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July 13, 2020

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Electric Supplier Coalition's Brief in Support of Petition for Certification of a Ruling on a Discovery Matter with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Karen O. Moury
Karen O. Moury

KOM/lww
Enclosure

cc: Hon. Eranda Vero w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the ESC's Brief in Support of Petition for Certification upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: July 13, 2020

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**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 :

**BRIEF OF ELECTRIC SUPPLIER COALITION IN SUPPORT OF ITS PETITION FOR
CERTIFICATION OF A RULING ON A DISCOVERY MATTER**

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I. INTRODUCTION

This Brief is filed in support of the request 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. (collectively, the “Electric Supplier Coalition” or “Coalition” or “ESC”) for the presiding Administrative Law Judge (“ALJ”) to certify to the Pennsylvania Public Utility Commission (“Commission”) a material question that has arisen in discovery. The Coalition’s members consist of electric generation suppliers (“EGSs”) participating in Pennsylvania’s competitive retail market and selling electricity to customers on the distribution system of PECO Energy Company (“PECO”). The disputed issues relate to discovery requests served by PECO on the Coalition that seek to gather highly confidential, irrelevant and overly burdensome information about the number of residential customers served by the Coalition’s members, the amount of electricity the Coalition members sell to residential customers, the prices charged by the Coalition and the terms of contracts they have with large commercial and industrial customers in the competitive retail market.

None of the requested information related to customers shopping in the competitive retail market has any bearing on the reasonableness of PECO’s proposed plans to procure and price electricity for non-shopping customers under a regulated default service model. Further, the ESC’s witness, Mr. Travis Kavulla, did not base his testimony on knowledge of this information, because he does not possess it. Rather, he relied on publicly available information about the state of the competitive market to make his recommendations. This information includes statistics on the overall number of shopping customers and a recently published treatise on the design of retail markets. While the Coalition is broad, it does not include all EGSs. Aggregated

data of the seven suppliers comprising the Coalition, even if it existed, would be irrelevant to Mr. Kavulla's observations.

Simply put, it is unreasonable to place the Coalition in a position of picking between providing highly confidential information in response to irrelevant and overly burdensome interrogatories or exercising its rights to review and testify about PECO's default service plan. The Coalition has a right to offer its perspectives as to whether PECO's plan or the default service structure need to be revised to comply with the law.

II. PROCEDURAL HISTORY

On March 13, 2020, PECO filed the Petition for Approval of its Default Service Program for the Period from June 1, 2021 Through May 31, 2025 ("DSP V Plan"). PECO filed the DSP V Plan in its role as the default service provider ("DSP") for customers on its distribution system who do not receive generation service from EGSs in the retail competitive market established by the Electricity Generation Customer Choice and Competition Act ("Competition Act").¹

The Electric Supplier Coalition filed a Petition to Intervene in PECO's DSP V proceeding specifically highlighting the importance of "the terms and conditions under which PECO will acquire electric supply to serve its Default Service load from June 1, 2021 through May 31, 2025 and thus, the rates against which ESC members must compete to sell electricity to retail customers in the PECO's service territory."² ALJ Eranda Vero granted the Coalition's Petition to Intervene by Prehearing Order dated May 8, 2020.³

Consistent with the Prehearing Order dated May 8, 2020, the Coalition served the Direct Testimony of Mr. Kavulla, ESC Statement No. 1, on June 16, 2020. By this Direct Testimony,

¹ 66 Pa.C.S. §§ 2801 et seq.

² ESC Petition to Intervene, Para. 7.

³ Prehearing Order dated May 8, 2020, Ordering Para. No. 7.

Mr. Kavulla undertook a review of whether PECO's DSP V Plan is consistent with the Competition Act, the Commission's regulations and the development of the competitive retail market. Based on his analysis, Mr. Kavulla made observations about the shortcomings of the competitive retail market and offered several recommendations for changes to the DSP V Plan, including future considerations by the Commission regarding the flaws of PECO's default service that are highlighted by many of PECO's proposals.

On June 19, 2020, PECO served Interrogatories, Set I, on the Coalition. Although ESC timely responded on June 29, 2020 to twenty-six of the Interrogatories (some containing multiple parts), it objected to four of the Interrogatories. The topics of the requests on which the Coalition responded include:

- Status of the retail market;
- Supplier consolidated billing;
- Removal of utilities from the default service role;
- Process for replacing a utility as the DSP;
- Effect of removing utility from the DSP role on the cost of default service;
- Adoption of "price-responsive demand products" in Texas;
- Implementation of TOU rates on an opt-out basis;
- Budget and time horizon for deployment of TOU rate options;
- Offering of both TOU rates and a real-time pricing plan to residential and small commercial customers;
- Effect of long-term contracts by DSPs on the ability of the Commission to remove EDCs from that role;
- Ability of EDCs in the DSP role to use true-up mechanisms when entering long-term contracts;
- Unpredictability of network integration transmission service costs; and
- NARUC's guidelines for allocating costs of products and services.

