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December 27, 2012

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company for Approval of
Its Default Service Program; Docket No. P-2012-2283641

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Retail Energy Supply Association's Comments to Revised Default Service Plan Compliance Filing Dated December 11, 2012, with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely yours,

A handwritten signature in cursive script that reads "Deanne M. O'Dell".

Deanne M. O'Dell, Esq.

DMO/lww
Enclosure

cc: Hon. Dennis Buckley, ALJ w/enc.
Certificate of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of RESA Comments to Revised Default Service Plan Compliance Filing Dated December 11, 2012 upon the participants listed below in accordance with the requirements of § 1.54 (relating to service by a participant).

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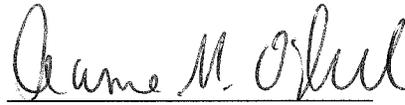
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Date: December 27, 2012

A handwritten signature in cursive script, reading "Deanne M. O'Dell". The signature is written in black ink and is positioned above a horizontal line.

Deanne M. O'Dell, Esquire

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company For : Docket Nos. P-2012-2283641
Approval Of Its Default Service Program :

**RETAIL ENERGY SUPPLY ASSOCIATION COMMENTS
TO REVISED DEFAULT SERVICE PLAN
COMPLIANCE FILING DATED DECEMBER 11, 2012**

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I. INTRODUCTION

The Retail Energy Supply Association (“RESA”)¹ submits these Comments to the Revised Default Service Plan Compliance Filing dated December 11, 2012 (“Revised Default Service Plan”) and submitted by PECO Energy Company (“PECO” or the “Company”). The Revised Default Service Plan was filed in accordance the Opinion and Order of the Commission entered October 12, 2012, in the above-captioned proceeding (“*PECO Default Service Order*”). The *PECO Default Service Order* adjudicated the default service plan submitted by PECO on January 13, 2012 and required:

- PECO, electric generation suppliers (“EGSs”) and interested parties are to file an updated proposal for the role of independent monitor, Opt-In Program EGS selection and Opt-In Program customer assignment that aligns with the revised program design directed by the Commission (Order at 91);
- PECO to convene a collaborative among the parties to review the terms and conditions of PECO’s proposed EGS application and form agreement (“EGS Applications and Form Agreements”) for the Retail Market Enhancement (“RME”) programs and to submit any recommended revisions to the Commission (Order at 107);
- PECO, EGSs and interested parties to resubmit a plan or proposal addressing how EGSs or customers will pay for the costs of the RME programs; (Order at 148)

The Commission issued a subsequent order addressing petitions for reconsideration and/or clarification on November 21, 2012 (“*PECO Default Service Reconsideration Order*”) which provided further clarity regarding issues relevant to the RME programs. In the Revised Default Service Plan, PECO proposed that parties file comments on December 27, 2012 and

¹ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

reply comments on January 7, 2013. RESA submits these comments consistent with this proposed schedule.

The collaborative process did yield positive changes to address some concerns of RESA which are incorporated in the Revised Default Service Plan. However, the parties were not able to reach consensus on all issues and, in those instances, PECO resubmitted its initial flawed proposals (notwithstanding RESA's request for modifications). As explained more fully below, PECO's cost recovery proposals must be modified to create a greater chance that EGSs will choose to participate in the programs to increase the likelihood that they may be successfully implemented. In addition, the Commission should direct PECO to permit small commercial and industrial ("C&I") customers to participate in the customer referral programs. Finally, although RESA does not agree that PECO's EGS Applications and Form Agreement are even necessary, to the extent the Commission permits them to be utilized, they still contain provisions that must be modified. For all these reasons, RESA requests that the Commission adopt the modifications proposed herein so that there is a greater likelihood that the RME programs are successfully implemented for the benefit of consumers in the PECO service territory.

II. PECO'S COST RECOVERY PROPOSALS MUST BE REJECTED

The key to successful implementation of the RME programs is to ensure that the programs are properly structured to encourage participation by EGSs as well as customers. There is no legal or other requirement that EGSs participate in any of the RME programs and, without the supportive participation of the EGSs, these programs cannot succeed. While RESA can support PECO's revised approach of translating program costs into a customer enrollment fee, if these costs are unreasonably high, then they will discourage EGSs from participating in the programs. Pursuant to the testimony filed in this proceeding, PECO estimates that the

implementation costs (defined as “IT, IVR, Call Center and Mailings”) for the standard offer customer program would be approximately \$1.3 million and the annual cost of program call center support would be \$900,000 per year.² Importantly, PECO made clear that this was only an estimate and that “the actual cost may vary significantly depending on the final design of each program.”³ In the collaborative process, PECO never provided any further level of detail or projections about the true costs that are likely to be incurred. RESA is concerned because, under the cost recovery approach recommended by PECO, PECO is assured full recovery of all costs of implementing and operating the RME programs and, therefore, has no incentive to structure the program to maximize the chances that the program would be successful in a cost effective manner. For this reason, directing PECO to provide detailed information about its expected final costs with supporting information is critically important.

