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October 17, 2014

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 for the period from June 1, 2015 through May 31, 2017; Docket No. P-2014-2409362

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Retail Energy Supply Association's ("RESA") Reply Exceptions with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Cynthia Fordham, w/enc.
Office of Special Assisants via email only (ra-OSA@pa.gov)
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of RESA's Reply Exceptions upon the participants listed below in accordance with the requirements of § 1.54 (relating to service by a participant).

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Dated: October 17, 2014

Deanne M. O'Dell, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2015 through May 31, 2017	:	Docket Nos. P-2014-2409362

REPLY EXCEPTIONS OF RETAIL ENERGY SUPPLY ASSOCIATION

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I. INTRODUCTION

As explained in the Exceptions that the Retail Energy Supply Association ("RESA")[1] filed on October 10, 2014, the Commission has an excellent opportunity in this proceeding to ensure that all customers pay only the actual costs – nothing more and nothing less – that all load serving entities ("LSEs") are assessed in the wholesale market (referred to this this case as "PJM Charges"[2]). Likewise, this proceeding presents the Commission with the opportunity to allow PECO's Medium Commercial customers to receive the benefits of a more market-based default service rate that is based on hourly LMP just as the Commission directed in its *End State Order*.[3] To achieve this result, the Commission should deny the Exceptions filed by the Office of Small Business Advocate ("OSBA") and the Philadelphia Area Industrial Energy Users Group ("PAIEUG") and, instead, direct (consistent with RESA's Exceptions) that: (1) the Partial Settlement be approved as submitted; (2) PECO shall assume the cost responsibility for NITS for all load; and, that (3) PECO's assumption of cost responsibility for all the PJM Charges (including NITS) apply to all customer classes.

Both OSBA and PAIEUG suggest that the Commission deny the sound recommendation of the ALJ to approve the Partial Settlement which sets forth a reasonable transition plan for

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1 RESA's members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy: Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent only those of RESA as an organization and not necessarily the views of each particular RESA member.

2 These charges include: (1) Transmission Enhancement charges (a/k/a Regional Transmission Expansion Plan "RTEP") and Expansion Cost Recovery charges (collectively, "TEC/ECRC"); (2) Generation Deactivation/Reliability Must Run ("RMR") charges for which charges are set after the approval of PECO's Revised DSP III by the Commission; and, (3) Network Integration Transmission Services ("NITS").

3 *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. 1-2011-2237952, Final Order entered February 15, 2013 ("*End State Order).*

Medium Commercial customers (depending on PECO's implementation of testing and necessary systems changes). As explained further below, PAIEUG's opposition has no foundation in fact as it is based on a failure to recognize that the Partial Settlement mooted its earlier concerns about how such transition would impact the default service rates for the Large Commercial and Industrial ("C&I") customers.

OSBA's opposition is really a collateral attack on the sound legal determinations in the Commission's *End State Order* that Medium Commercial customers should be transitioned to hourly priced service effective June 1, 2015. Despite OSBA's arguments to the contrary, the *End State Order* is fully consistent with the Electricity Generation Customer Choice and Competition Act ("Competition Act")[4] and there is no basis in law or fact to ignore that clear direction here. To the contrary, the Partial Settlement presents a reasonable manner to accomplish the direction so plainly laid out by the Commission in the *End State Order* which benefits Medium Commercial customers. For all these reasons, the ALJ correctly recommended that the opposition of PAIEUG and OSBA to the Partial Settlement's transition of Medium Commercial customers to hourly priced service should be rejected and the Commission must deny their exceptions on this issue.

Regarding PJM Charges, PAIEUG persists in its untenable view that enabling all customers to benefit from paying only the costs of the non-market based PJM Charges is a bad result for Large C&I customers. Thus, PAIEUG erroneously continues to argue in its exceptions that the record does not support the non-market based nature of these charges and their impact on retail pricing. As explained further below, these claims are not rooted in the actual record of this case which fully explains the non-market nature of the PJM Charges, how this nature impacts

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4 66 Pa.C.S. §§ 2801-2812.

retail pricing, and how allowing all LSEs to avail themselves of the right of full and current cost recovery provided to the electric distribution company ("EDC") benefits all customers and is consistent with the nondiscriminatory access requirements of the Competition Act.

