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July 13, 2020

**VIA ELECTRONIC FILING**

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

**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 for filing in the above-referenced proceeding is the **Brief of PECO Energy Company in Opposition to Petition of the Electric Supplier Coalition for Certification of a Ruling on a Discovery Matter** (the “Brief”).

As evidenced by the enclosed Certificate of Service, copies of the Brief have been served upon Administrative Law Judge Eranda Vero, and all parties of record.

If you have any questions, please contact me directly at 215.841.5974.

Very truly yours,



W. Craig Williams

Enclosures

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

**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 following **Brief of PECO Energy Company in Opposition to Petition of the Electric Supplier Coalition for Certification of a Ruling on a Discovery Matter** on the persons below in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

**VIA ELECTRONIC MAIL**

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Dated: July 13, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**BRIEF OF PECO ENERGY COMPANY IN OPPOSITION  
TO PETITION OF THE ELECTRIC SUPPLIER  
COALITION FOR CERTIFICATION OF A RULING ON  
A DISCOVERY MATTER**

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TO THE HONORABLE ADMINISTRATIVE LAW JUDGE ERANDA VERO:

Pursuant to 52 Pa. Code § 5.304(d), PECO Energy Company (“PECO,” or the “Company”) hereby files this Brief in Opposition (“Brief”) to the Petition of the Electric Supplier Coalition (“ESC”) for Certification of a Ruling on a Discovery Matter (“Petition”).<sup>1</sup> For the reasons set forth below, PECO respectfully requests that the Administrative Law Judge (“ALJ”) deny certification of ESC’s requested question for interlocutory review by the Pennsylvania Public Utility Commission (the “Commission”).

**I. INTRODUCTION**

On March 13, 2020, PECO filed the above-captioned petition requesting that the 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

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<sup>1</sup> 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.

Act”), as well as the Commission’s default 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 explained in the Company’s initial filing, PECO is proposing to continue the existing and successful products and programs under its current fourth default service program (“DSP IV”) approved by the Commission with three principal changes. Those changes include a proposal 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.

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 (“DSP”).<sup>2</sup> In support of his proposal, Mr. Kavulla contends that the retail electricity market in the Commonwealth is “stagnant.”<sup>3</sup> He also asserts that “in the presence of a dominant DSP, the electric generation supplier (“EGS”) market is designed primarily to consist of shorter-run arrangements that undercut the DSP.”<sup>4</sup> In addition, Mr. Kavulla opposes PECO’s procurement of long-term Solar AEC contracts, in part because he believes that such contracts will hamper the willingness and ability of EGSs to undertake similar contracts and solar projects.<sup>5</sup>

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<sup>2</sup> See ESC St. No. 1, pp. 6-14.

<sup>3</sup> *Id.*, p. 6, lines 10-12, 15; *see also id.*, p. 12, lines 14-19.

<sup>4</sup> *Id.*, p. 8, lines 21-22 to p. 9, line 1 & p. 27, lines 5-14.

<sup>5</sup> *Id.*, p. 8, lines 14-17 & p. 27, lines 11-14.

ESC's Petition arises from a discovery dispute involving PECO's Interrogatories Set I (ESC) Nos. 2, 4, 5 and 6 ("Set I Interrogatories") served by the Company on June 19, 2020. Each of these four interrogatories seeks information that pertains directly to the statements of Mr. Kavulla 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" PECO as DSP and are "reluctant" to enter into long-term renewable energy contracts. Specifically, the Set I Interrogatories request the following aggregate data or public information to assess the validity of Mr. Kavulla's statements:

- The aggregate sales and revenues of ESC members in PECO's service territory 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);<sup>6</sup>
- 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 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).

On June 24, 2020, ESC filed Objections to the Set I Interrogatories, asserting that the requested aggregate information about ESC members' activity in PECO's service territory is not relevant to the Company's DSP V procurement plan and rate design.<sup>7</sup> ESC also asserted the Set I Interrogatories involved "privileged and highly sensitive commercial information" and the

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<sup>6</sup> During consultations between counsel for ESC and PECO regarding ESC's objections, PECO limited its request in PECO-ESC-I-4 to 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, not information by individual member).

