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June 26, 2020

VIA eFILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

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

Dear Secretary Chiavetta:

Enclosed please find the **Motion to Dismiss Objections and to Compel Answers to PECO Energy Company's Set I Interrogatories Directed to the Electric Supplier Coalition**, in the above-captioned proceeding. As evidenced by the attached Certificate of Service, copies are being served upon Administrative Law Judge Eranda Vero, and all parties of record.

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

Very truly yours,



Kenneth M. Kulak

KMK/tp
Enclosures

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

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITION OF PECO ENERGY :
COMPANY FOR APPROVAL OF ITS :
DEFAULT SERVICE PROGRAM FOR : **Docket No. P-2020-3019290**
THE PERIOD FROM JUNE 1, 2021 :
THROUGH MAY 31, 2025 :

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Motion to Dismiss Objections and to Compel Answers to PECO Energy Company’s Set I Interrogatories Directed to the Electric Supplier Coalition**, on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

VIA ELECTRONIC MAIL

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Dated: June 26, 2020

Counsel for PECO Energy Company

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY COMPANY :
FOR APPROVAL OF ITS DEFAULT : DOCKET NO. P-2020-301920
SERVICE PROGRAM FOR THE PERIOD :
FROM JUNE 1, 2021 THROUGH MAY 31, :
2025 :**

**MOTION TO DISMISS OBJECTIONS AND TO COMPEL ANSWERS TO
PECO ENERGY COMPANY’S SET I INTERROGATORIES
DIRECTED TO THE ELECTRIC SUPPLIER COALITION**

Pursuant to 52 Pa. Code § 5.432(g) and the Prehearing Order of May 8, 2020 in this proceeding, PECO Energy Company (“PECO” or the “Company”) hereby requests that the Administrative Law Judge (“ALJ”) dismiss the objections (the “Objections”) filed by the Electric Supplier Coalition (“ESC”)¹ and compel full and complete answers to PECO’s Interrogatories Set I (ESC) Nos. 2, 4, 5 and 6 (“Set I Interrogatories”), which were served by PECO on June 19, 2020. A copy of ESC’s Objections, which set forth the relevant Interrogatories, is attached as Exhibit A.

I. OVERVIEW

On March 13, 2020, PECO filed the above-captioned petition (the “Petition”) requesting that the Pennsylvania Public Utility Commission (“Commission”) approve PECO’s fifth Default Service Program (“DSP V”) in accordance with the Company’s responsibilities as the default service provider for its certificated service territory for the period from June 1, 2021 through May 31, 2025. In accordance with the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801 *et seq.* (the “Competition Act”), as well as the Commission’s default

¹ The Electric Supplier Coalition’s members consist of NRG Energy, Inc., Direct Energy Services LLC, Interstate Gas Supply Inc., d/b/a IGS Energy, Vistra Energy Corp., Shipley Choice LLC, ENGIE Resources LLC and WGL Energy Services, Inc.

service regulations and policy statement, DSP V is designed to enable PECO to obtain a “prudent mix” of procurement contracts and thereby ensure that default service customers have access to an adequate and reliable supply of electric generation at least cost over time.

As set forth in the Petition, PECO continues to meet its default service obligations while supporting competition in retail electric markets under its current default service program (“DSP IV”). Specific programs to support competition include hourly-priced default service for PECO’s former “medium” commercial customers (100 kW to 500 kW peak demand) and continuing various retail market enhancements. To that end, PECO is proposing to continue the existing and successful products and programs approved by the Commission in DSP IV with three principal changes.²

First, PECO is proposing to procure new ten-year solar alternative energy credit (“Solar AEC”) contracts to replace the Company’s existing ten-year Solar AEC contracts previously approved by the Commission that will have expired by the end of DSP IV.³ With these new contracts, PECO expects to meet 25% of the Company’s requirement under Pennsylvania’s Alternative Energy Portfolio Standards Act, 73 P.S. §§ 1643.1 *et seq.* (the “AEPS Act”), to obtain a specific percentage of electricity sold to customers from solar resources.⁴ Under the solar procurement plan described in the Petition and in PECO witness John J. McCawley’s direct testimony, up to half of the AECs solicited competitively by PECO will be from solar generating facilities located within PECO’s service territory.⁵ The remaining portion of PECO’s AEPS Act

² See generally Petition, pp. 8-12 & 24; PECO St. No. 1, pp. 8-10; PECO St. No. 4, pp. 5-21.