In addition, the Commission should consider how to address the issue of cost allocation. As discussed below, there are other more reasonable alternatives to PECO’s insistence that 100% of the costs must be allocated to EGSs that would be more likely to lead to successful implementation of these programs – because more EGSs would participate. In addition, PECO’s proposal to recover the costs of the standard offer program through the POR discount must be rejected as the primary cost recovery mechanism; it is a completely unreasonable way to allocate the costs of an unrelated program to EGSs without regard for whether or not they participate in the program.

² PECO Exhibit ABC-5 (notes that these costs are estimates and subject to change).

³ PECO St. No. 5 at 19 (emphasis added).

A. PECO's Proposal To Allocate 100% Of The Costs To EGSs Must Be Modified

Consistent with its initial proposals in this proceeding, PECO proposes in the Revised Default Service Plan to allocate 100% of the costs of both RME programs to EGSs and characterizes the program costs as “tantamount to . . . EGS marketing expenses.”⁴ PECO states that it is maintaining its original proposals because “the collaborative participants were unable to reach a consensus” on a different cost allocation approach.⁵ Notwithstanding PECO’s unwillingness to support a different approach from its initial proposals, RESA urges the Commission to consider an alternate arrangement whereby consumers either pay in full or share a reasonable portion of the overall program costs with participating EGSs.

Allocating a reasonable portion (or even all) of the costs of the programs to consumers is fair because the RME programs benefit all stakeholders, especially default customers who are the targets of the programs. Claims that these costs only benefit EGSs or simply represent an EGSs’ marketing expenses are nothing more than meaningless shell arguments attempting to detract away from the reality that consumers – whether or not they are default or shopping customers – will be required to pay for these programs. Just as EDCs pass on their costs of providing default service to their default service customers, EGSs will likely need to pass on their costs to their “shopping” customers. Suggesting that EGSs pay for all of the costs because they gain some benefit from these programs is akin to arguing that EDC shareholders alone should pay 100% of the costs of the EDC’s billing and collection system because those systems inure to the financial benefit of the EDC.⁶ Likewise unsupported is PECO’s claims that these costs are nothing more

⁴ Revised Default Service Plan at 9, 11.

⁵ Revised Default Service Plan at 9.11.

⁶ RESA St. No. 2-SR at 23.

than EGS marketing costs. The products and programs that the EGS is required to offer through the RME programs are much more risky than an EGS's regular offering and, therefore, cannot be compared to an EGS's regular marketing activities. Thus, neither of PECO's claims add any substantive value to resolving this important issue and each should be ignored.

Rather, consistent with RESA's advocacy in this proceeding, allocating 100% of the costs of these programs to default service customers is fair and reasonable. These initiatives are only necessary because of the existence of and continued dominance of default service among mass market customers. Without default service, all customers would be on competitive supply thus eliminating the need for measures to encourage them to enter the competitive market.⁷ Indeed, the competitive enhancements will ultimately benefit default service customers since a significant number of these customers continue to remain on default service even though they would be able to save money or achieve other benefits by shopping.⁸ As such, these initiatives target default service customers – who have not chosen an EGS – and create incentives for them to choose an EGS. Since these programs are specifically targeted at default service customers, assessing them the costs of implementing these programs is reasonable.

Most importantly, the Commission should consider allocating 100% of the costs of the RME programs to distribution ratepayers because the opposite – allocating all the costs to EGSs – is likely to severely limit EGS participation and, thus, the success of the programs. This is especially true of the standard offer customer referral program. Based on PECO's preliminary cost estimate and the assumption that all implementation costs would be recovered in the first year of the program depending on customer participation, the cost per customer could exceed

⁷ RESA St. No. 1 at 17.

⁸ RESA St. No. 2 at 7-8.

\$75 per customer.⁹ In RESA’s judgment, if the cost of the standard offer customer referral program are significantly higher than \$30 per customer, there is little chance that EGSs will choose to participate. This is because there are risks to the EGSs to participating in the program. For example, EGSs are being asked to bear the costs of the standard offer “product” which is to be a 7% discount from a still to be determined PTC that must maintained for 12 full months regardless of how the PTC may change during that timeframe. EGSs do not have any right to full cost recovery for this product and, depending on how market conditions impact the effective PTCs during this time period, EGSs will bear the risk of either losing customers who exit the program or continuing to serve customers at lower than market price. Another significant risk is requiring EGSs to commit to participate in the program without any way of knowing the level of customer participation to expect. Notably, under PECO’s cost recovery proposal, participating EGSs would be responsible for reimbursing PECO if, after the start of the program, no EGSs elect to continue to participate or if there are unrecovered costs for which PECO has yet to be reimbursed.¹⁰ Thus, allocating 100% of the costs of the standard offer customer referral program in particular exclusively to EGSs will diminish the likelihood that EGSs will choose to participate which will lead to an unsuccessful program.