The four remaining PECO Interrogatories to which the ESC filed objections and that are the subject of this dispute seek: (i) total sales and revenue data for the members of the Electric Supplier Coalition;⁴ (ii) the aggregate number of residential customers served by members of the

⁴ PECO-ESC-I-2.

ESC, as well as prices charged by them;⁵ (iii) actions filed with the Commission or in a court the past 10 years concerning prices the ESC members have charged;⁶ and (iv) the long-term contracts that members of the ESC have signed with large commercial and industrial customers in PECO's service territory.⁷ The Coalition filed its Objections on June 24, 2020.

PECO filed a Motion to Dismiss Objections and to Compel Answers ("Motion") on June 26, 2020. The Coalition filed its Answer to PECO's Motion on June 29, 2020. By Interim Order dated July 2, 2020, ALJ Vero granted PECO's Motion.

The Coalition filed a Petition for Certification of a Ruling on a Discovery Matter ("Certification Petition") on July 6, 2020. The proposed Question for Certification is as follows:

Whether it was appropriate to direct electric generation suppliers ("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?

Proposed Answer: No.

This Brief is filed in support of the Certification Petition pursuant to 52 Pa. Code § 5.304(d).

III. ARGUMENT

A. Certification of the Material Question is Necessary

The Commission's regulations require a Certification Petition to explain the reasons why interlocutory review is necessary to prevent substantial prejudice to a party.⁸ Interlocutory review is necessary to prevent substantial prejudice to the members of the Coalition for numerous reasons, which are fully discussed below. The Coalition intervened in this proceeding

⁵ PECO-ESC-I-4. PECO modified its request for individual to "aggregate" supplier information during a telephone call on the discovery dispute on June 23, 2020, which the Coalition will explain made no difference to its objections.

⁶ PECO-ESC-I-5.

⁷ PECO-ESC-I-6.

⁸ 52 Pa. Code § 5.304(c)(2).

to offer the Commission unique perspectives on the DSP V Plan of EGSs actively participating in Pennsylvania's competitive market, including PECO's service territory. Yet, seemingly as a price of admission – for the right to advance arguments designed to improve PECO's DSP V plan and the overall default service model – the members of the Coalition are now being faced with demands to produce overly burdensome, irrelevant and highly confidential information about their own businesses that no other party is expected to reveal.

As an administrative body, the Commission is bound by the due process provisions of constitutional law and by fundamental principles of fairness.⁹ It is well-settled that administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. Due process entitles parties in administrative proceedings to notice and an opportunity to appear and be heard.¹⁰ Importantly, due process requires a meaningful opportunity to be heard, which entails a full hearing, including the development of a record and a decision by the Commission based on that hearing with full findings.¹¹ In short, having a meaningful opportunity to be heard entails the ability to present evidence on an issue.¹²

However, when the Coalition exercised its right to present evidence challenging certain aspects of PECO's DSP V Plan and questioning the overall default service framework, PECO sought to deprive the Coalition of its legal rights by using the Commission's discovery process to obtain overly burdensome, irrelevant and highly confidential information about the business practices and participation of the members of the ESC in the competitive retail generation market. By demanding data regarding the Coalition members' prices charged, the volume of

⁹ *Pittsburgh v. Pa. P.U.C.*, 171 Pa. Super. 391, 395, 90 A.2d 850 (1952).

¹⁰ *Schneider v. Pa. P.U.C.*, 83 Pa. Cmwlth. 306, 479 A.2d 10 (1984).

¹¹ *See Popowsky v. Pa. P.U.C.*, 805 A.2d 637, 643 (Pa. Cmwlth. 2002), *appeals denied*, 820 A.2d 163 (Pa. 2003) and 847 A.2d 60 (Pa. 2004).

¹² *Scott Paper v. Pa. P.U.C.* 126 Pa. Cmwlth. 111, 558 A.2d 914 (1989).

sales, the number of customer served in the retail market, and contract terms, PECO is improperly seeking to have the ESC members reveal their highly sensitive commercial practices as a prerequisite to or as part and parcel of exercising their fundamental due process rights as a party in this proceeding. The Coalition’s exercise of its rights does not entitle PECO, in turn, to demand that individual members of the ESC expend unreasonable resources to gather extensive data about their highly confidential operations serving shopping customers in the competitive retail market – most of which has no bearing on how PECO should be structuring its default service model in a regulated environment for non-shopping customers.

