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August 5, 2014

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA ELECTRONIC FILING

RE: 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

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the Main Brief of the Philadelphia Area Industrial Energy Users Group ("PAIEUG"), in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served with a copy of this document. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By 
Adeolu A. Bakare

Counsel to the Philadelphia Area Industrial Energy Users Group

Enclosure

c: Administrative Law Judge Cynthia W. Fordham (via E-mail and First-Class Mail)
Certificate of Service

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I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

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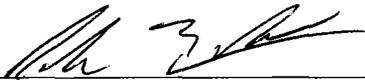
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Certificate of Service
Docket No. P-2014-2409362
Page 2

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Dated this 5th day of August, 2014, in Harrisburg, Pennsylvania.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY COMPANY :
FOR APPROVAL OF ITS DEFAULT : DOCKET NO. P-2014-2409362
SERVICE PROGRAM :**

**MAIN BRIEF OF THE
PHILADELPHIA AREA INDUSTRIAL ENERGY USERS GROUP**

Air Liquide Industrial U.S. LP
Boeing Company, The
Building Owners & Managers Association
of Philadelphia
Drexel University
GlaxoSmithKline
Jefferson Health System

Kimberly-Clark Corporation
Merck & Co., Inc.
Philadelphia College of Osteopathic
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Saint Joseph's University
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Dated: August 5, 2014

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. INTRODUCTION AND PROCEDURAL HISTORY.....	1
II. DEFAULT SERVICE PROCUREMENT AND IMPLEMENTATION PLANS.....	3
A. Summary of Briefing Party's Position	3
B. Residential Class Procurement	3
1. Term Length of Supply Contracts.....	3
2. Procurement Schedule	3
C. Small Commercial Class Procurement	3
D. Medium Commercial Class Procurement	3
E. Large Commercial and Industrial Class Procurement	4
F. Extension of Supply Contracts Beyond May 31, 2017.....	4
G. Contingency Plan.....	5
H. Uniform Supplier Master Agreement	5
I. Other Procurement and Implementation Plan Requirements.....	5
III. RATE DESIGN AND COST RECOVERY.....	5
A. Summary of Briefing Party's Position	5
B. Reconciliation of Default Service Costs and Revenues.....	8
C. Recovery of Certain PJM Charges.....	8
1. Background.....	8
2. Neither PECO Nor RESA Has Met Its Burden of Proof That Their Proposals Are Consistent With the Competition Act, Commission Precedent, and Commission Regulations.	14
3. Allowing for the Collection of Transmission and Transmission- Related Costs Through a Non-bypassable Rider Would Be Contrary to the Competition Act, Commission Precedent, and Commission Regulations.	16
4. The Collection of Transmission and Transmission-Related Costs Through a Non-bypassable Rider Would Raise Significant Contractual and Double Collection Concerns for Large C&I Customers.	20
5. Assuming, <i>Arguendo</i> , That the Commission Approves the Collection of Transmission and Transmission-Related Costs from Shopping Customers Via a Non-Bypassable Rider, the	

	<u>Page</u>
Commission Should Adopt a Carve-Out For Large C&I Customers.	27
6. The Commission Should Disregard PECO's Oral Rejoinder Testimony Due to Procedural Impropriety.	30
IV. STANDARD OFFER PROGRAM.....	34
A. Summary of Briefing Party's Position	34
B. Operational Changes.....	34
C. Implementation Costs	34
D. Standard Offer Program Collaborative	34
V. OTHER ISSUES.....	34
VI. CONCLUSION.....	35

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>Pa. Pub. Util. Comm'n v. Jackson Sewer Corp.</i> , Docket No. R-00005997 (Nov. 13, 2001).....	15
<i>Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n</i> , 578 A.2d 600 (Pa.Cmwlth. 1990)	15
<i>Se-Lin Hosiery, Inc. v. Margulies</i> , 70 A.2d 854 (Pa. 1950).....	15
 <u>Statutes:</u>	
66 Pa. C.S. § 315(a)	15
66 Pa. C.S. § 332(a)	15
66 Pa. C.S. § 2802.....	8
66 Pa. C.S. § 2802(13)	8, 19
66 Pa. C.S. § 2802(16)	8
66 Pa. C.S. § 2804(3).....	8
 <u>Rules:</u>	
52 Pa. Code § 5.243	31
52 Pa. Code § 54.182	8
52 Pa. Code § 54.187(d)	8
 <u>Other Authorities:</u>	
<i>Guidelines for Use of Fixed Price Labels for Products With a Pass Through Clause;</i> Docket No. M-2013-2362961, Final Order entered November 14, 2013.....	18
<i>Investigation of Pennsylvania's Retail Electricity Market: End State Order of Default Service</i> , Docket No. I-2011-2237952 (Order entered February 15, 2013)	4
<i>Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Commencing June 1, 2015 Through May 31, 2017</i> , Recommended Decision, Docket Nos. P-2013-2391368, <i>et al.</i> (May 6, 2014).....	32

Other Authorities: (cont'd)

Page

<i>Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Commencing June 1, 2015 Through May 31, 2017, Final Order, Docket Nos. P-2013-2391368, et al. (July 24, 2014).....</i>	13
<i>Petition of Duquesne Light Company For Approval of Default Service Plan For The Period of June 1, 2013 Through May 31, 2015, Opinion and Order, Docket No. P-2012-2301664 (Jan. 25, 2013).....</i>	21
<i>Petition of PECO Energy Company for Approval of Its Default Service Program; Docket No. P-2012-2283641 (Jan. 13, 2012)</i>	1, 5

I. INTRODUCTION AND PROCEDURAL HISTORY

On March 10, 2014, PECO Energy Company ("PECO" or "Company") filed with the Pennsylvania Public Utility Commission ("PUC" or "Commission") a Petition for Approval of the Company's Third Default Service Program ("DSP III"). *Petition of PECO Energy Company for Approval of Its Default Service Program*; Docket No. P-2014-2409362 (Mar. 10, 2014) (hereinafter, "Petition"). On March 27, 2014, the Philadelphia Area Industrial Energy Users Group ("PAIEUG")¹ filed a Petition to Intervene and Answer to the Company's Petition. A Prehearing Conference was held on April 10, 2014, before Administrative Law Judge ("ALJ") Cynthia A. Fordham.

PAIEUG received the Company's Direct Testimony on March 10, 2014. Pursuant to the procedural schedule, on June 5, 2014, PAIEUG received Direct Testimony from the following parties: the Office of Consumer Advocate ("OCA"); the Office of Small Business Advocate ("OSBA"); the Retail Energy Supply Association ("RESA"); and NextEra Power Marketing ("NextEra"). On June 26, 2014, PAIEUG submitted Rebuttal Testimony and received Rebuttal Testimony from the following parties: the Company; the OCA; the OSBA; and RESA. On May 17, 2012, PAIEUG received Surrebuttal Testimony from the Company, the OCA, the OSBA, and RESA.

An evidentiary hearing was held in this proceeding on July 17, 2014, for the purposes of presenting testimony and performing cross-examination. During this hearing, the parties confirmed the process for submitting Briefs. Pursuant to the procedural schedule, PAIEUG submits this Main Brief to address various issues raised in this proceeding.

¹ PAIEUG's compilation is listed on the cover page of this Main Brief.

Specifically, PAIEUG's Main Brief will address two issues. First, PAIEUG submits that none of the parties² seeking to implement a non-bypassable rider for the recovery of "certain PJM charges"³ have met their burden of proof with respect to implementing such a rider. For example, the parties seeking such implementation have not proven that the requested rider is consistent with PUC precedent; have not established that the costs at issue are volatile; have not considered the contractual implications for Large Commercial and Industrial ("C&I") customers, including the potential for double collection; and have not provided a fully vetted proposal that would enable Large C&I customers to directly address the implications of such a rider. *See* Section III.C.2-4, *infra*.

