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May 9, 2016

**VIA eFILING**

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

**Re: Petition of Direct Energy Services, LLC to Expand Retail Market Enhancements**  
**Docket No. P-2016-2535033**

Dear Secretary Chiavetta:

Enclosed for filing in the above-captioned matter is the **Answer of PECO Energy Company in Opposition to the Petition of Direct Energy Services, LLC** (“Answer”). As evidenced by the enclosed Certificate of Service, copies of the Answer have been served on Direct Energy Services, LLC (“Direct Energy”), the Retail Energy Supply Association and all of the persons and entities listed in the Certificate of Service that Direct Energy filed with the Commission on March 28, 2016, at the above-referenced docket.

Very truly yours,



W. Craig Williams

Enclosures

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF DIRECT ENERGY SERVICES, LLC TO EXPAND RETAIL MARKET ENHANCEMENTS** : **Docket No. P-2016-2535033**  
:   
:

**CERTIFICATE OF SERVICE**

I hereby certify and affirm that I have this day served a copy of the **Answer of PECO Energy Company in Opposition to the Petition of Direct Energy Services, LLC to Expand Retail Market Enhancements** on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

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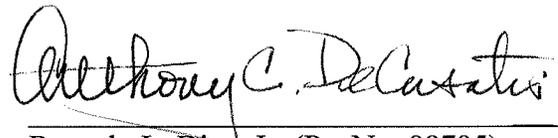
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Dated: May 9, 2016

**BEFORE THE  
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**PETITION OF DIRECT ENERGY SERVICES, LLC TO EXPAND RETAIL MARKET ENHANCEMENTS** :  
: **Docket No. P-2016-2535033**  
:

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**ANSWER OF PECO ENERGY COMPANY IN OPPOSITION TO  
THE PETITION OF DIRECT ENERGY SERVICES, LLC**

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Pursuant to 52 Pa. Code § 5.61 and the Secretarial Letter issued by the Pennsylvania Public Utility Commission (“PUC” or the “Commission”) at the above-referenced docket on March 24, 2016, PECO Energy Company (“PECO” or the “Company”) submits this Answer in opposition to Direct Energy Services, LLC’s (“Direct Energy”) Petition to Restart the Opt-In Retail Market Enhancement (“Petition”).

**I. INTRODUCTION AND OVERVIEW**

Under the guise of asking the Commission to “restart” a purportedly “previously ordered” Retail Opt-In (“ROI”) program, Direct Energy is proposing an ROI concept that differs substantially from the one the Commission initially endorsed, but ultimately abandoned, in the 2012-2013 Default Service proceedings of the major jurisdictional electric distribution companies (“EDCs”).<sup>1</sup> As more fully explained below, Direct Energy’s proposal is not lawful and, therefore, cannot be adopted by the Commission.

Direct Energy concedes that its proposal is a “modified version” of the ROI programs considered in prior Default Service proceedings.<sup>2</sup> That is an understatement. In fact, Direct Energy’s proposal deviates sharply from the Commission’s earlier ROI concept by, among other things, proposing that the Commission now “certify” energy saving and energy management

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<sup>1</sup> See *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641 (Final Order on Reconsideration entered Apr. 4, 2013) (“*Final Order on Reconsideration*”).

<sup>2</sup> Petition, p. 1.

products and services offered by EGSs.<sup>3</sup> That divergence raises serious legal, prudential and logistical issues that cannot be adequately addressed, consistent with fundamental due process, under the truncated and unrealistic procedural schedule Direct Energy advocates. Moreover, even if the Commission mandated implementation of Direct Energy’s proposal notwithstanding its inherent defects, the significant amount of work – system design and software programming, among other things – needed to bring the program to fruition would make the proposed implementation date (October 2016) entirely unachievable.

If the Commission does not – as it should – summarily reject the Petition, then any proceeding that may be initiated should provide a fair and reasonable opportunity for all stakeholders to explore and assess the complex and difficult issues raised by Direct Energy’s proposal. At a minimum, that process should provide for the submission of testimony, hearings and briefing. As the proponent of a rule or order, Direct Energy will have the burden of proof in such proceedings and the burden of going forward with the evidence.<sup>4</sup> Accordingly, in any proceeding initiated by the Commission, Direct Energy should present its case-in-chief before other parties are required to respond. To do otherwise would put PECO and other parties in the untenable position of having to give their views on a proposal so ill-defined in its most basic substantive elements that they would not know what they are expected to address.<sup>5</sup>

In Section II, below, PECO explains why the Commission cannot lawfully adopt Direct Energy’s proposed ROI program as proposed. In Section III, PECO further explains that the

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<sup>3</sup> See *id.*, p. 13, ¶ 16(vii).

<sup>4</sup> 66 Pa.C.S. § 332(a); 52 Pa. Code § 5.242(a).

<sup>5</sup> Contrary to generally accepted practice, Direct Energy’s Petition is not supported by the testimony of any witness on its behalf. In fact, the Petition is not even supported by a verification and, to that extent, fails to comply with the minimum requirements for a valid petition under the Commission’s regulations. 52 Pa. Code § 1.36(a) (“Applications, petitions, formal complaints, motions and answers thereto containing an averment of fact not appearing of record in the action or containing a denial of fact must be personally verified by a party thereto or by an authorized officer or other authorized employee of the party if a corporation or association.”) Because Direct Energy’s Petition is rife with “averment(s) of fact not appearing of record” (e.g., Appendix C to the Petition), a verification is unquestionably required.

proposed ROI program is neither a “pilot” nor mere “reinstatement” of a previously approved program, as Direct Energy contends. Section IV explains why Direct Energy’s proposed implementation date (October 2016) is unrealistic and unattainable. Finally, Section V sets forth PECO’s answers to the averments of each numbered paragraph of the Petition.

