



100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Teresa Harrold
Direct Dial: 717.237.5246
tharrold@mcneeslaw.com

May 3, 2021

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

VIA ELECTRONIC FILING

**RE: Pennsylvania Public Utility Commission v. PECO Energy Company;
Docket No. R-2020-3018929**


Dear Secretary Chiavetta:

Attached please find for filing with the Pennsylvania Public Utility Commission the Motion to Strike of the Philadelphia Area Industrial Energy Users Group ("PAIEUG") in the above-referenced proceeding. Thank you.

As shown by the attached Certificate of Service, all parties to these proceedings are being duly served via email only due to the current COVID-19 pandemic. Upon lifting of the aforementioned Emergency Order, we can provide parties with a hard copy.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 

Teresa Harrold

Counsel to the Philadelphia Area Industrial Energy Users Group

c: Deputy Chief Administrative Law Judge Christopher P. Pell (via E-Mail)
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

VIA E-MAIL

Anthony E. Gay, Esq.
Jack R. Garfinkle, Esq.
Brandon J. Pierce, Esq.
PECO Energy Company
2301 Market Street
P.O. Box 8699
Philadelphia, PA 19101
anthony.gay@exeloncorp.com
jack.garfinkle@exeloncorp.com
brandon.pierce@exeloncorp.com
Counsel for PECO Energy Company

Elizabeth R. Marx, Esq.
John W. Sweet, Esq.
Ria M. Pereira, Esq.
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net
Counsel for CAUSE-PA

Phillip Demanchick, Esq.
Christy Appleby, Esq.
Barrett Sheridan, Esq.
Darryl Lawrence, Esq.
Laura J. Antinucci, Esq.
Office of Consumer Advocate
555 Walnut Street 5th Floor
Forum Place
Harrisburg, PA 17101
OCAPECOGAS2020@paoca.org

Kenneth M. Kulak, Esq.
Mark A. Lazaroff, Esq.
Catherine G. Vasudevan, Esq.
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
ken.kulak@morganlewis.com
mark.lazaroff@morganlewis.com
catherine.vasudevan@morganlewis.com
Counsel for PECO Energy Company

Scott B. Granger Esq.
PA PUC Bureau of Investigation & Enforcement
Second Floor West
400 North Street
Harrisburg, PA 17120
sgranger@pa.gov

Steven C. Gray, Esq.
Office Small Business Advocate
555 Walnut St 1st Floor
Forum Place
Harrisburg, PA 17101
sgray@pa.org



Teresa Harrold

Counsel to the Philadelphia Area Industrial
Energy Users Group

Dated this 3rd day of May, 2021, in Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2020-3018929
	:	
PECO Energy Company	:	

**MOTION TO STRIKE OF
THE PHILADELPHIA AREA INDUSTRIAL ENERGY USERS GROUP**

TO THE HONORABLE, THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to 52 Pa. Code § 5.103, the Philadelphia Area Industrial Energy Users Group ("PAIEUG") hereby files this Motion to Strike ("Motion") portions of the Office of Small Business Advocate's ("OSBA") Exceptions filed with the Pennsylvania Public Utility Commission ("Commission") on April 26, 2021, in the above-captioned proceeding.

I. INTRODUCTION

1. On September 20, 2020, PECO Energy Company ("PECO") filed with the Commission Tariff Gas – Pa. P.U.C. No. 4 ("Tariff No. 4"), requesting approval of an overall base rate increase of approximately \$68.7 million over its present revenues.¹ On November 5, 2020, PAIEUG filed a Complaint in this proceeding. A Prehearing Conference was held on November 9, 2020, before Deputy Chief Administrative Law Judge ("ALJ") Christopher P. Pell.

2. After the submission of three rounds of testimony in this proceeding, an evidentiary hearing was held on February 17, 2021, for the purposes of presenting testimony and performing cross-examination. Although PAIEUG's witness was available for cross-examination, the OSBA

¹ *PECO Energy Company – General Base Rate Filing for Gas Operations*, Docket No. R-2020-3018929 (filed Sept. 30, 2020).

voluntarily chose to waive its opportunity to perform such cross-examination. On March 4, 2021, Main Briefs were submitted in this proceeding, with Reply Briefs submitted on March 16, 2021.

3. Deputy Chief ALJ Pell issued his Recommended Decision ("R.D.") in the above-referenced proceeding on April 12, 2021.

4. On April 26, 2021, PAIEUG received Exceptions from PECO, the Office of Consumer Advocate, the Office of Small Business Advocate ("OSBA"), the Bureau of Investigation and Enforcement, and the Coalition for Affordably Utility Services and Energy Efficiency in Pennsylvania.

5. In its Exceptions, OSBA flaunted Commission regulations and case precedent by raising new factual claims in its Exceptions.² OSBA's decision to raise these claims after the ALJ issued the R.D. is procedurally improper and violates traditional due process principles. *See* Section II, *infra*. Accordingly, PAIEUG hereby submits this Motion to Strike the following language from OSBA's Exceptions:

- a. The language on page 7 beginning with "The DCALJ's reliance on this evidence in support of rate shock" through the end of page 8; and
- b. Appendix A to OSBA's Exceptions.