Even though RESA’s primary view is that the costs of the RME programs should be allocated 100% to consumers, RESA does recognize that the Commission directed parties to consider “the possibility that customers as well as EGSs may be responsible for some program

⁹ \$1.3 million divided by 2 plus \$9 million divided by 20,000 participating customers = \$110 per customer.

¹⁰ See Revised Default Service Plan, Exhibit G, paragraph 9.

costs.”¹¹ Recognizing the desire of the Commission to consider a cost sharing arrangement, RESA offers the following for the Commission’s consideration.

1. Recovery Of Difficult To Quantify And Capital Costs From Consumers Is Reasonable

PECO proposes to recover all costs from EGSs which it specifically identifies as information system implementation costs for website and IVR changes, incremental call center support for the program and other associated administrative costs for the standard offer customer referral program.¹² The costs identified for the opt-in program include “the service of the Statistical Expert, and all incremental costs of developing, printing, and mailing the offer package (including return postage.”¹³ Some of these costs include capital costs or other costs – such as customer representative time – which would be more appropriately recovered from all consumers because these costs are either impractical to recover otherwise or are likely to provide benefits to customers beyond the implementation of the RME programs.¹⁴ Identifying these costs and then allocating them exclusively to consumers – who receive benefits beyond implementation of the RME programs – is fair and reasonable.

¹¹ *PECO Default Service Reconsideration Order* at 15.

¹² Revised Default Service Plan, Exhibit E at 6.

¹³ Revised Default Service Plan, Exhibit D at 10.

¹⁴ PPL offered a similar approach for similar reasons in its pending default service proceeding. *Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2013 Through May 31, 2015* Docket No. P-2012-2302074, Petition filed May 1, 2012 (Commission resolution of exceptions is pending) PPL St. No. 4-R at 44, 47.

2. Implementation Costs Should Be Recovered Over A Longer Amortization Period

PECO has been adamant that the recovery of the implementation costs for the RME programs must be fully collected within two years.¹⁵ Notwithstanding PECO's position, the implementation costs for both RME programs should be amortized over a reasonable period and RESA recommends five to seven years. Under normal ratemaking, an EDC would be permitted to recover the costs over the useful life of the asset. These costs are either straight capital or would be capitalized under generally accepted accounting rules because of the longer-term nature of the investment. In addition, the nature of the benefit – more customers in the competitive market – will accrue over a longer period, as customers who are exposed to the competitive market continue to realize benefits. Finally, it is very likely that the standard offer customers referral program will remain in place for several years to come (similar programs in New York have been in existence for almost ten years now). Therefore, the reasonable and prudent implementation costs of both the RME programs should be recovered from EGSs on an amortized bases, over five to seven years.

3. The Commission Should Implement A Cost Sharing Approach To Enhance Program Success And To Keep Program Costs As Low As Possible

Whether or not the Commission wishes to modify the program structure in order to try to obtain a consensus it should nevertheless decide to share the costs of both programs with EGSs and customers. If costs are going to be shared between distribution customers and EGSs, then the Commission should consider a cost recovery schedule that keeps costs at reasonable levels

¹⁵ PECO takes this position regarding the RME program costs despite its proposal in its initial filing that “the capital costs of any necessary IT or other changes will be amortized generally over five years.” PECO St. No. 5 at 18. Apparently, PECO did not intend to include the capital costs related to the RME programs in this amortization request.

and provides incentives for PECO to keep costs as low as possible. The costs of the opt-in program (which PECO has projected at about \$1 per customer solicitation) can be reasonably split equally between customers and EGSs. For the standard offer customer referral program, since the program is ongoing and it is impossible to determine with any certainty how many customers will participate, RESA urges that the Commission consider the following process:

1. Costs of both programs should be shared equally between EGSs and distribution customers.
2. On an expedited basis, PECO should submit a detailed projection of both how it intends to implement both the opt-in program and the standard offer customer referral program and the implementation and ongoing costs it projects it will incur for each. The costs should be subject to discussions with interested parties including the EGSs.
3. For each program, an initial, “per customer” cost for the first year of the program should be established by the Commission. For the opt-in program that “per customer” cost can reflect PECO’s best projection of what the costs will be (PECO has used a cost of about \$1 per mailing which is not unreasonable.) For the standard offer customer referral program, however, the Commission should establish a “per customer” cost of no more than around \$30/customer. If the per customer costs were to be significantly higher, RESA has serious doubts that EGSs will participate in the program.
4. EGSs would be asked to remit half of the initial per customer costs in order to participate in the opt-in program and the standard offer customer referral program.
5. PECO would be given the opportunity to recover the remaining initial per customer costs from distribution customers via a surcharge.
6. If the actual costs of the two programs exceed the initial per customer costs, PECO should be permitted to make a claim for the excess in a future base rate proceeding, but should be permitted to recover them from customers and EGSs, only if, after a proceeding, the Commission finds that PECO’s implementation approach and cost projections were prudent and reasonable. Specifically, PECO’s claim should be judged on whether it was designed to achieve the greatest success at the lowest, reasonable cost. If the Commission finds that PECO’s plan does not meet this standard, then revisions to the plan and costs should be ordered (with any necessary refunds provided to EGSs and customers who already paid at the higher initial level).
7. Any costs incurred by the PECO that are subsequently determined not to meet this “greatest success at lowest reasonable cost” standard should be