Moreover, assuming *arguendo* that a non-bypassable rider is implemented on PECO's system, the PUC should require PECO to implement a carve-out of the rider for Large C&I customers, as these customers not only face separate contractual concerns compared to residential and small commercial customers, but also have the ability to address risk premium issues within their individual Electric Generation Supplier ("EGS") negotiations. *See* Section III.C.5., *infra*.

Second, PAIEUG submits that PECO should maintain its current 500 kW demarcation between Medium C&I customers and Large C&I customers. Based upon the evidence submitted in this proceeding, shifting Medium C&I customers to the Large C&I customer procurement could result in an increase in costs to Large C&I customers receiving hourly default service. Because of the potential increase in costs to Large C&I customers, the current demarcation of 500 kW should remain. *See* Section II.D., *infra*.

² PAIEUG will describe the procedural issues surrounding the parties seeking implementation of a non-bypassable rider more fully in Section III.A. and Section III.C.6., *infra*.

³ PAIEUG will more fully describe the "certain PJM charges" at issue in Section III.A., *infra*.

II. DEFAULT SERVICE PROCUREMENT AND IMPLEMENTATION PLANS

A. Summary of Briefing Party's Position

Following review of PECO's testimony indicating that transferring Medium C&I customers with a measured billing demand between 100 kW and 500 kW to the Large C&I procurement group could raise the cost of PECO's hourly priced service, PAIEUG concurs with PECO's proposal to maintain the current 500 kW demarcation between Medium C&I customers and Large C&I customers.

B. Residential Class Procurement

1. Term Length of Supply Contracts

PAIEUG has no position on this issue.

2. Procurement Schedule

PAIEUG has no position on this issue.

C. Small Commercial Class Procurement

PAIEUG has no position on this issue.

D. Medium Commercial Class Procurement

Currently, PECO provides hourly priced procurement service to Large C&I customers, *i.e.*, customers with demand of 500 kW or greater. Direct Testimony of John J. McCawley, PECO Statement No. 2 ("PECO St. 2"), pp. 5-6. As part of its initial DSP III filing, PECO did not propose any modifications to this procurement class, stating that the current separation between Large C&I and Medium C&I procurement groups is "in accordance with [Large C&I] customers' high propensity for shopping and load shape as well as different bidder interest in products based on hourly prices." *Id.* at 6. To that end, PECO requested a waiver of the

Commission's "End State Order," which stated that customers served by interval meters with peak demands above 100 kW should receive hourly priced service.⁴ *Id.* at 7.

RESA, however, has requested that the Commission deny PECO's requested waiver and move all Medium C&I customers with interval meters into the Large C&I procurement group. Direct Testimony of Richard J. Hudson, RESA Statement No. 1 ("RESA St. 1"), p. 17. RESA avers that PECO should be directed to expand the provision of hourly priced service in compliance with the End State Order. *Id.*

In response to RESA's testimony, PECO reiterated that shifting Medium C&I customers into the Large C&I procurement group would lead to higher bid premiums for hourly priced service. Rebuttal Testimony of John J. McCawley, PECO Statement No. 2-R ("PECO St. 2-R"), p. 10. In other words, Large C&I customers would receive higher hourly priced default service rates from PECO in return for Medium C&I customers transitioning from full requirements contracts to hourly priced service.

Because RESA has not provided any evidence that would counter the cost increase to Large C&I customers, RESA's proposal must be rejected. Moreover, in light of the fact that RESA's proposal would increase the default procurement costs to Large C&I customers, thereby raising questions as to whether PECO's hourly default service procurements would be obtained on a least cost basis, RESA's request must be summarily rejected.

E. Large Commercial and Industrial Class Procurement

PAIEUG has no position on this issue.

F. Extension of Supply Contracts Beyond May 31, 2017

PAIEUG has no position on this issue.

⁴ See *Investigation of Pennsylvania's Retail Electricity Market: End State Order of Default Service*, Docket No. I-2011-2237952 (Order entered February 15, 2013) (hereinafter, "End State Order").

G. Contingency Plan

PAIEUG has no position on this issue.

H. Uniform Supplier Master Agreement

PAIEUG has no position on this issue.

I. Other Procurement and Implementation Plan Requirements

PAIEUG has no position on this issue.

III. RATE DESIGN AND COST RECOVERY

A. Summary of Briefing Party's Position

Pursuant to PECO's DSP I proceeding, the Commission approved the collection of costs for generation and transmission services by EGSs for shopping customers. *Petition of PECO Energy Company for Approval of its Default Service Program and Rate Mitigation Plan*, Order, Docket No. P-2008-2062739 (June 2, 2009) ("PECO DSP I Order") pp. 6-7. Although RESA proposed the implementation of a non-bypassable rider in PECO's DSP II proceeding for the collection of certain transmission and transmission-related charges, both PECO and PAIEUG opposed this change in collection due to the issues that would be created, especially for Large C&I customers. Importantly, the PUC agreed with PECO and PAIEUG, denying RESA's request. *Petition of PECO Energy Company For Approval of its Default Service Program II*, Order and Opinion (Sept. 27, 2012), p. 60 ("PECO DSP II Order"). As a result, since January 1, 2011, PECO has been collecting generation, distribution, and transmission costs from its non-shopping (*i.e.*, default) customers, while EGSs have been collecting generation and transmission costs from their shopping customers, leaving PECO to collect only distribution costs from shopping customers.

While PECO did not propose any change in collection for transmission or transmission-related charges for shopping customers as part of its case-in-chief in this proceeding,⁵ RESA requested, in its Direct Testimony, that the PUC require PECO to implement a non-bypassable rider for the recovery by PECO from both shopping and non-shopping customers of the following "certain PJM charges:" Network Integration Transmission Services ("NITS"), Regional Transmission Enhancement Plan ("RTEP"), Unaccounted for Energy ("UFE"), and Reliability Must Run/Generation Deactivation ("RMR").⁶ RESA St. 1, p. 24. Moreover, in the oral rejoinder stage of this proceeding, PECO submitted that it, too, would possibly seek to implement a non-bypassable rider for the collection of only some of the aforementioned costs, depending upon the outcome of the FirstEnergy Companies ("FE")⁷ DSP III proceeding;

⁵ As discussed more fully in Section III.C.6, *infra*, PAIEUG submits that PECO inappropriately submitted a substantive change to its DSP III Plan as part of the Company's oral rejoinder, thereby infringing upon PAIEUG's due process rights by failing to allow PAIEUG adequate opportunity to fully litigate any such proposal by PECO. *See* Section III.C.6., *infra*.

⁶ During the course of this proceeding, the term "certain PJM charges" has been applied to the costs sought by RESA to be collected through a non-bypassable rider. A clearer and more accurate description would be to recognize that NITS are "transmission costs," as a customer's transmission charge is effectively the customer's NITS charge. *See Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company For Approval of Their Default Service Programs*, Opinion and Order, Docket Nos. P-2011-2273650, et al. (Aug. 16, 2012) ("FE DSP II Order"), p. 83 ("NITS costs are directly related to the transmission service offered to customers, generally referred to simply as 'transmission' costs."). Similarly, RTEP, UFE, and RMR are "transmission-related costs." For purposes of PAIEUG's Main Brief, PAIEUG will refer to NITS as either NITS or "transmission costs," and RTEP, UFE, and RMR charges combined as "transmission-related costs."

⁷ The FirstEnergy Companies are the Electric Distribution Companies ("EDCs") of Metropolitan-Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company, all of whom have the same parent company of FirstEnergy. The schedule for the FE Companies' DSP III proceedings are slightly ahead of PECO's DSP III schedule.

however, PECO has not definitely provided a list of the costs to be included.⁸ Evidentiary Hearing Transcript on July 17, 2014 (hereinafter, "Tr."), 39-40.

