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August 11, 2016

*Via Electronic Filing*

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

Re: Petition of PECO Energy Company for Approval of Its Default  
Service Program for the Period June 1, 2017 through May 31, 2019;  
Docket No. P-2016-2534980

Dear Secretary Chiavetta:

Enclosed for filing on behalf of Noble Americas Energy Solutions LLC are its Objections to the Joint Petition for Partial Settlement in the above-referenced proceeding. Copies of the Objections are being served on the parties to this proceeding in accordance with the attached certificate of service.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Charles E. Thomas, III

Enclosure

cc: Honorable Cynthia Williams Fordham (via email and first class mail)  
Per Certificate of Service  
Becky Merola

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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Petition of PECO Energy Company for :  
Approval of Its Default Service Program for : Docket No. P-2016-2534980  
the Period June 1, 2017 through May 31, 2019 :

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**OBJECTIONS OF NOBLE AMERICAS ENERGY SOLUTIONS LLC  
TO THE JOINT PETITION FOR PARTIAL SETTLEMENT**

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AND NOW, comes Noble Americas Energy Solutions LLC (“Noble”), by its attorneys, and submits the following Objections to the Joint Petition for Partial Settlement entered into by PECO Energy Company (“PECO”), the Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, the Philadelphia Area Industrial Energy Users Group, and the Retail Energy Supply Association (collectively, the “Joint Petitioners”) which was filed with the Pennsylvania Public Utility Commission (“Commission”) on July 28, 2016 in the above-captioned matter. These Objections are submitted pursuant to 52 Pa. Code § 5.232 and the procedure and schedule approved by presiding Administrative Law Judge Cynthia Williams Fordham by email on July 28, 2016.<sup>1</sup> In support thereof, Noble submits as follows:

**I. INTRODUCTION**

Noble is an independent non-utility or generation-affiliated competitive Electric Generation Supplier (“EGS”) and PJM Interconnection, L.L.C. (“PJM”) Load Serving Entity (“LSE”) licensed by the Commission to offer, render, furnish or supply electricity and electric

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<sup>1</sup> In accordance with that procedure and schedule, Noble is authorized to file its formal written objections to the Partial Settlement on August 11, 2016, and any party wishing to address the matters raised in these Objections will have an opportunity to do so by filing a written response by August 25, 2016.

generation supplier services to large commercial (over 25kW), industrial, and governmental customers, and to residential and small commercial (25kW and under) customers (limited to mixed meters), throughout the Commonwealth of Pennsylvania, including PECO's service territory. Noble offers commodity products and services to commercial and industrial customers that specifically enable customers to successfully manage costs in volatile energy markets. Noble provides Pennsylvania customers with an integrated mix of services, including commodity supply, physical risk and portfolio management, energy information management, scheduling, settlement and billing management. As a licensed EGS, Noble has a direct and substantial interest in the Commission's disposition of this proceeding, as it will be bound and affected by the actions taken by the Commission with respect to PECO's fourth Default Service Program ("DSP IV"), which, if approved consistent with the terms of the Partial Settlement, will be in effect for a period of four years, from June 1, 2017 through May 31, 2021.<sup>2</sup>

PECO's DSP IV must comply with the provisions of the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801-2812 (the "Competition Act"). The Competition Act mandates the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation, transmission and distribution. 66 Pa.C.S. § 2804(3); *see also id.* § 2802(13). In that regard, the Competition Act requires electric distribution companies ("EDCs"), such as PECO, to collect distribution costs from customers, while generation and transmission costs are unbundled and collected instead by EGSs from retail shopping customers.

In addition to complying with the Competition Act, DSP IV cannot violate federal regulatory laws and authorizations, including those of the Federal Energy Regulatory Commission ("FERC"), as well as applicable PJM agreements and rules. PECO is a "public

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<sup>2</sup> Partial Settlement at ¶ 12.

utility” as the term is defined in Section 201(e) of the Federal Power Act (“FPA”), 16 U.S.C. § 824(e), and is affiliated with other companies that own transmission and other affiliates that are members of PJM. Accordingly, PECO and its transmission affiliates are subject to FERC’s jurisdiction and the terms and conditions of the PJM Open Access Transmission Tariff (“OATT”)<sup>3</sup> and Operating Agreement,<sup>4</sup> including the terms and conditions that require the provision of transmission service to eligible customers, including Noble.<sup>5</sup>

Under PECO’s first two default service programs, LSEs, including EGSs, were responsible for transmission costs charged by PJM, including Generation Deactivation/Reliability Must Run (“RMR”) charges (PJM bill line 1930), Expansion Cost Recovery charges (“ECRCs”) (PJM bill line 1730), and Transmission Enhancement (a/k/a Regional Transmission Expansion Plan “RTEP”) charges (PJM bill line 1108).<sup>6</sup> However, as part of its third default service program (“DSP III”), PECO changed course with respect to how retail shopping customers are charged for *unbundled* transmission service and implemented a new Non-Bypassable Transmission Charge (“NBT”) to collect and recover from all distribution customers certain “non-market based” PJM transmission charges, including Generation Deactivation/RMR charges, ECRCs, and RTEP charges.<sup>7</sup> In doing so, PJM charges were

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<sup>3</sup> PJM Open Access Transmission Tariff, available at <http://www.pjm.com/media/documents/merged-tariffs/oatt.pdf> (last visited Aug. 10, 2016).