## **II. DIRECT ENERGY’S PROPOSAL CANNOT LAWFULLY BE ADOPTED AND, THEREFORE, SHOULD BE SUMMARILY REJECTED BY THE COMMISSION**

### **A. The Commission Does Not Have The Legal Authority To Implement An ROI Program That Conditions An Offer To Provide Generation Supply Service Upon The Customer’s Purchase Of Energy Savings/Energy Management Products And Services.**

Notwithstanding Direct Energy’s bare assertions to the contrary, the Public Utility Code does not give the Commission “authority” to enlist EDCs to market, on behalf of a subset of electric generation suppliers (“EGSs”),<sup>6</sup> a hybrid product that consists of EGSs’ offers to furnish electric generation supply service and accompanying offers to provide “energy saving or energy management product(s) or service(s).”

The customer referral and ROI programs the Commission previously considered and endorsed consisted solely of EGS offers to furnish competitive *generation* service.<sup>7</sup> The Commission’s authority to direct EDCs to participate in those programs was inferred from statutory provisions that created a role for the Commission in monitoring and overseeing “the proper functioning of a fully competitive retail *electricity* market.”<sup>8</sup> In fact, the legislature

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<sup>6</sup> Not all EGSs offer, or have affiliates that offer, energy saving and energy management products and services. Similarly, not all of the companies that sell energy saving and energy management products and services are EGSs or are affiliated with EGSs. Direct Energy would, therefore, limit the participants who can take advantage of its proposed ROI program to those EGSs that share its “business model” (*see* Petition, p. 4, ¶ 1) of selling *both* competitive electric generation service *and* energy saving and energy management products and services.

<sup>7</sup> *E.g. Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Final Order entered Mar. 2, 2012), p. 33 (Retail Opt-In programs “pose a possible safe and easy mechanism to increase customer participation in the competitive market . . .”). See also *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641 (Final Order entered Oct. 2, 2012), pp. 90-91 (Describing and approving a generation-only product.).

<sup>8</sup> 66 Pa.C.S. § 2811(b) (emphasis added).

expressly stated that the “purpose” of the Electricity Generation Customer Choice and Competition Act (“Electricity Generation Choice Act”) “is to modify existing legislation and regulations and to establish standards and procedures in order to create *direct access* by retail customers to the competitive market for *generation* of electricity . . .”<sup>9</sup>

There is nothing in the Electricity Generation Choice Act conferring authority on the Commission to create, regulate, monitor, or oversee the competitive market for *non-generation* “energy saving or energy management product(s) and service(s)” such as those Direct Energy proposes to bundle with offers for competitive generation service.<sup>10</sup> For this reason, Direct Energy cannot rely upon prior PUC orders, which endorse ROI programs consisting solely of offers for generation service, as the purported authority to implement its ROI concept. Nothing in those prior orders determined or suggested that the Commission could leverage its authority to facilitate the proper functioning of a competitive retail *generation* market to require EDCs to develop programs to also market those EGSs’ *non-generation* products and services to retail distribution customers.

The absence of Commission authority to implement Direct Energy’s proposal is underscored by Direct Energy’s contention that, in order for its proposed ROI program to function as it intends, the Commission would be required to: (1) represent to potential customers that it “endorsed” and “authorized” the non-generation “value added” products and services bundled with EGSs’ offers to sell generation;<sup>11</sup> and (2) “certify” that the bundled non-generation portion of the offer actually represents an “energy saving or energy management product or

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<sup>9</sup> 66 Pa.C.S. § 2802(12) (emphasis added).

<sup>10</sup> See Petition, p. 11, ¶ 15 (“Direct Energy therefore submits that it is time to ‘restart’ the previously postponed ROI with additional, ‘value added’ enhanced programs to better manage customers energy bills in order to . . . 2) expose non-shopping customers to the energy plus value added product and service market . . .”). See also Petition, p. 13, ¶ 16(vii).

<sup>11</sup> Petition, p. 12, ¶ 16(v).

service.”<sup>12</sup> The Public Utility Code is devoid of authority for the Commission to assume that role.

Of course, EGSs are free, on their own, to sell energy saving and energy management products and services and, indeed, the Commission has repeatedly encouraged them to do so in the past.<sup>13</sup> EGS are also free to bundle such “value-added” products and services with offers to sell electric generation service, like the one described in the Petition. And no one is suggesting EGSs should be constrained from undertaking such innovative marketing on their own if they choose to do so; indeed, as Direct Energy acknowledges, more than ten percent (10%) of EGSs do so today. However, the Public Utility Code does not authorize this Commission to enlist EDCs to help Direct Energy and some subset of EGSs that share its “unique business model” market their *non-generation* products and services under the pretext of facilitating competition for retail electricity *generation* service.

**B. Direct Energy’s Proposed ROI Program Conflicts With The Statutory Mandates Imposed On EDCs By Act 129**

Not only does the Commission lack authority under the Electricity Generation Choice Act to implement the kind of ROI program Direct Energy proposes, but doing so would directly conflict with the clear statutory purpose of the energy efficiency and conservation (“EE&C”) mandates imposed on EDCs under Act 129 of 2008 (“Act 129”).

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<sup>12</sup> Petition, p. 13, ¶ 16(vii) (“The product or service would be *certified* by the Commission as being an energy saving or energy management product or service.”) (emphasis added). Notably, while Direct Energy provides examples of the services that it may offer, which include internet-enabled devices that provide on-going energy management, it provides no information regarding any additional or on-going costs of such services to consumers after the expiration of its proposed 24-month ROI offer. Moreover, Direct Energy’s suggestion that the Commission-certified products could include discounts on rooftop solar systems – presumably offered by Direct Energy – underscores the chasm between the types of products Direct Energy is seeking to sell and the ROI program originally endorsed by the Commission. See Section III *infra*.

<sup>13</sup> See *Investigation of Pennsylvania’s Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952 (Feb. 15, 2013) (“*Final End State Order*”), p. 82 (“We maintain our encouragement to the EGSs to provide their own energy efficiency offerings . . .”).

