

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for :
Approval of Its Default Service Program for : P-2024-3046008
the Period From June 1, 2025, Through :
May 31, 2029 :

**ORDER ON MOTION OF THE ENERGY JUSTICE ADVOCATES TO DISMISS
PECO’S OBJECTIONS AND
COMPEL PECO TO ANSWER INTERROGATORIES**

On February 2, 2024, PECO Energy Company (“PECO”) filed a Petition requesting that the Pennsylvania Public Utility Commission (Commission) approve its sixth Default Service Program (“DSP VI”) in accordance with its responsibilities as the default service provider for its certificated service territory for the period from June 1, 2025, through May 31, 2029 following the expiration of its current default service program (“DSP V”)¹.

On March 4, 2024, POWER Interfaith, Vote Solar, Clean Air Council, Sierra Club, Physicians for Social Responsibility Pennsylvania, and PennEnvironment (collectively, the “Energy Justice Advocates” or “EJA”) filed a Petition to Intervene in this matter.

On March 14, 2024, the undersigned presiding officers issued a Protective Order in this matter.

On March 15, 2024, EJA served its Set III Interrogatories on PECO. EJA and PECO engaged in discussions concerning the Set III interrogatories and resolved all but one of the objections i.e., that relating to Set III, Question 20, which reads as follows:

EJA-III-20. Please refer to the Direct Testimony of Katie Orlandi at 13:3-22. Please provide copies of all documents (confidential and

¹ See Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2021, through May 31, 2025, Docket No. P-2020-3019290 (Opinion and Order entered Dec. 3, 2020) (“PECO DSP V Order”).

non-confidential) prepared by or with the assistance of NERA that were submitted to the Pennsylvania Public Utility Commission in connection with or during the tenure of DSP V.²

On April 10, 2024, PECO filed its written objections to OCA Set 2, Question No.20 (Objections).

On April 15, 2024, EJA filed a Motion to Dismiss PECO's Objections and to Compel PECO to Answer Question 20 of EJA's Set III Interrogatories (as modified) (the "Motion").³

On April 18, 2024, PECO filed its Answer in opposition to the Motion ("Answer").

The Motion is ready for disposition.

Legal Standard

Section 5.321(c) of the Commission's Rules of Administrative Practice and Procedure, 52 Pa. Code Section 5.321(c), specifically provides that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Discovery is permitted regardless of whether the information sought "relates to the claim or defense of the party seeking discovery or to the claim or defense of another party or participant." *Id.* Information may be discoverable, even if it would be inadmissible at a hearing. It is not grounds for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* The Commission has held that, "The material sought to

² Motion at 1.

³ In the Motion, EJA indicates that it agreed to modify Question 20 to limit the request to Market Reports supplied to the Commission and redacted Final Reports provided to PECO under DSP V. EJA framed the Motion around its request for those reports; however, PECO's Answer to the Motion does not reference the modification proposed by EJA. In light of the analysis below, EJA's proposed modification to Question 20 would not have changed the ruling in this Order.

be discovered need not be admissible. Rather, it must be reasonably expected to lead to the discovery of admissible evidence.” *J3 Energy Group, Inc. v. West Penn Power Co. and UGI Development Co.*, 2014 Pa. PUC LEXIS 406 at *7 (Order Aug. 21, 2014). The Commission has also held that the relevancy test should be liberally applied when considering data requests. See, *Pa. PUC v. Equitable Gas Co.*, 1986 Pa. PUC LEXIS 110 at *22 (Order May 16, 1986)

Additionally, the party objecting to discovery bears the burden of establishing that the information requested is not relevant or discoverable. See *Petition of the Borough of Cornwall for a Declaratory Order that the Provision of Water Service to Isolated Customers Adjoining its Boundaries Does Not Constitute Provision of Public Utility Service Under 66 Pa. C.S. § 102*, P- 2015-2476211 at 6 (Order Sept. 11, 2015) citing *Koken v. One Beacon Insurance Co.*, 911 A.2d 1021, 25 (Pa. Cmwlth Ct. 2006). Relevancy depends upon the nature and facts of the individual case, and any doubts are to be resolved in favor of relevancy and permitting discovery. *Id.* For information to be relevant it must either tend to establish a material fact, tend to make a fact at issue more or less probable, or support a reasonable inference or presumptions regarding a material fact. *Id.* at 9-10, citing *Smith v. Morrison*, 47 A.3d 131, 37 (Pa. Super. Ct. 2012).

