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August 25, 2016

Via Hand Delivery

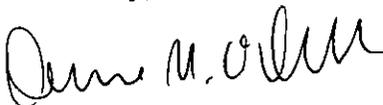
Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for please find the Response of the Retail Energy Supply Association ("RESA") to
Objections of Noble Americas Energy Solutions LLC to the Joint Petition for Partial Settlement
with regard to the above-referenced matter. Copies to be served in accordance with the attached
Certificate of Service.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Cynthia Fordham w/enc.
Cert. of Service w/enc.

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**RESPONSE OF RETAIL ENERGY SUPPLY ASSOCIATION
TO OBJECTIONS OF NOBLE AMERICAS ENERGY SOLUTIONS LLC TO THE
JOINT PETITION FOR PARTIAL SETTLEMENT**

I. INTRODUCTION

On July 28, 2016, PECO Energy Company (“PECO”) filed a Joint Petition for Partial Settlement (“Settlement Petition”) supported by the Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the Philadelphia Area Industrial Energy Users Group (“PAIEUG”) and the Retail Energy Supply Association (“RESA”)¹ (collectively, “Joint Petitioners”). The Settlement Petition reserves for briefing the issue of permitting low income customers participating in PECO’s Customer Assistance Program (“CAP”) to shop for electric generation supply. Interested parties (including RESA) submitted their main briefs on this issue on August 11, 2016 and reply briefs are to be submitted August 25, 2016.

The only party opposing the Settlement Petition is Noble Americas Energy Solutions LLC (“Noble”). As set forth in its Objections filed on August 11, 2016, Noble specifically opposing the continued non-bypassable recovery of various charges for shopping customers

¹ The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

only. Consistent with the agreement reached in this proceeding, RESA submits this response to Noble's Objections. As explained further below, RESA continues to support the Settlement Petition as a reasonable resolution of the issues raised in Noble's Objections. The Settlement Petition is lawful, fully supported by the record in this proceeding and approving it is in the public interest. Therefore, RESA recommends that the Administrative Law Judge ("ALJ") deny Noble's Objections.

II. DESCRIPTION OF THE ISSUE AND BACKGROUND

Noble opposes the continuation of PECO's current cost recovery mechanism for the following PJM transmission charges: (1) Generation Deactivation/Reliability Must Run ("RMR") charges, Expansion Cost Recovery charges and Transmission Enhancement (a/k/a Regional Transmission Expansion Plan "RTEP") charges (collectively, "RMR et al.")² Noble's opposition is limited to opposing the continued use of a non-bypassable cost recovery mechanism to recover the costs of these charges for shopping customers.

Consistent with the Commission-approved cost recovery mechanism from PECO's currently effective default service proceeding ("*PECO DSP III Order*"), PECO recovers the costs associated for these charges for all load serving entities ("LSEs"), including electric generation suppliers ("EGSs"), for all customers (default service customers and shopping customers).³ In the *PECO DSP III* proceeding, the parties did not reach a full consensus on the issue although they did offer a partial settlement that set forth how PECO would implement a Commission decision which adopted its preferred outcome on the litigated issues.⁴ While PECO

² Noble Objections at 5.

³ PECO St. No. 2 at 10. *Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2015 through May 31, 2017*, Docket No. P-2014-2409362, Opinion and Order entered December 4, 2014 at 46 ("*PECO DSP III Order*").

⁴ *PECO DSP III Order* at 15-16, referencing Paragraphs 48-50 of the settlement.

and RESA supported the non-bypassable cost recovery mechanism for RMR et al., this approach was opposed by PAIEUG.⁵ Regarding cost recovery for NITS, both PECO and PAIEUG opposed RESA's position that it should be recovered through the same non-bypassable cost recovery mechanism as proposed for RMR et al.⁶ All these parties set forth their various position in briefs and exceptions in the DSP II proceeding. Although Noble was also a party in the *PECO DSP III* proceeding, it did not submit any briefs or exceptions regarding these issues. In its letter of non-opposition to the *PECO DSP III* settlement, Noble set forth its understanding regarding issues related to PECO's Standard Offer Program but did not address the provisions related to the issues discussed herein.⁷

Ultimately, the Commission in its *PECO DSP III Order* adopted the cost recovery positions favored by PECO: (1) RMR et al. to be recovered from all customers through a non-bypassable mechanism;⁸ and, (2) NITS to be recovered by PECO only for default service customers.⁹ The Commission also approved the *PECO DSP III* partial settlement without modification.¹⁰ No party sought reconsideration of the cost recovery issue¹¹ nor was the final order appealed.

In this DSP IV proceeding, PECO did not propose any change to the DSP III Commission-approved cost recovery mechanisms.¹² RESA was the only party to raise the issue

⁵ *PECO DSP III Order* at 41.