³ PECO St. No. 1, pp. 28-29.

⁴ *Id.*, p. 29.

⁵ *Id.*, pp. 29-33.

obligations as default service supplier will be satisfied by the wholesale full requirements suppliers competitively chosen to provide default service supply.⁶

Second, PECO is introducing new time-of-use (“TOU”) default service rate options for eligible residential and small commercial customers to comply with PECO’s obligation under Act 129 of 2008 (“Act 129”) to offer TOU rates to all default service customers with smart meters.⁷

Finally, PECO is proposing to permit customers who are enrolled in the Company’s Customer Assistance Program (“CAP”) to shop for generation service, consistent with Commission guidance.⁸ Under DSP IV and PECO’s prior default service programs, CAP customers had not been able to shop for generation service.

On June 16, 2020, ESC served the direct testimony of its witness Travis Kavulla that, among other things, proposes “structural changes” to the existing statutory default service framework, including removal of PECO as the default service provider.⁹ In support of his proposal, Mr. Kavulla contends that the retail electricity market in the Commonwealth is “stagnant.”¹⁰ He also asserts that “in the presence of a dominant DSP, the EGS market is designed primarily to consist of shorter-run arrangements that undercut the DSP.”¹¹ In addition, Mr. Kavulla opposes PECO’s procurement of long-term solar contracts, in part because he

⁶ PECO St. No. 1, p. 29.

⁷ 66 Pa.C.S. § 2807(f)(5).

⁸ See PECO St. No. 3, pp. 4-12.

⁹ See ESC St. No. 1, pp. 6-14.

¹⁰ *Id.*, p. 6, lines 10-12 and 15; see also *id.*, p. 12, lines 14-19.

¹¹ *Id.*, p. 8, lines 21-22 to page 9, line 1 & p. 27, lines 5-14.

believes that such contracts will hamper the willingness and ability of EGSs to undertake similar contracts and solar projects.¹²

In light of Mr. Kavulla's testimony, PECO's Set I Interrogatories included requests for the following information:

- The aggregate sales and revenues of ESC members in PECO's service territory (PECO-ESC-I-2) over the last five years by customer group (Residential, Small Commercial, and Large Commercial and Industrial) (PECO-ESC-I-2);
- The number of residential customers served by ESC members in PECO's service territory and the percentage of those customers who receive service at a fixed rate greater than PECO's Price-to-Compare ("PTC") as of June 1, 2020 (PECO-ESC-I-4);
- A list of actions before the Commission or in court involving ESC members where the plaintiff or complainant claims that a competitive retail electric supplier charged more than the local utility default service rates (PECO-ESC-I-5); and
- Whether or not any ESC members have signed long-term contracts to supply AECs to Large Commercial and Industrial customers in PECO's service territory and, if so, the total megawatt-hours (MWhs) supplied under those contracts over the last five years (PECO-ESC-I-6).

Given Mr. Kavulla's testimony in support of ESC's contention that the retail electric market in Pennsylvania is stagnating and that EGSs are constrained to offer only short-term products that "undercut" PTC and are "reluctant" to enter into long-term renewable energy contracts, the information requested is plainly relevant to specific provisions of Mr. Kavulla's testimony and the Commission's consideration of ESC's arguments against PECO's DSP V and in favor of "structural changes" in default service.