EGSs have discretion to offer energy saving and energy management products and services – or not – based on their subjective assessment of profit potential. That is not the case with EDCs. Act 129 amended the Public Utility Code to require the provision of EE&C measures under the direction and supervision of the PUC to all electric distribution customers, whether they receive Default Service or “shop” with competitive generation suppliers. Under Act 129, EDCs were chosen – and compelled – by law to be the vehicle for ensuring that comprehensive EE&C measures are available to *all* distribution customers.

Section 2806.1 of the Public Utility Code imposed *directly* on EDCs – and requires the Commission to continue to impose – specific targets for EDCs to reduce electricity consumption and peak demand; it also dictates specific reductions to be achieved from particular customer groups.<sup>14</sup> Additionally, Section 2806.1 requires EDCs to file detailed plans identifying the specific measures they will implement to achieve targeted customer usage and peak demand reductions. The Commission must review those plans in detail and approve them before they become effective.<sup>15</sup> Finally, and most importantly, Section 2806.1(g) requires EDCs to achieve their targeted usage and peak demand reductions within a statutory cost cap, while Section 2806.1(h) imposes substantial penalties (up to \$20 million) for not achieving required reductions by stated deadlines. In other words, while limiting how much EDCs can expend to achieve mandated usage and peak demand reductions, Section 2806.1 subjects them to significant penalties if they do not reach the reductions mandated by this Commission by specific points in time.

The detailed EE&C provisions of Act 129 are comprehensive in scope and impose unique obligations – backed by stiff penalties – upon EDCs. In contrast, nothing within the four corners

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<sup>14</sup> 66 Pa.C.S. § 2806.1(b)-(d).

<sup>15</sup> 66 Pa.C.S. § 2806.1(b).

of Act 129 authorizes the Commission to “endorse,” “authorize,” “certify” or otherwise sponsor the provision of energy saving and energy management products and services by EGSs in conjunction with EGS offers to furnish electric generation service under an ROI program or any other PUC-approved program. Indeed, if the Commission were to assert jurisdiction over EGSs’ provision of EE&C measures, under the auspices of Act 129, there can be no doubt EGSs themselves would be the first to object that the Commission was exceeding its statutory authority.

The EE&C provisions of Act 129 differ markedly from the Commission’s prior asserted authority, under the Electricity Generation Choice Act, to facilitate a competitive retail electricity market (i.e., the legal grounding for the Commission’s previously endorsed retail market enhancement programs). Enlisting EDCs to help market EGSs’ offers to sell generation through an ROI program does not impinge upon any legal obligations imposed on EDCs. To the contrary, PECO and other EDCs – like the Commission and EGSs themselves – support a robust competitive retail electricity generation market in the Commonwealth. However, the situation is different with respect to providing EE&C measures.

As noted, the EE&C provisions of Act 129 impose EDC obligations, enforced by legal sanctions and substantial penalties, to achieve specified usage and peak demand reductions by set deadlines based on the measures set forth in an EDC’s approved EE&C plan.<sup>16</sup> As a consequence, usage or peak demand reductions achieved outside an EE&C plan (as would be the case for reductions obtained by the “value added” measures bundled with EGS generation sale offers such as Direct Energy proposes) will not – and cannot – count toward EDCs’ reduction targets under Act 129. In short, under the Direct Energy scheme, EDCs would be enlisted to

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<sup>16</sup> See 66 Pa.C.S. § 2806.1(c), specifying that the “plans adopted under subsection (b)” must be the source of the mandated reductions in electricity usage and peak demand.

market EE&C measures that, if adopted, would constrain their ability to fulfill their own obligations under their Commission-approved EE&C plans and expose them to large penalties. Direct Energy is well aware of this legal conflict between its proposal and the statutory strictures of Act 129, because it was explicitly addressed by comments of the trade association (in which Direct Energy is a leading member) on the Commission’s Tentative Order on the end-state of default service.<sup>17</sup> In its comments, the Retail Energy Supply Association (“RESA”) conceded that the Public Utility Code would have to be amended to accommodate its proposal to allow usage and peak demand reductions under EGS-sponsored EE&C measures to count in meeting EDCs’ statutorily-mandated reduction targets:

RESA recognizes that under the statute, EDCs are legally obligated to provide these [EE&C] programs and face significant financial penalties for failing to meet the mandated demand and consumption reduction targets. RESA recommends that, as part of any other legislative recommendations related to default service, the Commission should also support legislation to modify the EE&C requirements to rely more on competitive market participants to offer such programs and services to customers.<sup>18</sup>

In summary, not only does the Commission lack authority to implement Direct Energy’s ROI concept, any attempt to do so would conflict with the EE&C provisions of Act 129.<sup>19</sup> Simply stated, the Commission cannot, as a matter of law, implement Direct Energy’s proposal.

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<sup>17</sup> *Investigation of Pennsylvania’s Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952 (Tentative Order entered Nov. 8, 2012).

<sup>18</sup> Comments of the Retail Energy Supply Association, dated Dec. 10, 2012, at Docket No. I-2011-2237952, pp. 19-20. (Footnote 4 of RESA’s Comments identifies Direct Energy as one of its members.)

<sup>19</sup> See, in this regard, the *Final End State Order* (p. 82): “The Commission maintains its position that the provision of EE&C programs be retained by the EDCs. As stated in its *Tentative Order*, the Commission believes that the EDC-provision of EE&C programs allows for widespread outreach to the majority of Pennsylvania’s retail electric customers.”

### **C. The Commission Cannot Grant A “Blanket Waiver” Of Any And All “Rules, Regulations Or Orders” That Direct Energy’s Proposal Would Violate**

Recognizing the legal impediments to the approval of its request, Direct Energy takes the unprecedented step of asking the Commission to “waive” all rules, regulations or orders that are “inconsistent with the implementation of the proposed Program.”<sup>20</sup> However, the Commission is not free to simply “waive” its prior rules, regulations or orders absent findings, supported by substantial evidence, that the public interest requires such a waiver and that no stakeholder would be prejudiced by doing so.<sup>21</sup> The Commission cannot make such a finding here because Direct Energy has not even attempted to show that its requested “blanket waiver” – or, indeed, any “waiver” – is “necessary or appropriate” or that other parties would not be prejudiced by such “waivers.” In short, there is no evidence – let alone substantial evidence – that would support the findings necessary to grant a “waiver.”