For all these reasons, RESA urges the Commission to deny the exceptions of OSBA and PAIEUG, grant the exceptions of RESA and direct that: (1) the Partial Settlement be approved; (2) PECO shall assume the cost responsibility for NITS for all load; and that, (3) PECO's assumption of cost responsibility for all the PJM Charges (including NITS) applies to all customer classes.

II. REPLY TO EXCEPTIONS OF OSBA

OSBA urges the Commission to reject the ALJ's sound recommendation to adopt the approach in the Partial Settlement setting forth how PECO's Medium Commercial customers will be transitioned to hourly priced service. OSBA claims that the ALJ erred because: (1) she did not cite to legal support for her recommendation (OSBA Exception Number 1); and, (2) the record allegedly did not provide substantial evidence in support of transitioning Medium Commercial customers to hourly priced service (OSBA Exception Number 2). OSBA, however, is wrong to claim either that the Commission lacks the legal authority to issue a decision here consistent with the *End State Order* or that the record would not support such a decision.

The Commission's *End State Order* and the Partial Settlement's plan to transition Medium Commercial customers to hourly priced service are both consistent with the Competition Act. The Competition Act requires that the default service provider acquire electric energy through a "prudent mix" of resources that must be designed: (i) to provide adequate and reliable service; (ii) to provide the least cost to customers over time; and, (iii) to achieve these results through competitive processes which includes auctions, requests for proposals and/or

bilateral agreements.[5] In addition, the Competition Act specifically states that transitioning customers to the competitive market is "in the public interest" because "competitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[6] As the Commonwealth Court has noted, "the Competition Act was enacted to establish competition in the sale of electric power" and "places an affirmative mandate on the PUC to foster competition" so as to "provide cost savings to consumers."[7] Thus, the General Assembly clearly anticipated that the competitive market would lead to lower (or at least market based) pricing for electricity and the Competition Act specifically requires the Commission to take measures to develop a competitive retail market.[8] Therefore, in addition to satisfying the specific requirements of Section 2807(e)(3.1) regarding procurement plan design, the Commission is legally required to ensure that the approved default service plan is reasonably calculated to promote the development of a competitive retail generation market.

The Commission has spent much time interpreting these requirements of the Competition Act. Prior to (and following) the *End State Order,* the Commission consistently approved default service plans based on hourly priced service as the most appropriate default service design for large commercial and industrial customers.[9] These decisions have never been

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5 66 Pa. C.S. §§ 2807(e)(3.1), (3.2), and (3.4).

6 66 Pa.C.S. § 2802(3),(5).

7 *ARIPPA v. Pennsylvania Public Utility Commission*, 792 A.2d 636, 642, 654 n. 30; (Pa. Commw. Ct. 2002); *PP&L Industrial Customer Alliance v. PUC*, 780 A.2d 773, 776 (Pa. Commw. Ct. 2001).

8 66 Pa. C.S. §§ 2802(3) and (5); *see also Green Mountain Energy Company v. Pa. Public Utility Commission,* 812 A.2d 740, 742 (Pa. Cmwlth. 2002).

9 *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670, Opinion and Order entered August 16, 2012; *Petition of PECO Energy Company for Approval of its Default Service Program* II, Docket No. P-2012-2283641, Opinion and Order entered October 12, 2012; *Petition of Duquesne Light Company for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2013 through May 31, 2015,* Docket No. P-2012-2301664, Opinion and Order entered January 25, 2013; *Petition of Pike*