6. The Reply Exceptions deadline is May 3, 2021. PAIEUG's Reply Exceptions are being filed on the same day as this Motion.³

II. ARGUMENT

7. In this proceeding, OSBA proposed to shrink the volumetric differentials within PECO's Rates Transportation Service - Firm ("TS-F") and Transportation Service – Interruptible

² OSBA Exceptions, pp. 7, 8, and Appendix A.

³ PAIEUG's Reply Exceptions also briefly address the concerns raised herein and respond to the other portions of OSBA's Exceptions.

("TS-I") for customers above and below 18 mmcf.⁴ PAIEUG submitted evidence into the record of this proceeding establishing, among other things, that large Rate TS-F customers would experience a 56.2% increase in rates if OSBA's proposal is approved.⁵ Although all parties had ample opportunity, no party presented any evidence refuting this fact. In fact, PECO implicitly acknowledged the accuracy of PAIEUG's calculation by subsequently arguing that a 56.2% increase in rates was not unreasonable because PECO had not filed a rate case since 2010.⁶ Conversely, OSBA chose to remain silent with respect to PAIEUG's testimony and exhibits regarding this issue until the Exceptions phase of this proceeding.

8. In an unequivocal violation of Commonwealth Court and Commission precedent, in its Exceptions, OSBA raises new factual claims related to the veracity of PAIEUG's testimony and exhibits supporting the 56.2% rate increase associated with OSBA's proposal.⁷ OSBA's discussion includes no citations to the record and cites to a new, unverified exhibit attached to its Exceptions.⁸ The portions of OSBA's Exceptions that raise new factual claims must be stricken from the record and given no weight by the Commission.

9. Commonwealth Court and Commission precedent clearly establish that parties may not raise new factual claims, *i.e.*, extra-record evidence, as part of their exceptions.⁹ In a direct analogy to this circumstances of this filing, the Commonwealth Court agreed that the Commission did not abuse its discretion by striking the portions of exceptions raising factual claims that

⁴ OSBA Statement No. 1, *Direct Testimony of Robert D. Knecht*, p. 53-56.

⁵ PAIEUG Statement No. 1-S, *Surrebuttal Testimony of Billie S. LaConte*, p. 7; *see also* PAIEUG Exhibit BSL-2S.

⁶ PECO Main Brief, p. 121.

⁷ OSBA Exceptions, pp. 7-8, Appendix A.

⁸ *See id.*

⁹ *Hess v. Pa. Pub. Util. Comm'n*, 107 A.3d 246, 265-267 (Pa. Commw. Ct. 2014); *Pa. Pub. Util. Comm'n v. Verizon Pa., Inc.*, Docket No. R-00994697 (Opinion and Order entered Jun. 3, 2001); *Application of Apollo Gas Co.*, Docket No. A-120450 (Opinion and Order entered Feb. 10, 1994).

"disputed, for the first time in the proceeding" another issue in the record.¹⁰ The Commonwealth Court further recognized that admitting new evidence at the exceptions stage of a proceeding violates the opposing party's due process rights.¹¹

10. The Commission's regulations also do not permit extra-record evidence to be raised at the exceptions stage of a proceeding after the record has closed. Section 5.431(a) of the Commission's regulations provides that "the record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission."¹² In addition, the Commission's regulations regarding exceptions state that "statements of reasons supporting the exceptions must, insofar as practicable, incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs."¹³

11. The identified portions of pages 7, 8, and Appendix A of OSBA's Exceptions must be stricken as required by Commonwealth Court and Commission precedent, as well as the Commission's regulations. PAIEUG's 56.2% rate increase calculation is undisputed in the evidentiary record of the proceeding. OSBA did not seek to cross-examine PAIEUG's witness regarding this issue or supplement the evidentiary record with any information to dispute PAIEUG's calculation. Nevertheless, for the first time in OSBA's Exceptions, OSBA is raising factual claims asserting that the calculation is inaccurate or that other factors impact the scope of PAIEUG's calculated rate increase.¹⁴ These claims represent new factual assertions that are not supported by any evidence in the record. Moreover, by presenting these factual assertions in the

¹⁰ *Hess* at 266 (Affirming the Commission's decision to strike exceptions where one party was raising, for the first time, new quarterly reports to dispute record evidence that a transmission line was a worst performing circuit.)

¹¹ *Id.* at 267 ("They also had every opportunity to introduce PPL's quarterly reports into the record. They did not do so. PPL would have been clearly prejudiced if the argument and evidence were allowed in after the record closed because PPL had no opportunity to respond to this evidence and the arguments based on it.")

¹² 52 Pa. Code § 5.431(a). If a party seeks to reopen the record, the party must file a petition to reopen the record, which has not occurred here. 52 Pa. Code § 5.571(a).

¹³ 52 Pa. Code § 5.533(c).

¹⁴ OSBA Exceptions, pp. 7-8, Appendix A.

Exceptions stage of the proceeding, OSBA has effectively thwarted any efforts by PAIEUG to respond to these allegations.