Moreover, the authority Direct Energy cites for his proposed “waiver” – the Commission’s regulations at 52 Pa. Code §§ 1.2(c) and 56.222 – is limited in scope and could not possibly cover the full breath of the “blank waiver” Direct Energy is seeking. Section 1.2(c) applies only to Subpart A (General Provisions), encompassing Chapters 1, 3, and 5 of the Commission’s regulations, which are entirely procedural in nature.<sup>22</sup> And, in any event, Direct Energy does not show that it can meet the standard for waiver set forth in that section, as

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<sup>20</sup> Petition, p. 19, ¶ 27 and p. 20, ¶ (4). At page 20, Paragraph (4), Direct Energy asks the Commission to waive all of its “rules, regulations or orders” that are inconsistent with the adoption of “the enhanced Standard Offer Customer Referral Program as explained above.” However, Direct Energy proposed an ROI program, not a Standard Offer Customer Referral Program. PECO already has a Standard Offer Customer Referral Program in place, although Direct Energy has never participated in it.

<sup>21</sup> See 52 Pa. Code § 1.2(c), permitting a “waiver” of provisions in Subpart A of Title 52 only “when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.” See also *Barasch v. Pa. P.U.C.*, 107 Pa. Cmwlth. 122, 126, 527 A.2d 634, 636 (1987) (The Commission cannot reverse a prior position without furnishing a reasoned decision for doing so.)

<sup>22</sup> Section 1.2(c) is typically invoked for non-substantive lapses, such as filing exceptions one day late (*AT&T Communications of Pa. v. Pa. P.U.C.*, 568 A.2d 1362 (Pa.Cmwlth. 1990). See, e.g., *Info Connections, Inc. v. Pa. P.U.C.*, 630 A.2d 498 (Pa. Cmwlth. 1993) (Authorizing the Commission to waive “procedural defects” that do not affect the “substantive rights” of the parties.).

explained above. Section 56.222, in turn, applies only to Chapter 56 (Standards and Billing Practices For Residential Customers) – not to the entirety of the Commission’s “rules, regulations or orders.” But, Direct Energy has not identified what “standards and billing practices” its proposal might violate and, therefore, would be within the scope of its waiver request. Moreover, Section 56.222(a) may be invoked only upon a showing by the party seeking a waiver that it would suffer “unreasonable hardship” from complying with a specific regulation. Again, no such showing was attempted by Direct Energy.

There is, therefore, no valid basis for the Commission to consider or grant Direct Energy’s proposed “blanket waiver.”

### **III. DIRECT ENERGY’S PROPOSAL IS NEITHER A “REINSTATEMENT” OF A “PREVIOUSLY POSTPONED” ROI PROGRAM NOR A “PILOT”**

#### **A. Contrary To Direct Energy’s Contentions, Its Proposal Is Not A “Reinstatement” Of A “Previously Postponed” ROI Program**

Direct Energy asserts that it is proposing the “reinstatement” of a “previously postponed” ROI program<sup>23</sup> while also conceding that its proposal contains a “key modification.”<sup>24</sup> In reality, Direct Energy’s proposal incorporates a number of significant changes and, therefore, its attempt to package its ROI concept as merely “restarting” an earlier ROI model fails in its premise.

At the outset, the product Direct Energy now urges the Commission to order EDCs to help market is significantly different from the generation supply contract that was at the heart of the earlier ROI concept. The previous ROI product consisted of the following elements:

- The sale of generation supply service *only*;

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<sup>23</sup> See Petition, p. 11, and ¶ 16.

<sup>24</sup> *Id.* at 2.

- An initial four-month component at a price 5% below the incumbent EDC’s price-to-compare at the time of the offer;<sup>25</sup>
- A subsequent eight-month fixed-price offer, with the terms and conditions of such offer to be filed with Commission at least 45 days before that offer was to be extended to customers;<sup>26</sup> and
- A \$50 “bonus” available only to customers that remained with their assigned EGS for the entire four months of the first tranche of the offer.<sup>27</sup>

In contrast, the product Direct Energy now proposes consists of the following:

- A hybrid that bundles an offer to sell generation supply service with “energy saving and energy management product(s) and service(s)” that, presumably, would be selected from a menu like the one set forth in Paragraph 16(vii) at page 13 of the Petition;<sup>28</sup>
- A certification by the Commission that the non-generation portion of the offer “qualified as a value added energy saving or energy management product or service;”<sup>29</sup> and
- A two-year electricity generation sale contract at a fixed price 5% below the price-to-compare of the incumbent EDC at the time of the offer.<sup>30</sup>

As the forgoing summary illustrates, Direct Energy’s attempt to characterize its proposal as a “restart” of previously considered ROI programs is unsustainable. The product being offered – which is the heart of the program – is significantly different from anything the

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<sup>25</sup> *Petition of PECO Energy Company for Approval of a Default Service Program*, Docket No. P-2012-2283641 (hereafter, “*PECO DSP I*”) (Order entered Oct. 12, 2012), pp. 90-91.

<sup>26</sup> *PECO DSP II* (Order entered Nov. 21, 2012), p. 27.

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

<sup>28</sup> *Petition*, pp. 1 and 13.

<sup>29</sup> *Id.* at 13, ¶ 16(viii).

<sup>30</sup> *Id.* at 1 and 12, ¶ 16(vi).

Commission considered in the past, let alone the ROI program it endorsed but declined to implement.<sup>31</sup> Even the generation sale offer in the Direct Energy proposal is markedly different from the one the Commission reviewed in the past. Notably, the Commission previously considered and *rejected* an offer for a generation sale contract as long as two years.<sup>32</sup> Nonetheless, Direct Energy has proposed a generation sale that directly conflicts with that prior Commission ruling without even acknowledging the conflict.