appealed. After an investigation that lasted almost two years, involved eight rounds of comments, and numerous technical conferences and *en banc* hearings relying on input from a wide variety of stakeholders, the Commission concluded in the *End State Order* that that all customers benefit from a default service rate that is "more market-based."[10] Regarding Medium Commercial customers, the Commission concluded in the *End State Order* that they "are equally well-equipped and educated [like large commercial and industrial customers] to manage their commodity costs in an hourly LMP default service environment" and, therefore, they too could benefit from a more market-based default service rate based on hourly LMP. Consistent with these determinations, the Commission directed the EDCs to offer this type of default service rate to medium commercial customers with interval meters for default service plans to be effective on June 1, 2015.[11] The Commission's *End State Order* has not been appealed and it continues to be the most on-point and recent precedent of the Commission regarding the transition of Medium Commercial customers to hourly priced service. OSBA implicitly concedes that approving the Partial Settlement's transition for the Medium Commercial customers would be consistent with the *End State Order* – a result the ALJ rightly recommended that the Commission approve.

Notwithstanding this, OSBA seems to believe that any default service procurement plan that might lead to a "more market-based" default service rate would violate the Competition Act.

County Light & Power Company for Approval of its Default Service Implementation Plan, Docket No. P-2011-2252042, Opinion and Order entered May 24, 2012.

10 *End State Order* at 24. OSBA also attempts to find support for its flawed view in text of the Commission's *Act 129 Final Rulemaking Order. Implementation of Act 129 of October 15, 2008; Default Service And Retail Electric Markets*, Docket No. L-2009-2095604, Final Rulemaking Order Entered October 4, 2011) ("*Act 129 Final Rulemaking Order*"). As explained in RESA's Reply Exceptions, the Commission's *Act 129 Final Rulemaking Order* – entered fifteen months before the *End State Order* – provides no basis upon which to reject the Partial Settlement because the Commission made clear that it was not intended to create an mandates for future default service plans or require (or reject) any specific contract mix. RESA Reply Brief at 4-5.

11 *End State Order* at 29.

According to OSBA's faulty logic, a market-based default service rate fails to acknowledge the 2008 amendments to the Competition Act (effectuated through House Bill 2200, referred to as "Act 129") which removed the prior "prevailing market rate" language and, according to OSBA, requires the Commission to focus not on the "market-responsiveness of default service but rather . . . a prudent mix of sources designed to provide the least cost to customers over time."[12] Ironically, OSBA ignores the fact that the Act 129 amendments did not alter the core purpose of the Competition Act which is that customers should have direct access to the competitive market and that transitioning customers to the competitive market is "in the public interest" because "competitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[13] Nowhere in OSBA's Exceptions does it discuss how the clearly expressed goals of competition and direct access to the competitive market set forth in the Competition Act would be accomplished by not transitioning Medium Commercial customers to hourly priced service. Contrary to OSBA's flawed advocacy, the mere removal of the term prevailing market rate does not mean that the Commission is legally barred from seeking to establish a more market-based default service rate. Rather, a holistic review of the Competition Act and the Commission's interpretations of the Competition Act over the years (which have been affirmed on appeal), makes clear that the Commission was well within its legal authority regarding the pronouncements in the *End State Order* and; therefore, adopting the Partial Settlement's transition plan here for Medium Commercial customers is legally sound.

Despite this, OSBA attempts to use the Commission's own words in the *End State Order* as alleged proof that the Commission itself believes that it needs legislative amendments before

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12 OSBA Exceptions at 14.

13 66 Pa.C.S. § 2802(3),(5).

it can transition Medium Commercial customers to hourly pricing.[14] This argument is unavailing, though, because the Commission does not reference in the *End State Order* any specific sections of the Competition Act which it believes: (1) prohibits the movement of Medium Commercial customers to the hourly priced procurement group; or, (2) needs to be changed before the Commission can implement the recommendations in the *End State Order*.[15] To the contrary, the Commission stated that it "appears currently to have authority to establish shorter-term default service products that are more reflective of market conditions than existing products."[16] On review, the appellate court affords the Commission "great deference" regarding its interpretations of the Competition Act and does not reverse the Commission's decision "unless clearly erroneous."[17] Appellate courts also recognize that deference regarding the Commission's interpretation of the Competition Act is particularly important because "the statutory scheme is technically complex."[18] The Commission's interpretation of the Competition Act regarding the transition of Medium Commercial customers as expressed in the *End State Order* is entirely consistent with the Competition Act's requirements that the Commission: (1) approval a default service plan that satisfies the requirements of Section 2807(e)(3.1); and, (2) ensure that the approved default service plan is reasonably calculated to promote the

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14 OSBA Exceptions at 8-9 OSBA's arguments about the *Act 129 Rulemaking Order* are addressed above in footnote 10.