B. The July 2 Order Overlooks a Number of Reasons that PECO’s Interrogatories are Objectionable

1. The Permissible Scope of Discovery is Broad But Not Unlimited

Under the Commission’s regulations, “[d]iscovery or deposition is not permitted which:

- (1) Is sought in bad faith.
- (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.
- (3) Relates to matter which is privileged.
- (4) Would require the making of an unreasonable investigation by the deponent, a party or witness.”¹³

Further, it is well-settled under the Commission’s rules that a party may only seek discovery that is relevant to the subject matter involved in the pending action and which appears reasonably calculated to lead to the discovery of admissible evidence.¹⁴ The standard for discovery is relevance, not curiosity.¹⁵

¹³ 52 Pa. Code § 3.361(a). In a rate case, a party may not object merely because the discovery request requires the compilation of data or information which the answering party does not maintain in the format requested. As this proceeding is not a rate case, parties may not be required compile data that currently does not exist.

¹⁴ 52 Pa. Code §5.321(c). *See Application of Laurel Pipe Line Company, L.P.*, Docket No. A-2016-2575829 (Order Regarding Motions to Compel dated March 8, 2017 at 2) (Motion to Compel granted when information was irrelevant to the issues to be addressed in the proceeding and not likely to lead to the discovery of admissible evidence).

¹⁵ *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).

While some proprietary information may be produced pursuant to a protective order, other information may trigger the issuance of a protective order that “totally prohibits the disclosure of a trade secret or other confidential information” when “the party from whom the information is sought demonstrates that a greater restriction is necessary to avoid severe and extreme prejudice.”¹⁶ In the past, the Commission has refused to require a party to produce proprietary information even in the existence of a protective order so as to protect the integrity of future pricing and business strategies.¹⁷

2. The Information Sought Does Not Exist in the Format Requested¹⁸

The July 2 Order does not question the highly confidential nature of the number of customers served, prices charged, volumes of electricity sold and contract terms of the ESC members. Rather, it suggests that aggregation of the data from seven EGSs, combined with the Protective Order issued on May 7, 2020, will provide sufficient protection to the information. At the outset, this conclusion overlooks the fact that aggregated data of the seven EGSs participating in the Coalition does not currently exist. As a result, the July 2 Order would require the ESC to create new documents by aggregating data from seven different and unrelated entities in an effort to preserve the confidentiality of each individual company’s data. The Coalition consists of seven EGSs who are competitors in Pennsylvania competitive retail market. They are competing against each other to sell electricity to customers on PECO’s distribution system. As

¹⁶ 52 Pa. Code § 5.365.

¹⁷ *Joint Petition of Metropolitan Edison Co., et al. for Approval of Their Default Serv. Programs*, Docket Nos. P-2011-2273650 (Order dated March 16, 2012) (“*Met-Ed Order*”).

¹⁸ Although the Coalition did not originally raise this objection in response to the discovery, it identified this problem in the 3-page Certification Petition and thereby put PECO and the other parties on notice. In any event, the Coalition has now identified another valid limitation on discovery that is applicable here and nothing in the regulations suggests that a party waives an objection to discovery if it is not raised from the outset.

such, they do not maintain aggregated data in the format requested and the Commission's regulations do not require them to compile it solely for the purpose of discovery.¹⁹

Indeed, even if the data were not so commercially sensitive, it would take extensive time and resources to compile, which would be overly burdensome at any time, but especially at a time when the ESC members are focused on running their businesses and protecting customer interests during COVID-19. For instance, although the complaint data sought by PECO may not enjoy the confidentiality protections of the other information, it likewise does not exist on a shelf and would be overly burdensome to produce. Notably, the Interrogatory asks for 10 years' worth of complaints filed at the Commission, while the Commission's regulations only require complaints to be retained for 4 years.²⁰ Moreover, separately combing activities in each jurisdiction in which each of the suppliers currently operates and reviewing actions filed with courts for any allegations about prices being above those charged by utilities would require resources that are simply not available, especially during this compressed period. As this data is not on the shelf and would be overly burdensome to produce, the Coalition should not be compelled to respond to the objectionable Interrogatories.

