstances that were presented to Mr. Lookup during cross-examination.[145] A close reading of OCA's questions and Mr. Lookup's testimony in

[141] PPL Electric St. No. 1-R, pp. 12-14; PPL Electric St. No. 5-R, pp. 42, 50-51; PPL Electric MB, pp. 45-47.
[142] NERC, *Sanction Guidelines of the North American Electric Reliability Corporation* (Effective Jan. 19, 2021), https://www.nerc.com/globalassets/who-we-are/rules-of-procedure/Appendix-4B.pdf.
[143] 66 Pa.C.S. §§ 501, 502, 3301.
[144] OCA MB, pp. 52-53.
[145] Tr. 443 (ATTORNEY GUTHRIE: "So if the phase one facilities are constructed and if Customer Number 1's ramp reaches less than half of its full anticipated peak demand, or 400 megawatts, and the phase two facilities are not constructed, then PPL's system will experience thermal overloads. Is that correct?" (emphasis added)); Tr. 444 (ATTORNEY GUTHRIE: "So it's after phase one is constructed, it is – is it also correct that PPL's system will experience thermal overloads if Customer Number 1 reaches its full anticipated peak demand of 965 megawatts?"

response makes it apparent that the argument rests upon a series of hypothetical contingencies—which may or may not ever happen—in certain hypothetical circumstances—which may or may not ever happen—under certain hypothetical operating conditions—which may or may not ever not happen.

Specifically, with respect to a hypothetical thermal overload, OCA claims that "an overloaded conductor can overheat," causing power to shift to other transmission lines following a breaker trip, "those lines can become overheated," and those lines "may sag below [their] designed clearance and create a potential fire risk."[146] Yet, there has been no showing that the specific conductors proposed in the LON (a) have overloaded or will overload, (b) have sagged or will sag below their designed clearance, or (c) have created or will create a fire risk as a result of such conditions. Relatedly, and with respect to a hypothetical voltage violation, OCA notes that such a violation "could lead to" cascading events, only if that violation interfered with PPL Electric's ability to operate equipment and where current would have to be rerouted to other lines.[147] Yet again, no evidence suggests that such voltage violation has occurred or will occur, that such cascading events have occurred or will occur, or that PPL Electric's ability to operate its equipment has been or will be interfered with due to such violation. The only thing OCA's hypotheticals show is that PPL Electric is indeed aware of the potential risks of allowing service to be taken in excess of what its facilities can handle. However, this does not show that such

THE WITNESS: "Yes, but I'd like to clarify that. I mean, we would not operate the system above the threshold if phase two solution was not in place."); Tr. 549 (ATTORNEY EL ATIEH: " . . . if phase one is completed and the customer interconnects and their load exceeds 400, are you able to direct an interruption to that [LP-6] customer so that it will not take beyond 400 megawatts? THE WITNESS: Yeah. I mean, hypothetically, if we only completed phase one and did not – connect phase two, we would not operate that system like I described earlier in the testimony."); Tr. 550 ("ATTORNEY EL ATIEH: And if that curtailment goes to that customer, would that be directed only to that customer so no other customers would be affected by outages or reliabilities caused by this customer exceeding its 400 megawatts? THE WITNESS: Hypothetically, if they went above the 400 megawatts before we were able to upgrade this system, correct, it would go to that customer. ATTORNEY EL ATIEH: And why are you saying hypothetically? THE WITNESS: Because it's – it's a situation where it doesn't exist and we're trying to define the boundaries of it as we – as we have this discussion here.").

[146] OCA MB, p. 53 (emphasis added).

[147] OCA MB, p. 53 (emphasis added).

violations will occur or have a quantified likelihood of occurrence on the HV transmission line facilities proposed in the LON.

Finally, PPL Electric notes that many of OCA's specific arguments pertaining to reliability violations and risks are contained in Section VI.A of its Main Brief, which is addresses the need for the Project under 52 Pa. Code § 57.76(a)(1).[148] However, the need showing required by Section 57.76(a)(1) is separate from the showing that no unreasonable risk of danger to the health and safety of the public which is required by Section 57.76(a)(2).[149] The Commonwealth Court has previously determined that it is improper to "graft" language which would require the Commission to consider factors contained within one subsection of the regulations at 57.76(a) onto another;[150] yet, OCA is doing just that. This appears to be an attempt by OCA to shoehorn its reliability and resource adequacy argument into the "need" section of its Main Brief in order to avoid the fact that its only witness attempting to offer testimony from the perspective of a transmission system planning, Mr. Konidena, admitted the Project will not create an unreasonable risk of danger to the health and safety of the public based upon his transmission planning expertise.[151]

3. OCA's argument is based upon generalized concerns regarding resource adequacy, and hypothetical operating conditions

OCA does acknowledge that the focus of the inquiry in the instant case is upon the specific facilities at issue and the operation of those facilities.[152] However, as repeatedly made clear in this Reply Brief, OCA's Main Brief advances speculative arguments regarding the risks to health and safety of this Project that are based upon generalized concerns and hypotheticals disconnected from the specific facilities and service involved in the LON.

[148] OCA MB, pp. 24-33.
[149] 52 Pa. Code § 57.76(a)(1)-(2).
[150] *TrAILCo-ECC* at 483.
[151] PPL Electric MB, pp. 42-43.
[152] OCA MB, pp. 50-51.

OCA Witness Dr. Felder's principal argument pertains to his resource adequacy concerns stemming from a generation and capacity resource shortfall in the PJM region, which includes 13 states and the District of Columbia.[153] Dr. Felder admits, however, that an analysis of the risks associated with his concerns requires a quantification of the probability of an event occurring, the probability of specific consequences occurring, and the value of those consequences.[154] Yet, Dr. Felder conducted no such analysis in this case, but instead relies upon "simple" "mental math" that was never actually presented in his testimony.[155]

Indeed, these generalized concerns premised upon hypotheticals are further borne out by the "if, then" assumptions repeated through OCA's Main Brief that relies upon Dr. Felder's testimony. Such examples include:

- "Phase One, standing alone, is insufficient to safely and reliably serve Customer One's load above 400 MW and . . . no tariff mechanisms currently [ensure] that Customer One's usage will be curtailed should its demand exceed the threshold where reliability violations will occur," and "Phase Two has not been approved yet by the Commission,"[156] *i.e.*, <u>if</u> PPL Electric operates its system in violation of NERC standards and <u>if</u> Phase 2 is denied, <u>then</u> Phase 1, standing alone, is insufficient to safely and reliably serve the Customer's load above 400 MW.

- "<u>[I]f</u> only the Phase One facilities are constructed, <u>then</u> PPL Electric's existing system would be unable to serve Customer One's full load of 965 MW."[157]

- "Customer One's service will not be curtailed <u>if</u> its demand or consumptions reaches levels that produce the identified thermal overloads and voltage violations."[158] PPL Electric notes that this also improperly assumes that PPL Electric would operate its system in violation of NERC standards.

[153] OCA St. 1SR, p. 18; OCA MB, p. 51. As explained in PPL Electric's Main Brief, however, OCA Witness Dr. Felder also admitted that generation service is not transmission service, and this LON does not involve generation service. PPL Electric MB, p. 44.
[154] Tr. 628-630 ("Q. Would you agree with me then that that analysis, when you're determining what a risk is it's generally comprised of a probability of a specific consequence occurring? A. That's right. That's what resource adequacy is trying to do. Q. So you're trying to identify a specific consequence under specific circumstances that has a specific probability of occurring. Correct? A. That's correct.").
[155] Tr. 626.
[156] OCA MB, p. 12.
[157] OCA MB, p. 13 (emphasis added).
[158] OCA MB, p. 14 (emphasis added).

- "Customer One's bargained-for, contract peak load will cause thermal overloads and voltage violations if additional transmission facilities are not built."[159]

- "[T]he interconnection and service of Customer One will create NERC violations without adequate controls in PPL Electric's tariff to ensure continued reliable service,"[160] *i.e.*, if PPL Electric's tariff does not contain adequate controls, which PPL Electric disputes, then the interconnection and service of Customer One will create NERC violations.

- "[I]f large loads are added to the electric power system without sufficient new supply to serve them or without meaningful policies to curtail their electricity consumption during times of supply shortages, then the reliability, specifically the resource adequacy, of the system will be degraded."[161]

- "PPL Electric's system will incur thermal overload and voltage violation contingency violations if the Customer's load ramps to 400 MW and 700 MW, respectively."[162] PPL Electric notes that this improperly assumes that (1) Phase 2 is not approved and (2) PPL Electric would operate its system in violation of NERC standards.

- "[I]f Customer One is permitted to fully ramp to its contracted amount of 965 MW, the customer's interconnection will worsen grid reliability and the Phase One LON should be disapproved."[163]

- "[A]pproval of Phase One, without additional safeguards and without assurance that the facilities necessary to serve Customer One's contracted load will be constructed and placed in service, creates such a risk,"[164] *i.e.*, if PPL Electric does not provide safeguards and assurance beyond that already provided, then the construction of Phase One will create unreasonable risk to the public.

- "If the Commission does not act, . . . PPL will interconnect a large load that will exacerbate PJM's resource adequacy shortfalls, which, if it results in the need for load curtailment, may allow large loads with backup generation to continue to receive power from the grid while ordinary ratepayers are curtailed.[165]

Not a single one of these hypotheticals has been quantified or otherwise shown to have a specific likelihood of occurrence related to the Project.

[159] OCA MB, p. 17 (emphasis added).
[160] OCA MB, p. 20.
[161] OCA St. 1, p. 8 (emphasis added).
[162] OCA MB, p. 34.
[163] OCA MB, p. 37 (emphasis added).
[164] OCA MB, p. 51.
[165] OCA St. 1SR, p. 18 (emphasis added).

Finally, OCA argues that "the evidence establishes a known pathway from Customer One's load growth to resource inadequacy and to identified NERC violations."[166] However, the "known pathway" is comprised of solely of OCA's unquantified and speculative assumptions about things that may or may not ever occur, each of which would require the ALJs and the Commission to make numerous leaps in logic to advance along this path. The law is clear, however, that such leaps in logic are not evidence let alone substantial evidence.[167] Therefore, these arguments should be rejected.

4. The "additional" safeguards and assurances advanced by OCA are already included in PPL Electric's Commission-approved tariff, and the ESA

Throughout this proceeding, OCA has contended that the Company's Commission-approved tariff and/or ESA lack sufficient terms and conditions that allow Company to respond to the needs of the grid and to manage the service provided to the Customer so as not to unreasonably impact public health and safety.[168] This is patently false. OCA also argues that further assurances and safeguards are required to determine that the Project would not create such unreasonable impact. Yet, this appears to be an attempt to distract from the plain language of the ESA, as well as from PPL Electric's explicit statements to this subject.[169]

PPL Electric previously identified several sections within its ESA which contain provisions which would allow the Company to manage its service and to curtail the Customer if needed, in the event that it would try to operate in excess of what the grid can handle.[170] Specifically, the ESA sections are:

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[166] OCA MB, p. 56.
[167] *Mid-Atlantic Power Supply Ass'n v. Pa. PUC*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (citing *Bureau of Corrections v. City of Pittsburgh, Pittsburgh City Council*, 532 A.2d 12, 14 (Pa. 1987)); *see also West Penn Power Co. v. Pa. PUC*, 219 A.3d 716, 2019 Pa. Commw. Unpub. LEXIS 532, at *24-25 (Pa. Cmwlth. 2019).
[168] OCA St. 1, pp. 25-30; OCA St. 1SR, pp. 17-20; OCA MB, p. 40, 55.
[169] Tr. 548-50.
[170] PPL Electric Hearing Exhibit No. 3.

- Section 1: Provides that the electric service provided is conditioned on construction work being completed.

- Section 9: Provides that customers must cooperate by following reliability and outage orders in accordance with PPL Electric's Commission-approved tariff.

- Section 14: Provides that customers are subject to the terms and conditions of PPL Electric's Commission-approved tariff and applicable law.

- Section 25: Provides that, in the case of a conflict between the ESA and PPL Electric's tariff, the tariff controls.

- Schedule D: Provides that the Phase 2 work is within the scope of work.[171]

Moreover, OCA simply ignores all of the tariff provisions that OCA Witness Felder acknowledged exist and bind the Company and the Customer. Critically, tariff Rule 5A provides that customers cannot operate equipment in a manner that damages the Company's system. This is not disputed. Also, with respect to the Company's tariff, Dr. Felder acknowledged his review of several of the provisions within LP-6 without disputing these baseline protections.[172]

OCA now contends that these undisputed terms and conditions of service—that bind both the Company and the Customer—essentially lack the specificity PPL Electric would need to actually curtail the Customer's service.[173] Yet, it would be counter to prudent and reasonable management for the Company to be required to specifically identify every instance in which it could curtail this or any Customer. As a matter of policy, increased specificity of conditions that would warrant curtailment could easily be taken to mean that matters which are not specifically identified would not be a proper basis for curtailment. The nature of the provisions within the tariff and the ESA importantly allow the Company to preserve a reasonable level of flexibility in managing the grid. The discretion which PPL Electric maintains as a result of the ESA in order to

[171] PPL Electric Hearing Exhibit No. 3.
[172] PPL Electric MB, pp. 45-47.
[173] OCA MB, p. 40.

curtail the customer and to prevent them from obtaining service that would jeopardize the safety or reliability of the system is a benefit, not a hindrance.