<sup>4</sup> Amended and Restated Operating Agreement of PJM, available at <http://www.pjm.com/media/documents/merged-tariffs/oa.pdf> (last visited Aug. 10, 2016).

<sup>5</sup> PJM is a “public utility” as that term is identified in Section 201(e) of the FPA. PJM provides transmission and other services under the FERC-approved OATT. PJM is a duly authorized regional transmission organization (“RTO”) approved by FERC pursuant to 18 C.F.R. §35.34. PJM is the Transmission Provider as that term is defined in the PJM OATT, and as such, is responsible for the administration of the PJM OATT. PJM’s footprint covers thirteen states, including Pennsylvania and the District of Columbia.

<sup>6</sup> PECO DSP IV Petition at 8. See also *Petition of PECO Energy Company For Approval of its Default Service Program II* (Order and Opinion entered Sept. 27, 2012), slip op. at 60 (holding that transmission and transmission-related costs should continue to be collected by EGS, rather than by PECO through a non-bypassable rider).

<sup>7</sup> *Id.* at 8-9. Generation Deactivation charges (OATT Part V), in particular, are charges for *generation*, not transmission and, according to PJM’s billing guide, are based on revenues:

artificially labeled as either “market” or “non-market based,” a labeling practice that continues to persist with EDCs’ most recent default service proceedings.

As part of the Partial Settlement of the DSP IV proceeding, PECO is once again seeking Commission approval to continue using its NBT to unlawfully recover these “non-market based” PJM transmission charges from shopping customers. Although the Commission approved the recovery of such charges on a non-bypassable basis in PECO’s DSP III proceeding,<sup>8</sup> the Commission should not allow PECO to continue to do so with respect to *shopping customers* for the duration of DSP IV for the reasons discussed more fully below.

## **II. NOBLE’S OBJECTIONS TO THE PARTIAL SETTLEMENT**

The Partial Settlement purports to resolve all issues, except one,<sup>9</sup> related to PECO’s DSP IV. Noble, however, has not joined the Partial Settlement and opposes the Partial Settlement, as indicated in its letter filed on July 28, 2016.

Noble’s objections to the substance of the Partial Settlement concern the treatment and recovery of FERC-jurisdictional wholesale market charges at the retail shopping level during the duration of DSP IV. Specifically, pursuant to Paragraph 38 of the Partial Settlement, PECO

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[C]ollected for generators requesting retirement where PJM studies find reliability issues that require the generation to continue operating. Cost allocations to zonal load and firm withdrawal rights are determined by PJM based on the beneficiaries. These responsible customers pay the generation owners a share of the Deactivation Avoidable Cost Rate or the FERC-approved Cost of Service Recovery Rate. ***Any time that the zonal cost allocations change, notice is provided to the Markets and Reliability Committee, Market Implementation Committee, and Market Settlements Working Group prior to the change being implemented.***

PJM Guide to Billing, available at <http://www.pjm.com/markets-and-operations/billing-settlements-and-credit/guide-to-billing.aspx> (last visited Aug. 10, 2016) (emphasis added). As PJM’s billing guide illustrates, there are various transmission and transmission-related costs that comprise PJM charges and are included as line items on PJM bills. PECO has selectively chosen certain of these billing line items, artificially labeled them as “non-market based” charges, and implemented a non-bypassable rider to transfer the collection of these costs from EGSs to PECO. However, there is no substantive basis which would warrant the continuation of this mechanism.

<sup>8</sup> See Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2015 through May 31, 2017, Docket No. P-2014-2409362 (Order entered Dec. 4, 2014), slip op. at 40-46.

<sup>9</sup> That issue, concerning PECO’s proposed plan concerning CAP customers to shop for electric generation supply, has been reserved for briefing.

would continue “to be responsible for and recover the following PJM charges from all distribution customers in [its] service territory through its [NBT]: Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014; RTEP charges (PJM bill line 1108), and [ECRCs] (PJM bill line 1730).”<sup>10</sup> This provision has several shortcomings which forms the basis of Noble’s objections, most notably: (1) The PJM transmission charges subject to the NBT fall squarely within the FERC’s jurisdiction and PECO’s continued recovery of these charges from shopping customers on a non-bypassable basis violates the terms of the PJM OATT and FERC orders; (2) PECO’s NBT is unjust, unreasonable, and unduly discriminatory and violates the Competition Act; and (3) the NBT interferes with an EGS’s rights as a PJM LSE to directly bill their shopping customers for their PJM transmission charges in connection with customized product and service offerings.