12. The portions of OSBA's Exceptions identified herein clearly represent extra-record evidence that must be stricken.¹⁵ The referenced language on Pages 7 and 8 of OSBA's Exceptions includes no citations to the record, which is inconsistent with the Commission's regulations for Exceptions and further supports the argument that OSBA's claims are outside of the existing evidentiary record.¹⁶ In addition, OSBA presented an entirely new exhibit for the first time in Exceptions.¹⁷

13. PAIEUG has several concerns regarding the accuracy of OSBA's new claims, but PAIEUG is unable to submit discovery to OSBA or cross-examine OSBA's witness regarding these claims, which violates PAIEUG's due process rights. For example, OSBA's new calculations refer to a 4% rate increase for Rate TS-F, but I&E's revenue allocation indicates Rate TS-F would experience a 16.4% rate increase.¹⁸ OSBA may be trying to capitalize on a typo in the R.D. to try to undermine PAIEUG's calculations regarding the rate impact of OSBA's proposed Rate TS-F changes, but PAIEUG cannot be certain because it had no opportunity to cross-examine OSBA's witness.¹⁹

14. In Exceptions, OSBA states that that it "hesitates to offer rate design calculations in its exceptions," which indicates that OSBA may be aware of the procedural inappropriateness of its actions.²⁰ However, OSBA's disagreement with the R.D.'s recommendation regarding the Rate TS-F and TS-I rate designs does not permit OSBA to submit extra-record evidence at this

¹⁵ See *Hess* at 265-267; *Pa. Pub. Util. Comm'n v. Verizon Pa., Inc.*, Docket No. R-00994697 (Opinion and Order entered Jun. 3, 2001); *Application of Apollo Gas Co.*, Docket No. A-120450 (Opinion and Order entered Feb. 10, 1994).

¹⁶ See 52 Pa. Code 5.533(c).

¹⁷ OSBA Exceptions, Attachment A.

¹⁸ See I&E Statement No. 1-S, *Surrebuttal Testimony of Ethan H. Cline*, p. 21 (corrected via Errata filing dated Feb. 16, 2021).

¹⁹ See OSBA Exceptions, pp. 7, 8, and Attachment A; see also *Hess* at 267.

²⁰ OSBA Exceptions, p. 7.

stage in violation of PAIEUG's due process rights and when the record is already closed. The Commission's regulations prohibit OSBA from raising new evidence at the Exceptions stage of the proceeding.²¹ OSBA had ample opportunity to cross-examine PAIEUG's witness and present any evidence in opposition to PAIEUG's 56.2% rate increase calculation while the record was still open in this proceeding, but it chose not to do so.

15. OSBA's inclusion of extra-record evidence in its Exceptions is prohibited under Commission and Commonwealth Court precedent, as well as the Commission's regulations. Accordingly, the Commission should grant PAIEUG's Motion to Strike portions of OSBA's Exceptions.

²¹ 52 Pa. Code §§ 5.431(a), 5.533(c).

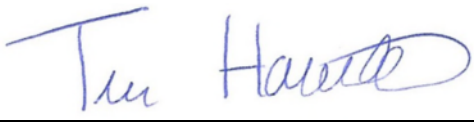
III. CONCLUSION

WHEREFORE, the Philadelphia Area Industrial Energy Users Group respectfully requests that the Pennsylvania Public Utility Commission grant this Motion to Strike the following text in the Office of Small Business Advocate's Exceptions:

- A. The language on page 7 beginning with "The DCALJ's reliance on this evidence in support of rate shock" through the end of page 8; and
- B. Appendix A to OSBA's Exceptions.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Charis Mincavage (Pa. I.D. No. 82039)
Adeolu A. Bakare (Pa. I.D. No. 208541)
Teresa Harrold (I.D. No. 311082)
Jo-Anne S. Thompson (Pa. I.D. No. 325956)
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: 717.232.8000
Fax: 717.237.5300
cmincavage@mcneeslaw.com
abakare@mcneeslaw.com
tharrold@mcneeslaw.com
jthompson@mcneeslaw.com

Counsel to the Philadelphia Area Industrial Energy
Users Group

Dated: May 3, 2021

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
	:	
v.	:	Docket No. R-2020-3018929
	:	
PECO Energy Company	:	


NOTICE TO PLEAD

To: Office of Small Business Advocate

PER 52 PA. CODE § 5.103(C), YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED MOTION WITHIN TWENTY (20) DAYS OF THE DATE OF SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Charis Mincavage (Pa. I.D. No. 82039)
Adeolu A. Bakare (Pa. I.D. No. 208541)
Teresa Harrold (I.D. No. 311082)
Jo-Anne S. Thompson (Pa. I.D. No. 325956)
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
Phone: 717.232.8000
Fax: 717.237.5300
cmincavage@mcneeslaw.com
abakare@mcneeslaw.com
tharrold@mcneeslaw.com
jthompson@mcneeslaw.com

Counsel to the Philadelphia Area Industrial Energy
Users Group

Dated: May 3, 2021