declared to be imprudent be and should be required to be absorbed by PECO shareholders.

4. Cost Sharing Can Be Coupled With Reasonable Program Design Changes To Address Concerns Raised By Consumer Advocates

One possible modification that the Commission could consider might be to structure the existing products in ways that would reasonably address concerns that have been raised by the Office of Consumer Advocate (“OCA”) in exchange for allocating some of the costs to consumers. For example, OCA has expressed concerns about assuring consumers a “guaranteed” savings for a particular period of time. If the amount of time an EGS is required to guarantee this savings is lessened and the cost burden to EGSs is shared, then such a result may be possible. The opt-in program could be structured so that the term of the program is six months and EGSs agree to provide a 5% guaranteed savings from the PTC in effect during the term (in addition to the \$50 bonus paid after three months if the customer stays with the EGS) in exchange for a cost allocation agreement whereby 50% of the costs are recovered from consumers. Similarly, the standard offer customer referral program could be structured so that EGSs would provide customers a guaranteed discount of 7% off the PTC for the first four months of the twelve-month program again, in exchange for a cost allocation agreement whereby 50% of the costs are recovered from consumers.

OCA has also expressed concerns about the product consumers will receive at the end of the RME program if they take no other action.¹⁶ Assuming both programs are restructured as suggested above to address the guaranteed savings issue, OCA’s concern about the end of the

¹⁶ Customers in both programs would remain free to leave at any time and without penalty. They would also be free to affirmatively select another product of the EGS. OCA’s concern, as understood by RESA, is limited to those customers who have chosen to participate in the program and have taken no other action at the time the program ends.

program can also be addressed in exchange for allocating the costs of the program on a 50/50 basis between EGSs and consumers. For the six month opt-in program, EGSs could be required to provide a fixed price product to participating customers in the program at the end of the six month term. This additional six month fixed price offering would not be a continuation of the opt-in program and RESA would not recommend any additional regulatory requirements – beyond the requirement of a fixed price product to address OCA’s concerns – on this product. In contrast, the standard offer customer program would be a twelve-month program term with the guaranteed savings in operation only during the first four months. For the remaining eight months, to address OCA’s concern, EGSs would offer a fixed price product to those customers who have not selected another option. Standard Commission regulations and rules would apply at the end of the twelfth month of the customer referral program.

While RESA continues to believe that its primary positions regarding the design of the RME programs are superior and justify full allocation of the costs to consumers, RESA also recognizes that the programs may have a better chance at being successfully implemented if reasonable compromise is reached. In that spirit, RESA requests that the Commission give due consideration to comprehensively addressing the design and cost recovery issues consistent with the suggestions set forth herein.

B. PECO’s Proposal To Recover The Initial And On-Going Costs Of The Standard Offer Customer Referral Program Through The POR Discount Must Be Rejected

PECO’s initial filing proposed to recover costs associated with the RME programs through the Purchase of Receivables (“POR”) program. Through a POR program, PECO purchases the accounts receivable of the EGS, adds the supplier’s charges to the customer’s distribution bill, and sends the customer one bill with all his or her electricity charges. A component of the POR program is the amount by which the EDC purchases the EGS’s accounts

receivables. The “POR discount” refers to an amount that is some percentage less than 100% by which the EDC purchases the accounts receivable. The discount has been used to: (1) recover the administrative costs to develop and administer the POR; and/or, (2) recover the uncollectible expense associated with the EDC’s inability to collect 100% of the value of the accounts bought from the customer. Under PECO’s proposals, a new third use for the POR discount would be established to recover the costs of the RME programs. More specifically, PECO initially proposed: (1) to recover all the costs of the standard offer customer referral programs through the POR discount;¹⁷ and, (2) to recover the costs of the opt-in program through the POR discount if no EGSs participated.¹⁸ RESA opposed PECO’s proposals and, in the *PECO Default Service Order*, the Commission stated that it “has significant concerns that the POR discount method of allocating costs may be a significant barrier to EGS participation.”¹⁹ Consequently, parties were directed to resubmit a plan or proposal addressing how participating EGSs or customers will pay for the costs of the RME programs.