**1. The PJM Transmission Charges Subject to PECO’s NBT Fall Squarely Within FERC’s Jurisdiction**

The PJM transmission charges subject to the PECO’s NBT fall squarely within the FERC’s jurisdiction, and PECO’s continued recovery of these charges from shopping customers on a non-bypassable basis is unlawful because it violates the terms of FERC orders and the PJM OATT.

FERC Order No. 888 and Order No. 2000 provide clear directives regarding wholesale transmission service: all customers must take service pursuant to an OATT, and each RTO must control and administer its own transmission tariff pursuant to such requirements.<sup>11</sup> Further, in

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<sup>10</sup> Partial Settlement ¶ 38. While the Partial Settlement would permit the NBT to be collected from “all distribution customers” (i.e., shopping and non-shopping), Noble’s objections only pertain to shopping customers.

<sup>11</sup> *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy*

Order No. 888, FERC gave guidance on the issue of Federal versus State jurisdiction over transmission in interstate commerce and distribution, concluding that its jurisdiction under Section 201(b) of the FPA extends to the provision of transmission service when the sale of retail electric service is unbundled, as unbundled transmission service is within the FERC's exclusive jurisdiction.<sup>12</sup>

As a result, FERC found:

The [FERC]'s assertion of jurisdiction is that if retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail wheeling program, the [FERC] has exclusive jurisdiction over the rates, terms, and conditions of such transmission and public utilities offering such transmission must comply with the FPA by filing proposed rate schedules under section 205.<sup>13</sup>

PECO's NBT is exactly the type of wholesale transmission charge that falls clearly within FERC's jurisdiction, as FERC and courts have repeatedly found in similar situations. In *New York v. FERC*, the U.S. Supreme Court specifically noted that FERC's jurisdiction is broad in regard to transmission and affirmed FERC's assertion of jurisdiction over retail transmission:

It is true that FERC's jurisdiction over the *sale* of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity *transmissions* contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.<sup>14</sup>

While PECO's DSP IV includes certain wholesale products and may be impacted by changes in either the retail or wholesale market, that should not be construed to somehow extend the Commission's jurisdiction over matters that are properly within the jurisdiction of FERC and

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*Study Group v. FERC*, 225 F.3d 667 (D.C. Cir 2000), *aff'd sub nom. New York v. FERC*, 535 U.S.1 (2002); *Regional Transmission Organizations*, Order No. 2000, 65 FR 809, (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom, Pub Util. Dist. No. 1 of Snohomish Country, Washington v. FERC*, 272 F.3d 607 (D.C. Circuit. 2001) ("Order No. 2000").

<sup>12</sup> Order No. 888, slip op. at 431.

<sup>13</sup> *Id.*

<sup>14</sup> *New York v. FERC*, 535 U.S. 1, 20 (2002) (emphasis in original).

PJM. The Commission's jurisdiction is targeted and limited to intrastate retail market matters, and its Orders must not undermine the policies promulgated by, or infringe upon the jurisdiction of, FERC which has exclusive jurisdiction over the interstate wholesale market. Because the PJM transmission charges subject to PECO's NBT fall squarely within FERC's jurisdiction, the Partial Settlement in this regard must be rejected or otherwise modified accordingly.

**2. PECO's NBT Is Unjust, Unreasonable, and Unduly Discriminatory and Violates the Competition Act**

In addition to jurisdictional concerns, permitting PECO to continue to use its NBT for recovery and collection of these PJM transmission charges from shopping customers would constitute a re-bundling of transmission and distribution in direct contravention of the Competition Act. It also shifts responsibility for procuring these transmission costs from the competitive retail market – as it traditionally has and should be done – to a regulated service, again in violation of the Competition Act.

The Partial Settlement's continuation of the NBT to collect certain PJM transmission charges from shopping customers is also inconsistent with competition in the wholesale and retail power markets because of its price and market suppressive effects. Its effects are unduly discriminatory, as the non-bypassable charge interferes with an EGS's ability to innovate, build products and services, and otherwise compete in the retail electric market. The NBT also circumvents and ignores existing market structures, shifts the risk to Pennsylvania consumers, and deprives consumers of choice. Non-bypassable charges on shopping customers are the antithesis of competition, employing a one-size-fits-all approach, negatively affecting the incentives of EGSs to build products and services, and results in harm to existing LSEs that have

in good faith followed the rules and the PJM OATT, all of which holds shopping customers captive.<sup>15</sup>

This predatory attempt to shift risk and assign costs directly harms retail choice. By placing an EGS's PJM wholesale transmission charges – *i.e.*, Deactivation/RMR charges (PJM bill line 1930), RTEP charges (PJM bill line 1108), and ECRCs (PJM bill line 1730) – within its NBT, PECO is directly and materially interfering with the ability of suppliers, including Noble, who compete with PECO's retail affiliate from offering further retail market products and services and innovation to shopping customers. Consequently, the NBT is not competitively neutral in that it harms those suppliers that do not have the same business plan as those that support it, including their affiliates.