Finally, OCA argues that PPL Electric "did not identify a specific provision [within the ESA and tariff] requiring Customer One to reduce its load at either threshold."[174] Ignoring, for the sake of argument, PPL Electric's earlier establishment that it has sufficiently identified the governing tariff provisions here, OCA's statement essentially asks the Commission to assume that PPL Electric would be willing to violate its duties and obligations under the Public Utility Code, the Commission's regulations, the Commission's orders, the requirements of NERC, and the requirements of PJM, despite the fact that such violations would subject it to severe and significant monetary and non-monetary penalties. This is absurd, and OCA has failed to point to any evidence to show that PPL Electric would be willing to commit such violations.

C. THE PROPOSED HV TRANSMISSION LINES ARE IN COMPLIANCE WITH APPLICABLE STATUTES AND REGULATIONS PROVIDING FOR THE PROTECTION OF NATURAL RESOURCES

PPL Electric has presented undisputed evidence demonstrating that the proposed Project is in compliance with the applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth, in accordance with 52 Pa. Code § 57.76(a)(3). This evidence is detailed on pages 50 through 54 of PPL Electric's Main Brief, as well as the testimony of PPL Electric Witness Mr. Peter Sparhawk (PPL Electric St. Nos. 3 and 3-R), and PPL Electric Hearing Exhibit No. 2 – Letter of Notification, Attachment 3. In those materials, PPL Electric has provided the ALJs and the Commission with information on regulatory permit requirements and agency coordination regarding cultural and environmental resources that addresses and exceeds the requirements of the Commission's regulations. These materials evidence PPL Electric's commitment to obtain all required permits prior to construction of the Project and to comply with

[174] OCA MB, p. 55.

any and all conditions placed on those permits, and detail PPL Electric's analysis of the environmental and land use impacts for the Project. As explained in the Company's Main Brief, the Project will not impact various environmental resources, cultural resources and land uses, and PPL Electric has coordinated (or will continue to coordinate) with the appropriate state and/or federal agencies to obtain all necessary permits.[175] Importantly, no party disputed this evidence in testimony or in their Main Briefs and no party has alleged that the Project does not meet the requirements of 52 Pa. Code § 57.76(a)(3).

For these reasons, and as more fully explained in the Company's Main Brief, the ALJ and the Commission should find that PPL Electric has demonstrated the proposed HV transmission lines comply with applicable statutes and regulations providing for the protection of the natural resources of the Commonwealth, pursuant to 52 Pa. Code § 57.76(a)(3) and *PEDF*.

D. THE PROPOSED HV TRANSMISSION LINES WILL HAVE MINIMUM ADVERSE ENVIRONMENTAL IMPACTS

Pages 54 through 59 of PPL Electric's Main Brief summarize the clear evidence demonstrating that the proposed HV transmission lines will have a minimum adverse environmental impact, rebutting OCA's unsubstantiated recommended potential alternative to the proposed HV lines, and responding to the concerns regarding potential environmental impacts raised by Ms. Cook and by the public at the public input hearings. In their Main Briefs, neither Ms. Cook nor Mr. Zola claimed that PPL Electric has not met its burden of demonstrating that the proposed HV transmission lines will have minimum adverse environmental impacts.[176] For its

[175] *See* PPL Electric MB, pp. 50-52.

[176] *See generally* Cook MB, Zola MB. PPL Electric notes that both of these parties' briefs invoke environmental issues, but do not present facts or argument that suggest the Commission will not be able to carry out its obligations under the Environmental Rights Amendment in this matter.

part, OCA chose not to address its proposed "Nescopeck Alternative," or any other alternatives, in its Main Brief.[177]

However, OCA claims that PPL Electric has not met its burden of proof in demonstrating that the proposed HV transmission lines will have minimum adverse environmental impacts.[178] Yet, OCA Witnesses Dr. Felder and Mr. Konidena both admitted that their testimony "does not opine on whether 'the Project is in compliance with applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth'" and that their testimony "does not opine on whether 'the Project will have minimum adverse environmental impact.'"[179] OCA presented no expert testimony or affirmative evidence regarding the environmental impact of the proposed HV transmission lines or PPL Electric's compliance with the applicable statutes and regulations concerning the protection of natural resources.

Rather, OCA purports to rely upon the testimony of OCA Witness Mr. Teti that summarized public input hearing testimony, including lay witness testimony regarding alleged environmental impacts.[180] Importantly, however, Mr. Teti did not present his own opinions or independent evidence alleging that the Project will not have minimum adverse environmental impacts, and specifically noted that the purpose of his testimony was to simply "amplify" not endorse the public testimony he summarizes.[181]

Nevertheless, PPL Electric has already fully addressed the concerns OCA now raises through unrebutted, credible expert testimony.[182] OCA's argument relies on the public input hearing testimony of lay witnesses who did not offer expert testimony regarding the environmental

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[177] *See* OCA MB, p. 59.
[178] *See* OCA MB, p. 56-59. While OCA may have summarized the lay testimony of members of the public in the testimony of Witness Teti, the fact that it did not submit any independent expert analysis or opinions regarding the purported adverse environmental impacts of the proposed HV transmission lines undermines its claims on brief.
[179] PPL Electric Cross Exhibit Nos. 19 and 20.
[180] OCA MB, pp. 57-59.
[181] *See, e.g.*, OCA St. No. 3, pp. 2, 8.
[182] *See* PPL Electric MB, pp. 50-59.

impacts of the proposed HV transmission lines. As explained in the Company's Main Brief, while the Commission has recognized that lay witnesses, including those who testify at public input hearings, are qualified to provide opinions based on their personal experiences,[183] it has also recognized that some matters, such as "the health effects of the line, the probability of structural failure, and the effect on real estate values," require expertise to offer competent testimony.[184] The Commission also clarified that to be an "expert," a witness must have "any reasonable pretension to specialized knowledge on the subject under investigation."[185] The testimony that OCA highlights was not offered by expert witnesses qualified to render expert opinions regarding the impact of HV transmission lines on the natural environment.

Moreover, at least two of the passages cited by OCA on page 58 of its Main Brief concern the environmental impacts of the Customer's proposed development and project site, not the Company's proposed HV transmission lines.[186] Yet, the Customer's facilities are not within the scope of this case, Section 57.76(a)(4) of the Commission's regulations, or the Commission's jurisdiction.

PPL Electric is mindful of the public's concerns regarding its proposed HV transmission lines, and has fully addressed each of the concerns highlighted by OCA, i.e., wetlands, endangered species, and wildlife. PPL Electric has committed to obtaining all required permits prior to construction of the Project and to complying with any and all conditions placed on those permits.[187]

Regarding wetlands, the Company conducted a wetland delineation of the affected property and determined that the wetlands and streams located there are not anticipated to be impacted

[183] PPL Electric MB, pp. 8-9 (citing *Susquehanna-Roseland Commission Order* at *27-30)
[184] *Id.* at *28-29.
[185] *Id.* at *29 (citing *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995).
[186] *See* Tr. 266-68 (summarizing and discussing concerns regarding the Customer's development and project site); Tr. 348-52 (discussing impact of construction at the Customer's project site).
[187] PPL Electric MB, p. 53.

during construction.[188] PPL Electric will use the information gleaned from this survey to minimize wetland and waterway impacts during construction, including by obtaining and complying with all necessary permits and erosion and sedimentation plans.[189]

Regarding endangered species, the record is clear that the Company has coordinated and will continue to coordinate with the Pennsylvania Department of Conservation and Natural Resources, the Pennsylvania Game Commission, the Pennsylvania Fish and Boat Commission, and the U.S. Fish and Wildlife Service to appropriately survey, identify, and mitigate impacts to any known endangered species that may be impacted by the Project.[190] PPL Electric will comply with any mitigation and permitting requirements imposed by these agencies.[191]

With respect to wildlife impacts related to electric and magnetic fields ("EMF"), PPL Electric established that its EMF policy ensures that transmission lines are designed to reduce EMF exposure. The instant Project is designed for zero EMF exposure at the edge of the ROW, and there are not currently any dwellings or structures located on the edge of the Company's ROW, providing a further buffer. The Company's EMF policy will be applied to the Project and the Project is designed with clearances that are at least 3 feet higher than NESC standards, which further limits magnetic field exposures.[192] Therefore, PPL Electric has offered unrebutted, credible expert testimony and evidence rebutting OCA's lately identified concerns and demonstrating that the proposed HV transmission lines will have minimum adverse environmental impacts.[193]

[188] PPL Electric Hearing Exhibit No. 2 – Letter of Notification, Attachment 3, p. 7.
[189] PPL Electric Hearing Exhibit No. 2 – Letter of Notification, Attachment 3, pp. 7-8.
[190] PPL Electric St. No. 3, pp. 10-11.
[191] PPL Electric St. No. 3-R, p. 6.
[192] PPL Electric MB, pp. 43-44.
[193] *See West Penn Power Co. v. Pa. PUC*, 2019 Pa. Commw. Unpub. LEXIS 532, at *24, 219 A.3d 716, 716 (Pa. Cmwlth. 2019) (overturning Commission Order where the Commission credited the personal opinions of a lay Complainant regarding alleged environmental harms of herbicide spraying, who offered "no scientific evidence or expert testimony" when the utility had offered the unrebutted, credible testimony of an expert).

For these reasons, and as more fully explained in the Company's Main Brief, testimony, and exhibits, PPL Electric has satisfied the requirements of 52 Pa. Code § 57.76(a)(4), and demonstrated that the proposed HV transmission lines will have a minimum adverse environmental impact.

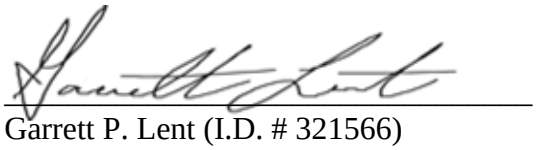
V. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that Administrative Law Judges Erin L. Gannon and John M. Coogan, and the Pennsylvania Public Utility Commission:

- (1) approve the above-captioned "Letter of Notification of PPL Electric Utilities Corporation, Filed Pursuant to 52 Pa. Code Chapter 57 Subchapter G, For Approval to Build Approximately 1.1 Miles of New Parallel Double Circuit 230 kV Transmission Taps that are Needed to Connect the Existing Susquehanna-Harwood #1 & #2 Transmission Lines to the New Tomhicken 230 kV Switchyard that are Respectively Located in Luzerne County, Pennsylvania"; and

- (2) grant such other approvals and/or waivers as are necessary or appropriate under all of the circumstances.

Respectfully submitted,



Michael J. Shafer (I.D. # 205681)
PPL Services Corporation
645 Hamilton Street, Suite 700
Allentown, PA 18101
Voice: 610-774-2599
Fax: 610-774-4102
E-mail: mjshafer@pplweb.com

Garrett P. Lent (I.D. # 321566)
David B. MacGregor (I.D. # 28804)
Lindsay A. Berkstresser (I.D. # 318370)
Megan E. Rulli (I.D. # 331981)
Hayley E. Wilburn (I.D. # 336055)
Post & Schell, P.C.
17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
Voice: 717-731-1970
Fax: 717-731-1985
E-mail: glent@postschell.com
E-mail: dmacgregor@postschell.com
E-mail: lberkstresser@postschell.com
E-mail: mrulli@postschell.com
E-mail: hwilburn@postschell.com

Date: October 23, 2026

Attorneys for PPL Electric Utilities Corporation

Appendix A

1999 Pa. PUC LEXIS 30

Pennsylvania Public Utility Commission

May 19, 1999

P-00981615; C-00982011; C-00981846; C-00981862

PA Public Utility Commission Decisions

Reporter
1999 Pa. PUC LEXIS 30 *

Mid-Atlantic Power Supply Association v. PECO Energy Company

Core Terms

customer, consumer, electric, advertize, interim, was, guideline, has, settlement, deceptive, energy, mail, campaign, mislead, supplier, recommend, public utility, restructure, company, message, transit, reply, competitive market, saving, referral, notice, fine, consolidate, unfair, cost

Panel: Commissioners Present: John M. Quain, Chairman; Robert K. Bloom, Vice Chairman; David W. Rolka, Concurring in part & Dissenting in part - Statement attached; Nora Mead Brownell - Dissenting - Statement attached; Aaron Wilson, Jr.

Opinion

OPINION AND ORDER

BEFORE THE COMMISSION:

Before the Commission for consideration is the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Allison K. Turner issued January 13, 1999, in the above-captioned consolidated proceedings and Exceptions and Replies to Exceptions filed thereto. Exceptions (Exc.) were received from the Mid-Atlantic Power Supply Association (MAPSA), PECO Energy Company (PECO), the Office of Consumer Advocate (OCA), and the Clean Air Council (CAC) on January 21, 1999. Replies to Exceptions (R.Exc.) were received from PECO, OCA, CAC and MAPSA on January 25, 1999.

Background

The pertinent background and procedural history of these consolidated proceedings are set forth as an Appendix B to the Recommended Decision. We shall not extensively repeat the procedural history and background.

In these proceedings, we are requested to adjudicate a dispute of first impression arising under the Electricity Generation Customer **[*2]** Choice and Competition Act, *66 Pa. C.S. § 2801-2812* (hereafter Act). MAPSA, through a Petition for Emergency Order and Formal Complaint filed October 6, 1998, has alleged that PECO has engaged in marketing activities through a direct mail campaign and mass media, of PECO's Provider of Last Resort Service (PLR service or PLR). *See* MAPSA Formal Complaint docketed at No. C-00981846 on October 26, 1998. MAPSA alleges that these marketing activities are unfair, deceptive, false and misleading. The October 6, 1998 Petition and Formal Complaint further asserted that the marketing activity of PECO had, as its purpose, to cause Pennsylvania consumers to not participate in the competitive electricity market and thereby remain as PLR customers of PECO. *See* October 6, 1998 Petition and Complaint.