In the Revised Default Service Plan, PECO has modified its cost recovery proposal for the opt-in program so that only any amount due to PECO by a specific supplier participating in the opt-in program can be recovered from that supplier through the POR discount rate.²⁰ RESA does not oppose this change because it relies on the POR program only when an amount is overdue and only to recover the costs from the specific delinquent supplier.

For the standard offer customer referral program, however, PECO simply resubmitted its initial proposals to utilize the POR program to recover costs because: (1) no other agreement was

¹⁷ PECO St. No. 2 at 29; PECO St. No. 5 at 19.

¹⁸ PECO St. No. 2 at 25; PECO St. No. 5 at 19.

¹⁹ *PECO Default Service Order* at 148.

²⁰ Revised Default Service Plan at 10.

reached by the participants; and, (2) the standard offer customer referral program “will be available to all EGSs.”²¹ RESA vehemently disagrees that the POR program is an appropriate primary mechanism through which to recover the costs of the RME programs and, consistent with the Commission’s view, believes that implementation of such a mechanism may be a significant barrier to EGS participation for several reasons.

First, the proposal violates the principle of cost recovery following cost causation. The purpose of the POR discount, as explained above, is to recover an EDC’s POR program implementation costs, administrative costs and/or the uncollectible accounts expense associated with the purchased accounts. From the perspective of traditional rate-making, the RME programs have nothing to do with the costs that are intended to be recovered through the POR discount, which should reflect the uncollectible rate on supplier charges billed through utility consolidated billing. There is also no evidence that these programs would favor EGSs in proportion to the volumes they bill through utility consolidated billing, though that is how the proposed mechanism would assess those costs.²²

Second, utilizing POR would result in the unintended consequence of exempting those suppliers who do their own billing (through dual billing) and could encourage those utilizing POR to no longer do so because they are receiving less value for their purchased accounts. Either consequence would not be in the public interest.

Third, any purchase of receivables-based assessment would unfairly and disproportionately assess competitive suppliers based on market share. In other words, the more customers an EGS has utilizing POR, the more significant the POR discount and the more the

²¹ Revised Default Service Plan at 11.

²² See RESA St. No. 1 at 28; RESA MB at 91-93; RESA RB at 51-52.

EGS will be contributing to the RME program. Market share is gained in large part, by significant investments in the Commonwealth, expenditures on the part of the supplier to educate customers to increase their awareness of choice and product offerings, and to better manage their overall energy usage. Instead of receiving the benefit of these investments through the acquisition of a greater number of customers, these EGSs would be penalized in the form of being required to make a proportionally larger financial contribution to the retail market enhancements.

Finally, PECO's claim that cost recovery through the POR program is appropriate because the standard offer customer referral program is available to all EGSs is nonsense. Even though the POR program is likewise available to all EGSs, only those EGSs participating in the program have been required to pay the administrative costs of the program through the POR discount. This is logical since the program participants are the ones receiving the benefit of the program. A strict application of PECO's terribly flawed logic to rely on the POR program as the primary funding mechanism for the standard offer customer referral program, however, would require all EGSs licensed in PECO's service territory to pay for the RME program regardless of whether or not they use it. Such a result would not only be unfair but would create an additional cost of doing business that EGSs would need to factor into their decision-making process when assessing whether or not to serve customers in PECO's service territory.

III. SMALL BUSINESS CUSTOMERS MUST BE ELIGIBLE TO PARTICIPATE IN THE STANDARD OFFER CUSTOMER REFERRAL PROGRAM

The Revised Default Service Plan proposes to limit eligibility in the standard offer customer referral program to residential customers only.²³ As set forth in RESA's Petition For

²³ Revised Default Service Plan, Exhibit E at 1.

Reconsideration *Nunc Pro Tunc* Or For Amendment Of The Commission's October 12, 2012 Order filed on December 14, 2012, RESA supports the inclusion of small C&I customers with loads of 25 kw and below in the customer referral programs. PECO has not included these customers in its referral program based on its view that it was not required to do so by the *PECO Default Service Order*. However, as explained in RESA's Petition, RESA believes the Commission intended to include small C&I customers in the referral programs. Further, such result would be consistent with the Commission's conclusion in the FirstEnergy default service proceeding that "including small commercial customers in the market enhancement programs will further the objectives of the Choice Act by inducing more customers to shop and ultimately reduce the costs of electric generation"²⁴ and the Commission's determination in the *Intermediate Work Plan Final Order* that small C&I customers should be included in new and moving customer referral programs.²⁵ Further, allowing small C&I customers in PECO's service territory to take advantage of the customer referral programs, in addition to participating in the opt-in program, will advance the Commission's policy to encourage shopping among all customer classes as small C&I participation in all RME initiatives is more likely to lead to greater levels of shopping within this customer segment than if these customers can participate in only the opt-in program.