Nonetheless, ESC objected to the Interrogatories on two grounds: an alleged lack of relevancy and protection of the purported "privileged and highly sensitive commercial information" ESC believes the Interrogatories seek. Counsel for ESC and PECO conferred regarding ESC's objections, and PECO proposed to modify its request in PECO-ESC-I-4 to

¹² *Id.*, p. 8, lines 14-17 & p. 27, lines 11-14.

request only aggregate information (i.e., the total number of customers served by ESC members in PECO's service territory and the aggregate percentage of all ESC customers receiving service at a fixed-rate greater than PECO's PTC, but not individual member information). ESC subsequently filed the Objections to PECO's Interrogatories on June 24, 2020.

As demonstrated below, the narrowly tailored information sought by PECO is directly relevant to the Commission's evaluation of Mr. Kavulla's testimony. ESC provides no explanation as to how the information sought could be privileged; to the extent any of the aggregate information of ESC members responsive to the Interrogatories could be "highly sensitive commercial information," the provisions of the Protective Order entered in this proceeding (which were acceptable to ESC) provide special "highly confidential" protection for information among the parties, including EGSs. ESC's objections are therefore entirely without merit.

II. ESC'S OBJECTIONS ARE WITHOUT MERIT AND ESC SHOULD BE COMPELLED TO RESPOND IN FULL TO PECO'S SET I INTERROGATORIES

A. The Information Sought By PECO Is Relevant

1. The Commonwealth Court of Pennsylvania has stated that "[d]iscovery itself is designed to promote free sharing of information so as to narrow the issues and limit unfair surprise. It is a tool which serves each litigant and promotes judicial economy." *See Pittsburgh Bd. of Pub. Educ. V. M.J.N. by N.J.*, 105 Pa. Cmwlt. Ct. 397, 403, 524 A.2d 1385, 1388 (1987).

2. Under the Commission's regulations, the scope of discovery is broad. In accordance with 52 Pa. Code § 5.321(c) of the Commission's regulations, parties may obtain discovery of any unprivileged matter which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the

claim or defense of another party. The Commission applies a liberal standard with respect to relevancy. *See, e.g., Pa. P.U.C. v. Equitable Gas Co.*, 61 Pa. P.U.C. 468, 477 (1986).

3. ESC generally objects to the Set I Interrogatories on the ground that the information sought about ESC members in PECO's service territory does not have "any bearing on PECO's PTC or its overall default service procurement plan."¹³ ESC's objection is unfounded with respect to each of the four Interrogatories, which clearly seek information directly relevant to Mr. Kavulla's testimony in support of his conclusions regarding "structural flaws" in the "stagnating" retail market, his specific assertions about PECO's PTC and proposals for long-term solar contracts, and his arguments in favor of replacing PECO with an alternative DSP.¹⁴

4. In PECO-ESC-1-2, PECO has requested aggregated data for ESC members regarding their total sales (in MWh) and sales revenue in PECO's service territory over the last five years for the same customer groups for which PECO proposes to procure default generation service in DSP V. The information is plainly relevant to Mr. Kavulla's testimony that the market is "stagnant," as well as his claim that "[w]ithout structural changes to improve the market, it is not realistic to expect that competitive retail offerings will flourish, drive significant generation investment or result in innovative product offerings."¹⁵ The general levels of the aggregate amounts of energy sold by ESC members and associated revenues (including revenues for

¹³ Objections, p. 3.

¹⁴ *See* ESC St. No. 1, pp. 6-10 (discussing "stagnation" of retail market); pp. 10-14 (proposing to "transition" PECO out of the default service role); p. 27, lines 5-14 (opposing PECO's solar proposal on the ground that it will hamper EGS willingness to undertake solar projects); p. 48, lines 4-9 (asserting that PECO is charging an "artificially low" PTC that "EGSs have difficulty competing with").

¹⁵ ESC St. No 1, p. 6, lines 10-12 and p. 6, lines 20-22.