Consequently, MAPSA's Petition and Complaint alleged PECO's marketing and promotion of PLR service was anticompetitive as it unfairly promoted PECO's PLR service over competitive electric generation supplier service. (R.D., p. 2). MAPSA included as Attachments to the Petition samples of PECO's allegedly improper newspaper and television advertisements. Also, at pages 11-14 of the Petition, MAPSA **[*3]** provides a detailed analysis of the alleged deceptive statements, the proposed inferences to be drawn from said statements, and the facts pertaining to PLR and competitive electric generation service (EGS).

MAPSA also alleged that the series of PECO marketing materials is in violation of the Act and the following Commission Orders: *Creation and Implementation of a Statewide Consumer Education Program for Electric Restructuring in the Commonwealth of Pennsylvania*; Docket No. M-00981036 (Order entered February 26, 1998) (*Interim Guidelines-Consumer Education*); *Interim Guidelines Addressing Electric Companies' Activities Relating to their Provider of Last Resort Function*; Docket No. M-00960890F0017 (Order entered November 19, 1998) *(Interim Guidelines-PLR)*; and *Interim Code of Conduct, Application of PECO Energy Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al.*; Docket No. R-00973953 (Order approving Joint Petition for Full Settlement … entered May 14, 1998) (*PECO Restructuring Settlement* and *Interim Code of Conduct*).

Petitions to Intervene were subsequently filed by Green Mountain Energy, DTE Edison America, **[*4]** Inc. and Conectiv Energy - all licensed EGSs offering electricity for sale in the service territories of PECO. [1] PECO opposed the intervention of these participants.

PECO thereafter filed an Answer and New Matter and Motion to Dismiss the Petition and Complaint of MAPSA. PECO, in its Answer and New Matter, strenuously asserted that neither the Act, nor any Commission Order, prohibited the marketing of PLR service, that its marketing and promotional materials were not false, deceptive, or misleading, and that MAPSA lacked a sufficient interest to be granted standing. PECO further attached, and incorporated by reference, its prior comments submitted in the *Interim Guidelines-PLR* proceeding. Those comments expressed PECO's position that this Commission had no authority to issue pertinent guidelines pertaining to PLR service, and that such guidelines implicate First Amendment concerns.

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[1] PP&L was also named as a respondent in the MAPSA Complaint. This Opinion and Order only addresses the MAPSA/PECO proceedings.

Subsequently, **[*5]** the OCA filed a Notice of Intervention and Response to the MAPSA Petition for Emergency Order and Complaint. The OCA was generally supportive of the position of MAPSA.

By Prehearing Order No. 1, dated November 16, 1998, presiding ALJ Turner established a procedural schedule which provided for further pre-hearing conferences and supporting memoranda on the issues. ALJ Turner concluded that the Petition for Emergency Relief filed pursuant to *52 Pa. Code § 3.1*-3.11 was moot.

CAC also filed a Formal Complaint against PECO on October 15, 1998, raising substantially the same issues against the pertinent letter, television, and newspaper advertisements as did MAPSA. *See* Docket No. C-00981862. CAC specifically cited the August 19, 1998 letter of Kenneth G. Lawrence, *infra*. The CAC Complaint and CAC's standing was opposed by PECO.

A series of preemptory motions to dismiss and for judgment on the pleadings were filed by PECO and MAPSA.

On or about December 10, 1998, MAPSA filed a second Formal Complaint (Docket No. C-00982011) and Petition for Emergency Order. The second MAPSA Complaint and Petition referenced a PECO letter sent during the week of November 23, 1998, and contended that **[*6]** the letter and related television ads constituted continuing violations of the Act and the Commission's *Interim Guidelines-PLR*.

Subsequently, ALJ Turner made two (2) rulings to consolidate the proceedings. The first decision was to consolidate the first MAPSA Complaint (Docket No. C-00981846) with the CAC Complaint. (December 3, 1998 Consolidation Order of ALJ Turner). There was no opposition to this decision. *See* CAC Post Hearing Brief at 3. The second ruling consolidated the first MAPSA Complaint and CAC Complaint with the second MAPSA Complaint. This consolidation ruling was vigorously opposed by PECO. *Id.* [2] *See also* R.D., p. 6, n. 9.

The record consists of the transcribed notes of testimony of hearings held December 29 and 30, 1998, several stipulations of facts and admitted exhibits. MAPSA presented two (2) **[*7]** witnesses, John E. Kelly and Mark N. Cooper. PECO presented the testimony of witness Thomas Hill and J. Howard Beales, Ph.D.

Discussion

I. ALJ RECOMMENDATIONS

ALJ Turner reached seventy-two (72) Findings of Fact and fifty-six (56) Conclusions of Law. The pertinent Conclusions of Law are as follows:

* * *

2. The Customer Choice and Competition Act vests the Commission with primary authority in the establishment of a new competitive market for the retail sale of generation supply,

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[2] Intervention was also granted to the Philadelphia Area Industrial Energy Users Group (PAIEUG). The Pennsylvania Rural Electric Association also sought intervention. That request was denied.

which includes jurisdiction over an EDC's marketing activities relating to PLR service. Therefore, it can exercise that jurisdiction to act upon MAPSA's Complaint and Petition. It can also refer the complaint to the Attorney General of the Commonwealth. *66 Pa. C.S. §§ 2801*, et seq., 2811.

3. Pursuant to Sections 1501 and 2801, et seq. including Section 2811, of the Public Utility Code, the Commission's authority with respect to claims of deceptive advertising includes jurisdiction to adjudicate claims that the Code and Act have been violated, and to determine whether or not the matter should be referred to the Pennsylvania Office of Attorney General.

4. The Commission's jurisdiction is **[*8]** concurrent with that of the Courts, and the remedies provided under the Public Utility Code are cumulative and in addition to those rights of action and remedies in equity or under common or statutory law. *66 Pa. C.S. § 103(c)*.

* * *

7. In the absence of specific, express legislative intent, the provisions of Section 2811 of the Code should not be considered an implicit limitation of the authority of the Commission created in pre-existing sections of the Public Utility Code. *Id.*

* * *

16. The Commission's Orders in PECO's restructuring proceeding expressly affirm that "any utility of [sic] supplier is free to promote themselves and their products as they deem fit, using their own funds. Consumers have the right to receive both objective and promotional commercial material." *Order On Revised Compliance Filing, Docket No. R-00973953*, etc., Order of February 26, 1998 at 26-27. *See also, Order On Compliance Filing*, Docket No. R-00973953, etc., Order of February 5, 1998 at 49.

17. The Commission's *Interim Guidelines Order* does not prohibit advertising of the PLR function, but it expressly limits how advertising and promotions may be carried out.

18. The Commission's **[*9]** *Interim Guidelines* require that EDC marketing of its PLR service be consistent with the Commission's consumer education initiative. *Interim Guidelines Order* at 14-16.

19. PECO's November letter and November-December TV advertising campaign is not consistent with the Commission's Interim Guidelines at Docket No. M-00960890F0017 in that it discourages customers from exploring competitive alternatives.

20. Under the First Amendment of the United States Constitution, the Pennsylvania Public Utility Commission can direct an electric distribution company to refrain from or modify certain marketing efforts regarding its Provider of Last Resort service.

21. The Commission may exercise its power to assure that commercial speech "flows cleanly as well as freely." *Central Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 561, 100 S.Ct. 2343, 2349, 65 L.Ed.2d 341 (1980)*, *quoting, Virginia Board of Pharmacy, 425 U.S. 748, 761-762, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976)*.

22. Restrictions on false, deceptive and misleading **[*10]** speech by the Commission are permissible [as] "untruthful speech, commercial or otherwise, has never been protected for its own sake." *Id., quoting* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, 805-806 (1974), *U.S. reh'g. denied, 459 U.S. 1226*.

23. The Commission may serve the governmental interest by a limited restriction on truthful protected commercial speech where the asserted governmental interest is substantial, the regulation directly advances the governmental interest asserted, and the regulation is not more extensive than is necessary to serve that interest. Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349, 65 Ed.2d 341 (1980).

* * *

28. The Commission does not have jurisdiction to enforce the Unfair Trade Practices Law. Pa. P.U.C. et al. v. The Bell Telephone Co. of Pa., 71 Pa. P.U.C. 338, 341 (1989). However, it may choose to invoke the statute and case law by interpreting **[*11]** it as guidance where appropriate.

29. To constitute deceptive advertising, an advertising practice need only have a tendency to deceive the consumer. Pekular v. Eich, 355 Pa.Super 276, 513 A.2d 427 (1986).

* * *

34. PECO's advertisements do not fully inform customers of all material facts relevant to the purchase decision.

Thereafter, ALJ Turner recommended that an order be directed against PECO to cease and desist from its current marketing practices pertaining to PLR, that MAPSA's Formal Complaint be sustained to the extent that it was based upon allegations that PECO's advertisement was based upon false, misleading and deceptive material, and that a civil penalty be imposed upon PECO. *See* R.D., pp. 91-93.

We shall, unless otherwise stated, adopt the ALJ's Findings of Fact. We shall only adopt the ALJ's Conclusions of Law as expressly discussed herein. We note that this agency must adhere to the statutory directives and limitations inherent in the Act. As discussed below, our interpretation of the Act is that this Commission should permit the market to develop and to intervene on an as needed basis.

Additionally, any argument **[*12]** not expressly discussed shall be deemed to have been considered and rejected consistent with the Opinion and Order. University of Pennsylvania v. Pa. P.U.C., 86 Pa. 410, 485 A.2d. 1217, 1222 (1984).

II. SUMMARY OF EXCEPTIONS

A. PECO Exceptions

PECO presents four objections or impediments to the Recommended Decision. PECO states that there are legal impediments under Section 2811 and the Commission's limited jurisdiction under the Act; that there are First Amendment impediments to the Recommended Decision;

that there are public policy impediments; and that there are factual impediments. Further, PECO stresses that its due process rights have been violated in the conduct of the proceedings resulting in the Recommended Decision. (PECO Exc., pp. 9-10).

1. Legal Impediments of the Act

PECO relies on Section 2811 of the Public Utility Code as a limitation upon the Commission's direct involvement in policing allegations of anti-competitive behavior or improper advertising. (PECO Exc., p. 11). Thus, PECO reads Section 2811 as supporting the deferral of this proceeding to the enforcement jurisdiction of other government agencies, **[*13]** departments or offices. *See* Exceptions, pp. 11-13, citing *Country Place Waste Treatment Co., Inc. v. Pa. PUC, 654 A.2d 72 (Pa. Cmwlth. 1995)* - no jurisdiction over offensive odors produced by utility facilities; *Rovin v. Pa. PUC, 502 A.2d 785 (1986)* - no jurisdiction over a complaint regarding the quality of water in regard to fluoridation as supplied to the public rather than quality of water service; and *Pa. PUC v. The Bell Tel. Co. of Pa., 71 Pa. PUC 338 (1989)*. [3]

[*14]

2. First Amendment Impediments

PECO states that the restrictions on PLR advertising requested by MAPSA and CAC, and accepted by ALJ Turner, would go far beyond prohibiting "false and misleading" advertising. PECO argues that these restrictions would reach any message that is allegedly not "consistent" with the Commission's consumer education materials. This is a standard which PECO alleges could be used to suppress even truthful advertising if the regulator believes it might discourage customers from shopping for EGS service. (PECO Exc., p. 14 *citing* R.D. at 74-75).

PECO also cites *Central Hudson Gas and Elec. Corp. v. P.S.C. of New York, 447 U.S. 557 (1980)*, as the controlling precedent. PECO states that the Supreme Court invalidated the New York Public Service Commission's ban on promotional advertising related to conservation interests of the state. PECO continues that even if promoting a vibrant electric generation market were a legitimate and substantial state interest, restricting EDC advertising of the PLR function is neither necessary to promote this interest, or the least intrusive means of doing so. (PECO **[*15]** Exc., pp. 14-15). PECO completes this Exception with the citation of *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)* - state may not completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of the information's effect upon its disseminators and its recipients. PECO Exc. p. 15, *citing* *425 U.S. at 772*.

3. Public Policy

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[3] The proceeding of *Pa. PUC v. The Bell Tel. Co. of Pa.* is the "Caller ID" Recommended Decision of Administrative Law Judge Michael C. Schnierle. In the "Caller ID" proceeding, Bell challenged the standing of the Attorney General to file its complaint, as well as the jurisdiction of the Commission over certain of the Attorney General's claims and/or the legal sufficiency of those claims. ALJ Schnierle granted the Bell motion to the extent that Bell challenged the jurisdiction of the Public Utility Commission to enforce the Unfair Trade Practices and Consumer Protection Law. (September 22, 1989 R.D., slip op. at 3).

PECO cites Section 2811 of the Public Utility Code to argue that unless we view this section as a limitation, the Commission will otherwise become an "all purpose agency" with unlimited jurisdiction, responsible for interpreting the entire range of laws and regulations that apply to the transaction of business and the conduct of commerce so long as an EDC or EGS is "involved to any extent." (Exc., p. 16). PECO observes the potential for duplication of the efforts of other agencies, departments and offices and potential inconsistent decisions resulting therefrom.

4. Factual Impediments

PECO argues that the determination of what constitutes false and misleading **[*16]** advertisement was not based upon evidence of whether "reasonable customers actually perceive those subliminal messages. " (PECO Exc., p. 18). PECO asserts that the Complainants did not present such evidence and the expedited hearing process did not permit it to develop and present such evidence in its defense. PECO stresses the fact that the analysis of the representations actually made is more rigorous when an "implied" challenge to the marketing statement is involved. (PECO Exc. at 19 citing *In re: Thompson Medical Co., Inc., 104 FTC 648 (1984)*; *Kraft, Inc. v. FTC, 970 F.2d 311, 319 (7th Cir. 1992)*; and *American Home Products Corp. v. Johnson & Johnson, 577 F.2d 160, 172, n. 27 (2d Cir. 1978)*.