3. Producing Confidential Data in the Aggregate Would Deprive the Coalition of its Fundamental Rights of Due Process

Being required to produce highly confidential information, including prices, number of customers, volume of sales, and private contract terms in an aggregated way would deprive the Coalition of meaningful due process. Since the ESC's witness, who works for one of the competing members of the Coalition, does not have access to this information for the remaining

¹⁹ See 52 Pa. Code § 3.361(a). In a rate case, a party may not object merely because the discovery request requires the compilation of data or information which the answering party does not maintain in the format requested. As this proceeding is not a rate case, parties may not be required compile data that currently does not exist.

²⁰ 52 Pa. Code § 56.432.

six members of the Coalition, it would be left to ESC's counsel to create a new documentary record that aggregates this data. However, counsel for ESC is not a witness, is not qualified to understand the information in question, and would therefore be unable to verify the response to the interrogatories. Moreover, neither the ESC's witness nor the other members of the Coalition would be able to view this data without breaching its commercial sensitivity. Although representatives of PECO and the other parties (and later the ALJ and the Commission) would presumably be able to evaluate, analyze or otherwise use this aggregated data, through confidential means, the ESC's witness would have none of these opportunities. This would put the ESC in an impossible situation and certainly would not be consistent with fundamental principles of due process.²¹

4. The Data is So Highly Confidential Such that Aggregation Among Seven Suppliers Would Not Ensure its Protection

Importantly, it is not correct to assume, as the July 2 Order does, that aggregating the data of seven suppliers would protect against disclosure of confidential information among the members of the Coalition. For instance, it is important to keep in mind that each member of the Coalition is aware of publicly available information, such as the number of PECO's distribution customers being served by EGSs, and each knows its own market share of the customers in PECO's service territory. Obtaining aggregated confidential data of seven suppliers, which includes its own data, would have the potential to provide some insights into the businesses of the other members. Although the members of the Coalition joined together in this proceeding, as EGSs participating in the market with their own unique business models, to share perspectives with the Commission designed to improve PECO's default service program and the competitive

²¹ Before suggesting that the Coalition chose to utilize a witness who works for one its members, it is important to keep in mind the expense of professional witnesses and the inability of EGSs to utilize a reconcilable rate mechanism to recover these costs.

retail market, they are not willing to risk the sharing of highly confidential data with each other about their prices, number of customers served, the volume of electricity used by the customers they serve or the terms of their contracts with large commercial and industrial customers.²² Indeed, the Commission's own regulations take measures to safeguard volumes of EGSs' sales information. While the Commission requires EGSs to report retail sales activity on an annual basis, the requirement is imposed on a statewide basis and then the Commission makes information available to the public on an aggregated basis information in reports that do "not disclose individual EGS market shares."²³ Compared to the seven EGSs whose data would be aggregated here, the Commission's 2018 report showing aggregate data reflected data filed by 100 EGSs.²⁴ Simply stated, the Coalition members should be free to come together as one party for purposes of offering factual, policy and legal arguments regarding PECO's DSP V Plan without placing at risk the possible disclosure of their private business details to their competitors that could be harmful to their existing and future businesses.

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. Sharing the type of information among competitors that PECO is seeking to have Coalition members reveal here allows others to see market shares, identify strategies, determine which customer groups are

²² Before it is suggested that the members of the Coalition could have each sought to intervene individually in this proceeding to avoid this problem, it is important to note that intervention in DSP proceedings is not inexpensive. Sharing the expenses is a cost-effective way to participate. Particularly since the Coalition members have no reconcilable rate recovery mechanism through which to recover the costs of litigation, cost-effective methods to participate are important. In addition, without the pooling of resources that the Coalition did in this proceeding, PECO may have had six additional parties conducting discovery, serving testimony etc. The Commission's own processes benefit from having parties with similar interests litigate their positions as one party.

²³ 52 Pa. Code § 54.204.

²⁴ http://www.puc.pa.gov/Electric/pdf/Electric_Choice_Report-2018.pdf

being targeted and otherwise gives insights as to the priorities and objectives of each individual business.

5. EGS Data Relating to the Sale of Electricity to Shopping Customers in the Competitive Retail Market is Largely Irrelevant to the Provision by PECO of Default Service to Non-Shopping Customers in a Regulated Environment

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. The central purpose of PECO's four-year DSP V Plan is to establish the plan for PECO as the default service provider to procure and supply generation service to customers on its distribution system who do not receive generation service from EGSs in the retail competitive market. These are non-shopping customers. By contrast, the EGSs who are members of the Coalition do not serve non-shopping customers. Rather, they supply generation service to customers on PECO's distribution system who elect to receive generation from an EGS in the retail competitive market established by the Competition Act. They serve shopping customers. In order to avoid substantial prejudice to the Coalition's legal rights, it is critical that the ALJ recognize the differences in these services.