As discussed more fully herein, any proposal to implement a non-bypassable rider for the collection of transmission and/or transmission-related costs must be rejected by the PUC on several grounds. First, none of the parties seeking implementation of such a rider have met their burden of proving this rider would conform to PUC precedent or regulations, including a showing that these costs are "volatile," thereby necessitating a non-bypassable rider. *See* Section III.C. 2. and 3., *infra*. Second, a non-bypassable rider would raise significant contractual issues, especially for Large C&I customers, who could not only lose competitive market product options, but also face double-collection of these costs due to the timing of any change in collection. *See* Section III.C. 4, *infra*. Third, none of the parties have presented any information regarding the implementation of such a rider, including the terms of rate allocation and cost collection, thereby raising significant concerns of subsidization within the Large C&I class, as well as the possibility of sending incorrect economic signals. *Id.* For these reasons, any proposal to implement a non-bypassable rider for the collection of transmission and/or transmission-related costs should be rejected.

Assuming *arguendo*, that the PUC determines that a non-bypassable rider is necessary for the residential and small commercial customer classes, PAIEUG submits that a carve-out should apply for Large C&I customers. *See* Section III.C.5., *infra*. Specifically, carving out Large C&I

⁸ During evidentiary hearings, RESA further refined its lists of costs to shift for purposes of a non-bypassable rider. *See* Tr. 125; RESA Exhibit RJH-10. Although RESA groups NITS and related transmission charges together in its Exhibit, in actuality, only the following charges are NITS: 1100-Network Integration Transmission Service (NITS), 1101-Low Voltage NITS, 1102-NITS (Exempt), 1104-Network Integration Transmission Service Offset, 1106-Non-Zonal NITS, 2100-Network Integration Transmission Service, 2101-Low Voltage NITS, 2012-NITS (Exempt), 2014-Network Integration Transmission Service Offset, and 2016-Non-Zonal NITS. The remaining charges (*i.e.*, 1108-Transmission Enhancement, 1730-Expansion Cost Recovery, 2018-Transmission Enhancement, 2320-Transmission Owner Scheduling, System Control and Dispatch, 2330-Reactive Supply and Voltage Control, and 2730-Expansion Cost Recovery), along with Generation Deactivation and UFE, are transmission-related costs.

customers would alleviate several of the concerns raised herein, including apprehension related to contractual issues and double-collection. Moreover, Large C&I customers are currently able to negotiate with their EGSs for products that fit their needs in the market, including allowing for the pass-through of certain costs, which would address any claims by RESA of cost volatility. In addition, during evidentiary hearings, PECO indicated that a carve-out for Large C&I customers on the Company's system would be possible. For those reasons, in the alternative to complete rejection of any non-bypassable rider, PAIEUG submits that the PUC should allow for a carve-out of Large C&I customers.

B. Reconciliation of Default Service Costs and Revenues

PAIEUG has no position on this issue.

C. Recovery of Certain PJM Charges

1. Background.

In 1996, Pennsylvania adopted the Electricity Generation Customer Choice and Competition Act ("Competition Act") to encourage more affordable, safe, and reliable electric service, as well as promote business and industry throughout the Commonwealth. *See generally* 66 Pa. C.S. § 2802. In order to allow EGSs to sell electricity directly to customers in the Commonwealth, the Competition Act provided for an unbundling of generation, transmission, and distribution services, which had previously been offered as a bundled product by EDCs. *Id.* at § 2802(13); *see also id.* at § 2804(3). As a result of this unbundling, customers could negotiate with competitive retail suppliers (*i.e.*, EGSs) who would provide such "shopping" customers with both generation and transmission service, while the customer would continue to receive distribution service from the EDC. Conversely, "non-shopping" customers, who chose to remain with the EDC, would receive generation, transmission, and distribution service under the EDC's "provider of last resort" default service. *See id.* § 2802(16). Moreover, the PUC adopted

regulations, consistent with the Competition Act, that assign responsibility for generation and transmission service to the same entity, *i.e.*, the EDC must provide generation and transmission service for non-shopping customers, and the EGS must provide generation and transmission service for shopping customers. 52 Pa. Code § 54.182; *see also id.* at § 54.187(d). Stated another way, Commission regulations designate transmission service as a load-following expense, meaning that the entity providing a customer's generation service must also take responsibility for the provision of transmission services and collection of the associated costs.

Pursuant to the Competition Act, generation became a competitive product available to all customers throughout the Commonwealth. Although the PUC retained jurisdiction over EDCs' provision of distribution service, the Federal Energy Regulatory Commission ("FERC") regulates the terms and conditions of transmission service, including wholesale transmission rates. To that end, PJM is charged with the safe and reliable operation of the PJM transmission region, which includes PECO's service territories. *See* Operating Agreement of PJM, Third Revised Rate Schedule FERC No. 24, Second Revised Sheet No. 32, Section 7.7(i)(A). As part of this responsibility, PJM determines each transmission owner's (*i.e.*, also the EDC in the case of PECO) transmission obligation for the forthcoming year as set during the one coincident peak ("1-CP") during the previous year. Specifically, prior to January 1 of each year, PJM alerts an EDC as to its transmission obligation for the previous year. The EDC then determines each customer's individual obligation based upon that customer's 1-CP usage. *See* Supplement No. 103 Tariff – Electric Pa. P.U.C. No. 4, p. 40A, *see also* Tr. 141. The EDC is then able to provide PJM with the overall transmission obligations of all of the EGSs on the EDC's system, in addition to the EDC's transmission obligation as it relates to the provision of default service. For customers that do not receive default supply, PJM bills each load-serving-entity ("LSE") (which

serve as EGSs under Pennsylvania's rules) for the transmission costs incurred during the year based upon that LSE's transmission obligation.⁹

Because one of the purposes of the Competition Act was to grant customers the ability to negotiate for energy service, and the Commission's regulations state that EGSs should charge shopping customers for both generation and transmission, Large C&I shopping customers on PECO's system generally have two options with respect to transmission and transmission-related costs: (1) a pass-through arrangement; or (2) a fixed-price arrangement. *See* Rebuttal Testimony of Randolph C. Haines, PAIEUG Statement No. 1 (hereinafter "PAIEUG St. 1"), p. 8.

Under a pass-through transmission arrangement, the EGS directly flows through to the customer the actual transmission and transmission-related costs incurred by the customer based upon the individual customer's 1-CP transmission obligation. *See id.* at 9. Because this is a direct "flow-through" of such costs, the EGS does not incur any risk in the event that transmission costs either increase or decrease over the course of the customer's contract. Rather, the customer takes the risk of changing transmission costs, but the customer is able to avoid any "risk premium" that might be included by the EGS in its energy price if this direct pass-through did not occur. *Id.* at 9.

By contrast, under a fixed-price transmission product, the EGS may include a "risk premium" in the customer's overall price that would allow the EGS to hedge fluctuating transmission and transmission-related costs over the course of a contract. In return, however, the customer pays the premium for the EGS to shoulder such risk. Moreover, under this type of product offering, the customer would receive a single combined price for generation and transmission/transmission-related services that remains steady over the course of the entire

⁹ PJM Open Access Transmission Tariff, July 31, 2014 available at <http://www.pjm.com/markets-and-operations/~media/documents/agreements/tariff.ashx> (last visited July 31, 2014).

contract, thereby allowing the customer to budget for a set energy price over the term of the contract. *See id.* at 9.