Discussion

The legal standard for approval of a default service plan is governed by 66 Pa. C.S. Section § 2807(e). Under Section 2807(e)(6), the Commission is required to consider whether a default service plan is consistent with a variety of requirements, including whether a default service plan will result in a competitively procured prudent mix of supply contracts to ensure “least cost over time” to customers. If, based on its review of the information provided by the Independent Evaluator, the Commission has reason to believe that one or more participants in the default service procurements may have engaged in anticompetitive behavior, the Commission may seek additional information and/or initiate an investigation at that time.

In its Set III interrogatories, EJA seeks to obtain all documents (confidential and non-confidential) prepared by or with the assistance of NERA that were submitted to the Pennsylvania Public Utility Commission in connection with or during the tenure of DSP V. The

request includes “Market Reports” and “Final Reports prepared by National Economic Research Associates, Inc. d/b/a NERA Economic Consulting (“NERA”), the independent evaluator (IE) appointed by the Commission in under the PECO default service program currently in effect (DSP V).⁴

Market Reports are submitted by NERA to the Commission 7 – 10 days in advance of the submission of bids during DSP V.⁵ EJA describes the Market Reports as follows:

This report would provide visible market prices for components of the full-requirements product and provide the PaPUC with any changes in broad trends in the wholesale markets since the previous solicitation. If appropriate, the market report could also report the results of similar solicitations held in the State or in a comparable region.

- If desired, the IE will prepare a confidential report to the PaPUC detailing current market conditions affecting the products of the RFP.
- This report would be provided one week to ten days in advance of the Bid Date to the PaPUC on a confidential basis.”⁶

Conversely, redacted Final Reports are provided by NEWA to PECO after all contracts with winning suppliers approved by the Commission have been executed. EJA describes the redacted Final Reports and their intended use as follows:

PECO will be provided with a redacted version of the factual report provided to the Commission on the results of the solicitation. The report will be redacted so that PECO will not receive information about bids that is bidder-specific or proposal information that a bidder may consider confidential or proprietary. . . . [to be used by] PECO in assessing whether the products offered could be improved in future procurement plans and to assist it in finalizing its contingency plans should the results of any solicitation be rejected by the Commission, PECO will be provided with certain additional information.⁷

⁴ See Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2021 through May 31, 2025, Docket No. P-2020-3019290 (Opinion and Order entered Dec. 3, 2020) (“PECO DSP V Order”).

⁵ See Description of Market Reports found in the RFP Protocol found in *Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2021, through May 31, 2025*, Docket No. P-2020-3019290 (Opinion and Order entered Dec. 3, 2020) (“PECO DSP V Order”).

⁶ Motion at 3, citing Exh. C, DSP V RFP, 23-24.

⁷ Motion at 4.

EJA contends that PECO should be compelled to supply the Market Reports and Final Reports because the information contained therein is: (a) relevant to the evaluation of DSP VI; (b) not privileged and (c) otherwise permissible.⁸

On the issue of relevance, EJA contends that examining the Market Reports and Final Reports is relevant to evaluating the performance of DSP V because it is largely replicated in DSP VI. Thus, EJA argues that an analysis of the performance of DSP V and the Market Reports, in particular, is directly relevant to assessing the reasonableness of continuing a similar approach in DSP VI.⁹ EJA also argues that the Final Reports were designed to assist PECO in improving products offered in future procurement plans, thereby making them essential to an assessment of whether DSP VI can be improved upon, labeling such an inquiry a “central issue” in this proceeding.¹⁰

It is PECO’s position that the Company’s competitive request for proposals (“RFP”) process for the procurement of default service supply is governed by rules (the “RFP Rules”) and protocol (the “RFP Protocol”) approved by the Commission in the *PECO DSP V Order*.¹¹ PECO contends that the confidentiality provisions in the RFP Rules and the Protocol explicitly limit the distribution of these reports.¹² PECO asserts that the Market Report “reflects the Independent Evaluator’s professional judgment on current market conditions and is intended solely to assist the Commission in evaluating the solicitation results.”¹³ PECO observes that

⁸ Motion at 3-5.

⁹ Motion at 3 citing Petition of PECO Energy Company for Approval of DSP VI, 2.

¹⁰ Motion at 5.

¹¹ Answer at 2.

¹² *Id.*

¹³ PECO Answer at 5.