Nothing about the Coalitions' prices, numbers of customers, volumes of sales, specific contract provisions with large commercial and industrial customers, or complaints filed against them has any bearing on the ESC's fundamental observations about the competitiveness of PECO's default service market. These facts are irrelevant to whether the Commission should consider the status of that market as it decides whether PECO's proposed DSP V Plan meets the objectives of the Competition Act and whether certain elements of the Plan may be interfering with the Commission's statutory obligations to ensure the development of a competitive generation market.²⁵ In fact, none of the commercially sensitive information about the ESC

²⁵ 66 Pa.C.S. § 2802 (12).

companies sought by the objectionable Interrogatories was (or is) available to Mr. Kavulla (because each ESC member is a competitor of the others) and, therefore, was not relied upon by Mr. Kavulla to support his testimony or inform his opinions. This further demonstrates the lack of relevancy of the requests and their inability to lead to any admissible evidence.

The Interim Order claims that the information sought by PECO is relevant in assessing the extent to which ESC members can expand their businesses under the DSP program, and refers to the possibility for EGSs to charge higher prices for such service. The objectionable Interrogatories tie to two statements of Mr. Kavulla about the stagnation of the competitive retail market, which are evidenced by publicly available aggregated information and the report of the Wind Solar Alliance. None of the information requested, if it did exist, would be relevant to these observations. While it is true that the ESC testimony points to a number of flaws in PECO's DSP V Plan and with its "basic default service model," Mr. Kavulla relies on his observations about the stagnant market to propose specific recommendations to address those shortcomings, including changes in PECO's four-year plan and revisions to the existing default service structure going forward.

At no time does Mr. Kavulla suggest that EGSs operating in the retail market should use their competitive business models to replace or supplement PECO's default service structure. Indeed, he expressly references the need for a separate process to examine alternative default service frameworks, which would be required under the Commission's regulations. In such a proceeding, it would be incumbent upon the Commission to determine how other entities would procure and price default service for customers. It would be up to the Commission to structure default service to protect customers. EGS activity in the competitive market would be irrelevant to that process and would continue on its own path.

6. No Stay is Needed

The regulations require the parties to indicate whether a stay of a proceeding is necessary while a ruling on a discovery request is reviewed by the Commission. The Coalition recognizes that a stay of the proceeding is not feasible. The timing of PECO's filing of the DSP V Plan was to ensure that it is ready to begin providing default service under the new plan by June 1, 2021. Indeed, if the Commission does not rule on PECO's filing within 9 months, the plan is deemed approved.²⁶ However, the need for a decision to be made within a certain time period should not be relied upon as a basis to deny a party interlocutory review of a ruling on a discovery request – particularly one that implicates so many issues, including the Coalition's fundamental right to due process. Rather than stay the proceeding or avoid a ruling on the discovery dispute, this Petition should be reviewed in the normal course.

If a Commission ruling is too late to result in a directive for the Coalition to produce the information sought by the Interrogatories or for PECO to incorporate such information in its testimony, or the parties to argue in briefs about the effect of the information, the ALJ in the Recommended Decision and/or the Commission in its final Order could afford the weight they view appropriate to the Coalition's testimony and arguments given the failure of the Coalition to respond to the objectionable Interrogatories. DSP proceedings continue to occur and given their timeframes, discovery disputes like this can be a recurring problem. The Commission could provide guidance to EGSs intervening in DSP proceedings about the type of confidential, irrelevant and non-existent (overly burdensome) information they should be expected to produce if they offer any observations or recommendations about the EDC's default service plan. If EGSs are not permitted to offer testimony about the retail market or critique an EDC's DSP plan

²⁶ 66 Pa.C.S. § 2807(d)(3.6). In this case, PECO voluntarily extended the Commission's review period from December 13, 2020 to December 17, 2020. *See* Order of Chief ALJ Rainey dated June 2, 2020.

without then making available their own confidential pricing data, number of customers served, amount of electricity sold to existing customers and contract terms with large commercial and industrial customers, they will be aware of these parameters when making the expensive business decisions about whether to intervene.

IV. CONCLUSION

The Electric Supplier Coalition respectfully requests that this Petition for Certification be granted so that the Commission conducts interlocutory review of the July 2, 2020 Order. It is imperative for the electric generation suppliers participating in the Coalition to have a meaningful opportunity to offer testimony about PECO's proposed default service plan, offer recommendations for improvement and discuss the need for changes to overall competitive retail market customers without being required to produce overly burdensome, irrelevant and highly confidential information about their own participation in the competitive retail market.

Respectfully submitted,

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