To support a competitive marketplace, the Competition Act requires EDCs such as PECO to recover generation and transmission services separately from distribution charges. As described above, PECO customers utilizing an EGS for competitive supply pay PECO for distribution service and secure a fixed-price or pass-through contractual arrangement with an EGS for generation and transmission services. Similarly, a customer taking default service from PECO pays traditional tariff rates for distribution service but pays for generation and transmission services through separate pass-through riders. PECO's Large C&I default service customers pay for generation and transmission-related services through the Generation Supply Adjustment for Procurement Class 4 ("GSA-4") and Transmission Service Charge ("TSC") riders, respectively. Supplement No. 104 Tariff – Electric Pa. P.U.C. No. 4, p. 33; Supplement No. 103 Tariff – Electric Pa. P.U.C. No. 4, p. 40A. PECO does not offer a fixed-price rate to Large C&I customers for generation or transmission services.

With the onset of the Competition Act, PECO's DSP I addressed the aforementioned collection of costs related to generation, transmission, and distribution services as applied to both shopping and non-shopping customers. During PECO's DSP I, none of the parties sought to implement a non-bypassable rider, and, as such, PECO began collecting distribution costs from shopping customers, while these customers' EGSs began collection costs related to transmission and generation services. PECO DSP I Order, pp. 6-7.

As part of PECO's DSP II, PECO did not propose any changes to the aforementioned collection of costs from shopping customers; however, RESA sought to impose a non-bypassable rider for the collection of various transmission and transmission-related charges. Both PECO

and PAIEUG opposed the change in collection of these costs, and the PUC agreed that RESA had not met its burden of proof with respect to its request to rebundle distribution and transmission services. PECO DSP II Order, p. 60. According to the Commission, "RESA's contention that, absent a NMB Rider, price distortions will occur and that supply costs will increase due to risk premium add-ons is not supported by record evidence." *Id.*

During this same timeframe, the FE Companies, as part of their DSP II proceeding, also sought to implement a non-bypassable rider. Specifically, the FE Companies sought to collect a majority of transmission and transmission-related costs from all customers (*i.e.*, both shopping and non-shopping). Not surprisingly, the Large C&I customers in the FE Companies' service territories opposed this collection of costs. At the end of the FE Companies' DSP II proceeding (which was actually prior to the conclusion of PECO's DSP II proceeding), the PUC found that the FE Companies could collect RTEP and TEC costs via a non-bypassable rider, as the FE Companies had met their burden of proving that, in approximately 2012, these costs were volatile. FE DSP II Order, p. 83 (finding that the record indicated that RTEP and TEC charges "are either incidental or impact only certain customers in the [FE] Companies' service territories, and therefore, are more unpredictable.")

As part of PECO's DSP III proceeding, PECO did not propose to implement a non-bypassable rider in its case-in-chief (*i.e.*, initial Direct Testimony), Rebuttal Testimony, or Surrebuttal Testimony, even though RESA raised the idea of a non-bypassable rider for all transmission and transmission-related costs in its Direct Testimony, and PAIEUG opposed the idea of a non-bypassable rider in its Rebuttal Testimony. RESA St. 1, p. 24; PAIEUG St. 1, pp. 5-9. Rather, only as part of the Company's oral rejoinder did PECO inform parties that "[i]f the Commission approves the settlement in the first energy EDC proceedings, PECO proposes to

establish a non-bypassable transmission service charge for all distribution [customers] which either includes or excludes NITS as directed by the Commission." Tr. 39-40. Unfortunately, PECO's less than fully fleshed out proposal is further complicated by the Company's less than clear linkage to the FE Companies' non-bypassable rider. Tr. 54 (confirming that PECO has not fully investigated which transmission-related charges should be included in a non-bypassable rider).

As noted previously, the FE Companies were granted a non-bypassable rider for the collection of only RTEP and TEC costs as part of their DSP II proceeding. Although the Companies requested this rider as part of their DSP II filing, which occurred in 2011 and was approved by a PUC Order in 2012, PECO did not propose any such non-bypassable rider for RTEP and TEC costs in either its DSP II, which was filed in 2012, or its DSP III, which was filed in 2014.¹⁰

The FE Companies, in their DSP III plan, which was filed on November 4, 2013, sought to add the collection of RMR, meter collection costs, and eventually NITS to their non-bypassable rider. Although this filing occurred in November 2013, approximately five months before PECO's DSP III plan filing on March 10, 2014, PECO still chose not to address the non-bypassable rider in its case-in-chief. *Id.* In addition, and perhaps most importantly, the FE Companies' DSP proceeding was resolved via a partial settlement, which allowed for the collection of UFE, RMR, and meter correction charges via the non-bypassable rider; however, the PUC denied the FE Companies' and RESA's requests to collect NITS through this rider. *See Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program*

¹⁰ In fact, PECO opposed the collection of RTEP and TEC costs in its DSP II proceeding, claiming that EGSs "are able to pass through the actual costs associated with each of these PJM charges to their customers without any risk premium." PECO DSP II Order, p. 57.

for the Period Commencing June 1, 2015 Through May 31, 2017, Final Order, Docket Nos. P-2013-2391368, *et al.* (July 24, 2014) ("FE DSP III Order"). Although PECO inexplicably seems to suggest that the results of the Commission's decision regarding any settlement in the FE Companies DSP III proceeding would apply to PECO, the clear language from the Commission specifies that the FE DSP III Order applies only to the FE Companies. *See* Tr. 39 (stating "If the Commission approves the settlement in the first energy EDC proceedings, PECO proposes to establish a non-bypassable transmission service charge for all distribution companies..."); *but see* FE DSP III Order (observing that "the Partial Settlement states that it does not constitute an admission against, or prejudice to, any position which any of the Settling Parties might adopt during subsequent litigation of this case or any other case.").

Accordingly, the details regarding the implementation of a non-bypassable rider on PECO's system remain murky, and this implementation is further hampered by both PECO and RESA's attempts to follow the implementation of a non-bypassable rider on the FE Companies' systems even though the timing and application of such implementation do not coordinate with PECO's DSP III proceeding. Regardless, even if any connection could be made, as discussed more fully herein, both PECO and RESA fail to meet their burden of proof as it applies to implementing a non-bypassable rider on PECO's system. As such, any proposal for the implementation of a non-bypassable rider for the collection of transmission and/or transmission-related costs must be rejected.

2. Neither PECO Nor RESA Has Met Its Burden of Proof That Their Proposals Are Consistent With the Competition Act, Commission Precedent, and Commission Regulations.

As the parties presenting the proposed modification to the collection of transmission and transmission-related costs, PECO and RESA bear the burden of proof in this proceeding. As set forth herein, PECO and RESA fail to provide a preponderance of evidence that supports a non-

bypassable collection of transmission and transmission-related costs by PECO as the EDC.

Accordingly, because insufficient evidence has been provided, the PECO and RESA proposals for PECO to collect transmission and transmission-related costs from shopping and non-shopping customers must be firmly denied.

Section 332(a) of the Public Utility Code requires the following with respect to burden of proof: "[e]xcept as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof." 66 Pa. C.S. § 332(a). In addition, under Section 315, "[i]n any proceeding... involving any proposed or existing rate of any public utility... the burden of proof to show that the rate involved is just and reasonable shall be upon the utility." *Id.* § 315(a).

According to the PUC, the "party seeking a rule or order from the Commission has the burden of proof" in a proceeding. *Pa. Pub. Util. Comm'n v. Jackson Sewer Corp.*, Docket No. R-00005997, at 5-7 (Nov. 13, 2001). In carrying this burden, a complainant must establish a case before an administrative tribunal using a preponderance of evidence as the requisite degree of proof. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990). The standard of preponderance of the evidence is defined as the greater weight of the evidence, in view of all of the facts and circumstances of the case. *See Se-Lin Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 n.1 (Pa. 1950).