⁶ *PECO DSP III Order* at 47-49.

⁷ Letter of Noble dated September 4, 2014 filed at Docket No. P-2014-2409362.

⁸ *PECO DSP III Order* at 46.

⁹ *PECO DSP III Order* at 53-54.

¹⁰ *PECO DSP III Order* at 26.

¹¹ The Office of Small Business Advocate sought reconsideration of the Commission's determination in regard to hourly pricing for PECO's Medium Commercial customers, i.e., those with peak demands greater than or equal to 100 kW, but less than 500 kW. The Commission adjudicated the OSBA's petition in its Opinion and Order entered February 26, 2015.

¹² PECO St. No. 2 at 10-11.

in its direct testimony. Specifically, RESA Witness White testified that RESA continues to support recovering the costs of PJM transmission-related charges (including NITS) through a non-bypassable rider as “a fair and equitable way to ensure that all customers (whether default service customers or shopping customers) are only required to pay the actual costs of these non-market based charges.”¹³ While Mr. White also specifically stated that RESA was not advocating a change to the treatment of NITS in this proceeding (recognizing the Commission’s decision in the *PECO DSP III Order*), Mr. White did offer recommendations about how PECO could provide more transparency regarding NITS.¹⁴ PECO was the only party to respond to RESA’s testimony on this issue, and it supported the suggestions of Mr. White.¹⁵ No further testimony on this issue was offered by any other party in surrebuttal.

Thus, consistent with the record developed in this proceeding, the Settlement Petition maintains PECO’s current cost recovery approach (Paragraph 38 of the Settlement Petition) while including RESA’s recommendation about providing more transparency regarding NITS (Paragraph 39).¹⁶ Noble’s Objections are limited to Paragraph 38 of the Settlement Petition and Noble only objects to the continued PECO current cost recovery mechanism for shopping customers. For the reasons set forth below, RESA does not support Noble’s Objections.

III. SETTLEMENT PETITION SHOULD BE APPROVED

While the Commission’s long-standing policy is to encourage settlements, the Commission must determine that the proposed terms and conditions of the settlement are in the

¹³ RESA St. No. 1 at 3.

¹⁴ RESA St. No. 1 at 4-5.

¹⁵ PECO St No. 2-R at 6.

¹⁶ Settlement Petition at 13-14.

public interest.¹⁷ Section 332(a) of the Public Utility Code provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.¹⁸ It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”¹⁹ The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. The burden of production tells the adjudicator which party must come forward with evidence to support a particular proposition.²⁰ The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established, and it never leaves the party on whom it is originally cast.²¹ In this case, the Joint Petitioners have the burden to prove that the Settlement Petition is in the public interest. As discussed further below, this burden has been met and the Settlement Petition should be approved as filed.

A. SETTLEMENT PETITION IS LAWFUL

Noble offers two legal arguments in support of its opposition to the Settlement Petition. First, Noble argues that the Federal Energy Regulatory Commission (“FERC”) has exclusive jurisdiction over all issues related to these charges and the Partial Settlement infringes on this jurisdiction.²² Second, Noble argues that the Settlement Petition is in direct contravention of the

¹⁷ *PECO DSP III Order* at 21, citing *Pa. PUC v. York Water Co.*, Docket No. R-00049165, Order entered October 4, 2004 and *Pa. PUC v. C. S. Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991).

¹⁸ 66 Pa.C.S. §332(a).

¹⁹ *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990)

²⁰ See *In re Loudenslager's Estate*, 240 A.2d 477, 482 (1968).

²¹ *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa. Commw. Ct. 1993).

²² Noble Objections at 5.

Competition Act because it constitutes “a re-bundling of transmission and distribution.”²³

Neither of these legal arguments support rejecting the Settlement Petition.

Regarding the first argument, States do not have the authority to disregard an interstate wholesale rate required by FERC or to prevent recovery of the wholesale rate through retail rates.²⁴ However, the issue here is not about the rates but rather how these charges (once they are set) should be recovered from retail customers. As nothing in the Settlement Petition proposed to regulate the “rates, terms, and conditions” of these charges in contravention to the jurisdiction of FERC, there is no jurisdictional issue here barring the Commission from approving the settlement.

Likewise, regarding the second argument, the Commission has already concluded that it has the legal authority to approve non-bypassable cost recovery mechanisms for these charges. Noble argues that the continued cost recovery treatment of RMR et al. on a non-bypassable basis is “unjust, unreasonable and unduly discriminatory and violates the Competition Act” on the basis that it constitutes “a re-bundling of transmission and distribution.”²⁵ In the FirstEnergy default service case preceding the *PECO DSP III Order*, this exact argument was raised by the Industrial User Groups (“IUG”).²⁶ In response to this argument, the Commission specifically “disagreed” that a non-bypassable cost recovery mechanism “would violate the Competition Act, the Public Utility Code or [Commission] Regulations.”²⁷ The Commission reaffirmed this

²³ Noble Objections at 7.