15 RESA Initial Brief at 21 citing *End State Order* at 45("spot market approaches in specific situations are appropriate" but the Commission stated that it would "prefer to purse legislative amendments that provide the authority.") The Commission also referenced the then pending appeal in the Pike County case which was subsequently affirmed on appeal in the *Popowsky v. PUC*, 71 A.3d 1112, 1117 (Pa. Commw. Ct. 2013), appeal denied, 83 A.3d 416 (Pa. 2013). ("*Pike Decision*").

16 *End State Order* at 46. The Commission also referenced the pending appeal in the Pike County case which, as discussed above, was affirmed by the Commonwealth Court thereby granting the Commission the discretion to approve a default service procurement plan that relies on one type of contract such as recommended here for medium commercial customers.

17 *Pike Decision* 71 A.3d 1117, citing *Energy Conservation Council of PA v. Public Utility Commission*, 995 A.2d 465, 478 (Pa. Commw. Ct. 2010).

18 *Id., citing Popowsky v. Pennsylvania Public Utility Commission*, 706 A.2d 1197, 1203 (Pa. 1997).

development of a competitive retail generation market. As such, the ALJ's recommendation that the Commission adopt the Partial Settlement's transition of Medium Commercial customers to hourly priced service has a solid legal foundation and must be approved.

When reviewing the Commission's determinations, the Commonwealth Court defers to the Commission's factual findings if they are supported by substantial evidence.[19] Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[20] In its Exceptions, OSBA clarifies that it is not disputing the number of contracts in the default service procurement plan,[21] "but rather whether hourly pricing for PECO's Medium Commercial customers is prudent and designed to provide the least cost to customers over time."[22] According to OSBA, the record allegedly does not show "why the increased volatility of hourly pricing is prudent for PECO's Medium Commercial customers or that this product is designed to provide the least cost to customers over time."[23] Despite these claims, the record here consists of substantial evidence to support the ALJ's recommendation that the Commission approve the Partial Settlement's transition plan for Medium Commercial customers.

Specifically, the record shows that hourly priced service is a more sustainable default service design for developing a functioning competitive market which benefits customers by giving them access to a competitive market that offers many different products and services that

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19 *Metropolitan Edison Company and Pennsylvania Electric Company,* 22 A.3d at 359 (Pa. Commw. Ct. 2011).

20 *Id. citing W.C. McQuaide, Inc. v. Pennsylvania Public Utility Commission*, 585 A.2d 1151 (Pa. Commw. Ct. 1991).

21 OSBA concedes that "it is possible for one product to meet" the statutory standard for prudent mix as the Commission approved for Pike County Power and Light which was upheld on appeal in the *Pike Decision.* OSBA Exceptions at 13.

22 OSBA Exceptions at 13.

23 *Id.*

will better meet the individual needs and desires of customers while also achieving broader public policy goals such as encouraging energy conservation and demand response.[24] In addition, the shopping statistics for the medium commercial class (85% of the load is shopping presently) support the Commission's determination in the *End State Order* that these customers are comfortable with the competitive market and are capable of managing a more market-based default service rate.[25]

Faced with this evidence, OSBA is left to argue that the few Medium Commercial customers continuing to receive default service "still value price stability" and have "chosen not to switch to an EGS."[26] However, as explained more fully in RESA's Initial Brief, concerns about volatile pricing are overreaching and place too much emphasis on just one component of pricing – its ability to change.[27] While RESA does not necessarily dispute that some customers may value price stability – even if that stable price is higher than the market price – the role of default service is not to provide that one particular product type.[28] In fact, there is nothing in the text of the Competition Act which requires the default service rate to be a "stable" rate.[29] Thus, as directly consistent with the Competition Act and based on the substantial evidence in the record here, the Commission should stay the course in ensuring that the default service plan is reasonably calculated to produce a more market-based default service rate to encourage competitors to enter the market, prevent opportunities for "boom/bust" cycles and provide a

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24 RESA Initial Brief at 17 citing RESA St. No. 1 at 20-21. RESA Reply Brief at 6-7.