“innovative product offerings”) over the past five years are relevant in assessing the extent to which ESC members are in fact able to expand their business under the DSP program components that PECO is proposing to continue in DSP V.

5. In PECO-ESC-1-4 and I-5, PECO is seeking information from ESC to assess the validity of Mr. Kavulla’s assertion that the EGS market “is destined to primarily to consist of shorter-run arrangements that undercut the DSP” if there is a “dominant utility DSP” (which PECO is, according to Mr. Kavulla).¹⁶ PECO ESC-I-4 requests that ESC provide aggregate information as to the total number of customers that ESC members serve in PECO’s service territory, and the aggregate percentage of those customers who are charged more than PECO’s PTC for generation service by ESC members. As with PECO-ESC-I-2, such data will allow PECO (and the Commission) to assess whether Mr. Kavulla’s assertion that EGSs must primarily “undercut” PECO’s PTC under DSP IV, or whether EGSs are able to charge higher prices. Because the price that suppliers charge above or below the PTC may also be at issue in other proceedings, PECO has requested ESC to list any proceedings (all of which will be a matter of public record) in which ESC member pricing above the price charged by a local utility has been asserted.

6. Finally, PECO-ESC-I-6 requests aggregate data regarding the total amount of MWH of AECs that ESC members have supplied to Large Commercial and Industrial Customers over the past five years. Such information is plainly relevant to Mr. Kavulla’s opposition to PECO’s proposed solar proposal on the grounds that EGSs are unwilling to enter into long-term

¹⁶ ESC St. No. 1, p. 7, lines 17-19.

renewable energy contracts if an EDC is entering into such contracts to meet a portion of AEPS requirements as default service provider.¹⁷

7. In sum, each of these four interrogatories seeks either aggregate data or information that is publicly known and pertains directly to the express statements of ESC's witness. The ALJ should reject ESC's Objection that the Interrogatories do not seek relevant information.

B. To The Extent The Information Sought Is Highly Confidential, ESC May Utilize The Protective Order Entered In This Proceeding

8. ESC also objects to PECO's Set I Interrogatories on the grounds that they involve "privileged and highly sensitive commercial information," the disclosure of which "would cause members of the ESC unfair uneconomic or competitive damage."¹⁸ Specifically, ESC claims that "[t]he cost, volume, price and contract data requested by PECO is of such a highly commercially sensitive nature that members of the Coalition would not even exchange it among themselves, let alone place in the public domain or even provide pursuant to a protective order."¹⁹ ESC's objection is without merit for several reasons.

9. First, the basis for ESC's confidentiality objection does not apply to PECO-ESC-I-5 at all, which asks only for the name, jurisdiction, docket number, and status of certain cases. All of the requested information is in the public domain and presumably known and accessible to

¹⁷ ESC St. No. 1, p. 27, lines 5-14.

¹⁸ Objections, p. 3.

¹⁹ *Id.*

EGS members given their involvement in the proceedings. The request does not require ESC or its members to divulge any “privileged and highly sensitive commercial information” at all.

10. Second, each of the remaining interrogatories asks only for aggregate information, not information specific to any ESC member. PECO anticipates that each member could provide information to ESC’s counsel, who could then compile the information on behalf of ESC without disclosing the individual member information to other members and thereby avoid the exchange of information among members that ESC presents in its objection.

11. Third, even if ESC believes the aggregate information is confidential, the Protective Order entered in this proceeding and accepted by ESC permits ESC to designate particularly sensitive commercial information as “HIGHLY CONFIDENTIAL” and subject to the highest level of protection, including a more limited scope of individuals who can review the material. Under these provisions of the Protective Order, “Reviewing Parties” cannot be “Restricted Persons,” which include “individuals involved in marketing or pricing of the competitor’s products or services or advising another person who has such duties.”²⁰

12. The only decision ESC cites in support of its confidentiality claim is *Joint Petition of Metropolitan Edison Co., et al. for Approval of Their Default Serv. Programs*, Docket Nos. P-2011-2273650, *et al.* (Order dated March 16, 2012) (“*Met-Ed Order*”). Contrary to ESC’s claims, this decision has nothing to do with the Commission’s “respect” for the “high confidentiality of information among competitors in the retail competitive market,” as ESC contends.²¹ In fact, the decision addressed an EGS’ effort to obtain data on the amounts of

²⁰ Protective Order, ¶ 7.