<sup>7</sup> ESC Objections, p. 3.

“potential harm” of disclosing the information “would cause members of ESC unfair economic or competitive damage.”<sup>8</sup>

On June 26, 2020, PECO filed a Motion to Dismiss Objections and to Compel Answers to PECO Energy Company’s Set I Interrogatories Directed to the Electric Supplier Coalition (“Motion to Compel”). In the Motion to Compel, PECO explained that the Set I Interrogatories clearly seek aggregated information directly relevant to Mr. Kavulla’s testimony, including his specific assertions about the need for EGSs to “undercut” PECO as DSP, PECO’s proposals for long-term solar contracts, and the state of the retail competitive market.<sup>9</sup> PECO also noted that to the extent that any of the aggregated information could be confidential, the ALJ had entered a protective order in this proceeding, accepted by ESC (the “Protective Order”), that included specific provisions to protect highly sensitive commercial information.<sup>10</sup>

On June 29, 2020, ESC answered PECO’s Motion to Compel (“Answer”) and offered three principal arguments in support of its objections. First, despite Mr. Kavulla’s assertions of adverse effects on EGSs associated with PECO’s proposals in this proceeding and PECO’s continuing role as DSP, ESC asserted that none of the requested aggregated ESC member information is relevant to the Commission’s consideration of Mr. Kavulla’s testimony because there is “no link” between the service provided by EGSs and default service provided by PECO “for purposes of discovery in this proceeding.”<sup>11</sup> In ESC’s view, Mr. Kavulla was making “general observations about the competitive market that exists in PECO’s service territory”; since Mr. Kavulla did not rely on the information that ESC believes is commercially sensitive,

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<sup>8</sup> *Id.*

<sup>9</sup> Motion to Compel, pp. 6-8.

<sup>10</sup> *Id.*, pp. 8-9.

<sup>11</sup> Answer, ¶ 15.



actual information of ESC members is not relevant to “the ESC’s fundamental observations” about the “competitiveness of PECO’s default service market” or whether PECO’s DSP V “may be interfering” with the development of a competitive generation market.<sup>12</sup>

Second, ESC argued that PECO’s request that ESC produce “highly confidential” information that ESC believes is irrelevant is “improperly seeking” information, as ESC is exercising its fundamental due process rights.<sup>13</sup> Finally, ESC claimed that the information requested by PECO is of such a “highly commercially sensitive” nature that the Protective Order was inadequate.<sup>14</sup>

On June 29, 2020, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania, the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (jointly) filed an Answer in support of PECO’s Motion to Compel (“CAUSE-PA/TURN Answer”), asserting that the information requested in the Set I Interrogatories is relevant and “an essential component of this case.”<sup>15</sup>

On July 2, 2020, the ALJ issued an Order granting PECO’s Motion to Compel (“Order”). The ALJ determined that ESC’s relevance objection is “tantamount to claiming that specific portions of Mr. Kavulla’s direct testimony on behalf of ESC are irrelevant to the matter at hand” because PECO’s Set I interrogatories “properly linked” the requested information to specific statements of ESC’s witness.<sup>16</sup> In rejecting ESC’s claims, the ALJ found that “ESC’s arguments for the separation of [Mr. Kavulla’s] statements and conclusions from the reality of ESC’s

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<sup>12</sup> *Id.*, ¶ 17.

<sup>13</sup> *Id.*, ¶ 22.

<sup>14</sup> *Id.*, ¶ 24.

<sup>15</sup> CAUSE-PA/TURN Answer, p. 4.

<sup>16</sup> Order, p. 4.

business practices are counterintuitive and faulty at best.”<sup>17</sup> The ALJ also agreed with PECO that ESC may utilize the Protective Order and aggregate individual member data through ESC’s counsel to protect any information ESC believes is highly confidential.<sup>18</sup>

In response to the Order, on July 6, 2020, ESC filed the Petition seeking certification to the Commission and interlocutory review of the following question:

Whether it was appropriate to direct [EGSs] to produce pricing, sales, complaint and long-term contract information relating to the competitive generation services they provide to shopping customers in the retail market in a proceeding that is designed to establish the parameters under which PECO will provide default generation service to non-shopping customers in a regulated market[.]