Direct Energy also ignores the conflict between its proposed ROI concept and Section 2807(d)(2),<sup>33</sup> which is designed to protect shopping customers by assuring appropriate and understandable pricing information is provided to customers. Specifically, Section 2807(d)(2) provides:

The commission shall establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. *Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.* (Emphasis added.)

Under the ROI program considered in the 2012-2013 timeframe, the comparison of “prices and services” was straight-forward – the price and the term of the contract were to be spelled out in advance, and those terms could be compared to both the price-to-compare and competing offers for the sale of generation. Not so with Direct Energy’s new proposal. Rather, a value has to be placed on whatever it is that an EGS would offer by way of an “energy saving or energy management product or service” – and those “value added” products and services

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<sup>31</sup> See *Final Order on Reconsideration*.

<sup>32</sup> See *Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Tentative Order issued Dec. 16, 2011), p. 29 (“We share the concern that a two-year contract term is too long . . . We are also convinced that a two-year contract term could complicate the price and savings messages to consumers.”)

<sup>33</sup> 66 Pa.C.S. § 2807(d).

could differ materially from one EGS to another. Those differences would likely extend to energy management services provided – and associated customer-incurred costs – after the end of the two-year contract term. This problem is aggravated by the fact that customers who do not choose a specific EGS and are randomly assigned to one could receive markedly different “value-added” “product(s) and service(s)” based on the particular EGS to whom they are assigned.

The confusing array of “energy saving and energy management product(s) and service(s)” offered by participating EGSs would have significant adverse implications for EDCs and for the customers who are the alleged beneficiaries of Direct Energy’s proposed ROI program. As described by Direct Energy, EDCs would be responsible for assembling and mailing the information packet informing customers of the ROI program. That packet would have to include descriptions of, among other things, the assortment of “value added” “product(s) and service(s)” being offered by *each* participating EGS. Handling the sheer size and complexity of that mailing would be problematic. Even more important, the multitude of descriptions of alleged “value-added” “product(s) and service(s)” would certainly overwhelm the customers who receive the mailing and, therefore, are more likely to reinforce customers’ inertia to retain the status quo than to encourage and empower them to begin “shopping.”

Direct Energy’s ROI proposal differs in other material respects from the previously considered ROI concept. With respect to cost recovery, Direct Energy misstates the cost-recovery method the Commission previously approved for PECO.<sup>34</sup> Contrary to Direct Energy’s

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<sup>34</sup> Petition, p. 14, ¶ 16(x) (“For example, for PECO, the Commission approved PECO’s proposal that the cost of the ROI Program would be determined by assessing a \$1 charge for each customer that opts-in to the offer by that EGS with remaining costs (if any) recovered through either a non-bypassable surcharge or equally from EGSs through an addition to PECO’s POR discount and a charge to affected distribution customers.”)

proposal, the fee of \$1.00 was to be imposed “per assigned customer” – not based only on customers that actually “opt-in,” as Direct Energy now proposes.<sup>35</sup>

In similar fashion, in another departure from the previously considered ROI program, Direct Energy now proposes that customers who “opt-in” would be “enrolled by the EDC with one of the participating EGSs.”<sup>36</sup> The ROI process endorsed by the PUC for PECO did not require PECO to “enroll” customers. Rather, “[c]ustomers who accept the offer . . . will be enrolled by the Opt-In Supplier via a switching request and Electronic Data Interchange transaction . . .”<sup>37</sup>

Direct Energy also proposes to eliminate the provision of the earlier ROI programs that limited participation to 50% of an EDC’s eligible customer base.<sup>38</sup> That provision had been carefully considered and approved by the Commission *with the support of RESA*.<sup>39</sup> Direct Energy has not offered any cogent reason for this modification, which the trade association of which it is a member previously advocated.

In summary, Direct Energy’s attempt to package its proposal as a “reinstatement” or “restart” of a “previously ordered” ROI program is unavailing. Its proposal differs markedly from the ROI concept the Commission previously considered but declined to implement. Moreover, the Commission made it clear that, if it were to reconsider its decision declining to implement an ROI program, it would not simply “reinstate” or “restart” the previously considered program. Rather, it would “revisit” the concept in light of the on-going performance of other retail market enhancements.<sup>40</sup> The Commission clearly understood – and communicated

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<sup>35</sup> *PECO DSP II* (Order entered Feb. 14, 2013), p. 13.

<sup>36</sup> Petition, p. 12, ¶ 16(iv).

<sup>37</sup> *PECO DSP II* (Order entered Oct. 12, 2012), pp. 78-79.

<sup>38</sup> See Petition, p. 14, ¶ 16(xi).

<sup>39</sup> *PECO DSP II* (Order entered Oct. 12, 2012), pp. 90-91, 95.

<sup>40</sup> See *Final Order on Reconsideration*, p. 3.

– that “revisiting” the ROI concept would have to entail more than the cursory process Direct Energy proposes in its suggested litigation schedule.

**B. Direct Energy’s Characterization Of Its Proposal As A “Pilot” Program Is A Misnomer – The Alleged “Pilot” Would Extend To 54% Of The Residential Customers And 60% Of The Small Non-Residential Customers Of All Seven Major EDCs**

In an apparent attempt to minimize the magnitude of what it is asking the Commission to approve, Direct Energy has labeled its proposal a “Pilot Program.”<sup>41</sup> That term is a misnomer as applied to Direct Energy’s request.