Based on the foregoing, PECO alleges error in three respects: (1) the ALJ endorsed the legal standards of the Federal Trade Commission (FTC), but did not apply them (R.D., pp. 64-65); (2) the ALJ did not conduct the kind of analysis necessary to determine if implied claims actually exist in the subject advertising, and if so, whether they are false; [4] and (3) the ALJ excused MAPSA, et al. from their **[*17]** obligation to present evidence of how reasonable customers actually perceive PECO's advertising.

PECO's Exceptions conclude with the argument that there is no basis in the record on which to impose penalties upon PECO. (PECO Exc., pp. 29-31). PECO states that this would be the first invocation of the *Interim Guidelines* and that no meaningful guidance on how they are to be interpreted or applied has been given.

B. MAPSA Exceptions

MAPSA urges this Commission to direct PECO to issue a follow-up letter and to release to EGSs the customer information reflected in the Lawrence letter. This information could not be resold or used for telephone solicitation purposes, but be used solely for the purpose of sending material in the mail to customers. MAPSA takes the position that PECO has achieved **[*18]** an unfair and illegal advantage through the preferential use of monopoly resources. Thus, the information would be used exactly the same as PECO's use. (MAPSA Exc., p. 12).

MAPSA also urges the Commission to adopt its requested relief that a separate proceeding be instituted and additional hearings held which would address the questions of fines, penalties and other sanctions against PECO. (MAPSA Exc., p. 13). MAPSA states that "PECO has already been compensated for uneconomic costs due to competition [and] the marketing of PLR service fosters the unjust enrichment of PECO. . ." Based on these observations, MAPSA

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[4] We note that PECO, as it has argued in its Post Hearing Brief, asserts that the statements are not only truthful, but repeat "verbatim" the language of Commission-approved customer education materials. (PECO Exc., pp. 21-22).

asserts that the $ 106,000 fine recommended by ALJ Turner is an insufficient response for the unjust enrichment created by PECO's allegedly illegal efforts to thwart the transition to a competitive electric generation market. (MAPSA Exc., p. 14).

MAPSA further excepts to the ALJ's computation to the amount of the fine against PECO. MAPSA urges this Commission to consider each offending, i.e., deceptive and misleading letter, as a discrete violation of the Public Utility Code, subject to the imposition of a fine. (MAPSA Exc., p. 16, citing *Barasch v. The Bell Telephone Company* **[*19]** *of Pa.*, Docket No. C-881727 (June 15, 1990); *Kviatkovsky v. Pa. PUC, 618 A.2d 1209 (Pa. Cmwlth. 1992)*; and *Newcomer Trucking, Inc. v. Pa. PUC, 531 A.2d 85 (Pa. Cmwlth. 1987)*.

Finally, MAPSA requests that this Commission find that PECO's conduct is violative of the applicable law and the *Restructuring Settlement* .

C. OCA Exceptions

The OCA has generally supported the position of MAPSA. The OCA filed Exceptions objecting to the ALJ's failure to direct PECO to send a corrective, follow-up letter to customers. (OCA Exc., p. 2). The OCA argues that a follow-up letter, approved by the Commission, should be sent to PECO's customers at PECO's expense to provide them with full information about customer choice and to correct any misleading impressions from PECO's prior letters and advertisements. (OCA Exc., p. 2 citing R.D. at 76). The OCA distinguishes its request from forcing PECO to associate with views with which it disagrees. The OCA analogizes the directive to send a corrective, follow-up letter, as indistinguishable from a legal notice.

The OCA observes that the law is clear that PECO can be required to send legal **[*20]** notices which inform customers without violating PECO's First Amendment rights. The OCA relies upon *South River Power Partners v. Pa. PUC, 673 A.2d 422 (Pa. Cmwlth. 1996)*, *alloc. denied*, *686 A.2d 1315*. The OCA submits that the facts of this case are similar to *South River Power Partners*, which held that West Penn Power Company could be required to send legal notice to its customers in a mailing where the intent of the notice was to inform customers about the proceedings and the customers' right to participate. *See* OCA Exc., pp. 3-4, citing South River Power Partners, 673 A.2d 428-429, *citing* *Pacific Gas and Electric Company v. PUC of California, 475 U.S. 1 (1986)*. Based on the foregoing, the OCA submits that PECO can and should be directed to send a corrective follow-up letter to its customers to *inform* them about PLR service. The letter should, in the OCA's view, be approved by the Commission in order to ensure that the letter clarifies the "prior misleading communication" and is consistent with the Commission's consumer education program. (OCA Exc., **[*21]** p. 4).

Next, the OCA clarifies that it has not sought in this proceeding a complete prohibition against PECO's advertising of its PLR service. (OCA Exc., p. 4 citing R.D., pp. 41-43). The OCA clarifies that in the instant proceeding, as well as in its Comments pertaining to the *Interim Guidelines,* PLR service must not be *promoted* as a preferred alternative to customer choice in a way that denigrates customer choice or in a manner that is inconsistent with the Commission's consumer education initiative. (OCA Exc., p. 5). With regard to PLR service, the OCA states that PECO's role should be to explain and to inform customers about PLR service, not promote this service over competitive alternatives. *Id.*

Therefore, the OCA is not seeking a complete prohibition on PECO's ability to provide customers "information" about PLR service. Rather, states the OCA, its position is that to avoid undermining the development of the competitive market, EDCs should not promote or market their PLR service over competitive alternatives. *Id.* (OCA here emphasizes its Memorandum of Law Regarding the First Amendment issues at p. 14).

The OCA adds that there is a difference between a prohibition **[*22]** on promoting PLR service over competitive alternatives and a complete prohibition on advertising that informs and educates consumers. It points to our regulations addressing promotional advertising, *52 Pa. Code § 57.61*, as supportive of the fact that this difference is recognized. The OCA emphasizes that PECO's advertising is inconsistent with the consumer education initiatives of the Commission and inconsistent with PECO's obligations under the Act, the *Restructuring Settlement* and the *Interim Guidelines* .

As an additional safeguard, the OCA would further impose a requirement on PECO that any further customer information about PLR service issuing from PECO should be approved by the Commission in accordance with the consumer education program. This is proposed so that the possibility of consumers misinterpreting the information is reduced. (OCA Exc., pp. 5-6).

In its last Exception, the OCA objects to the ALJ's rejection of MAPSA's arguments relating to stranded cost recovery. (OCA Exc., p. 6 *citing* R.D. at 52-53). The ALJ discussed MAPSA's argument that PECO's marketing of its PLR service is inconsistent with the stranded cost allowance under Section 2808(c) of the Public **[*23]** Utility Code, *66 Pa. C.S. § 2808(c)*. The ALJ rejected this argument. (OCA Exc., p. 6). The OCA concludes that the ALJ misunderstood the nature of CTC collections and incorrectly focused on the CTC rather than on the shopping credit in analyzing MAPSA's argument.

D. CAC Exceptions

In its Exceptions, CAC generally supports the determinations of ALJ Turner. CAC asserts, however, that the ALJ did not adopt any remedy which would correct the deceptive and misleading messages contained in the PECO promotional materials. CAC supported two (2) remedies to counter the alleged deceptive and misleading information of the PECO promotional effort. (CAC Exc., p. 2). As argued in its brief, CAC proffered using a follow-up letter to be sent by the Commission itself, rather than PECO. This would, states CAC, eliminate the First Amendment concern of forcing the utility to associate with views with which it does not agree. *See Pacific Gas, supra.* [5] The second remedy proffered by CAC is that additional consumer education materials should be instituted to correct the deceptive and misleading messages.

[*24]

CAC, in its second Exception, argues for a substantial increase in the fine against PECO. (CAC Exc., p. 3). CAC urges a fine in the amount of $ 4.81 million based on its assessment of the "ill-gotten gains" from PECO's marketing approach. *Id.* CAC, citing a Reuters News story dated

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[5] CAC requests that we use proceeds from the fine imposed upon PECO to underwrite the cost of developing and distributing a letter to PECO's customers. (CAC Exc., p. 2).

January 15, 1999, estimates that 820,000 of PECO's residential and commercial customers are not shopping. (CAC Exc., pp. 3-4). Using the assumption that one percent of the non-shopping customers were influenced by PECO's marketing and promotion campaign, CAC concludes that 8,200 customers were improperly dissuaded from shopping. Therefore, CAC goes on the theorize that each 1% of the residential and commercial customers PECO retains as a PLR customer allows the utility to retain about $ 8.8 million in extra revenue for 1999. Consequently, CAC states that an appropriate fine in order to prevent "unjust enrichment" is $ 4.81 million. [6]

[*25]

E. PECO Reply Exceptions

In its Replies to Exceptions, PECO responds as follows. First, PECO replies to the position of MAPSA and CAC that the ALJ did not go far enough in the imposition of penalties. PECO states that it did not engage in any willful or knowing wrongdoing that would warrant penalties. (PECO R. Exc., p. 2). PECO relies on its witness, Dr. J. Howard Beales, a nationally recognized expert on government regulation and advertising who was instrumental in developing the FTC's *Policy Statement on Deception*, to urge this Commission to find that the evidence does not warrant a finding that the communications were false and misleading. Rather, states PECO, if this Commission were to find PECO's advertisements to be false and misleading, we would, according to its position, be using a different standard than that employed by the FTC. *Id.*

Additionally, PECO asserts that penalties would violate the minimum requirement for due process of prior notice of prohibited conduct. Also, PECO cites *Coates v. Cincinnati, 402 U.S. 611 (1971)*, for the proposition that because the November 19, 1998 *Guideline Order* addresses speech, it is too vague **[*26]** and overbroad to pass muster under the First Amendment. (PECO R. Exc., p. 2).

PECO further discredits MAPSA's and CAC's call for additional penalties by noting: (1) there is no authority pursuant to Section 3301 of the Public Utility Code, *66 Pa. C.S. § 3301*, for the Commission to craft penalties according to the approach requested; (2) there is no evidence that any consumer suffered harm as a result of the allegedly misleading statements in PECO's advertising. Thus, PECO repeats its position that the absence of evidence that customers actually perceived the implied deceptive messages and relied on the purportedly misleading messages to make a decision, indicates that no harm was shown on this record; (3) that MAPSA and CAC rely upon non-record information in support of their remedial penalty computations. Their position was presented for the first time in Exceptions and is, according to PECO, in violation of the holdings of *Pa. PUC v. PP&L, 57 Pa. PUC 535, 596-597 (1983)* - "It is highly inappropriate for a party to propose a completely new adjustment for the first time in its brief. Trial Staff made no attempt to develop this issue during the course **[*27]** of this case, nor did they present testimony in support of such an adjustment."; *see also Pa. PUC v. Phila. Electric Co., 56 Pa. PUC 191, 236 (1982)*; and (4) the calculations of penalties recommended against PECO are demonstrably incorrect.

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[6] These estimates are based on projections advanced in an article entitled "The Dollars that PECO Sees When Customers Do Not Shop," The Center for Competitive Markets, John Hanger and Peter Meadows Adels (November, 1998), and assume that a 1% block of non-shoppers, or 15,000 customers adds $ 8.8 million to PECO's revenues. The CAC proposed penalty represents approximately one-half of this projection. (CAC Ex., p. 4, n. 1; n. 2).

In concluding its replies concerning whether its conduct warrants a penalty, PECO notes that MAPSA's request for additional hearings underscores its allegations that due process deficiencies occurred because of the expedited nature of the procedures used in this case. (PECO R. Exc., pp. 3-4).

PECO next responds to MAPSA's request that it be directed to issue a follow-up letter. (PECO R. Exc., pp. 5-7). PECO relies upon the First Amendment protection against forcing one to associate with views with which it does not agree to oppose this relief. PECO also points to the February 5, 1998 *Order on Compliance* filing, Docket No. R-00973953, which supports the proposition that the Commission will not restrain PECO's right to speak or compel it to speak. PECO goes on to articulate its fundamental disagreement with any view that supports the services of EGS competitors. (PECO R.Exc., pp. 6-7).

F. MAPSA Reply Exceptions [*28]

In its Replies to Exceptions, MAPSA asserts that the Commission has primary jurisdiction over this proceeding. MAPSA disagrees with PECO's argument that the Commission is required to defer this matter to other state and federal agencies. MAPSA posits that the Commission is obliged under the Act to ensure that the legislative goal of the Act is accomplished. That is the establishment of an effective competitive market in electric generation in Pennsylvania. MAPSA adds that the Commission is empowered with the authority under Section 501(a) and 1501 of the Public Utility Code Pa. C.S. §§ 501, 1501, to determine whether EDC communications with respect to PLR service meet the adequate and reasonable service standard of Section 1501. (MAPSA R.Exc., p. 6).

MAPSA further contends that the case cited by PECO as supporting its contention that the Commission has declined to address claims of deceptive advertising for lack of subject matter jurisdiction, Pennsylvania Public Utility Commission v. The Bell Telephone Company of Pennsylvania, (Bell or "Caller ID" *Proceeding) 71 Pa. P.U.C. 338 (1989)*, is distinguishable from the instant proceeding. MAPSA explains that **[*29]** the *Bell* decision involved a challenge to the Commission's authority to enforce the Unfair Trade Practices and Consumer Protection Law (UTPCPL). MAPSA points out that in the instant proceeding, the Commission is not being asked to enforce the UTPCPL, but rather to enforce the Public Utility Code. (MAPSA R.Exc. 7).