“Under the RFP Protocol, NERA provides the Market Report *only* to the Commission. PECO does not receive that report and could not produce it even if ordered by the Commission.”¹⁴

Further, PECO asserts that the Market Report contains data that could affect bidding strategy in PECO’s procurements, including reasonable bid ranges and as proposed for DSP VI, a reserve price. Recipients of the information produced could use these ranges in the future to submit bids that they expect the Commission may be willing to accept, instead of submitting their best possible bids, which in turn, could lead to higher default service prices.¹⁵ Finally, PECO contends that “there is no basis to presume that the Commission envisioned dissemination of any Market Report to any other entity (including PECO), even under a protective order.”¹⁶

PECO rejects EJA’s assertion that a redacted version of the Final Report would not reveal information that could “create competitive advantages for certain bidders in PECO’s future solicitations, harm a supplier’s overall market position, and/or irreparably harm the competitiveness of the solicitations.”¹⁷ PECO argues that even a redacted Final Report reveals information that potentially would impact supplier bid strategy, decisions to participate in future PECO solicitations, and ultimately the competitiveness of the Company’s procurements of default service supply, including the following:

- The number and names of entities that participated at each step of the RFP process or that were contacted by the Independent Evaluator – e.g., registrants to the webcast, participants in the alternate guaranty process, successful and unsuccessful Part 1 and Part 2 proposals, bidders who did and did not participate in the training session, and winning bidders.
- Analysis to support the Independent Evaluator’s recommendation to the Commission that presents ranges of estimated

¹⁴ PECO Answer at 9. (Emphasis in original.)

¹⁵ Answer at 7.

¹⁶ Id.

¹⁷ Answer at 6.

bid prices, number and names of entities that have a load cap, and specific competitiveness measures across the products, including those requested by the Commission to assist it in the evaluation of the results of the solicitations.

- Data pertaining to losing bidders and bids, including the number of tranches bid and the average of all bids received by bidder by product.¹⁸

In its Answer, PECO explains that suppliers who choose to participate in PECO's solicitations must assemble their own portfolio of products that will permit the supplier to offer the best, most competitive bids across the products available. Maintaining strict confidentiality of bid information is necessary for such suppliers to be willing to continue participating in PECO's solicitations, thereby preserving the competitiveness of PECO's procurements, which are responsible for delivering default service supply to customers at the "least cost over time" in accordance with the Public Utility Code.¹⁹

PECO also points out that its suppliers include not only generation owners, but also energy marketers and financial institutions. Several of those types of entities have intervened in this proceeding, including Calpine Retail Holdings, LLC, NRG Energy, Inc., and Constellation NewEnergy, Inc. and Constellation Energy Generation, LLC.²⁰ Releasing the information requested by EJA and, thus, not maintaining strict confidentiality of bid information could be detrimental to maintaining the participation levels and competitiveness of the procurements. For example, if information about one supplier ("Supplier A") were known to another supplier ("Supplier B"), but not vice-versa, then Supplier A would have a competitive advantage in PECO's solicitations, which may result in Supplier B not participating in future procurements. Similarly, disclosure of information that a supplier believes could harm its position in the market (e.g., that a supplier intends to participate in a PECO solicitation or was a losing bidder in a solicitation) could deter participation.

¹⁸ Id.

¹⁹ Answer at 4.

²⁰ The Retail Energy Supply Association ("RESA"), which is a trade association that represents numerous electric generation suppliers, is also an active party in this case.

PECO contends that releasing the information requested would give competitive intelligence to suppliers that is not currently available to them.²¹ Suppliers should bid across the products available based on their individual assessment of the cost to serve default service supply and not because of any other information such as analysis provided by the Independent Evaluator to the Commission to assist in whether to approve the results of a solicitation.²² PECO insists that

Maintaining the confidentiality of information is a necessary measure to preserve the competitiveness of the solicitations, which is responsible for delivering default service prices that are consistent with the market. If suppliers decide not to participate in the solicitations because they believe that sensitive information detailing their participation could be released, this could result in decreased participation, reduced competition in the solicitations, and potentially higher prices for default service customers. If sensitive information is released once, suppliers may not trust that it will not be released again and therefore the release of the requested information could cause irreparable harm to PECO's solicitations to the detriment of default service customers.²³

PECO maintains that the requested information is not discoverable because it is privileged and confidential. In support of its position, PECO cites to Administrative Law Judge ("ALJ") Elizabeth Barnes' March 16, 2012 Order in *Joint Petition of Metro. Edison Co., Pa. Elec. Co., Pa. Power Co. and West Penn Power Co. For Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650 et al. (*FE-PA Order*) in which ALJ Barnes granted the utility's objection and dismissed the Retail Energy Supply Association's Motion to Compel with respect to an interrogatory that would have required the utility to produce information about the results of historical default service auctions, including disaggregated bid information with fictitious labels. In that case, the ALJ found that the auction rules (which are similar to the RFP Rules and RFP Protocol in the present matter) impose "a cloak of confidentiality" to prevent

²¹ Answer at 5.