A “pilot program” is commonly understood to mean a feasibility study or experimental trial conducted on a small-scale basis to help an organization learn how a large-scale project might work in practice. That is not what Direct Energy is proposing. To the contrary, Direct Energy proposes to roll-out a “pilot” across the customer base of the two largest EDCs in the Commonwealth, which collectively serve 54% of the residential and 60% of the small non-residential customers of all seven major Pennsylvania EDCs.<sup>42</sup> Moreover, Direct Energy also proposes that its “pilot” should be implemented *without* the Commission’s previously-imposed condition limiting its earlier ROI program to fifty percent (50%) of an EDC’s default service customers. This is not a “pilot;” it is a full-scale deployment of Direct Energy’s ROI concept.<sup>43</sup>

Furthermore, the shopping statistics that Direct Energy uses to try to justify its proposal also undercut its effort to characterize its ROI concept as a “pilot program.” Since Direct Energy’s alleged purpose is to reinvigorate “shopping,” it would be reasonable to expect that a

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<sup>41</sup> See Petition, p. 11, ¶ 16.

<sup>42</sup> See Appendix A, which tabulates the percentages set forth above based on data from the quarterly Retail Electricity Choice Activity Reports filed at Docket No. L-00070184 (i.e., the same data source Direct Energy used to prepare Attachment A to its Petition).

<sup>43</sup> Direct Energy has tried to rationalize its selection of the PECO and PPL Electric Corporation (“PPL”) service territories by claiming its broad-based proposal is really only a “pilot” that targets EDCs with fully deployed “smart meters.” Yet, its own statements belie its motivation, because Direct Energy concedes that smart meters are not a necessary precondition to implementing its program. See Petition, p. 15, fn. 35 (“Smart meters are not absolutely required for energy saving products and service to be offered . . .”)

purported “pilot” should be implemented in the service areas of those EDCs with the lowest levels of shopping by the targeted classes. Direct Energy has proposed the exact opposite. PECO and PPL had the highest percentages of residential and small business customers shopping for generation service of any EDCs in the fourth quarter of 2015.<sup>44</sup> And, Direct Energy’s contention that its radically new “pilot” concept, which would bundle *non-generation* products and services with generation service, is somehow necessary because, in Direct Energy’s opinion, retail *generation* shopping has “plateaued somewhat” is totally unsupported.<sup>45</sup>

Because Direct Energy’s proposal cannot, without fracturing accepted usage, be characterized as a “pilot,” it is also wrong for Direct Energy to suggest that, as a “pilot,” its proposal can be adopted with only an abbreviated procedural schedule and can be put into operation on a fast-tracked implementation timeline. It cannot. Direct Energy proposes a full-scale, company-wide deployment, for the two largest EDCs in the state, of an ROI program that is a radical departure from anything the Commission has previously considered. While its proposal is defective as a matter of law and should be rejected on that basis alone, even if the Commission were to consider it, a more robust procedural schedule would have to be adopted to provide reasonable notice of substantive issues and an adequate opportunity for other stakeholders to respond. Moreover, as more fully addressed in Section IV *infra*, Direct Energy’s proposed implementation schedule – with a go-live date in October 2016 – simply cannot be achieved.

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<sup>44</sup> Petition, Appendix A.

<sup>45</sup> Petition, p. 2. In this regard, it is noteworthy that Direct Energy, while lauding the Standard Offer Customer Referral Program’s efficacy in increasing the number of customers shopping for electricity in Pennsylvania, does not even participate in PECO’s Standard Offer Customer Referral Program.

#### **IV. DIRECT ENERGY'S PROPOSED IMPLEMENTATION TIMELINE IS UNREALISTIC**

For the reasons previously discussed, the Commission should not adopt Direct Energy's proposal. However, it is important for the Commission to also understand that Direct Energy's proposed implementation date of October 2016 is entirely unrealistic.

The work required to roll-out a program like the one Direct Energy is promoting is considerable. And, contrary to Direct Energy's unsupported contentions, "the work already achieved by the EDCs to prepare for the subsequently postponed ROI" does not make Direct Energy's proposed "implementation target" "reasonable." As the Commission is well aware, its *Tentative Order* and *Final Order on Reconsideration* were entered on March 14 and April 4, 2013, respectively. There was not a significant amount of work done by PECO on the prior ROI program by March 2013, and Direct Energy provides no basis whatsoever for its assertion that EDCs should have stood ready (and presumably continue to incur any associated costs) to immediately implement a program that the Commission had suspended.

Moreover, even the modest amount of work that was performed in 2013 is no longer usable because of other major changes that have occurred in PECO's customer accounting and billing systems at the direction of the Commission. Indeed, since March 2013, PECO has implemented, or is in the process of implementing, a number of initiatives designed to promote and facilitate customer shopping for electric generation. These initiatives include the Commission-approved Standard Offer Customer Referral Program, off-cycle switching, electric account number look-up, the "fixed credit option" for customers in PECO's Customer Assistance Program, the Advanced Meter Infrastructure web portal, and seamless moves and instant connects. Because of the system modifications these initiatives require, the software code written for the prior ROI program can no longer be applied to PECO's system. Furthermore,

PECO is currently working to develop, implement, and administer the various initiatives described above. As a consequence, its resources are already fully engaged in those projects. It is not feasible to continue those Commission-imposed programs on their existing timelines while, at the same time, trying to achieve an October 2016 implementation date for an ROI program like the one Direct Energy is proposing.

**V. ANSWERS TO AVERMENTS IN THE NUMBERED PARAGRAPHS OF DIRECT ENERGY'S PETITION**

1. Admitted in part, and denied in part. It is admitted that Direct Energy is a licensed EGS in Pennsylvania. The Company lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph No. 1. Accordingly, those averments are denied and proof thereof requested at a hearing in this matter.

2. Admitted.

3. Denied. The Commission's Order cited by Direct Energy speaks for itself. Accordingly, Direct Energy's characterization of the Commission's purpose and intent in entering that Order is denied.

4. Denied. The Commission's Order cited by Direct Energy speaks for itself. Accordingly, Direct Energy's attempted summary and characterization of the Commission's Order are denied.

5. Denied. The Commission's Orders cited by Direct Energy speak for themselves. Accordingly, Direct Energy's attempted summary and characterization of the Commission's Orders are denied. It is specifically denied that the Orders identified in Paragraph No. 5 of the Petition "affirmed" any authority by the Commission to approve an ROI program like the one proposed by Direct Energy.