²¹ Objections, p. 3.

default service supply load won by individual *wholesale* suppliers in default service auctions to “confirm” that “load caps” on the amount a single supplier could win had been observed in prior auctions. In the *Met-Ed Order*, Administrative Law Judge Elizabeth H. Barnes (“ALJ Barnes”) denied the EGS request on the grounds that the auctions were conducted under Commission rules with an independent evaluator, the information sought was outside the scope of information the Commission had already determined should be released after auctions were completed, and was not relevant to a determination of the proper size of future load caps on the percentage of default service load that an individual supplier might serve.²²

13. After noting that “the standard for discovery is relevance, not curiosity,” ALJ Barnes explained that the Commission-established protections for the individual, *disaggregated* wholesale supplier information sought by the EGS served “to prevent parties from ‘mining’ historical data to try to obtain a competitive advantage that would compromise the integrity of future auction processes.”²³ Clearly, none of the limited, *aggregate* data requested by PECO to assess the specific claims of ESC’s witness in this proceeding will undermine future offerings by ESC members or any other EGS in the retail competitive market, and ESC provides no basis for any other conclusion.

²² *Met-Ed Order*, pp. 3-8.

²³ *Id.*, p. 6.

WHEREFORE, for the reasons set forth above, PECO respectfully requests the Administrative Law Judge and Pennsylvania Public Utility Commission:

1. Grant this Motion;
2. Overrule the Objections of the Electric Supplier Coalition; and
3. Compel the Electric Supplier Coalition to answer PECO's Set I Interrogatories Nos. 2, 4, 5 and 6 no later than 5:00 pm on Monday, July 6, 2020, in light of the deadline for service of PECO's rebuttal testimony on July 9, 2020.

Respectfully submitted,



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Dated: June 26, 2020

For PECO Energy Company

EXHIBIT A

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**OBJECTIONS OF ELECTRIC SUPPLIER COALITION
TO INTERROGATORIES OF PECO ENERGY COMPANY SET I,
NOS. 2, 4, 5 AND 6**

NRG Energy, Inc., Direct Energy Services LLC, Interstate Gas Supply, Inc. d/b/a IGS Energy, Vistra Energy Corp., Shipley Choice LLC, ENGIE Resources LLC and WGL Energy Services, Inc. (collectively, the “Electric Supplier Coalition” or “Coalition” or “ESC”) hereby objects to the Interrogatories of PECO Energy Company, (“PECO” or the “Company”), Set I, Nos. 2, 4, 5 and 6. These Interrogatories were served before Noon on Friday, June 19, 2020. ESC orally communicated its intention to PECO on Monday, June 22, 2020 to file written objections to these Interrogatories. The parties further discussed the objections by telephone on June 23, 2020. The Interrogatories that the Coalition is objecting to are set forth below.

PECO-ESC-I-2. Reference ESC Statement No. 1, p. 6, lines 10-12. For the members of the Electric Supplier Coalition in aggregate, please provide the following data for each of the last five full years by customer procurement group (Residential, Small Commercial, Large Commercial and Industrial):

- a. Total sales in aggregate in MWH in PECO's service area.
- b. Total sales revenues in aggregate in dollars in PECO's service area.

PECO-ESC-I-4. Reference ESC Statement No. 1, p. 8, line 22 to page 9, line 1. For each member of the Electric Supplier Coalition, please provide:

- c. The number of residential customers in PECO's service area served by that supplier as of June 1, 2020.