RESA and PECO fail to meet this burden of proof for numerous reasons. As a threshold matter, the PECO and RESA proposals violate the Competition Act and contravene the Public Utility Code in several important respects. Initially, the PECO and RESA proposals contravene explicit Commission regulations and recent Commission precedent, which provide that generation and transmission should remain with a customer's retail supplier. *See* Section III.C.3.,

infra. PECO's and RESA's proposals to shift responsibility for procuring transmission and transmission-related costs from the competitive retail market to a regulated service also represent a direct violation of the Competition Act and a step backward in the evolution of Pennsylvania's retail market. *Id.* Equally troubling, these proposals present a concrete risk that customers who have existing EGS arrangements that include fixed prices may be overcharged for transmission as these customers would face a double-collection of transmission costs by both their EGS and EDC. *See* Section III.C.4., *infra*.

Because PECO and RESA fail to provide any evidence to overcome these logistical challenges and this adverse legal precedent, RESA and PECO have failed to meet their burden of proof, and the status quo collection of transmission and transmission-related costs by EGSs on PECO's system must be retained.

3. Allowing for the Collection of Transmission and Transmission-Related Costs Through a Non-bypassable Rider Would Be Contrary to the Competition Act, Commission Precedent, and Commission Regulations.

As part of this proceeding, the proposal has been made to shift the collection of transmission and transmission-related costs from EGSs to the EDC for shopping customers. Although RESA claims the need for the change in collection is due to the volatility of these costs, review of PUC precedent and record evidence in this proceeding indicates that these costs, especially NITS, are not volatile costs requiring a change in collection. Similarly, RESA inappropriately attempts to extrapolate a previous PUC Order to apply to the issues in this proceeding, even though a clear reading of this Order not only indicates complete inapplicability, but also directly provides support for a carve-out for Large C&I customers. Moreover, any change in collection in transmission and transmission-related costs would represent a step backwards in the evolution of the retail market by rebundling transmission service with

distribution service. Based upon these reasons, any proposal to collect transmission and transmission-related costs through a non-bypassable rider should be rejected.

Although RESA claims that the collection of transmission and transmission-related costs through a non-bypassable rider is necessary due to the volatility related to these costs, in actuality, both past, present, and extremely recent PUC precedent has held that such costs (and most recently NITS costs specifically) do not have a volatility level requiring such change in collection.

In PECO's DSP II proceeding, the Commission held that transmission and transmission-related costs should continue to be collected by EGSs rather than by PECO via a non-bypassable rider. PECO DSP II Order, p. 60. Specifically, the Commission noted that because EGSs are LSEs for shopping customers, in the same way EDCs are LSEs for default service customers, the EGSs must be responsible for collecting all transmission costs from customers. *Id.* In addition, the Commission found that RESA was unable to provide sufficient evidence that, "absent a NMB Rider, price distortions will occur and that supply costs will increase due to risk premium additions...." *Id.*

In an attempt to distinguish the present circumstances from the Commission's denial of RESA's efforts to implement non-bypassable recovery of transmission and transmission-related costs through PECO's DSP II proceeding, RESA describes the costs at issue as "unpredictable," adding that they "cannot be hedged by competitive retail suppliers or wholesale default service suppliers." RESA St. 1, p. 24. Unfortunately, RESA fails to provide any empirical evidence or data with respect to these claims.

For example, only last month the PUC found in the FE Companies DSP III proceeding that NITS should **not** be recovered through a non-bypassable rider because the evidence offered

to show volatility in NITS costs was "unconvincing." FE DSP III Order, p. 31. In the current proceeding, PECO confirmed that the Company's NITS are not volatile costs that would benefit from being collected through a non-bypassable rider. PECO Witness John McCawley testified in response to suggested volatility of NITS as follows:

Your premise is that NITS is something that is unpredictable, but from PECO's, my experience is that NITS is extremely predictable year to year. The PECO network rate has not changed for several, several years in terms of dollar per kilowatt year, and the cost determinant is network service load number, which is established in advance of the calendar year so that if someone were to buy and try to predict what their NITS cost would be for a particular customer, my bet is they could lock it into the penny for a year.

Tr. 58-59. Mr. McCawley's testimony confirms that the reasons cited to justify rejecting a non-bypassable rider for transmission and transmission-related costs in PECO's DSP II proceeding, and more recently in the FE Companies' DSP III proceeding, remain valid for purposes of PECO's current proceeding.

RESA also alleges that the Commission's recent "Fixed Price Order" presents changed circumstances from earlier (*i.e.*, DSP II) determinations that transmission and transmission-related costs should not be recovered through a non-bypassable charge.¹¹ In actuality, the Commission's Fixed Price order focuses only on the nomenclature to be used by EGSs for contracts, thereby rendering it inapplicable to the current issues. In the Fixed Price Order, the Commission finds that customers, specifically residential and small commercial customers, may be deceived by a fixed price contract that includes variable price components or regulatory-out clauses. Fixed Price Order, pp. 21-23 ("It is simply unrealistic to expect the average residential consumer to understand electric markets to this level of granularity, with many of them still struggling with the basic distinctions of generation, transmission, and distribution.").

¹¹ See, *e.g.* *Guidelines for Use of Fixed Price Labels for Products With a Pass Through Clause*; Docket No. M-2013-2362961, Final Order entered November 14, 2013 ("Fixed Price Order").

Importantly, the conclusions of this Fixed Price Order specifically carved-out Large C&I customers for applicability purposes. *Id.* at 30.

RESA also argues that PECO's current practice of assigning responsibility for collecting NITS on a load-following basis creates competitive inequities because PECO can pass-through any NITS charges without reflecting a risk premium in the Price to Compare, whereas an EGS "must account for the current transmission rate and the risk that this rate may increase in prices offered to retail customers." RESA St. 1, p. 26. RESA fails to recognize, however, that if an EGS is concerned regarding the level of risk premiums it would need to include within a fixed price contract, that EGS can negotiate a pass through clause with its customers, as has been done by many Large C&I customers. PAIEUG St. 1, pp. 5-6. By contrast, Large C&I customers are often willing to pay a risk premium to EGSs in order to avoid market volatility and establish budgets. *Id.* at 6. Unfortunately, contrary to the intent of the Competition Act, implementation of a non-bypassable rider would remove this options for Large C&I customers.

The Competition Act indicates that the framers of the legislation intended to provide customers with prices and products to stimulate increased retail competition among EGSs rather than practically eliminate it altogether. The Competition Act provides for "the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation, transmission and distribution." 66 Pa. C.S. § 2802(13); *see also id.* § 2804(3). As a fundamental part of the restructuring of Pennsylvania's retail electric market, the Competition Act required that EDCs collect distribution costs from all customers, while generation and transmission costs were unbundled and collected instead by EGSs from shopping customers. 66 Pa. C.S. § 2802(13); *see also id.* § 2804(3). All EGSs currently participate in the retail marketplace in this

manner, *i.e.*, offering products that include both generation and transmission costs to shopping customers.

By contrast, any proposal for a non-bypassable rider would rebundle distribution and transmission because only PECO would be permitted to collect transmission costs from customers, regardless of whether or not the customers are shopping. In other words, with generation and transmission costs being unbundled, EGSs may offer a range of products to attract Large C&I customers, as well as customers in smaller customer classes. By contrast, requiring PECO to begin collecting transmission costs equates to a rebundling of transmission and distribution in contravention of the Competition Act. As a result, this proposal is contrary to the plain language of the Competition Act, which requires that only distribution costs should continue to be charged by a shopping customer's EDC.