MAPSA argues that contrary to PECO's contention, the subject customer communication and advertisements are misleading and deceptive and, therefore, in violation of the Commission's *Interim Guidelines* and *Interim Guidelines Order*. MAPSA replies that PECO's contention that the ALJ applied the wrong standards in determining whether the communications were deceptive and misleading is erroneous for three reasons: (1) the ALJ applied the standards set forth in the FTC's Policy Statement as suggested by PECO; (2) PECO's reliance on the FTC Policy Statement negates its argument that consumer testimony is needed; and (3) PECO's position that the ALJ failed to correctly analyze MAPSA's claims based upon the FTC's policy statement standard is undermined by the utility's failure to present any affirmative or probative evidence to justify its customer letters or advertisements. **[*30]** (MAPSA R.Exc., pp. 10-11).

MAPSA further argues that PECO's claim that it was denied procedural due process is unfounded and unsupported in the law. According to MAPSA, in an administrative hearing,

procedural due process is satisfied if a hearing is conducted for the purpose of appraising all parties of the evidence, giving the parties opportunity to cross-examine witnesses, inspect documents and to offer evidence in rebuttal. (MAPSA R. Exc., p. 12). MAPSA observes that in this proceeding, PECO presented witnesses, cross-examined MAPSA's witnesses and examined the record evidence presented to the Commission. MAPSA is of the opinion that PECO was afforded all proper procedural due process protections.

MAPSA also contends that the Commission should reject PECO's claim that it was not given adequate notice. MAPSA states that upon the filing of the first Complaint on October 6, 1998, PECO was on notice that the Complaint involved allegations of false, deceptive and/or misleading statements made in specific advertisements. At the December 29 and 30, 1998 hearings, MAPSA did not present any new factual averments beyond the original Complaint. MAPSA stresses that its testimony was specifically **[*31]** limited in scope to the issue of whether PECO's advertisements contained false, misleading or deceptive statements. MAPSA concludes that PECO was afforded due process and ample opportunity to adequately prepare and defend the Complaint. (MAPSA R. Exc., p. 14).

MAPSA also believes that PECO's argument that the ALJ improperly shifted the burden of proof should be rejected. (MAPSA R. Exc., p. 14). MAPSA avers that ALJ Turner properly applied Section 315(b) of the Public Utility Code, *66 Pa. C.S. § 315(b)*, which requires the public utility to bear the burden of proof in cases involving an alleged violation of a Commission Order. MAPSA urges the Commission to deny PECO's Exceptions in their entirety.

G. OCA Reply Exceptions

In its Reply Exceptions, the OCA reiterates many of the arguments previously set forth in the pleadings. However, the OCA has specifically replied to four (4) of PECO's Exceptions. We will address them, briefly, in the order in which they are presented in the OCA's filing.

The OCA provides an in-depth analysis of why it disagrees with PECO's theory that this Commission does not have jurisdiction to deal with this matter. As the OCA has previously provided information **[*32]** relative to this issue, we will address these issues herein at Section B, Commission Jurisdiction Over the Dispute.

Further, the OCA asserts, and we have acknowledged throughout the restructuring proceedings, that concurrent jurisdiction with the Federal Energy Regulatory Commission (FERC), the Pennsylvania Attorney General's Office, or another office or agency, depending on the nature of the dispute, may arise in any particular case. However, this issue is discussed in detail in this Opinion and Order. *See* specifically, Section C. 3. herein.

We have discussed, at length herein (*See specifically*, Section E), issues involving the due process rights of the parties in this case. In its Reply Exceptions, the OCA asserts that PECO has violated various Commission Orders, the *Interim Guidelines* , and Section 315(b) of the Public Utility Code, thereby necessitating extraordinary procedures by this Commission.

The OCA asserts that PECO's alleged violations of both the *Interim Guidelines Order*, and the Public Utility Code allow the ALJ, and this Commission, to levy fines in this matter.

The OCA disagrees with MAPSA's assertion that limited access to PECO's customer information **[*33]** must be allowed in order to remedy the unfair advantage that it perceives PECO gained by using information which was at PECO's disposal because of its monopoly position as an EDC.

H. CAC Reply Exceptions

In its Replies to PECO's Exceptions, CAC notes initially, the reasons why it has prosecuted the instant Formal Complaint. CAC stresses that it is not a competitor of PECO. Specifically, CAC notes that PECO incorrectly quoted its August, 1998 letter, thus distorting its attack on Finding of Fact No. 44. (CAC R. Exc., p. 4).

CAC points out that PECO's attack on the Finding of Fact hangs on an incomplete and, therefore, deceptive, quote from the August letter. (R.Exc., p. 5). CAC states that the full text of the sentence in question is:

> With PECO Energy, you're guaranteed to save 8% off your entire electric bill in 1999, whether or not you choose a new supplier. [italics and underline in original].

CAC observes that the phrase PECO omitted from its quotation of the above sentence is "With PECO Energy, " which, argues CAC, significantly changes the tone of the sentence. (CAC R. Exc., p. 5). CAC makes the point that the inference of the letter is, in its view, deceptive **[*34]** in that it disparages the savings and implies uncertainty of the savings absent staying with PECO. CAC goes on to note that PECO's Exceptions fail to quote the second mention of the 8% savings in the August letter and that the language in this letter is materially different than the similar letter used in the Commission-approved consumer education mailing in its text, inference, and context. (CAC R. Exc., p. 6).

CAC finally disputes PECO's claim that direct testimony from customers is needed to prove material is deceptive and misleading. (CAC R. Exc., p. 7).

III. DISPOSITION

A. First Amendment Claims

The First Amendment to the United States Constitution provides in pertinent part that: "Congress shall make no law . . . abridging the freedom of speech . . ." *U.S.Const., Amend. I*. The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. (*See* Recommended Decision issued, slip op. at 44, *citing, Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557, 561 (1980)*, *citing, Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 761-762 (1976)*. **[*35]**

Our Supreme Court has, however, made distinctions between commercial speech and other types of speech relative to the degree of protections to be afforded under the Constitution. *See* R.D., p. 45, *citing, Id. at 562*, *see also Ohralik v. Ohio Bar Association, 436 U.S. 447, 455-456 (1978)*, U.S. reh'g. denied, *439 U.S. 883*; OCA Mem Law re: First Amendment. Commercial Speech has been defined by the Supreme Court as "expressions related solely to the economic interests of the speaker and its audience." *Central Hudson, 477 U.S. at 561*, *citing, Virginia*

Board of Pharmacy, 425 U.S. at 762. As such, the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. Id., 477 U.S. at 563, *citing, Ohralik v. Ohio Bar Association, 436 U.S. at 457*.

While a lesser protection does not provide the state with an unrestricted ability to regulate speech, it does, in circumstances where there is a substantial state interest to be achieved **[*36]** by the regulation of the speech, allow some regulation. *See Central Hudson, supra.*

The key issue here, as set forth very succinctly by the ALJ is whether PECO's promotional materials are false, misleading and/or deceptive. (*See* R.D., p. 43). No utility has the right to communicate with its customers falsely and deceptively under the commercial free speech doctrine. In instances where this occurs, we conclude that there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. R.D., p. 46, *citing, Central Hudson, 447 U.S. at 563-564*; also *Friedman v. Rogers, 440 U.S. 1 (1979)*.

PECO's advertising must be viewed as a single marketing campaign. Therefore, as noted by the ALJ, there is no dispute that the material in question is intended as advertising and not consumer education. However, a review of the materials reflect a message that is not consistent with this Commission's Consumer Education Order, supra.

1. Relevant Background in Electric [*37] Restructuring

By way of background, we note that in January of 1997, the Act became effective. *66 Pa. C.S. § 2801-2812*. The Act provides, among other things, that Electric Distribution Companies (EDCs) may divest themselves of generation facilities, *66 Pa. C.S. §§ 2802(14)*; 2804(4)(5). Further, as part of the restructuring process, and also the PECO Settlement proceeding, PECO, as were all other EDCs, was obligated to abide by a Code of Conduct which would, consistent with the Act, clearly define its EDC and EGS corporate identity for marketing purposes. *See PECO Restructuring* , Docket No. R-00973953 (May 14, 1998), Section H.

PECO's conduct has, in our opinion, created confusion between consumer education and marketing. The Commission stated in its Consumer Education Order:

> As stated in every Commission document on consumer education, the distinction between information and education on the one hand, and marketing must prevail. Many of the efforts at the statewide level serve to provide information while the local outreach plan serves to educate in an unbiased and neutral way. If the materials are designed to place any utility or supplier in either a savory or unsavory light, **[*38]** then those materials are deemed to be marketing materials and are therefore shareholder or other utility account expenses, not ratepayer expenses funded by the CTC.
>
> It is of the utmost importance that education materials do not cross the line into marketing, as distinguished from objective, non-commercial education. Marketing materials are those materials which promote a company and/or its services and products. Such materials are not part of the Commission's education process, will not be reviewed by the Board or the Commission and are not funded by ratepayers through the CTC as consumer education. In

> addition, dissemination of litigation positions or political and ideological messages conducted by any company will be funded by shareholders and shall not be subject to any Commission approval.
>
> * * *
>
> The types of messages agreed to for the statewide plan should be included in the local plan. The local plan may also include concepts such as: an explanation of how service is currently delivered; an explanation of how service will be delivered once competition begins; issues related to safety, reliability, price, billing and customer service; supplier of last resort; energy sources; **[*39]** and … energy efficiency information. Consumer protection issues such as: termination of service; the availability of existing assistance programs; where to go for more information; where to go to resolve disputes; and how to compare cost differences for generation from different providers. The local plan should include a variety of delivery mechanisms such as: local press, radio and cable, town meetings, workshops, churches, CBOs, hotlines, direct mail, fairs and conferences, trade shows, use of the Consumer Advisory Council, co-hosting events with local organizations and political leaders, information booths, etc.

Creation and Implementation of a Statewide Consumer Education Program for Electric Restructuring in the Commonwealth of Pennsylvania, Docket No. M-0098103 (Order entered February 27, 1998).

Consistent with the distinction between the transmission and distribution functions from the generation function, PECO exercises its competitive EGS function through Exelon, an affiliated company. Exelon is the licensed electric generation supplier which markets in PECO's distribution service territory. (Finding of Fact No. 25; Tr. 122; 125). Consequently, we find that there **[*40]** should be a distinction made between efforts of Exelon to compete for and attract customers to purchase the electric generation portion of their electric service from the PLR service which PECO is mandated to provide.

It is incumbent upon all participants in the competitive market to inform consumers and the public that there is a choice in the electric market. That choice is to switch to another electric generation supplier or to stay with their existing supplier. In either case, the consumer must be fully informed as to the choices in a non-disparaging manner so that he/she can make an informed decision.

Based on the record of this proceeding, we find that PECO, in its advertising campaign, has created confusion regarding customer choice. Rather than seek customer enrollment, PECO's advertising sent mixed signals concerning customer choice. This behavior is inconsistent with the commitment contained within the *PECO Restructuring Settlement* , to cooperate with the program for consumer education.

There is a clear distinction between a distribution company or any other electric supplier conducting a campaign to convince customers that they should not shop and a campaign encouraging **[*41]** customers to carefully evaluate their choices. Certain of PECO's campaign materials effectively encouraged customers not to choose, but instead to do nothing. The message delivered by PECO did not clearly educate the consumer of the available choices.

Rather, it conflicted with the purpose of Chapter 28 and the Commission's consumer education program.

2. Background of PLR Service

PLR service, as referenced in the Act, provides that an EDC's obligation to provide electric service to customers, following implementation of restructuring, takes hold in two (2) circumstances which include the following:

> (3) If a customer contracts for electric energy and it is not delivered or if a customer does choose an alternative electric generation supplier the electric distribution company or commission-approved alternative supplier shall acquire electric energy at prevailing market prices to serve that customer and shall recover fully all reasonable costs.
>
> (4) If a customer that chooses an alternative supplier and subsequently desires to return to the local distribution company for generation service, the local distribution company shall treat that customer exactly as it would any new **[*42]** applicant for energy service.

66 Pa. C.S. §§ 2807 (3) and (4).

PECO, as an EDC, may retain, through the transition period, generation facilities sufficient to supply customers in its service territory with power in the event that the customer's generation supplier of choice fails to perform. However, at such time as that happens, based upon the Act, the 'choice' for generation supply lies with the PLR (either the EDC or Commission approved alternative generation supplier) , and not with the consumer, to fulfill the PLR obligation. Since the PLR has a duty to secure supply sufficient to meet the PLR obligation, and the circumstances at that time may actually control which supply is available, it does not appear that the consumer has a choice relative to the identity of the PLR generation supplier.

As the consumer does not have a 'choice' relative to the source of the PLR service, and PECO, as the EDC, has the duty, pursuant to the Act, *supra*, to ensure continued service, communications by EDCs to the consumer which market PLR as a function of consumer choice is contrary to the goals and objectives of Section 2807(e) of the Act. Further, PECO, in the *Interim Code of Conduct* **[*43]** , as part of the Restructuring Plan Settlement, was provided with guidelines relative to the manner in which PECO could represent its services.

Specifically at issue in this case, are the letters [7] and commercials [8] disseminated by PECO. The correspondences were issued on PECO letterhead, and signed by PECO executives. While the August Lawrence correspondence was issued prior to the *Interim Guidelines Order*, the issuance of the Shannon letters, and also the airing of a portion of the commercials clearly may have been prevented. *See* R.D., pp. 74-75.