- d. The percentage of residential customers in PECO's service area served by that supplier who are paying a price for electric generation service greater than PECO's Price-to-Compare in effect as of June 1, 2020.

PECO-ESC-I-5. Reference ESC Statement No. 1, p. 6, lines 10-12. Please provide a list of any actions filed at the Commission or in court in the past 10 years against members of the Electric Suppliers Coalition, or an EGS owned by or affiliated with a member of the Electric Suppliers Coalition, where the Plaintiff claims that a retail electric and/or natural gas supplier operating in a state with retail access charged more than the local utility default service rates. Please identify the name of the case, jurisdiction, docket number, and its current status.

PECO-ESC-I-6. Reference ESC Statement No. 1, p. 8, lines 14-16, where Mr. Kavulla states, "The Wind Solar Alliance Report focuses on one negative consequence, namely the lack of long-term contracts that are signed to supply customers in Pennsylvania and other states that have a similar, domineering DSP." Have the Electric Suppliers Coalition members signed long-term contracts (10 years or longer) for Alternative Energy Credits with Large Commercial and Industrial Customers in PECO's service territory? If so, provide the total MWH of Alternative Energy Credits supplied in aggregate under those contracts in PECO's service territory for each of the last five full years.

OBJECTIONS:

The Coalition objects to PECO's Interrogatories, Set I, Nos. 2, 4, 5 and 6, on the grounds that they would be neither relevant to this default service proceeding nor reasonably calculated to lead to the discovery of admissible evidence. 52 Pa. Code § 5.321(c). The purpose of this proceeding is to establish the terms and conditions under which PECO will procure default service supply, provide default service to non-shopping customers, satisfy requirements imposed by the Alternative Energy Portfolio Standards Act, and recover all associated costs on a full and current basis for the period from June 1, 2021 through May 31, 2025. Under the Commission's regulations, the default service rate design is required to recover on a full and current basis all reasonable costs incurred to provide default service. 52 Pa. Code § 54.187(b). In particular, the price to compare ("PTC") must be designed to "recover all default service costs, including generation, transmission and other default service cost elements, incurred in serving the average member of a customer class." 52 Pa. Code § 54.187(e).

The Commission's regulations expressly prohibit a default service provider from recovering default service costs through the distribution rate and require that such costs currently recovered through the distribution rate must be reallocated to the default service rate. 52 Pa. Code § 54.187(e). Nothing about (i) the sales or revenues of members of the Electric Supplier Coalition in the retail competitive market; (ii) the number of residential customers served by the ESC or prices paid to its members in the retail competitive market; (iii) the prices charged to consumers by members of the ESC in retail competitive markets in other jurisdictions; or (iv) the contracts signed by ESC members with large commercial and industrial customers in PECO's service territory have any bearing on PECO's PTC or its overall default service procurement plan. The standard for discovery is relevance, not curiosity. *See Pennsylvania Public Utility Commission, et. al., v. Pennsylvania American Water Company*, Docket No. R-2011-2232243 (Order on Motion to Compel dated July 21, 2011, at 21-22).

The Coalition further objects to PECO's Interrogatories, Set I, Nos. 2, 4, 5 and 6, on the grounds that they involve privileged and highly sensitive commercial information. 52 Pa. Code § 5.361(a)(3). While a protective order has been issued in this proceeding, the potential harm of disclosing the information sought by PECO would be substantial and would cause members of the ESC unfair uneconomic or competitive damage. 52 Pa. Code § 5.365. The cost, volume, price and contract data requested by PECO is of such a highly commercially sensitive nature that members of the Coalition would not even exchange it among themselves, let alone place in the public domain or even provide pursuant to a protective order. The Commission has long recognized and respected the high confidentiality of information among competitors in the retail competitive market. *See Joint Petition of Metropolitan Edison Company, et al. for Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, et al. (Order dated March 16, 2012).

Respectfully submitted,

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