²² Answer at 5.

²³ *Id.*

disclosure of bid information that would “compromise the integrity of future auction processes.”²⁴

It is undisputed that the RFP confidentiality protections give notice that protection of bidder specific information is not absolute but may be disclosed “if required by a federal, state, or local agency (including the Commission) or a court of competent jurisdiction.”²⁵ It is also true that on one occasion, the Commission approved release of a redacted copy of a Final Report during PECO’s second DSP term (June 1, 2013 through May 31, 2015) (*DSP II*). In that case, a redacted Final Report was released in accordance with a stipulation between PECO’s parent company and the requesting party in the context of a merger involving PECO’s parent company.²⁶

The *FE-PA Order* and *DSP II* demonstrate that the determination of whether or not to pierce “the cloak of confidentiality” is made on a case-by-case basis and is based on the outcome of balancing the need for the information requested versus the need to protect the confidentiality of the process.

Here, the determination depends on balancing EJA’s stated interest in examining whether the procurement plan for DSP V was the least cost over time for consumers and assessing the reasonableness of continuing a similar approach in DSP VI²⁷ versus the interest of

²⁴ See *FE-PA Order*, p. 6; see also *id.*, pp. 3-8.

²⁵ Motion at 2 ¶4; *citing* PECO Exhibit KO-1, § VII.4.5. Answer at 2 ¶4; *citing* PECO Exhibit KO-1, § VII.4.5.

²⁶ See Stipulation, (I) *Petition of the Office of Small Business Advocate (OSBA) Seeking Intervention by the Pennsylvania Public Utility Commission in Proceedings Before the Federal Energy Regulatory Commission Regarding the Proposed Merger of Exelon Corporation and Constellation Energy Group*; (II) *Complaint of the OSBA Seeking an Investigation by the Commission into the Proposed Merger*; and (III) *Petition of the OSBA for a Declaratory Order (A) Confirming Exelon Corporation Must Seek Prior Commission Approval of the Transfer of Its Electric and Natural Gas Generation Supplier Licenses or Assignment of Customer Contracts and (B) Directing Constellation Energy Group to Notify the Commission of the Proposed Merger and File Amended License Applications*, Docket No. P-2011-2247936 (filed Apr. 6, 2012), pp. 5-7; *Petition of PECO Energy Co. for Approval of Its Default Serv. Program II*, Docket No. P-2012-2283641 (Opinion and Order entered Oct. 12, 2012), p. 44 (citing PECO Statement No. 4-S, Supplemental Direct Testimony of Chantale LaCasse dated Apr. 24, 2012, pp. 2-3).

²⁷ Motion at 3.

the stakeholders (PECO, PECO DSP customers and bidders) in the uncompromised integrity of the auction process.

Upon review of PECO's Objection, EJA's Motion to Compel and PECO's Answer to the Motion, we find that PECO has successfully carried its burden of showing that the interest of the stakeholders in the uncompromised integrity of the auction process outweighs the EJA's interest in developing the record of the DSP V procurement plan. Therefore, the information requested by Question 20 is not discoverable.

THEREFORE,

IT IS ORDERED:

1. That the Objections of PECO Energy Company to EJA Set III Question 20 are sustained.
2. That the Energy Justice Advocates' Motion to Dismiss PECO's Objections and to Compel PECO to Answer Question 20 of EJA's Set III Interrogatories is denied.

Dated: April 29, 2024

/s/
Eranda Vero
Administrative Law Judge

/s/
Arlene Ashton
Administrative Law Judge

**P-2024-3046008 - PETITION OF PECO ENERGY COMPANY
FOR APPROVAL OF IT'S DEFAULT SERVICE PROGRAM FOR THE
PERIOD OF JUNE 1, 2025, THROUGH MAY 31, 2029**

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