²⁴ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Default Service Program*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (Opinion and Order issued Aug. 16, 2012) (Amended Opinion and Order issued September 27, 2012) at 13 (emphasis added).

²⁵ *Investigation of Pennsylvania Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Final Order entered March 2, 2012 at 18.

IV. PECO'S EGS APPLICATIONS AND FORM AGREEMENTS ARE UNNECESSARY BUT, IF THEY ARE PERMITTED, MODIFICATIONS MUST BE MADE

RESA opposes PECO's proposal that each EGS participating in the RME programs be required to sign PECO's EGS Applications and Form Agreements as a condition of being able to participate in the program.²⁶ RESA notes that the relationship between an EGS and an EDC is already governed by existing agreements such as the supplier tariff and the billing services agreement. Further, the structure of these programs will be consistent with the directives of the Commission. Any additional agreements may conflict with or dilute the clarity of the agreements under which EGSs and EDCs are currently doing business and/or the direction provided by the Commission regarding the programs. RESA views these required forms as unnecessary intrusions into the competitive market by an entity (the EDCs) that has no business dictating terms and conditions for retail generation service.

Moreover, while PECO and the other participants were able to reach resolution on some of the provisions of PECO's proposed EGS Applications and Form Agreements which were potentially problematic from RESA's viewpoint, there are still a number of provisions in these documents that are heavily slanted in favor of PECO's interests, are unreasonable or unnecessary. Because agreement on these provisions could not be reached in the collaborative process, PECO simply resubmitted its initial proposals and asks the Commission to accept them. As explained further below, even if the Commission chooses to permit PECO to utilize standard

²⁶ Revised Default Service Plan, Exhibit D at Exhibit 1 (Participant Application including Participant Agreement); and, Exhibit E at Exhibit 1 (Form of Standard Offer Supplier Agreement).

agreements as a condition of participation in these programs, the Commission must direct that certain provisions be modified as recommended by RESA.²⁷

1. Modifications That Must Be Made Common To Both Programs

a. EGS Additional Reporting Unnecessary

Section 6.5 of the opt-in program rules and Section 4.5 of the standard offer program rules both require participating EGSs to commit to various reporting requirements to PECO. For the opt-in program, PECO proposes that EGSs submit a confidential report to PECO with specific program statistics including number of customers sent offers, number of customers accepted, and form of acceptance.²⁸ Similarly, for the standard offer customer referral program, PECO proposes that participating EGSs provide monthly reports to PECO providing the number of accounts that have been enrolled, the number of accounts that have been dropped, and the number of accounts that have been retained at the end of the standard offer period.²⁹

RESA submits that requiring EGSs to report this information to PECO is unnecessary and burdensome. To the extent the Commission determines that this information is useful to assess the programs, then the Commission has the authority to request it directly from EGSs. Placing PECO in the middle of this information flow serves no legitimate purposes. In addition, it is likely to create additional program costs which may negatively impact the willingness of an EGS to participate in the programs. For these reasons, RESA recommends that these sections (as well as any other related provisions) be deleted.

²⁷ These modifications would be in addition to other modifications that may be necessitated to be consistent with the Commission's final order in this matter including, but not limited to, provisions related to cost recovery.

²⁸ Revised Default Service Plan, Exhibit D at 8.

²⁹ Revised Default Service Plan, Exhibit E at 5.

b. EGSs Must Maintain The Right To Cancel Contracts With Customers Obtained Through The Programs

Section 7.15 of the opt-in program rules and Section 5.6 of the standard offer program rules prohibit a participating supplier from discontinuing service to its customers “because of a change in applicable rules, regulations, tariffs, or orders.”³⁰ These provisions are completely unacceptable as they require EGSs to agree to abandon their inherent legal right to engage in good faith negotiations with PECO regarding changes in the law that affect provision of service and to discontinue their participation in the programs if the change required it. This is a significant and unacceptable demand by PECO. There is no certainty about how future Commission directives and/or legislation may impact the ability of EGSs to continue to participate in the Pennsylvania market. If such changes make EGS participation in the market impossible, PECO’s requirement that EGSs must continue to participate in its programs is completely unreasonable. Moreover, the right of an entity to a contract to renegotiate its terms based on changes in law is a basic contractual right that the Commission should not permit PECO to require EGSs to abandon. For these reasons, RESA recommends that these sections (as well as any other related provisions) be deleted.

c. A Participating Suppliers Ability To Refer To Its Participation In The Programs Needs To Be Clarified

Section 8.8 of the opt-in program rules and Section 6.8 of the standard offer customer referral program rules both attempt to limit the ability of participating suppliers to reference PECO in marketing the programs.³¹ As initially drafted, participating EGSs would have needed

³⁰ Revised Default Service Plan, Exhibit D at 10 and Exhibit E at 6. Since EGSs do not have the right to “terminate” service to customers as EDCs do, RESA understands PECO’s use of the term “terminate” here to refer to the ability of EGSs to discontinue providing service to their customers who would then be returned to default service

³¹ Revised Default Service Plan, Exhibit D at 11 and Exhibit E at 7.