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[7] The first letter, referred to as the Shannon Letter in the Recommended Decision, was signed by James F. Shannon, Director of Marketing for PECO Energy Distribution Company. That letter was attached as Appendix A to the December 10, 1998 MAPSA Petition and Complaint. See Recommended Decision, Finding of Fact No. 12.

The second letter, the Lawrence Letter, dated August 10, 1998, was signed by Kenneth G. Lawrence, President, PECO Energy Distribution Company. This letter was included as Attachment 1 to MAPSA's Petition filed October 6, 1998.

[8] Copies of the dialogue for the subject commercials was submitted as Appendix B to MAPSA's December 10, 1998 filing.

[*44]

The *Interim Guidelines Order*, as noted, was entered November 19, 1998, prior to the November 23, 1998 issue date of the first round of Shannon letters, and clearly prior to the November 30, 1998 mailing. The Interim Guidelines were also issued prior to the commercials which ran during the weeks of November 30, December 7, and December 14, 1998.

The Interim Code of Conduct provides that neither a PECO EDC nor a PECO Supplier may directly, or by implication, falsely and unfairly represent that any power purchased from an EGS other than a PECO Supplier may not be reliably delivered. (*See* Interim Code of Conduct, No. 7). The Shannon and Lawrence letters, discussed above, each promote PECO Energy's 'superior service'. Specifically, the Shannon letter says that "you, [the consumer] can save yourself time and effort by simply choosing to stay with PECO Energy. " (Shannon Letter, p. 2). The implication here, is that PECO Energy has better, or superior, service than the competitors.

We generally agree with the conclusions of ALJ Turner regarding the First Amendment questions. Society has a strong interest in the free flow of commercial information, both because the efficient allocation **[*45]** of resources depends upon informed consumer choices and because even an individual advertisement, though entirely commercial, may be of general public interest. However, restrictions on false, deceptive or misleading speech, [as] "untruthful speech, commercial or otherwise, has never been protected for its own sake," and will certainly not be overlooked by us in this developing market. *Friedman, supra*, *quoting, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974)*.

Although we find that PECO has created confusion regarding customer choice through its advertising campaign, we note that Section 2811 was drafted specifically to limit the Commission's remedial authority in this area. It directs the Commission, upon investigation to refer such matter to the appropriate state and federal authorities. Consistent with the clear intent of Section 2811, we shall direct that the record of this matter be referred to the Office of Attorney General of Pennsylvania (Office of Attorney General) as contemplated by statute and as provided for in the Memorandum of Understanding between this Commission and the Office **[*46]** of Attorney General for appropriate disposition. [9] Of course, the Commission's referral does not foreclose the parties from pursuing any other remedies which are available to them by law. In the interim, we would direct that PECO refrain from such further conduct which this Commission determines constitutes a violation of the commitment set forth in the PECO *Restructuring Settlement* .

In light of our referral of this matter to the Office of Attorney General, we shall grant and deny the Exceptions of MAPSA, CAC, and the OCA **[*47]** regarding the First Amendment issues, without prejudice. We note that there is an administrative agency having more extensive expertise in this area to which this matter is deferred.

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[9] The Memorandum of Understanding between the Public Utility Commission and the Office of Attorney General recognizes that agency's enforcement authority under Pennsylvania's Unfair Trade Practices and Consumer Protection Law and the federal antitrust laws, *15 U.S.C. §§ 1, et seq.* to challenge unfair or deceptive marketing practices, terms-of-service provisions, and other anticompetitive or discriminatory conduct engaged in by electric generation suppliers.

B. Commission Enforcement Jurisdiction Over the Dispute

1. Jurisdiction

PECO has argued that the Commission lacks jurisdiction under the Public Utility Code to engage in any enforcement of allegedly anticompetitive, discriminatory conduct or the unlawful exercise of market power. PECO views Section 2811 of the Code as a restriction on our authority to regulate the rates and services of public utilities which authority existed prior to the Act.

On consideration of the record in this proceeding, we will refer to the Office of Attorney General, pursuant to Section 2811 of the Code, *66 Pa. C.S. § 2811*. Thus, PECO's Exceptions regarding the application of Section 2811 are granted to the extent consistent with the discussion in this Order.

Pursuant to Section 2811, our role in the transition to a competitive market for electric generation is to exercise an investigatory function, with the results of such investigation to be referred to other appropriate state and federal agencies/forums. *See* *66 **[*48]** Pa. C.S. § 2811* which states:

> **§ 2811. Market power remediation**
>
> (d) Referrals and intervention. -- If, as a result of an investigation conducted under this section, the commission has reason to believe that anticompetitive or discriminatory conduct, including the unlawful exercise of market power, is preventing the retail electricity customers in this Commonwealth from obtaining the benefits of a properly functioning and workable competitive retail electricity market, the commission, pursuant to its regulations, shall:
>
> (1) Refer its findings to the Attorney General, the United States Department of Justice, the Securities and Exchange Commission or the Federal Energy Regulatory Commission.
>
> (2) Subject to subsection (c)(3), disclose any information it has obtained in the course of its investigation to the agency or agencies to which it has made a referral under paragraph (1).
>
> (3) Intervene, as provided and permitted by law or regulation, in any proceedings initiated as a result of a referral made under paragraph (1).

This is not to suggest that the Commission's jurisdiction over these matters lies wholly within Section 2811 of the Code. On the contrary, the Commission's **[*49]** jurisdiction spans the breadth of the Public Utility Code, *66 Pa. C.S. §§ 101-3316*. Concurrent jurisdiction with another governmental entity does not divest the Commission of jurisdiction retained or exercised under another section of the Code. *See* *Re DQE, Inc., 186 PUR 4th 39, 66 n. 15 (1998)*. For example, an instance may arise which may be addressed within the confines of Section 2811, but also may be appropriately handled under, *inter alia*, Section 701 of the Code, *66 Pa. C.S. § 701*. In fact, the Commission recently settled a case where Commission authority could have been exercised pursuant to Section 1501 or Section 2811 of the Code, *66 Pa. C.S. §§ 1501*; 2811.

See Pa. P.U.C v. PP&L, Inc., d/b/a PP&L EnergyPlus, Docket No. M-00981050 (Tentative Order entered March 26, 1998; Order became final April 10, 1998).

Thus, the Commission is empowered to refer matters which may fall within Section 2811 to another government agency. *See* *Re DQE, Inc., 186 PUR 4th 39, 66 n. 15 (1998)*. Consistent with our determinations above, we shall refer the record of this proceeding to the Office of Attorney General.

Both MAPSA and **[*50]** CAC excepted to the ALJ recommendation for a fine as an inadequate enforcement remedy to the findings being made. These exceptions are denied on procedural grounds as the level and manner of a fine was only first suggested within the context of the exception pleading. Additionally, the issue of a violation hinges upon a finding involving the interpretation of documents and materials where the Office of Attorney General has more extensive expertise. Our referral, together with record in this proceeding, sets this issue before the Office of Attorney General for their full consideration to bring an enforcement action and suggested remedy.

2. Federal Trade Commission Standards

In its Exceptions, PECO argued that the ALJ applied the wrong standards in making her finding that PECO's advertising violated the Commission's *Interim Guidelines* . PECO asserted that before reaching a conclusion that the subject advertisements were false, deceptive and misleading, ALJ Turner was required to apply the legal criteria for determining what is false, misleading or deceptive under the standards enunciated by the Federal Trade Commission Act, (FTC Act) *15 U.S.C. § 41* **[*51]** -58, as adopted by the Commonwealth in Pennsylvania's Unfair Trade Practices and Consumer Protection Law (Unfair Trade Practices Law). According to PECO, the applicable legal standards require that a complainant prove by clear and convincing evidence three (3) essential elements: (1) that there is a clearly identified representation, omission or practice likely to mislead; (2) that the act or practice be considered from the perspective of the reasonable consumer; and (3) that the representation, omission or practice must be material, i.e., likely to affect a consumer's choice or use of a product. PECO contends that the ALJ erred in failing to apply the proper standards. PECO argues in the alternative, that even if the ALJ applied the proper FTC standards, the record does not support a finding that its advertising is false or misleading.

On consideration of our referral of this matter to the Office of Attorney General, we conclude that we need not resolve the Exceptions in this regard.

With regard to the Exceptions of MAPSA, CAC, and the OCA relating to anticompetition and unfair or deceptive practices involving this matter, we shall, in light of our referral of this matter to the Office **[*52]** of Attorney General, grant and deny said Exceptions without prejudice. We note that there is an administrative agency having more extensive expertise in this area to which this matter is deferred.

C. Procedural Due Process

As noted, PECO has excepted to the Recommended Decision based on allegations that the procedures employed in this matter denied it due process of law. (PECO Exc., p. 26). PECO

states that "pursuant to Prehearing Order Nos. 1 and 2, the "expedited procedure applied only to MAPSA's second Petition and Complaint [served December 17, 1998 and docketed at Nos. P-00981615 and C-00982011, respectively]. However, at the beginning of hearings, on December 29, 1998, MAPSA and the Clean Air Council moved to consolidate their earlier Complaints, thereby putting them on the "fast track" as well. Over PECO's strenuous objection, the ALJ granted this motion and, thereby, vitiated the earlier, agreed-upon schedule. Because of the way these events unfolded, PECO had no notice, during the critically short preparation period, that the earlier Complaints would be addressed at the upcoming hearings." (PECO Exc., p. 27).

Related to PECO's objections concerning the process used **[*53]** in these proceedings, is its criticism that this Commission did not exhibit adequate "knowledge" or "appreciation" of how cases involving claims of deceptive advertising are presented, analyzed or defended. (Exc. at 27). Here, PECO suggests that because the subject advertisements are alleged to carry implied or inferential messages, evidence of whether reasonable customers actually perceived such messages is important. (PECO Exc. at 28). PECO complains that the ALJ agreed that PECO should be afforded the opportunity to present such subjective consumer perception evidence in its defense. However, the truncated schedule denied it the chance to develop and present this kind of evidence. *Id.* PECO goes further and states that this evidence would require an expert to conduct surveys and interviews of statistically significant audience samples. *Id.*

PECO additionally views its due process rights as violated, based on the fact that the schedule provided no time for discovery. This, states PECO, resulted in it having to try to prepare its defense before MAPSA identified the implied or inferential claims that its witness would assert were false and misleading. (PECO Exc., p. 28). Finally, **[*54]** PECO objects to the improper shifting of the burden of proof. *Id. citing* Tr. 104. PECO states that the presiding ALJ was wrong in assigning the burden of proof on PECO as to MAPSA's second complaint based on application of Section 315(b) of the Public Utility Code, *66 Pa. C.S. § 315(b)*. PECO concludes this part of its Exceptions by arguing that the Interim Guidelines do not satisfy the criterion of Section 315(b) of the Code because the guidelines set forth therein stop short of being the kind of "determination or order" necessary to trigger the Section. (PECO Exc., p. 29).

We review PECO's claims in light of *Barasch v. Pa. PUC, 546 A.2d 1296 (Pa. Cmwlth. Ct. 1988)*, *petition for allowance of appeal denied 523 Pa. 652, 567 A.2d 655 (1989)* which provides that due process is required in Commission proceedings which are adjudicatory in nature and involve substantial property rights. The instant proceeding is such a proceeding. Thus, the essential elements of due process are adequate notice of governmental action and a meaningful opportunity to be heard at an appropriate stage of the proceeding to challenge **[*55]** that action. Meaningful opportunity to be heard includes reasonable examination and cross-examination. *See Application of PECO Energy Company for Issuance of a Qualified Rate Order Under Sections 2808 and 2812 of the Public Utility Code,* Docket No. R-00973877, et al. (*PECO QRO Order*), (Order entered May 22, 1997), slip op. at 20, citing AT&T Communications of Pa., Inc. v. Pa. PUC, 570 A.2d 613 (Pa. Cmwlth. 1990).

Although we conclude that appropriate due process was observed in this proceeding, PECO will have the opportunity to bring to the attention of the Office of Attorney General any concerns relative to the sufficiency of the record in this matter.

We note additionally that our referral of this record to the Office of Attorney General will further provide MAPSA, CAC, and the OCA the opportunity to bring to the attention of that office any concerns relating to the sufficiency of the record in this case and the need, if any, to supplement said record.

IV. ORDER

On consideration of the January 13, 1999 Recommended Decision of ALJ Turner and the Exceptions and Replies thereto:

IT IS ORDERED:

1. That PECO Energy Company shall refrain **[*56]** from its current marketing practices which promote, solicit and advertise Provider of Last Resort Service over competitive alternatives and which deceptively and inaccurately portray, communicate or infer Provider of Last Resort service as a competitive service at this time.

2. That the record of this proceeding shall be referred to the Pennsylvania Office of Attorney General for such proceedings as may be necessary consistent with the Memorandum of Understanding with the Pennsylvania Public Utility Commission.

3. That the Recommended Decision of Administrative Law Judge Allison K. Turner is modified consistent with this Opinion and Order.

4. That in light of the referral of this matter to the Office of Attorney General, and the primacy of these Formal Complaints involving issues of First Amendment, and unfair/deceptive, or anticompetitive acts pursuant to the Electricity Generation Customer Choice and Competition Act, the Exceptions of the Mid-Atlantic Power Supply Association, PECO Energy Company, the Office of Consumer Advocate, and the Clean Air Council are granted in part, and denied in part, only to the extent consistent with this Opinion and Order.

5. That the recommended civil **[*57]** penalty of Administrative Law Judge Allison K. Turner shall be rejected consistent with our discussion in this Opinion and Order and referral to the Office of Attorney General.