Accordingly, any proposal to remove the collection of transmission and transmission-related costs from EGSs and transfer them to PECO for collection would run contrary to PUC precedent and record evidence specifically finding that these costs are not volatile; would inappropriately rebundle transmission and distribution service contrary to the Competition Act; and would eliminate numerous products from the competitive marketplace in direct contradiction to the needs of Large C&I customers for contracting purposes. For these reasons, any proposal to collect transmission and transmission-related costs through a non-bypassable rider must be rejected.

4. The Collection of Transmission and Transmission-Related Costs Through a Non-bypassable Rider Would Raise Significant Contractual and Double Collection Concerns for Large C&I Customers.

Collection of transmission and transmission-related costs through a non-bypassable rider would not just raise precedential concerns, but would also bring about significant contractual and

double-collection concerns for Large C&I customers. Unfortunately, as part of this proceeding, neither PECO nor RESA address how customers can be protected from the issues that would arise if a change in collection were to occur in the middle of customers' contracts, especially those customers with fixed-price contracts. Moreover, neither PECO nor RESA provide any detail regarding how the allocation and collection of any costs collected through a non-bypassable rider would occur in order to ensure that subsidization among and between the customer classes does not result. Similarly, because incorrect cost collection could send inappropriate market signals, especially to Large C&I customers, lack of details regarding implementation raises further concerns. Because of these overarching issues that remain outstanding, any proposal to recover transmission and transmission-related costs through a non-bypassable rider should be rejected.

i. Collection of Transmission and Transmission-Related Costs Through a Non-bypassable Rider Would Raise Significant Contractual and Double Collection Concerns for Large Commercial and Industrial Customers.

RESA contends that utilizing a non-bypassable rider for the collection of transmission and transmission-related costs would benefit EGSs because EGSs would no longer have to place a risk premium into customers' contracts.¹² In focusing on the benefits to EGSs, RESA fails to recognize the resulting problems that will occur for customers, especially Large C&I customers, including contractual concerns. Because of the potential harm that could arise to Large C&I customers, any proposal to collect transmission and transmission-related charges through a non-bypassable rider must be rejected.

¹² Interestingly, PECO appears to fundamentally agree that transmission and transmission-related charges should ideally be recovered on a load-following basis. PECO St. No. 1-R, p. 18 (stating that "Consistent with DSP II, PECO believes that LSEs, including EGSs should be responsible for PJM charges assigned to LSEs").

The Commission has previously recognized the inherent problems that can be faced, especially by Large C&I customers, due to non-bypassable riders. In PPL Electric Utility Corporation's previous DSP proceeding, the Commission opposed non-bypassable transmission cost collection, noting the forced renegotiation of shopping contracts and increased likelihood of double cost collection by EDCs and EGSs. *Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. P-2012-2302074 (Jan. 24, 2013), p. 85. Similarly, in Duquesne Light Company's last DSP proceeding, the Commission held that the current collection of transmission costs by EGSs is "consistent with the Commonwealth's continued migration to a more competitive retail market, and that RESA's proposal would be a step backward because it would result in the rebundling of transmission costs with distribution rates." *Petition of Duquesne Light Company For Approval of Default Service Plan For The Period of June 1, 2013 Through May 31, 2015*, Opinion and Order, Docket No. P-2012-2301664 (Jan. 25, 2013), p. 222.

Currently, Large C&I customers may choose to utilize the option of allowing for either pass-through or fixed price arrangements by negotiating with their EGS to apply a pass-through of some transmission/transmission-related charges while including other transmission/transmission-related charges within a fixed price. PAIEUG St. 1, p. 8. For example, Thomas Jefferson University/Thomas Jefferson University Hospital, Inc. ("TJU"), a member of PAIEUG, has entered into contracts with its EGS based upon the EGS offering the type of product TJU is seeking for each of its accounts. For its GS accounts, TJU has been willing to remit a risk premium to obtain an all-in, fixed price. *Id.* at 4. For its HT accounts, TJU has utilized a pass-through for NITS and capacity costs, with TJU remitting a risk premium to obtain all other costs via a fixed price. *Id.* at 5. Unfortunately, any proposal to shift the

collection of these costs to the EDC would effectively eliminate TJU's ability to work with its EGS to obtain a pricing model that best accommodates each of its accounts. *Id.* at 5.

In addition to removing customer choice options, any change in collection would further interfere with customers' contracts by raising fundamental transition issues for Large C&I customers that have competitive supply contracts. Customers with fixed price contracts are particularly susceptible to the unfair transitional issues associated with a non-bypassable proposal. For example, a customer such as TJU may have certain transmission and transmission-related costs in its fixed price; however, TJU's EGS may not be certain what portion of the fixed price should be reduced to represent the transmission and transmission-related costs that would be transferred to PECO for collection. *See, e.g.*, PAIEUG St. 1, p. 7. Moreover, the burden would then fall on the customer to ensure that the EGSs have properly removed these costs (possibly mid-way through a contract term) to avoid any double-collection.

If EGSs cannot ascertain the components of the contract price attributable to the costs recovered through a non-bypassable rider, the concern that shopping customers would be overcharged, if not charged twice, for transmission costs is quite real. *See* PAIEUG St. 1, p. 6. Removal of transmission and transmission-related costs from shopping contracts is increasingly complex for large customers with multiple accounts, including accounts supplied by both pass-through and fixed-price arrangements, and these concerns are not theoretical. As recognized by the Commission in the recent FE DSP III Order, the FirstEnergy Companies were permitted to collect RTEP and TEC costs as part of their DSP II proceeding; however, the removal of these costs from EGSs led to disputes between customers and EGSs. *See* FE DSP III Order, p. 42 (stating that "there is merit in the concerns expressed by [Industrials] with regard to a possible

double-collection."). Thus, while the benefits may be viable for EGSs under this proposal, Large C&I customer concerns continue to mount.

Similarly, the purported "solution" to the foregoing transitional issues proposed by RESA fails to resolve the potential for double collection or contract unwinding. RESA proposes to delay the collection of transmission costs by EGSs until one year after PECO's DSP III goes into effect, (*i.e.*, from June 1, 2015, to June 1, 2016). Rebuttal Testimony of Richard J. Hudson, RESA Statement No. 1-R ("RESA St. 1-R"), p. 18. Although RESA contends this additional time period will allow contracts that collect transmission and/or transmission-related costs to expire, RESA fails to acknowledge that customers are currently negotiating contracts that do not necessary track with the timing of PECO's DSP proceedings. *See* PAIEUG St. 1, p. 6.

For example, TJU is in the process of considering whether to enter into a contract that would cover the period of June 1, 2015 through June 1, 2018. *Id.* Because this contract could be entered into prior to a decision in PECO's DSP III proceeding, RESA's "transitional" solution does little to alleviate TJU's contractual concerns. In other words, private contracting between customers and EGSs occurs in accordance with business needs and market forces, without adherence to default service plan schedules. Although RESA argues that EGSs would proactively remove costs to be recovered via any non-bypassable rider, the Commission's acknowledged concern regarding double collections of RTEP and TEC costs, as expressed in the FE DSP III Order, indicates otherwise. FE DSP III Order, pp. 40, 42. Accordingly, delay in implementation of this proposal would in no way eliminate these transitional concerns for customers.

Accordingly, because of the contractual concerns raised for customers, especially the Large C&I customer class, any purported benefits claimed by EGSs outweigh the concerns

raised by customers. Moreover, none of the "transitional" arguments set forth by RESA accurately and adequately address these concerns but rather raise further issues for such customers, especially in terms of negotiating competitive market products that would meet these customers' needs in a fair and reasonable fashion without implicating double collection concerns. For these reasons, any proposal to collection transmission and transmission-related costs through a non-bypassable rider must be rejected.

ii. None of the Parties Proposing a Non-bypassable Rider Have Provided Adequate Information Regarding the Rate Allocation and Collection of These Costs.