PECO's express consent to publicize their participation on the programs consistent with PECO's general policy of not permitting any entity to publicize its business relationship of any kind with PECO. Overly broad restrictions prohibiting EGSs participating in the programs to market the programs is counterproductive. Effective customer participation in these programs is more likely to result through a combination of marketing efforts by the Commission, PECO and participating suppliers. There is simply no logical reason to impede the ability of participating suppliers to engage in their own marketing activities about their participation in these programs.

Based on the discussions in the collaborative process, PECO did make improvements to these sections. However, RESA recommends that the following underlined and stricken changes also be included in these sections to be clear that EGSs are not prevented from providing factual information about their participation in the programs:

Publicity. Each Participant understands and agrees the PECO does not participate in, nor does it allow, Participants to utilize media releases of any kind to publicize Participant's business relationship with PECO. Each Participant shall not use any trade name, trademark, service mark or any other information which identifies PECO in such Participant's sales, marketing and publicity activities, including interviews with representatives of any written publication, or television or radio station or network, without PECO's express prior written consent. This prohibition, however, shall not be construed to require PECO's express consent before a Participant can refer, in a factual manner, to the PECO service territory or the Participant's participation in the PECO program so long as ~~For all other references to PECO not requiring PECO's prior consent, the~~ references ~~must be~~ are factual and ~~can~~ do not infer an endorsement by or affiliation with PECO.

d. Limitations Of Liability And Indemnification Clauses Must Be Made Mutual

Paragraph 10 of Exhibit 1, Attachment A of the Form of Opt-In Supplier Agreement and Paragraph 7 of Exhibit 1, Attachment A of the Form of Standard Offer Supplier Agreement each require a participating supplier to "waive any right to claim any loss of business, consequential

damage or any monetary or other direct damages from PECO of any kind whatsoever arising from or relating to” the agreement or the program.³² Similarly, Paragraph 11 of Exhibit 1, Attachment A of the Form of Opt-In Supplier Agreement and Paragraph 8 of Exhibit 1, Attachment A of the Form of Standard Offer Supplier Agreement each require the participating supplier to “hold PECO harmless against any and all third party losses, costs liability, damages and expenses incurred or suffered as a result of a participating supplier’s breach of the agreement, failure to comply with any applicable laws, or intentional, negligent or willful misconduct.”³³

While limitations on liability and indemnification clauses are common in contracts, in fair contracts, they are mutual. PECO, however, has rejected RESA’s request to make these clauses mutual so that participating suppliers are granted the same protections as PECO. There is simply no reason to demand that suppliers participating in these programs give up their rights in this regard while PECO insists on maintaining its rights. Therefore, both of PECO’s agreements should be changed as follows:

Limitations. . . . (b) PECO has no obligation to provide electric supply other than default service in accordance with the Pennsylvania Public Utility Code to any customer that may be served by the Opt-In Supplier in the event that the Opt-In Supplier no longer serves that customer for any reason. ~~Each party~~ ~~The Participating Supplier~~ waives any right to claim any loss of business, consequential damage or any monetary or other direct damages from ~~each other~~ PECO of any kind whatsoever arising from or relating to this Agreement or the Program.

Indemnification. ~~Each Party~~ ~~The Participating Supplier~~ shall indemnify, save and hold ~~the other Party~~ PECO harmless from and against any and all

³² Revised Default Service Plan, Exhibit D, Exhibit 1, Attachment A at 2 and Exhibit E, Exhibit 1, Attachment A at 2.

³³ Revised Default Service Plan, Exhibit D, Exhibit 1, Attachment A at 2 and Exhibit E, Exhibit 1, Attachment A at 2.

third party losses, costs, liabilities, damages and expenses (including, without limitation, attorneys' fees and expenses) incurred or suffered as a result of or in connection with the ~~other Party's~~ ~~the Participating Supplier's~~ breach of this Agreement, failure to comply with any applicable laws, or intentional, negligent or willful misconduct.

2. Modifications That Must Be Made Regarding The Opt-In Program

Section 7.7 of the opt-in program rules require participating EGSs to track specific information related to the payment of the bonus to customers and provide the information to the Commission, OCA and OSBA upon request.³⁴ Specifically, the rules propose to require EGSs to provide the customer name, address, account number, date that the customer qualified to receive the bonus check, the date that the bonus check was mailed and an indicator of whether the bonus check was cashed. Consistent with the discussion in Section IV.1.a, these specific record retention and reporting requirements dictated by PECO in these form agreements are unnecessary and burdensome. To the extent the Commission determines that it desires this level of information about the bonus checks, then the Commission has the authority to request it directly from EGSs. Moreover, the specific information that PECO seeks to require EGSs to maintain may be administratively burdensome. For these reasons, RESA recommends that these sections (as well as any other related provisions) be deleted.