In the Petition, ESC again restates its relevance arguments and contends that the ALJ’s Order granting PECO’s Motion to Compel was “inappropriate” because PECO’s Set I Interrogatories request “highly confidential” information that ESC should not be required to produce “as a condition of offering its perspectives about PECO’s default service model.”<sup>19</sup> ESC also introduces new arguments, including claims that the requested aggregate information would have to be compiled because it is “not sitting on a shelf” and could not be shared among ESC representatives or with Mr. Kavulla.<sup>20</sup>

As explained below, ESC has not raised important matters of law or policy justifying interlocutory review of discovery matters, as required by the Commission’s regulations. The

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<sup>17</sup> *Id.*, pp. 4-5.

<sup>18</sup> *Id.*, p. 5.

<sup>19</sup> *Id.*, ¶¶ 2, 10.

<sup>20</sup> *Id.*, ¶¶ 9, 10.

ALJ properly overruled each of ESC's objections to PECO Set I Interrogatories, and ESC's Petition should be denied.<sup>21</sup>

## II. ARGUMENT

ESC's Petition fails to meet the stringent requirements for interlocutory review of discovery matters and should be summarily denied. Interlocutory review of discovery orders is generally disfavored and permitted only in limited circumstances.<sup>22</sup> Under Section 333 of the Public Utility Code and Section 5.304 of the Commission's regulations, a request for certification of a question for interlocutory review must demonstrate that the discovery ruling involves "an important question of law or policy that should be resolved immediately by the Commission."<sup>23</sup>

The Commission has determined that important questions of law or policy are not implicated by routine rulings on the scope of discovery. For example, in *Pa. P.U.C. v. Lyft, Inc.*, the Commission rejected an interlocutory appeal of a discovery ruling where Lyft sought to prevent disclosure of information that it similarly believed was not relevant and would be burdensome to produce:

The Material Question at issue, whether Lyft should be required to furnish requested information when it believes such information is burdensome and irrelevant, is a standard discovery issue which does not merit interlocutory review.<sup>24</sup>

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<sup>21</sup> PECO notes that ESC has not sought a stay of the proceedings under 52 Pa. Code § 5.304(d). In light of the lack of merits of ESC's Petition, as well as the statutory time limitation for Commission review of default service programs under 66 Pa. C.S. § 2807(e)(3.6), any stay of these proceedings would be inappropriate.

<sup>22</sup> See *MCI WorldCom Comm., Inc.*, Docket No. C-00015149 (Opinion and Order entered Nov. 13, 2001), pp. 14-15 (finding that the standard for certification of a discovery ruling is not met unless the ruling involves compelling circumstances that cannot be remedied in the informal course of Commission review after an initial decision).

<sup>23</sup> 66 Pa.C.S. § 333(h); 52 Pa. Code § 5.304(b).

<sup>24</sup> *Pa. P.U.C. v. Lyft, Inc.*, Docket No. C-2014-2422713 (Opinion and Order entered Nov. 13, 2014), p. 16. See also *Pa. P.U.C. v. Lyft, Inc.*, Docket No. C-2014-2422713 (Interim Order on Petition for Certification issued Nov. 20, 2014), p. 4 ("The exchange of information in discovery which is alleged to be confidential is nothing new

Similarly, ESC has not provided any valid reason as to why the Order involves an important question of law or policy. ESC merely seeks to second-guess the ALJ's determination regarding the scope of discovery in this case.