²⁴ *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 at 1298-1299 (U.S. 2016)

²⁵ Noble Objections at 7-9.

²⁶ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of their Default Service Programs*, Docket Nos. P-2013-2391368, P-2013-2391372, P-2013-2391375, P-2013-2391378, Opinion and Order entered July 24, 2014 at 36 (“*FE DSP III Order*”).

²⁷ *FE DSP III Order* at 38.

position in its *PECO DSP III Order*.²⁸ As such, the Commission has already considered and rejected the legal view that Noble raises here regarding the Commission's authority to continue the current cost recovery process.

For all these reasons, the Commission has all the requisite legal authority necessary to approve the Settlement Petition and RESA urges the ALJ to recommend approval of the Settlement Petition.

B. SETTLEMENT PETITION IS SUPPORTED BY THE RECORD

In addition to its legal arguments, Noble also offers numerous facts to support its opposition to the Settlement position including:

- non-bypassable treatment “interferes with an EGS’s ability to innovate, build products and services, and otherwise compete in the retail electric market” depriving consumers of choice;
- non-bypassable treatment “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;”
- non-bypassable treatment discourages LSEs from making the investments necessary for better forecasting;
- non-bypassable treatment “endangers and interferes with customized product and service offerings and the attendant contractual objections between LSEs/EGSs and their shopping customers;”
- “Noble provides direct billing to its shopping customers through a competitive product that is highly tailored to the individual customer;”²⁹

The record, however, contains none of these facts and, therefore, there is no record support for Noble's Objections. Moreover, Noble's view that allowing PECO to continue to collect the RMR et al. charges on a non-bypassable basis negatively impacts customers is in contrast to the Commission's clear determination in the *PECO DSP III Order* “that the non-

²⁸ *PECO DSP III Order* at 46.

²⁹ Noble Objections at 7-9.

bypassable recovery of certain PJM transmission charges is beneficial to customers.³⁰ There is nothing on the record of this proceeding to support a reversal of the Commission's prior conclusion regarding customer impact.

To the contrary, the record in this proceeding fully supports the Settlement Petition. Specifically, RESA Witness White testified that non-bypassable recovery of these costs is "a fair and equitable way to ensure that all customers (whether default service customers or shopping customers) are only required to pay the actual costs of these non-market based charges."³¹ No party disputed this testimony. As such there is no record support for the Noble's Objections and RESA supports approval of the Settlement Petition as submitted.

C. SETTLEMENT PETITION IS IN THE PUBLIC INTEREST

Ultimately, the Commission must determine whether approval of the settlement is in the public interest. For the reasons discussed above, Noble's Objections provide neither legal justification nor record support to reject the Settlement Petition. Aside from this, however, it is important to recognize that this specific issue has been highly contentious in numerous proceedings and the Commission has set forth its position. None of the parties active in those prior litigations (namely PECO, RESA and PAIEUG) sought to re-open the Commission's prior determinations in this proceeding. As such, the Settlement Petition does not – as RESA would prefer – recommend that all these charges (to include NITS) be recovered on a non-bypassable basis for all customers. The Settlement Petition also does not, as PAIEUG had previously advocated (and what Noble advocates here), reverse the current non-bypassable treatment for the RMR et al. charges. Despite this, both RESA and PAIEUG fully support the Settlement Petition.

³⁰ *PECO DSP III Order* at 46 (emphasis added).

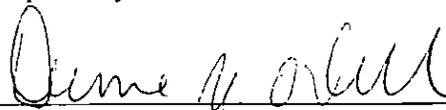
³¹ RESA St. No. 1 at 3.

In its Statement in Support, PAIEUG specifically references continuing the current bypassable treatment of NITS as well as implementing the various NITS transparency provisions as in the public interest.³² Similarly, in its Statement in Support, RESA states that the outcome of the Settlement Petition on this issue “is a practical and reasonable outcome.”³³ Therefore, while the Settlement Petition does not propose consistent cost recovery treatment for all these charges, it does – consistent with the Statements in Support of both RESA and PAIEUG – present a reasonable outcome of this issue that is in the public interest.

IV. CONCLUSION

RESA continues to support the Settlement Petition as a reasonable resolution of the issues raised in Noble’s Objections and recommends that the Commission approve the Settlement Petition as filed.

Respectfully submitted,



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Attorneys for Retail Energy Supply Association

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³² Settlement Petition, Statement E at 4.

³³ Settlement Petition, Statement F at 3.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Response to Objections of Noble Americas Energy Solutions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: August 25, 2016

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