Although both PECO and RESA have proposed a non-bypassable rider for the collection of certain transmission and transmission-related costs, neither party has presented any detail regarding the actual implementation of such a non-bypassable rider. Specifically, neither party has presented any details regarding the means by which these costs would be allocated among the rate classes; the methodology that would be used to collect these costs from customers; or a tariff supplement providing the applicable language governing the implementation of such a mechanism on PECO's system. Because of the lack of specificity regarding these proposals, they must be denied by the Commission.

For example, because PECO and RESA both fail to specify a cost collection method, current shopping customers cannot determine whether the proposed non-bypassable rider would continue utilizing the preferred CP-1 cost collection method or adopt an alternative methodology. *See PAIEUG St. 1, pp. 8-9.* Large C&I shopping customers currently are in a position to work with their EGSs to design an appropriate structure by which they may be charged for transmission service. Under one option, a Large C&I customer may choose to be charged for transmission on a pass-through basis based on the customer's individual transmission

obligation as determined by PJM. If PECO were to implement a non-bypassable rider that would allocate transmission and transmission-related costs among Large C&I customers based on a customer's previous month's peak demand, a Large C&I customer would no longer have the choice to be allocated its own individual transmission obligation, but rather, would be allocated a portion of the Large C&I class transmission obligation in a manner that is not consistent with how cost responsibility for the transmission system is established under PJM's rules.

Similarly, a cost collection methodology that would utilize a customer's monthly kWh usage rather than 1-CP would result in cross-subsidization within the Large C&I class. Under existing processes, Large C&I shopping customers have an incentive to minimize their consumption on peak days to reduce their individual transmission obligation, either through investing in on-site generation or implementing demand response strategies. Large C&I customers may, in the competitive market, negotiate to have their individual costs passed directly through so that the customer's costs for transmission service align with their individual contribution to the transmission system's requirements. Such strategies closely align with the objectives of reducing EDCs' peak demand. If PECO were to collect customers' transmission or transmission-related costs based upon an energy (rather than demand) basis, PECO would eliminate the market signals Large C&I customers currently utilize to reduce their transmission obligation.

If PECO desires to implement a non-bypassable charge to recover transmission or transmission-related charges, the Company should observe the Commission's procedural regulations and submit a separate Petition outlining the proposed rider and providing a specific account of the rate design and cost collection procedures. Alternatively, if the Commission determines that implementation of a non-bypassable rider would be appropriate for some or all

transmission and transmission-related charges, the Commission should direct PECO to submit the proposal as a component of PECO's DSP IV.

Because of the lack of clarity regarding these proposals, combined with the significant problems that could arise, including subsidization among and between classes, as well as the sending of incorrect market signals, these proposals must be rejected.

5. Assuming, *Arguendo*, That the Commission Approves the Collection of Transmission and Transmission-Related Costs from Shopping Customers Via a Non-Bypassable Rider, the Commission Should Adopt a Carve-Out For Large C&I Customers.

As discussed in the foregoing sections, a non-bypassable collection of transmission and transmission-related costs is contrary to the intent of the Competition Act, Commission precedent, and Commission regulations. Similarly, all purported justifications to support a non-bypassable collection of transmission and transmission-related costs are uncorroborated by evidence and therefore carry very little weight. In addition, the transition of transmission and transmission-related costs collection from EGSs to EDCs creates a risk for double collection that may be impossible to avoid. Moreover, the lack of implementation detail presented in this proceeding raises concerns regarding subsidization and inappropriate market signals occurring. For all of these reasons, the Commission's rejection of a non-bypassable collection of transmission and transmission-related costs is just and reasonable. Assuming, *arguendo*, however, that the Commission approves a non-bypassable rider for collection of any transmission or transmission-related charges PJM Charges, then the Commission should also approve a carve-out for Large C&I customers.

Large C&I customers' unique involvement in Pennsylvania's retail electric market warrants divergent treatment with respect to transmission and transmission-related costs. Large C&I customers in PECO's service territory have utilized the existing market structure, with 93%

of Large C&I customers taking competitive supply from EGSs. RESA Exhibit RJH-6. As a class, Large C&I customers are sophisticated consumers, well-positioned to invest in detailed contract negotiations beyond the scope reasonably achievable by Residential or Small C&I customers. *See* Tr. 106-107 (PECO Witness Scott G. Fisher testifying that "that Industrials and Residentials have different understandings of competitive markets.") While Residential and Small C&I customers may seek to simplify their contractual arrangements, many Large C&I customers prefer the option of crafting and customizing their contract terms to include various pass-through and fixed price components based on their individual budgetary concerns. *See, e.g.,* PAIEUG St. 1, p. 8.

For example, Large C&I customers might prefer a shopping contract with more pass-through elements based on the customer's ability to manage risk and willingness to negotiate with EGSs on a number of different pricing components. By contrast, Large C&I customers who are expected to provide accurate projections of their monthly energy expenses for budgeting and forecasting purposes may prefer the predictability of more fixed price components. As a result of the unique manner in which Large C&I customers participate in the competitive market, the Commission should not prohibit Large C&I customers from continuing to pursue competitive products.

Even the evidence offered in support of RESA's proposed non-bypassable rider suggests that the Commission should approve a carve-out for Large C&I customers. RESA contends that the Commission's recent Fixed Price Order justifies non-bypassable collection of transmission or transmission-related charges due to the additional risk associated with collecting such costs through a fixed price. Nevertheless, the Fixed Price Order explicitly exempts Large C&I customers from the findings within the Order because of Large C&I customers' increased

expertise and differing participation in the competitive market. *See* Fixed Price Order, pp. 28, 30. Because the purported "new" precedent relied upon by RESA specifically excludes Large C&I customers, RESA fails to provide any legitimate evidence supporting non-bypassable collection of transmission and transmission-related costs from Large C&I customers. In contrast to RESA's failure to show evidence justifying non-bypassable recovery of transmission and transmission-related costs from Large C&I customers, PECO's testimony indicates that it possesses the capability to develop and implement a non-bypassable charge with a Large C&I carve-out. *See* Tr. 89.

Finally, the potential for a double collection of transmission or transmission-related charges during the transition to non-bypassable collection would have a particularly devastating impact on Large C&I customers who, out of all the customer classes, remit the highest levels of energy costs. Therefore, the repercussions of RESA's proposal would be gravest for Large C&I customers who would suffer the greatest financial harm. Large C&I customers are also the most likely to have multiple accounts with multiple EGSs that might require contract renegotiation. *See* PAIEUG St. 1, p. 2.

Accordingly, if the Commission adopts a proposal that would allow for the change in collection for any or all transmission and/or transmission-related costs, Large C&I customers must be exempted from the non-bypassable collection of these costs. Large C&I customers should be allowed to continue utilizing the competitive retail market to develop products that benefit their individual needs. The Commission's recent Fixed Price Order, cited by RESA, in favor of its proposal, explicitly treats Large C&I customers differently for this same reason. Finally, because non-bypassable cost collection could have the most detrimental impact on Large

C&I customers from a financial perspective, a Large C&I carve-out from any approved non-bypassable collection mechanism is just and reasonable.