6. Admitted. In further answer, despite proposing an entirely new program to allegedly “jump start” competition, Direct Energy has not participated in PECO’s Standard Offer Customer Referral Program or offered any reason for its failure to do so.

7. Admitted. In further answer, the Commission does not have authority to include “value added products and services” in the Standard Offer Customer Referral Program for the same reasons it lacks authority to include “value added products and services” in an ROI program, as explained in Section II, *supra*.

8. Admitted.

9. Denied. The Commission’s *Tentative Order* and *Final Order on Reconsideration* speak for themselves. Accordingly, Direct Energy’s attempted summary and characterization of those Orders are denied.

10. Admitted.

11. Denied. The data set upon which Direct Energy relies is too small and covers too short a time to support the sweeping generalization Direct Energy offers in its Petition. Moreover, the data presented differ substantially by company; Direct Energy’s reliance on state-wide averages misstates the level of shopping in PECO’s service territory.

12. Denied, for the reasons set forth in the Answer to Paragraph No. 11, above. In further answer, while Direct Energy attempts to marginalize the success retail market enhancements have had in PECO’s service territory, the data produced in Appendix A to the Petition show that PECO has experienced increases in shopping among customers in the two groups targeted by Direct Energy, notwithstanding the relatively short time-frames covered by that data. Moreover, contrary to what the shopping data would suggest, Direct Energy makes the counter-intuitive proposal that its ROI “pilot” should target the two companies with the most robust shopping statistics. As previously explained, if Direct Energy’s proposal was, in fact,

designed to “jump start” increased shopping in areas where it allegedly has “plateaued,” as Direct Energy claims, there is no reasonable basis to select PECO and PPL as the only subjects of that proposal.

13. Denied. To the extent Direct Energy is suggesting that the Standard Offer Customer Referral Program was intended as a means of marketing “ ‘value added’ ” non-generation “products and services,” its averments are denied. The Standard Offer Customer Referral Program was not designed to fulfill that purpose and, for the reasons set forth in Section II, *supra*, the Commission does not have legal authority to impose a Standard Offer Customer Referral Program that bundles offers for non-generation products and services with offers for generation service. Additionally, the fact that between 10% and 15% of existing EGS offers already include non-generation “value added” products and services is strong evidence that EGSs are ready, willing and able to craft innovative sales channels for non-generation “energy saving and energy management” products and services on their own without the need for the unprecedented and unauthorized imposition of the kind of ROI program Direct Energy espouses.

14. Admitted in part and denied in part. It is admitted that: (1) customers benefit from the deployment of “smart meters;” (2) customers currently have an abundance of options for “monitoring and managing their energy usage;” (3) the Standard Offer Customer Referral Program has fostered increased shopping and increased awareness of the availability of alternatives to Default Service; and (4) “value added goods and services” for monitoring and reducing electricity usage are widely available in the competitive marketplace today. It is denied that Direct Energy’s proposed ROI program is needed to “increase awareness” or “facilitate” the “overall development of energy-efficiency, demand-response, and connected home devices.” It is also denied that Direct Energy’s proposal, if implemented, would achieve those goals.

15. The averments of Paragraph No. 15 are a prayer for relief to which an answer is not required. Nonetheless, PECO denies that Direct Energy's proposed ROI program is needed to achieve the alleged goals identified in Paragraph No. 15 and also denies that Direct Energy's proposal, if implemented, would actually achieve those goals.

16. The averments of Paragraph No. 16, which outline Direct Energy's proposed ROI program, constitute a prayer for relief to which an answer is not required. Nonetheless, a number of averments of fact embedded in Direct Energy's request for relief are erroneous and, therefore, in addition to a blanket denial by PECO of Paragraph No. 16, PECO denies various specific averments for the reasons set forth in detail in Sections II, III and IV, *supra*. Accordingly, the responses to Direct Energy's proposal set forth in Sections II, III and IV, above, are incorporated herein by reference as if set forth at length.

17. Admitted in part and denied in part. It is admitted that Direct Energy has accurately quoted portions of Section 501 of the Public Utility Code<sup>46</sup> and Section 69.1815 of the Commission's regulations.<sup>47</sup> It is denied that either of those provisions furnishes any authority for the Commission to adopt Direct Energy's proposed ROI program or to grant the "blanket waiver" it requests.

18. Denied. Direct Energy's reliance on Sections 1.2(c) and 56.222 of the Commission's regulations<sup>48</sup> is misplaced. Neither provision authorizes the "blanket waiver" that Direct Energy requests. It is also denied that Direct Energy has established that the conditions for the limited waivers permitted under Sections 1.2(c) and 56.222 have been met. In further answer, PECO incorporates herein by reference Section II.C., *supra*, as if set forth at length.

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<sup>46</sup> 66 Pa.C.S. § 501.

<sup>47</sup> 52 Pa. Code § 69.1815.

<sup>48</sup> 52 Pa. Code § 1.2(c) and 56.222.

19. Denied for the reasons set forth in Sections II.A. and B, *supra*, which are incorporated herein by reference as if set forth at length. The Commission does not have the authority to adopt the ROI program Direct Energy has proposed.

20. Denied for the reasons set forth in Sections II.A. and B, *supra*, which are incorporated herein by reference as if set forth at length. The Commission does not have the authority to adopt the ROI program Direct Energy has proposed. In further answer, none of the authorities cited by Direct Energy authorize the Commission to establish retail market enhancement programs to market non-generation products and services.

21. Denied for the reasons set forth in Sections II.A. and B, *supra*, which are incorporated herein by reference as if set forth at length. The Commission does not have the authority to adopt the ROI program Direct Energy has proposed. In further answer, none of the authorities cited by Direct Energy authorize the Commission to establish retail market enhancement programs to market non-generation products and services. No party challenged the Commission's authority to establish retail market enhancement programs to promote shopping for *generation* service. The Commission has never before considered a program like the one Direct Energy now proposes, which would bundle the compulsory purchase of non-generation products and service with offers to sell competitive generation service.