6. That the Formal Complaints of the Mid-Atlantic Power Supply Association are granted in part, and denied in part, only to the extent consistent with this Opinion and Order.

7. That the Formal Complaint of the Clean Air Council is granted in part, and denied in part, consistent with this Opinion and Order.

8. That the respective Motions for Summary Judgment are denied.

9. That PECO Energy Company's Motion to Strike and/or Dismiss MAPSA's complaint at C-00981846 is denied.

10. That the Joint Petition to Intervene field by Green Mountain Energy, DTE Edison America, Inc., and Conectiv Energy, is hereby granted.

11. That the grant of CAC's request to intervene at Docket Nos. P-00981615/C-00982011 is hereby, affirmed.

12. That PECO's Motion to strike and/or Dismiss the Clean Air Council's complaint at Docket No. C-00981862 is denied.

13. That in association with its intervention, the Clean Air Council shall provide a copy of its by-laws and a list showing some if not all of its members for this record within twenty **[*58]** (20) days of the date of this Order for placement in the record.

BY THE COMMISSION

Concur By: DAVID W. ROLKA, COMMISSIONER

Dissent By: DAVID W. ROLKA, COMMISSIONER; NORA MEAD BROWNELL, COMMISSIONER

Dissent:

STATEMENT OF COMMISSIONER DAVID W. ROLKA

I find that I concur in part and dissent in part. I cannot fully support the Chairman's motion because I find that a violation did occur, and I would agree with Commissioner Brownell on that point. In particular, I accept Administrative Law Judge (ALJ) Turner's findings of fact 16-34.

Additionally, the Chairman's motion directs PECO to refrain from the conduct which constitutes the subject of this proceeding. The admonition is inadequate and a Cease and Desist Order from this Commission, as was recommended by the ALJ, is appropriate.

Finally, I concur with the Chairman with respect to the penalty provisions that should be invoked, but I disagree with Commissioner Brownell with respect to the relief that we can fashion. I do agree that the matter should be appropriately referred to the Office of OAG consistent with our Memorandum of Understanding with the clear understanding that that reference or that referral does not preclude the parties from pursuing any other **[*59]** relief that they think is appropriate.

So I should be recorded as concurring in part and dissenting in part.

4-26-99

DATED

DAVID W. ROLKA, COMMISSIONER

Statement of Commissioner Nora Mead Brownell

I have carefully reviewed the Chairman's Motion in this matter. It is gratifying to see the seriousness which with this issue is being treated. It should be apparent that each of my colleagues has spent a substantial amount of time working on this matter. I respect the Chairman's attention to consumer protection and his findings relating to the gravity of PECO's actions here. The Motion is carefully crafted and worthy of every consideration. As will be

discussed below, I must respectfully dissent only because I do not believe that the specific result is the only appropriate action in this matter.

I hasten to add that I share the Chairman's reluctance to intervene in a developing market. The key word is developing. My approach to this matter is dictated by the fact that this is not yet a market nor is there a fully mature customer base. An immature market is particularly vulnerable to confusing messages. My review of the statute and our prior orders leads me to conclude **[*60]** that we have the necessary tools and the statutory duty to move the transition process forward in an orderly fashion and intervene when necessary to ensure that the public is protected and the market is given a fair chance to develop.

The actions before us involve direct mail and multi-media campaigns initiated by PECO Energy Company (PECO). My point of departure from the Motion today concerns the issue before us. While the Motion focuses on anti-competitive behavior, my focus is whether, based upon the record before us, those direct mailings and promotional campaigns violate prior Commission Orders and/or the Public Utility Code.

At this point I emphasize that I avidly support responsible marketing. Responsible and accurate marketing can be a tremendous positive force in the development of new markets. PECO, and its affiliate EGS, Exelon, have devoted tremendous resources to marketing and raising public awareness of customer choice. They, and others in the market, are to be commended for committing those resources to retail choice. However, whether the direct mailings and media campaigns before us are accurate and responsible so as to be in compliance with prior Commission Orders **[*61]** and PECO's commitments in its Joint Petition for Settlement is at issue.

For the reasons expressed below, the record in this case clearly demonstrates that the direct mailings and multi-media campaigns at issue herein are directly contrary to PECO's commitments in the Joint Petition for Settlement of its restructuring case. It is equally clear that PECO's actions have violated this Commission's Orders on Consumer Education. Finally, PECO's continued exhortations to customers not to shop, and the message that choice is confusing or a "hassle", serve to frustrate this Commission's obligation to ensure an orderly transition to a competitive market place.

By Order entered May 14, 1998, [1] this Commission approved a Joint Petition for Settlement which resolved litigation over our decision approving PECO Energy Company's (PECO) restructuring plan. [2] Among the various terms of that Settlement, PECO was permitted to recover $ 5.26 billion in stranded costs. That number is a figure which the Settlement guarantees by providing for annual reviews to ensure the appropriate recovery of that amount.

[*62]

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[1] *Application of PECO Energy Company*, Pa. P.U.C. Docket Nos. R-00973953 and P-00971265, Order adopted May 14, 1998, entered May 14, 1998.

[2] *Application of PECO Energy Company*, Pa. P.U.C. Docket Nos.R-00973953 and P-00971265, Order adopted December 11, 1997, entered December 23, 1997.

In return for that stranded cost award, and additional significant concessions by other parties, PECO also agreed to certain conditions. These included mandatory rate cuts (funded by approved securitization savings), increased funding for universal service programs and similar terms. However, equally significant in my review of that Settlement Agreement and a substantial basis for my support thereof, were several consumer protection commitments made by PECO. The following is quoted from the Joint Petition for Settlement filed on April 29, 1998:

> Moreover, PECO specifically agrees, as part of the settlement, to fully comply and cooperate with all Commission-directed Consumer Education efforts and orders, including the PECO Restructuring Order and the Commission's March 30, 1998 Secretarial Letter.

Joint Petition for Settlement , at 32.

PECO also joined with all other Settlement participants and committed as follows:

> The Joint Petitioners **[*63]** agree that they shall make all reasonable and good faith efforts necessary (a) to obtain final approval of the settlement by the Commission and (b) to insure full implementation and enforcement of all of the terms and conditions set forth in this settlement, including those providing for an orderly transition from the current regulated structure under which retail customers will have direct access to a competitive market for the generation of electricity and a fair and reasonable recovery of PECO's transition and stranded costs created by this transition to a competitive market.

Joint Petition for Settlement , at 42. Emphasis supplied.

It is equally important to note that PECO agreed to be bound by Competitive Safeguards, attached to the Joint Petition for Settlement as Appendix G, and a Code of Conduct, attached to the Joint Petition for Settlement as Appendix H.

The foregoing quote from the Joint Petition for Settlement is grounded in Section 2804(14) of the Public Utility Code, *66 Pa. C.S. § 2804(14)*, which provides the following:

> (14) The transition to a competitive generation market shall be orderly, protect electric system reliability, be fair to ratepayers, and **[*64]** provide the investors in Pennsylvania electric utilities with a fair opportunity to fully recover the amount of transition or stranded costs that the commission determines to be just and reasonable.

Equally important is Section 2807(d)(2), *66 Pa. C.S. § 2807(d)(2)*:

> (2) The commission shall establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.

In the administration of any statutory framework, those charged with its implementation must provide guidance in addition to that framework. In the context of electric restructuring, we not only have the restructuring orders and several approved Joint Petitions for Settlement, we also were very concerned with consumer education and information. Accordingly, in the late winter

and early spring of 1998, we embarked upon a cooperative effort with our **[*65]** *Consumer Education Order*, at M-00981036 entered on February 27, 1998.

In that Consumer Education Order, we outlined several goals for our program. They were:

> 1. Create an environment to minimize confusion.
>
> 2. Provide information on how the electric industry restructuring may affect consumers and what is driving this transition.
>
> 3. Provide consumers with clear, accurate, comparable information to assist them in making sound decisions about their electric service including an understanding of choice and how to exercise their choice.
>
> 4. Establish a level of protection for vulnerable consumers by providing information about consumer rights, protections, programs and other measures available. Further, by encouraging the use of CBO's [Community Based Organizations] to educate enables vulnerable populations additional access to support and information networks.
>
> 5. Provide information and sources of assistance to consumers so they understand the basics and not fear the change.
>
> 6. Make it clear that the safety and reliability of the power delivery will be maintained, regardless of how the customer decides to purchase the actual power supply.

Creation and Implementation **[*66]** *of a Statewide Consumer Education Program*, Pa. P.U.C. Docket No. M-00981036, Order entered February 27, 1998 at 20-21. Emphasis supplied.

Be reminded of that portion of the *Joint Petition for Settlement* quoted above in which PECO expressly agreed to cooperate with this Commission's Consumer Education efforts and principles.

Beginning in June and July of 1998, this Commission's Consumer Education Campaign ramped up as customer choice enrollments began. The well known "Where do you think you are?" slogan was broadcast and the Commission, industry and many other organizations involved with the orderly transition to a competitive market place were inundated with questions, requests for forms and speaking engagements to ensure that a fully informed and enabled consumer population would examine the infant market place for electric choice. The most important goal of this incredible effort was to create consumer confidence in the market place.

As set forth in the record before us, in the middle of this intense effort, PECO launched its own promotion involving electric choice. On or about August 19, 1998, PECO mailed a letter to approximately 1.4 million electric customers in its service **[*67]** territory, using the customer list for PECO's regulated electricity service. That letter contains the following statements as the last two paragraphs:

> Avoid the hassle of extra bills and confusing charges by keeping PECO Energy as you electricity and billing provider...and save 8% on your electricity in 1999. Its easy--*stay with PECO Energy Distribution Company!*

> PECO Energy has been around for over 100 years. It's important to remember that no matter who you choose to buy your electricity from, we'll still be delivering it. The easy choice is not to change suppliers --do nothing, even if you've already enrolled! If you have any questions, just call the Consumer Choice Education Center at (800) 980-9655 or visit our website at *www.peco.com*.

Simultaneous with the August 19, 1999 letter, PECO also began a series of radio, newspaper and television advertisements. One set of newspaper advertisements appeared as follows:

> 'Will I need a special meter?'
>
> 'Is there a fee to switch?'
>
> 'Who's licensed to sell electricity? '
>
> 'Do savings only apply to certain hours?'
>
> seem complicated?
>
> Make electric competition easy - stay with PECO energy. After all, we've been here for over a hundred **[*68]** years, so we are the one company you already know. And the only company that delivers power to every doorstop in the region. Plus we'll soon be offering guaranteed 8% savings to all our customers.

Petition and Complaint of MAPSA, filed October 6, 1998 at C-00981846, Attachment 2.

A similar newspaper advertisement concluded with the following paragraph:

> There is only one way to guarantee that the energy company you choose is best for you. Stay with PECO Energy. After all, we have over 100 years of experience and we'll soon be offering guaranteed savings to all our customers. Not to mention, PECO Energy is the only company delivering power, no matter who generates it, to every doorstep in the region.

Id.

Simultaneous with the direct mailing and newspaper advertisements, PECO also aired television ads. One of those ads was scripted as follows:

> (Song): 'You made me promises, promises you knew you'd never keep.' (Announcer): New energy companies will be making all kinds of promises, but only one energy company has been here for the last 100 years, the same company that will soon be offering guaranteed savings, the only company delivering power, no matter who generates **[*69]** it, to every doorstep in the region. PECO Energy, no doubt about it.

Petition and Complaint of MAPSA, filed October 6, 1998 at C-00981486, Attachment 4.

As I have stated above, one of the overarching goals of the Commission's Consumer Education effort was to instill confidence in consumers regarding the infant retail choice market place. The above quoted letter and marketing aired at the same time as the Commission's statewide consumer education campaign was moving into full swing. This is also the same time period during which the first phase of customer enrollments was initiated.

On November 19, 1998, at M-00960890F0017, the Commission issued its Order (hereafter, *Interim Guidelines Order*) which provided for interim guidelines relating to activities regarding provider of last resort service (PLR). In the *Interim Guidelines Order*, we stated the following:

> We expect that, in furtherance of the Act [the Electricity Generation Customer Choice and Competition Act], EDCs will adhere to the interim guidelines both to assure the provision of adequate service and to avoid engaging in conduct that is actionable under the Public Utility Code or under other state and federal **[*70]** laws governing anti-competitive conduct and unfair or deceptive marketing practices. Additionally, we note that all EDCs are already bound by provisions in interim Codes of Conduct, as adopted in the Commission's restructuring orders and as modified by the settlements in the PECO, PP&L, GPU and West Penn cases. In large measure, these guidelines simply apply many of those same principles to EDCs in fulfilling their statutory obligations as PLRs.

Interim Guidelines Order, at 6.

We also stated in that *Interim Guidelines Order*:

> In the Commission's view, disparaging statements that inferior generation service might be received from competitive suppliers or characterizations about the cumbersome or complex nature of the competitive market would fall within the realm of misleading advertising by the EDC of the PLR obligation.

Interim Guidelines Order, at 14.

The *Interim Guidelines Order* noted concerns regarding the incumbent status of EDCs in the market place. In that context, the *Interim Guidelines Order* stated the following:

> First, it is inappropriate for EDCs to use their customer mailing lists to promote their PLR function to existing customers unless **[*71]** the mailings lists are made available to all other EGSs for a reasonable fee approved by the Commission. The use of that information by an EDC to market the PLR function is no different than affording a preference to an affiliate EGS in terms of access to customer mailing lists.
>
> ****
>
> The marketing of PLR service through direct mailings or bill inserts ensures that EDCs, as incumbent providers, retain an unfair advantage over alternative suppliers. Therefore, aside from consumer education efforts that occur in accordance with the procedures set forth in these PLR guidelines, EDCs should not tout the advantages of staying with their PLR service through these means unless all EGSs are provided access to the customer mailing lists, for which the EDCs may charge a reasonable fee approved by the Commission.