6. The Commission Should Disregard PECO's Oral Rejoinder Testimony Due to Procedural Impropriety.

As part of its case-in-chief, PECO chose not to submit any testimony regarding implementation of a non-bypassable rider or present any tariff supplements detailing such a rider, but rather, indicated only that it would take any Commission directives in the FirstEnergy Companies DSP III proceeding into consideration. *See* Tr. 86-87. After maintaining this position through Direct, Rebuttal and Surrebuttal Testimony, PECO reversed position in its oral rejoinder testimony.¹³ Because of PECO's failure to advise parties of its desire to implement a non-bypassable rider in its case-in-chief, as required by Section 5.243 of the Commission's Regulations, the Commission should disregard PECO's oral rejoinder testimony.¹⁴

Throughout the majority of this proceeding, PECO's only position with respect to a non-bypassable rider has been to suggest that the Company did not seek to implement a non-bypassable rider. First, in PECO's case-in-chief Testimony submitted on March 10, 2014, PECO referenced the FirstEnergy proceeding and indicated only that "[a]s in PECO's DSP II proceedings, PECO will continue to monitor the FirstEnergy EDCs' proceedings and will take into consideration any Commission direction to the FirstEnergy EDCs as may apply to PECO." PECO St. 2, p. 18. Second, in Rebuttal Testimony submitted on June 26, 2014, PECO further acknowledged that the presiding ALJ in the FirstEnergy DSP III proceeding issued a Recommended Decision on May 6, 2014 supporting recovery of certain transmission and

¹³ PAIEUG raised its objections to PECO's oral rejoinder at the evidentiary hearings, at which time ALJ Fordham declined to strike PECO's oral rejoinder testimony; however, ALJ Fordham indicated that parties could address any issues at the briefing stage. Tr. 47.

¹⁴ In the event the PUC does not choose to disregard PECO's procedurally inappropriate oral rejoinder, PAIEUG addresses the substantive issues regarding PECO's oral rejoinder in the other sections of this Main Brief. *See* Section III.C.2-5, *supra*.

transmission-related costs on a non-bypassable basis. PECO St. 2-R, p. 17. As a response, PECO reiterated that it would continue to monitor the FE DSP III proceeding, but additionally clarified that "[c]onsistent with [PECO's] DSP II, PECO believes that LSEs, including EGSs should be responsible for PJM charges assigned to LSEs." PECO St. 2-R, p. 17.

Despite continuing to effectively oppose the implementation of a non-bypassable rider, PECO abruptly reversed its position at the evidentiary hearings. Whereas the Company had previously represented that it believed that transmission and transmission-related charges should be recovered on a load-following basis but would take any Commission direction to the FE Companies into "consideration," PECO's oral rejoinder testimony added a more rigid proposition, stating that "[i]f the Commission approves the settlement in the first energy EDC proceedings, PECO proposes to establish a non-bypassable transmission service charge for all distribution [customers] which either includes or excludes NITS as directed by the Commission." *See* Tr. 39-40. Unfortunately, PECO's decision to delay introduction of this proposal until oral rejoinder raises compliance issues with Commission regulations directing parties to establish a case-in-chief as early as possible.

Section 5.243 of the Commission's regulations establishes procedures governing the presentation of evidence by parties. *See* 52 Pa. Code § 5.243. As relevant to this proceeding, Section 5.243(e) establishes that:

- (e) A party will not be permitted to introduce evidence during a rebuttal phase which:
 - (1) Is repetitive
 - (2) Should have been included in the party's case-in-chief
 - (3) Substantially varies from the parties case-in-chief

Id. PECO failed to comply with Section 5.243 by submitting Direct and Rebuttal Testimony indicating that PECO did not have any interest in implementing a non-bypassable recovery of

transmission and transmission-related charges, and then, without any change in circumstances, reversing position in its oral rejoinder testimony.

Appropriately, PECO's case-in-chief, which was filed on March 10, 2014, indicated PECO's decision not to implement a non-bypassable rider in this proceeding. PECO St. 2, p. 18. At that time, a decision had not yet been made in the FE Companies DSP III proceeding. Upon receipt of the other parties' Direct Testimony, PECO was made aware of RESA's position to implement a non-bypassable rider; however, PECO's response in Rebuttal Testimony was to reiterate that it would continue to monitor the FirstEnergy proceeding, but further clarify that "[c]onsistent with [PECO's] DSP II, PECO believes that LSEs, including EGSs should be responsible for PJM charges assigned to LSEs." PECO St. 2-R, p. 17.

Similarly, PECO became fully aware of PAIEUG's opposition to RESA's proposal in the Rebuttal Testimony phase of this proceeding but chose not to respond in Surrebuttal Testimony. Moreover, between the submission of the parties' Direct and Surrebuttal Testimonies, the only change in circumstance that occurred in the FE Companies' DSP III proceeding was the issuance of a Recommended Decision, which occurred on May 6, 2014. *See* Tr. 86-87; *see also* PECO St. 2-R, p. 17; *see also See Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Commencing June 1, 2015 Through May 31, 2017, Recommended Decision, Docket Nos. P-2013-2391368, et al. (May 6, 2014) ("FE R.D.).* If the R.D. in the FE Companies DSP III proceeding had been the impetus for any "change of mind" by PECO, then PECO could have provided that response in its Rebuttal Testimony, which was submitted on June 26, 2014, (*i.e.*, almost two months after the FE Companies' R.D.)

Rather, PECO chose to abruptly reverse its position in the oral rejoinder phase of the proceeding, in which the Company indicated that "If the Commission approves the settlement in the first energy EDC proceedings, PECO proposes to establish a non-bypassable transmission service charge for all distribution [customers] which either includes or excludes NITS as directed by the Commission." Tr. 39. As evidenced by PECO's statement, the PUC had not yet entered an Order in the FE Companies' DSP III proceeding, so that no change of circumstance could truly be claimed by PECO. Moreover, by presenting this change of position in its oral rejoinder phase, PECO failed to develop an evidentiary record in support of the proposal, including proposed tariff supplements and cost collection procedures.¹⁵ In addition, if PECO would have presented this information earlier in the proceeding, PAIEUG would have had adequate opportunity to propound discovery; consider the necessity for an expert witness; engage PECO in informal discovery; and generally establish a complete record for the Commission's consideration.

PECO inappropriately waited until the oral rejoinder phase of this testimony to present a proposal that, per Commission regulations, should have been presented in the Company's case-in-chief. Moreover, considering that no change in circumstances occurred between the submission of the Company's case-in-chief and oral rejoinder, PECO was not estopped from presenting any change in its position earlier in this proceeding. Because PAIEUG's due process rights were violated based upon PECO's actions, PECO's oral rejoinder should be stricken from the record in this proceeding.

¹⁵ At the evidentiary hearings held on July 17, 2014, PECO introduced a document identified as PECO Hearing Exhibit No. 8, which contained discovery responses prepared by RESA Witness Richard Hudson indicating that RESA would not object to adopting the rate design of PECO's current Transmission Service Charge (through which PECO currently collects transmission costs for non-shopping customers) for purposes of a non-bypassable rider. *See* Tr. 139; PECO Hearing Exhibit No. 8. At the time of filing this Main Brief, PECO has not provided any indication as to whether it agrees with Mr. Hudson or has the capability to adopt Mr. Hudson's referenced rate design for purposes of a non-bypassable rider.

IV. STANDARD OFFER PROGRAM

A. Summary of Briefing Party's Position

B. Operational Changes

C. Implementation Costs

PAIEUG has no position on this issue.

D. Standard Offer Program Collaborative

PAIEUG has no position on this issue.

V. OTHER ISSUES

None.

VI. CONCLUSION

WHEREFORE, the Philadelphia Area Industrial Energy Users Group respectfully requests that the Pennsylvania Public Utility Commission:

- (1) Deny RESA's proposal to move Medium C&I customers into the Large C&I procurement group;
- (2) Deny any proposal to implement a non-bypassable rider to collect any transmission and/or transmission-related costs from shopping customers;
- (3) Alternatively, approve a carve-out for Large C&I customers applicable to any non-bypassable rider for the recovery of any transmission and/or transmission-related costs;
- (4) Strike PECO's oral rejoinder as procedurally deficient; and
- (5) Grant any additional relief deemed appropriate and consistent with the above recommendations.

Respectfully submitted,

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