In large part, ESC's Petition simply reiterates the arguments ESC already made in its Answer to PECO's Motion to Compel in support of its Objections. The ALJ already considered each of those arguments and granted the Motion to Compel because she found and determined that:

- (1) The aggregated data requested in PECO-ESC-1-2 regarding the total sales and associated revenues of ESC's members in PECO's service territory over the last five years is relevant to "assessing the extent to which ESC members can expand their business" under PECO's proposed DSP V;<sup>25</sup>
- (2) PECO ESC-I-4 and I-5 seek information relevant to Mr. Kavulla's assertion that "EGSs must primarily 'undercut' PECO's PTC under DSP IV";<sup>26</sup>
- (3) The aggregate information requested in ESC-I-6 is relevant to Mr. Kavulla's opposition to PECO's proposed solar proposal on the grounds that EGSs are unwilling to enter into long-term renewable energy contracts if an electric distribution company is entering into such contracts to meet a portion of Alternative Energy Portfolio Standards Act requirements as default service provider;<sup>27</sup>
- (4) ESC's concerns about confidentiality may be alleviated by aggregation of data from ESC members and the Protective Order;<sup>28</sup> and
- (5) All parties that participate in Commission proceedings have the same rights in terms of discovery and due process. The ALJ noted: "Just as the ESC has the fundamental due process right to present its views of how PECO's DSP V Plan stacks up against

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or novel."); *Pa. P.U.C. v. Dauphin Consol. Water Supply Co.*, Docket No. R-860350, 65 Pa. PUC 12, 16 (Aug. 21, 1987) (determining that "there is nothing 'exceptional' about disputes over the scope of discovery").

<sup>25</sup> Order, p. 4.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, p. 5.

the requirements of the Competition Act, so does PECO have a due process right to seek information from ESC to assess the validity of Mr. Kavulla’s assertions.”<sup>29</sup>

ESC’s additional arguments asserting that compilation of the requested information would be burdensome and could not be shared among its members or with its own witness are similarly without merit. While the requested aggregate information may not be “sitting on a shelf,” ESC does not dispute that the information can be obtained and provides no details as to how compilation would actually be burdensome.<sup>30</sup> And any limitation ESC members may have on sharing information among themselves or with their witness is entirely of ESC’s own creation: ESC provides no authority for its assertion that the unwillingness of members of a coalition participating in a proceeding to share information among themselves or their witness provides a basis to withhold relevant information in a Commission proceeding.<sup>31</sup>

Notably, in its effort to avoid producing relevant information, ESC undermines many of the arguments of Mr. Kavulla by arguing that “EGS activities in the competitive retail market are largely irrelevant to how PECO fulfills its role as a default service provider in the regulated environment.”<sup>32</sup> ECS further explains that:

How EGS price their competitive retail products, how many customers they serve, how much electricity they sell to their customers, whether their shopping customers complain about their prices and how they structure their energy supply contracts **have nothing to do with how PECO’s regulated default generation service is procured or sold to non-shopping customers.**<sup>33</sup>

If the aggregate number of customers EGSs serve and the manner in which they price their service with respect to the PTC have “nothing at all” to do with how PECO procures default

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<sup>29</sup> *Id.*

<sup>30</sup> Petition, ¶ 10.

<sup>31</sup> Petition, ¶ 9.

<sup>32</sup> Petition, ¶ 6.

<sup>33</sup> *Id.* (emphasis added).

service supply or sells that default service supply, it is difficult to see how ESC and Mr. Kavulla can claim that PECO's proposed DSP V at issue in this proceeding can be adverse to the activities of ESC members.<sup>34</sup>

### III. CONCLUSION

WHEREFORE, for the reasons set forth above, PECO respectfully requests that the Administrative Law Judge should deny the Petition of Electric Supplier Coalition for Certification of a Ruling on a Discovery Matter.

Respectfully submitted,



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Dated: July 13, 2020

*For PECO Energy Company*

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<sup>34</sup> ESC also appears to have retreated from Mr. Kavulla's recommendation that the Commission "lay the groundwork" for default service to become a "true backstop service provided by EGSs." Compare ESC St. No. 1, p. 11 & Petition, ¶ 8 ("At no time does Mr. Kavulla suggest that EGSs operating in the competitive retail market should take their business models and replace or supplement PECO's default service structure.").