The fact that a transmission charge is served on all LSEs at the wholesale level does not mean that LSEs' loads or the management of those loads are the same, that LSEs' business risks are the same, or that all LSEs have the same expertise or priorities. Indeed, in order to provide products and services at retail levels, it is imperative for an LSE/EGS to understand its load, manage costs (including wholesale costs), and hedge risks. These are business functions that are the responsibility of the LSE. For example, making better forecasts requires the devotion of adequate resources to improve the forecasting process. Simply passing through the imbalances and PJM charges via the NBT discourages LSEs from making the investments necessary for better forecasting. Moreover, insulating an LSE/EGS from its wholesale market responsibilities for its own individual wholesale costs actually discourages that market participant from seeking

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<sup>15</sup> See *Electric Power Supply Association, et al. v. FirstEnergy Solutions Corporation, et al.*, Docket No. EL16-34-000, Order Granting Complaint, 155 FERC ¶ 61,101 (April 27, 2016) (concluding that even though retail ratepayers might have a statutory right to choose suppliers, they are nonetheless “captive” because they have no choice as to payment of non-bypassable generation-related charges).

the means to manage its costs effectively and instead shifts that risk and responsibility from the LSE/EGS to the Pennsylvania electric consumer, who in turn becomes captive.

Ultimately, retail suppliers that have issues with the PJM OATT and related PJM transmission charges should address those matters through the PJM stakeholder process and/or at FERC. Those issues should not be inserted in a Commission default service proceeding and addressed through the implementation and continuation of PECO's NBT, as means of shifting an EGS's wholesale market risk.

**3. PECO's NBT Interferes with an EGS's Rights as a PJM LSE To Directly Bill Their Shopping Customers for Their PJM Transmission Charges in connection with Customized Product and Service Offerings**

PECO's NBT should also be rejected because it endangers and interferes with customized product and service offerings and the attendant contractual obligations between LSEs/EGSs and their shopping customers, including the LSEs participation in the PJM market as the billing party. PJM LSEs maintain the right to direct bill their shopping customers for their PJM transmission charges as part of their individual and propriety contracts with those customers. Noble provides direct billing to its shopping customers through a competitive product that is highly tailored to the individual customer. Unlawfully forcing retail EGSs to unilaterally transfer certain billing responsibility and rights to PECO interferes with an EGS's ability to offer unique and innovate billing products to its shopping customers. It also ignores and alters the billing determinants used for transmission service available to shopping customers/LSEs through the PJM tariff and removes an EGS/LSE's billing services available to its shopping customers. Such unduly discriminatory treatment goes to the heart of the FPA's prohibition against unduly discriminatory and preferential charges.<sup>16</sup>

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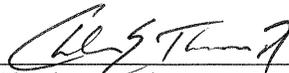
<sup>16</sup> *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 418 (1952) (stating that "(a) major purpose of the whole (Federal Power) Act" was to protect customers from excessive prices).

### III. CONCLUSION

The Commission is being asked to approve a Partial Settlement which would authorize PECO to continue using its NBT to collect and recover certain PJM transmission charges from shopping customers, viz. Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014, RTEP charges (PJM bill line 1108), and ECRCs (PJM bill line 1730). Even though this non-bypassable recovery mechanism was approved as part of PECO's DSP III case, the Commission should reject the continued use of the NBT in DSP IV as it relates to *all shopping customers* for the reasons discussed above and should modify the Partial Settlement to prohibit the NBT from being used to collect PJM transmission charges on a non-bypassable basis from shopping customers.

WHEREFORE, Noble Americas Energy Solutions LLC respectfully requests that Administrative Law Judge Cynthia Williams Fordham and the Pennsylvania Public Utility Commission sustain these Objections to the Joint Petition for Partial Settlement, modify the Partial Settlement consistent therewith, and provide any other relief that may be warranted under the circumstances.

Respectfully submitted,



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*Counsel for Noble Americas Energy Solutions LLC*

DATED: August 11, 2016

## CERTIFICATE OF SERVICE

I hereby certify that I have this 11<sup>th</sup> day of August, 2016, served a true and correct copy of the foregoing document upon the parties, listed below, via email and first class mail in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

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