25 RESA Reply Brief at 7.

26 OSBA Exceptions at 8.

27 RESA Initial Brief at 9-15.

28 RESA St. No. 1-SR at 7.

29 Rather, the term "price stability" appears only in the Preamble to Act 129, and the Competition Act never references price stability in either Section 2807(e) or Section 2802 ("Declaration of Policy").

variety of products and services (including higher priced, but stable products) so that each individual customer can choose the product that best suits their desires. Contrary to OSBA's advocacy, tailoring a default service plan to suit the alleged needs of just one small subset of Medium Commercial customers does not best serve their interests to be able to avail themselves of "competitive market forces [that] are more effective than economic regulation in controlling the cost of generating electricity."[30]

For all these reasons (which are consistent with the determination of the *End State Order*), exercising the discretion afforded to the Commission by the Commonwealth Court and based on the substantial evidence in this record, the ALJ was correct to recommend that the Partial Settlement's transition be adopted and OSBA's exceptions must be denied.

III. REPLY TO THE EXCEPTIONS OF PAIEUG

A. Adopting The Partial Settlement's Transition Plan For Medium Commercial Customers To Hourly Priced Service Does Not Create A Potential For Increased Risk Premiums In The Wholesale Bids For Hourly Priced Service

In Exception Number 2, PAIEUG incorrectly argues that the ALJ erred by allegedly not "addressing the impact that transferring Medium C&I customers to hourly-priced service at currently unknown dates could have on risk premiums for hourly-priced procurement" and that the Commission should reject the Partial Settlement's transition plan for Medium Commercial customers because Large C&I customers need to be "protected" from "potential risk premium increases" that PAIEUG claims will result from the transition.[31] PAIEUG's opposition,

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30 66 Pa.C.S. § 2802(3),(5).

31 PAIEUG Exceptions at 15.

however, is based on regurgitated arguments from its Main Brief which were completely mooted by the transition plan set forth in the Partial Settlement (which was filed after main briefs).[32]

As explained by both PECO and RESA in their reply briefs, the Partial Settlement fully resolves PAIEUG's concerns because it would maintain PECO's current approach for bidding out the supply for Large C&I customers as 12-month contracts.[33] This, coupled with the timeline established in the Partial Settlement, means that wholesale default service suppliers for the Large C&I customers will know prior to submission of their bids whether additional customers from the Medium Commercial customer class are to be included in the procurement.[34] Thus, if PECO determines that it can accommodate the transition of Medium Commercial customers in time to include them with the Large C&I solicitation scheduled for March 2016 (for delivery on June 1, 2016), PECO will cancel the Medium Commercial customer solicitation and include the Medium Commercial customers as part of the solicitation for the Large C&I customers.[35] If the transition cannot occur for the June 1, 2016 delivery date, then the solicitations will proceed without change.

Because of this approach, there is no need for the wholesale default service suppliers to factor into their bids an additional amount as a risk premium to cover a future possibility of being required to serve more customers than anticipated – because there is no such risk. As

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32 PAIEUG's concerns as expressed in its Main Brief were in response to a suggestion by RESA that the Large C&I procurements could have been changed from 12-month contract to 3-month contracts to accommodate a rolling transition of Medium Commercial customers into the Large C&I procurement class. RESA Initial Brief at 23; RESA St. No. 1-SR at 12-13. PECO opposed this approach claiming that it would lead to failed procurements and higher costs for Large C&I customers. While RESA did not agree with PECO's view, the issue was mooted by the Partial Settlement because the Large C&I procurements will be for 12-month contracts consistent with PECO's initial proposal.