Interim Guidelines Order, at 14-15.

The *Interim Guidelines Order* is remarkable in its effective balancing of the interests of EDCs in promotional activities, the interests of the public in receiving accurate information and the interests of a newly developing market place. It is also noteworthy that these guidelines relate back to the Joint Petitions for Settlement, the **[*72]** *Consumer Education Order* and other Commission adopted or approved matters (such as interim Codes of Conduct). It is also of some import that the *Interim Guidelines* Order was a unanimous action of this Commission.

Literally on the heals of the *Interim Guidelines Order*, PECO initiated a new waive of promotional activity relating to its PLR service. During the weeks of November 23, 1998, November 30, 1998, December 7, 1998 and December 14, 1998, PECO again launched a media campaign in which it suggested that competitive EGS suppliers would not follow through on promises or were in some way inferior to PECO's PLR service. On November 23, 1998, and November 30, 1998, PECO issued a direct mailing to residential and small commercial customers which again implied that customer choice was a confusing and daunting proposition. Although there appears to be some confusion in the record regarding which customer list was used, the Administrative Law Judge found that those mailings were sent to customers already enrolled in the customer choice program.

Because the materials appeared immediately following the Commission's *Interim Guidelines Order*, it is illustrative to quote some **[*73]** it here. In several television advertisements, PECO launched a campaign portraying itself as a hometown company. While local community sites were pictured in the background, an announcer would read the following:

> (Announcer): When outside electric companies look at Havertown, they see dollar signs. At PECO Energy, we see a community where honesty and hard work lead to success as trust is measured over time. We're the only electric company that's been a trusted friend and neighbor over a hundred years. And we're about to back up that trust with guaranteed savings to all our customers. Save with PECO energy. No doubt about it.

Petition for Emergency Order of Mid-Atlantic Power Supply Association, filed December 10, 1998 at P-00981615, Appendix B. Similar ads appeared which targeted the local Pennsylvania communities of Germantown, Morrisville, Conshohocken, and West Chester. *Id.*, Appendices C and D; *Recommended Decision*, Appendix A.

The direct mailings which issued on November 23, 1998 and November 30, 1998 opened with the sentence: "Deciding whether to change electricity suppliers can be a confusing process." Those mailings also stated, in part:

> Good value is **[*74]** about more than dollars and cents. If you're not careful, you could be giving up important things like customer support and convenience to save no more than a few pennies a day -- if you save anything at all.
>
> ****
>
> Right now, paying for your electricity is easy. You make one payment, once a month to PECO Energy. One of the suppliers can't even offer you a single-billing option, leaving you with extra paperwork and additional bills to pay that may come at different times during the month. Find out if the supplier you're considering offers consolidated billing. If they don't, is paying two bills really worth the hassle? You can save yourself time and effort by simply choosing to stay with PECO Energy as your full-service provider.

Petition for Emergency Order of MAPSA, filed December 10, 1998 at P-00981615, Appendix A.

As determined by the presiding Administrative Law Judge in this case, these campaigns implied that customer choice is a complicated proposition. The materials also imply that alternative generation suppliers will not follow through on promises made. The Administrative Law Judge also found that PECO's campaign wrongfully implied that mandated, across the

board **[*75]** rate cuts would not be available to shopping customers. *Mid-Atlantic Power Supply Association v. PECO Energy Company*, Recommended Decision of Administrative Law Judge Turner issued January 13, 1999 at P-00981615, and the consolidated dockets thereunder (hereafter, *Recommended Decision*), at pp. 15-17.

PECO has mounted several arguments in its defense in these actions. Those arguments include the First Amendment to the Constitution of the United States, jurisdiction, due process and whether or not MAPSA has made out a case of deception under either federal or state standards. Certainly, PECO is entitled to raise and argue any defense it believes available to it in this matter. However, it is increasingly clear to me that PECO is merely engaging in conduct intended to obfuscate the issues of this case, just as its promotional activities have been found by the presiding Administrative Law Judge to obfuscate customer choice and PLR service.

The Motion under consideration suggests that this is a matter of anti-competitive behavior which must be referred over to the Attorney General and/or other pertinent authorities. I respectfully disagree that the Public Utility Code is so limiting **[*76]** when an action is brought by private parties. I believe that the Motion, although very well done as far as it goes, gives too little effect to Section 2811(f), *66 Pa.. C.S. § 2811(f)*, which provides that Section 2811 is not intended to circumscribe other causes of action. However, and more importantly, I disagree that we must adopt that view of this case.

I believe that the Consumer Advocate succinctly stated the issue in the case before us:

> The OCA submits, however, that we must remain focused on this case and what it is about. This case is about PECO, a regulated EDC, and the provider of last resort service-a service that remains a regulated service under the jurisdiction of the Commission, even under the Customer Choice Act. This case presents a unique issue to the Commission: Can an EDC use its position as an EDC, including its access to proprietary identifying information about all of its customers, to discourage competition. The OCA submits that the Commission must assume jurisdiction and resoundingly answer this question "no" as it did in its Interim Guidelines .
>
> *Reply Exceptions of the Office of Consumer Advocate*, filed January 25, 1999, at 12.

I agree with the **[*77]** OCA that stripped of all the rhetoric and attempted obfuscation by PECO, we can break this case down to a few fundamental questions. They are:

1. Did PECO's direct mail and advertising campaigns of August, November and December of 1998 serve to frustrate the legitimate governmental interest in a fair and orderly transition to a competitive market place?

2. Did PECO's direct mail and advertising campaigns of August, November and December of 1998 conform to PECO's commitment to "fully comply and cooperate with all Commission-directed Consumer Education efforts and Orders ..."?

3. Did PECO's direct mail and advertising campaigns of August, November and December of 1998 conform to PECO's commitment to ensure full implementation and enforcement of all the terms and conditions of its Settlement, including those relating to an orderly transition to a competitive market place?

4. Did PECO's direct mail and advertising campaigns of August, November and December of 1998 violate PECO's Interim Code of Conduct as agreed to by PECO in its Settlement?

5. Did PECO's direct mail and advertising campaigns of August, November and December of 1998 violate PECO's Interim Competitive Safeguards as agreed **[*78]** to by PECO in its Settlement?

Each of the foregoing questions are within the primary jurisdiction of this Commission. Each of those questions are clearly encompassed within the pleadings filed by MAPSA, of which PECO had notice and to which PECO, a multi-billion dollar corporation with highly sophisticated expertise, had a full and fair opportunity to respond. PECO suggests that the issues in this case are better left to the Attorney General. Again, PECO obfuscates the issues. Interpreting the Joint Petition for Settlement, our *Consumer Education Order* or our *Interim Guidelines Order* is within the primary jurisdiction of this Commission.

I endorse the recommended resolution of PECO's First Amendment claim. The Office of Consumer Advocate, in particular, raised very clear and convincing arguments which put that defense to rest. In addition to the Consumer Advocate's arguments, I would note that much of my deliberations in this action are guided by PECO's affirmative, voluntary commitments in the Joint Petition for Settlement. This also eases concerns relating to PECO's First Amendment claims. As I stated at the beginning, I avidly support responsible and accurate marketing **[*79]** efforts by any entity that wishes to come into Pennsylvania's retail electricity market. Such marketing is absolutely necessary to the development of the market place. I am also extremely conscious of, and awed by, the power of the First Amendment.

As argued by the OCA, and held by the presiding Administrative Law Judge in this case, commercial speech is clearly protected by the First Amendment. I fervently agree. However, it is also clear that the First Amendment protects commercial speech from unwarranted governmental regulation. Central Hudson Gas & Electric Corporation v. Public Service commission of *New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980)*, citing, *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)*. Although there is extensive discussion of this issue in the *Recommended Decision*, my determination of this particular issue is summed up by this precept from Central Hudson: In cases where commercial speech is brought into question, the state may exercise its power **[*80]** to assure that such speech "flows cleanly as well as freely." Central Hudson, 477 U.S. at 563, 100 S.Ct. at 2350, quoting, *Virginia Board of Pharmacy, 425 U.S. at 772, 96 S.Ct. at 1831*.

Accordingly, my review of PECO's First Amendment claim leads me to conclude that my preferred result in this matter is entirely consistent with the protections inherent in the United States Supreme Court's interpretations. First, my view of this case begins with PECO's voluntary commitments in the Joint Petition, and our Consumer Education orders and principles which PECO has agreed to support and implement. To that extent, I am not imposing any restraint on PECO to which it has not already voluntarily committed. Second, in line with Central Hudson, PECO's messages clearly do not flow cleanly at all. As

determined by the Administrative Law Judge below, PECO cannot avail itself of a First Amendment claim here and I agree.

The record before me clearly establishes that PECO's various advertising and direct marketing materials only serve to frustrate this Commission's *Consumer Education Order*, several provisions **[*81]** of the Joint Petition for Settlement and the Act. I need not engage in an exhaustive analysis of another authority's statute or standards to be able to determine that PECO has not complied with the Act, our prior Orders or its voluntary commitments in the Joint Petition for Settlement.

Based on the record before us, it is clear that PECO's use of confidential customer information in the August, 1998 direct mailing, in the furtherance of its own generation service (PLR) violated at least the spirit (if not the letter) of both the Competitive Safeguards and the Interim Code of Conduct of the Joint Petition for Settlement (Exhibits G and H to the Joint Petition, respectively). It is equally clear that the use of confidential customer information in a direct mailing which exhorts customers not to choose and to stay out of the competitive market place violates PECO's express commitments in the Joint Petition for Settlement which provide that PECO will support an orderly transition to a competitive market place and the Commission's Consumer Education efforts.

For similar reasons, I believe that it is clear, on the record before me, that PECO's August mass media campaigns and the November **[*82]** and December, 1998 mailings and media campaigns violate PECO's commitments contained in the Joint Petition. Each of those matters contain material which, on its face, disparages the services of competing EGSs or otherwise fails to provide consistent information which would promote an orderly transition to a competitive market place.

There can be no question whatsoever that PECO's direct mail campaign of August, 1998, its media campaigns during that time, the direct mailings of November, 1998 and the surrounding media campaign were directly at odds with the *Consumer Education Order.* I will repeat several of those goals here:

> Create an environment to minimize confusion.
>
> Provide consumers with clear, accurate, comparable information to assist them in making sound decisions about their electric service including an understanding of choice and how to exercise that choice.
>
> Provide information and sources of assistance to consumers so they understand the basics and not fear the change.
>
> Make it clear that the safety and reliability of the power delivery will be maintained, regardless of how the customer decides to purchase the actual power supply.

Consumer Education Order, at **[*83]** 20-21.

I have no difficulty whatsoever in finding, on this record, that the materials at issue here violate the foregoing goals for consumer education. Any possible question regarding this issue was put to rest by our unanimous decision in the *Interim Guidelines Order.* Certainly the presiding Administrative Law Judge had no difficulty in making such a finding. In discussing PECO's actions during the weeks of November 30, 1998 and beyond, after the

entry of our *Interim Guidelines Order*, the Administrative Law Judge noted that PECO's conduct "amounts to defiant non-compliance with the Commission's Order." *Recommended Decision*, at 75. I agree. As I have discussed above, I also find that PECO's conduct has violated the Joint Petition for Settlement as well as the Commission's *Consumer Education Order.*

The various parties in this case have suggested several possible remedies for these violations. They range from monetary penalties to directed messages from PECO. The proper penalties ought to be crafted in such a matter as to mitigate the harm done without violating PECO's legitimate free speech rights. Accordingly, I would issue a cease and desist order directing that PECO **[*84]** refrain from further promotional activities which are inconsistent with the *Interim Guidelines Order* or otherwise counsels against consumer exploration of the market place.

I do not believe that monetary penalties would be at all meaningful in this instance. However, PECO's use of its regulated EDC customer lists, not available to the EGSs, can be remedied by directing the delivery of ratepayer names and addresses only, to any licensed EGS which requests it. This has the effect remedying at least some of the harm while giving consideration to the Office of Consumer Advocate's confidentiality concerns.

Directing PECO to provide the foregoing information is consistent with, and authorized by, Section 2804(6) and (14) of the Public Utility Code, *66 Pa. C.S. § 2804(6)* and (14). Section 2804(14) expressly provides for the orderly transition to competition. Section 2804(6) provides that PECO must provide access to its transmission and distribution services to EGSs which are comparable to PECO's own use of its system.

To the extent that PECO used its regulated distribution customer lists to promote its generation facilities, it is no stretch to find that it must provide that list to **[*85]** competing EGSs. This conclusion is buttressed by the record here which amply supports the finding that PECO's communications were not merely promotional, but were also in violation of various Commission Orders. My position here is tempered by the OCA's concerns relating to confidential customer information. Although this clearly did not hinder PECO in its abuse of the list, I do believe that information other than the ratepayer name and address should not be provided in this instance.

For the foregoing reasons, I would find that PECO has violated its commitments in the Joint Petition for Settlement, the Commission's *Consumer Education Order* as well as the guidelines set forth in the *Interim Guidelines.* Accordingly, I would direct PECO to cease and desist from actions which violate those orders and provide the ratepayer names and addresses from the list used in its August, 1998 direct mailing to those licensed EGSs that request it.

3/04/99

DATE

NORA MEAD BROWNELL

COMMISSIONER

PA Public Utility Commission Decisions

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