22. Denied for the reasons set forth in Sections II.A. and B, *supra*, which are incorporated herein by reference as if set forth at length. The Commission does not have the authority to adopt the ROI program Direct Energy has proposed. In further answer, none of the authorities cited by Direct Energy authorize the Commission to establish retail market enhancement programs to market non-generation products and services. No party challenged the Commission's authority to establish retail market enhancement programs to promote shopping for *generation* service. Moreover, EGSs already have the ability to "jump start" the

“differentiation” of their generation products by bundling offers for the sale of generation with non-generation products and services if they choose to do so – and some already do. EGSs do not need the Commission to create an unprecedented – and unauthorized – ROI program in order to initiate such innovative marketing techniques. In fact, as Direct Energy has conceded, between 10% and 15% of the offers from EGSs to electric customers in Pennsylvania already bundle generation service with “value added” energy saving and energy management products and services.<sup>49</sup>

23. Denied. It is denied that the Commission should attempt to implement an unauthorized retail market enhancement for the untested and unsupported proposition that non-generation, “value added” products and services will not otherwise be offered by EGSs or that EGSs are incapable, on their own, of raising customers’ awareness of such EGSs’ offers to sell non-generation products and services.

24. Denied. The Commission’s authority to promote the Commonwealth’s goals of “increasing energy efficiency and reducing carbon emissions” is limited to the authority conferred upon it by the EE&C provisions of Act 129, which represent the carefully considered policy decisions of the Pennsylvania legislature. For the reasons set forth in detail in Section II.B., *supra*, and incorporated herein by reference as if set forth at length, the Commission lacks authority to adopt Direct Energy’s proposed ROI program and doing so would directly conflict with the express policies and goals set forth by the Pennsylvania legislature in the EE&C provisions of Act 129. In further answer, it is not possible to “coordinate the energy efficiency products and services to be provided as part of [Direct Energy’s] ROI with each EDC’s Act 129 programs” because, as RESA, speaking on behalf of Direct Energy and its other members, has

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<sup>49</sup> See Petition, p. 10, ¶ 13.

already stated in comments to the Commission, such “coordination” requires a legislative change. *See* Section II.B., *supra*.

25. Admitted in part and denied in part. Direct Energy’s recitation of the history of the Commission’s consideration, and ultimate abandonment, of the ROI programs in EDC Default Service proceedings in the 2012-13 timeframe is admitted. It is denied that those prior proceedings justify short-circuiting fundamental due process by adopting a truncated and inadequate schedule for considering and deciding Direct Energy’s Petition, as Direct Energy now advocates. For the reasons set forth in Section I, *supra*, and incorporated herein as if set forth at length, the abbreviated schedule Direct Energy is trying to force on the Commission would not provide interested parties adequate notice of the issues – since Direct Energy has utterly failed to flesh out its proposal – or a reasonable opportunity to respond. Thus, even if the Commission were inclined to consider Direct Energy’s Petition, a proper litigation schedule would have to be established providing for: (1) Direct Energy’s submission of its case in chief; (2) a reasonable opportunity for discovery; (3) the submission of responsive testimony by other interested parties; (4) evidentiary hearings; (5) briefing, an initial or recommended decision, exceptions and reply exceptions.

26. Denied for the reasons set forth in Paragraph 25 above and in Sections III and IV, *supra*, which are incorporated herein by reference as if set forth at length.

27. Denied for the reasons set forth in Section II.C., *supra*, which are incorporated herein by reference as if set forth at length.

The averments in Paragraphs (1) – (5) at pages 19-20 of the Petition are Direct Energy’s prayer for relief, to which a response is not required. For the reasons set forth above, those requests for relief should be denied.

WHEREFORE, for the foregoing reasons, the Petition of Direct Energy to Expand Retail Market Enhancements should be denied.

Respectfully submitted,



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Dated: May 9, 2016

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## APPENDIX A

### Residential And Small Non-Residential Customers Of PECO Energy Company and PPL Electric Utilities Corporation As A Percentage Of All Residential And Small Non-Residential Customers Of The Seven Major Pennsylvania EDCs – Fourth Quarter 2015

Company	Residential Customers*	Small Non-Residential Customers*
PECO	1,444,465	156,748
PPL	1,241,062	180,349
<b>Subtotal</b>	<b>2,685,527</b>	<b>337,097</b>
Met-Ed	493,793	41,027
Penelec	497,959	54,751
Penn Power	143,073	11,807
West Penn	619,612	66,282
Duquesne	524,560	50,162
<b>Grand Total</b>	<b>4,964,524</b>	<b>561,126</b>

**PECO and PPL (Subtotal) as a percentage of all Pennsylvania EDCs (Grand Total):**

**Residential Customers:**  $2,685,527/4,964,524 = .541$  (54.1%)

**Small Non-Residential Customers:**  $337,097/561,126 = .601$  (60.1%)

\* **Source:** Retail Electricity Choice Activity Reports for the quarter ended December 31, 2015, as filed at Pennsylvania Public Utility Commission Docket No. L-00070184.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF DIRECT ENERGY :  
SERVICES, LLC TO EXPAND RETAIL :       Docket No. P-2016-2535033  
MARKET ENHANCEMENTS :**

**VERIFICATION**

I, Richard G. Webster, hereby declare that I am the Vice President of Regulatory Policy and Strategy of PECO Energy Company; that, as such, I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Answer of PECO Energy Company in Opposition to the Petition of Direct Energy Services, LLC to Expand Retail Market Enhancements are true and correct to the best of my knowledge, information and belief; and that I make this verification subject to the penalties of 18 Pa.C.S. § 4904 pertaining to false statements to authorities.



Richard G. Webster, Jr.  
Vice President of Regulatory Policy and  
Strategy of PECO Energy Company

Date: May 6, 2016