If, however, the Commission determines that requiring EGSs to provide some verification regarding the payment of the bonus is appropriate, then this requirement must be simplified. Similar to how the customer authorization process works whereby EGSs are required to certify to EDCs that they have a customer's authorization, the Commission could require EGSs to certify to the Commission that the bonus checks have been sent to customers.

³⁴ Revised Default Service Plan, Exhibit D at 9.

3. Modifications that Must Be Made For The Standard Offer Customer Referral Program

a. Time For Providing Enrolled Customers The Terms And Conditions

Sections 4.4 requires participating EGSs to provide enrolled customers the terms and conditions of service within one business day after sending the EDI 814 enrollment transaction to PECO.³⁵ There are two clarifications that should be made to this section.

First, the requirement that the terms and conditions be sent within one business day after the EGS sends the EDI 814 enrollment transaction should be changed to “no more than three business days.” The reason for this proposed change is that after the EGS sends the EDI 814 enrollment transaction to PECO, PECO sends back to the EGS an enrollment response EDI. This response may take a day to be sent by PECO and may notify the EGS of some problem with the enrollment that needs to be corrected – which may take another day or two to correct – before the enrollment request can be processed. To avoid any confusion from a customer’s perspective while this process occurs, RESA recommends that adding a three business day window for EGSs to provide the terms and conditions is reasonable. Aside from addressing some operational issue, EGSs have no incentive to delay the processing of these enrollments.

Second, RESA also recommends that the language be modified to the extent it requires participating EGSs to use the exact terms and conditions set forth in Article 5 of the program rules. Such restriction is not necessary as the Commission already requires EGSs to use disclosure statements for residential and small business customers to explain prices, terms and conditions and exemplary disclosure statements must be filed as part of the application process.³⁶

³⁵ Revised Default Service Plan, Exhibit E at 5.

³⁶ 52 Pa. Code § 54.5 (Disclosure statement for residential and small business customers).

There is no need to require EGSs to substantially redraft these agreements to mimic PECO's exact language.

To address both of these issues, RESA recommends the following modifications (underlined and stricken) to Section 4.4:

4.4 Sales Agreement. Each Standard Offer Supplier shall send a sales agreement, which meets all PUC regulations and ~~includes~~ complies with the requirements set forth in the terms and conditions set forth in Article 5, to the customer ~~within one~~ no later than three business days after sending the EDI 814 enrollment transaction. The sales agreement will provide the terms of service for the initial 12-monthly billing cycle period and also provide information about how the terms may change after the initial 12-month period.

b. Time For Providing Enrolled Customers Options Notice Prior To The End Of The Program Term

In Sections 4.4 and 5.1, PECO proposes to require EGSs to provide customers “the date by which the customer must take action to exercise his or her options at the end of the term.”³⁷ Providing this specific date at this point in the standard offer program is unnecessary as it may create administrative burdens and is already sufficiently addressed by the Commission’s standard notice requirements (which are already referenced by Section 5.5 of PECO’s proposed program rules). Pursuant to the Commission’s currently effective Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Contractual Changes Affecting Customer Service, EGSs are already required to provide consumers with both an “Initial Notice” and an “Options Notice” prior to the expiration of their existing contract terms with an EGS. The Options Notice, which must be provided forty-five days prior to the expiration date of the fixed term agreement, is already required to include “a date certain for any action required by customers to exercise their available options, including what will occur if customers fails to

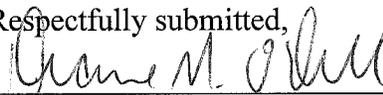
³⁷ Revised Default Service Plan, Exhibit E at 5.

respond to the notice.”³⁸ Because EGSs are already required to provide this information to consumers in a timely manner, PECO’s requirement that EGS also provide this information in the initial terms and conditions is unnecessary. It is also likely to be problematic depending on when the enrollment is actually effectuated. The better course is to allow EGSs to address this issue in the normal course as they do now consistent with the Commission’s Interim Guidelines. This is also likely to be less confusing to consumers who are receiving the information in a more timely manner. To implement this modification, RESA recommends that the last sentence of both Section 4.4 and 5.1 of PECO’s proposed program rules (as well as any other related provisions) be deleted.

V. CONCLUSION

For all the reasons discussed above, RESA respectfully requests that the Commission modify the Revised Default Service Filing of PECO consistent with the recommendations herein.

Respectfully submitted,



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Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Contractual Changes Affecting Customer Service, Docket Numbers Docket No. M-2010-2195286 and Docket No. M-0001437, Order entered September 23, 2010, Appendix A at Guideline II(b)(vi)(emphasis added).