33 RESA Reply Brief at 3-4; PECO Reply Brief at 7-8.

34 Partial Settlement at Exhibit A.

35 Partial Settlement at 8-9, ¶26(b).

such, the ALJ did not err in recommending that the Partial Settlement's transition of Medium Commercial customers to hourly priced service should be rejected on the basis of increasing costs for the Large C&I customers because no such result will occur. Thus, PAIEUG's Exception Number 2 should be denied and the Commission should accept the ALJ's recommendation to approve the Partial Settlement's transition plan for Medium Commercial customers.

B. The Record Fully Supports Requiring PECO To Assume The Cost Responsibility For All PJM Charges And Recover The Costs From All Customers Through A Non-Market Based Charge

In Exception Number 1, PAIEUG opposes the ALJ's recommendation to allow PECO to assume the cost responsibility for PJM Charges and recover the costs from all customers through a non-bypassable charge on the basis that it is "unreasonable and unnecessary" for "any customer class."[36] PAIEUG claims that no evidence has been presented to warrant this approach and, further, there has been no showing of a change in circumstances as a result of the *Fixed Price Label Order*.[37] Finally, PAIEUG claims that adopting the Partial Settlement's approach regarding PJM Charges would have a discriminatory impact on Large C&I customers.[38] PAIEUG is patently wrong on all these points and, therefore, its Exception Number 1 must be denied and the Commission should enter an order consistent with RESA's exceptions that would require PECO to assume the cost responsibility for all PJM Charges (including NITS) and recover the costs from all customers through a non-bypassable charge.

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36 PAIEUG Exceptions at 3. PAIEUG does, however, "wholeheartedly" support the ALJ's recommendation for a carve out for the Large C&I customers. As explained in RESA's Exception Number 1, RESA opposes such carve out.

37 *Id.* at 5-6.

38 *Id.* at 10.

PAIEUG's claim that no evidence exists to support the non-market based nature of the PJM Charges or that claims of rate volatility of these PJM Charges are "unsubstantiated" is undermined by: (1) its own recognition that PJM and the Federal Energy Regulatory Commission ("FERC") are in control regarding the costs that are assessed to all LSEs; and, (2) the description by PAIEUG's own witness that there "is volatility associated with some of these costs."[39] By definition, when costs are allocated based on regulatory action or control, those costs are not market-based costs.[40] Therefore, the costs are subject to change and are volatile.[41] As explained in RESA's Exceptions, the non-market based nature of all the PJM Charges makes them non-hedgeable wholesale cost obligations that are unpredictable.[42] As such, there is no market-based, transparent way to reasonably calculate future rate increases to the PJM Charges and then accurately factor them into retail pricing. The result – as set forth in the record – is that customers may pay something other than the actual costs of the PJM Charges unless the EDC assumes the cost responsibility for the PJM Charges for all load and leverages its right to full and current cost recovery to ensure that no customers pay anything but the actual costs of the PJM Charges.[43] This outcome – which would result from adopting the Partial Settlement as modified by RESA's exceptions – would treat all customers fairly and equally.[44] As such, the record fully

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39 Id. at 6; PAIEUG St. No. 1-R at 5.

40 All of the PJM Charges fit within this category. *See* RESA Initial Brief at 33-34.

41 A recent example of this FERC Order on Docket Number EL 11-54-002 available at http://www.ferc.gov/CalendarFiles/20140908122402-EL11-54-002.pdf. *See* RESA Exceptions at 7, n. 19.

42 RESA Exceptions at 3. *See* also RESA Initial Brief at 33-35; RESA Reply Brief at 9-13; RESA St. No. 1 at 25.

43 RESA St. No. 1 at 27-18; RESA St. No. 1-SR at 16, 19.

44 As RESA explained in its Exceptions, PAIEUG's claims that the Commission must protect its ability to negotiate contracts that address PJM Charges ignores: (1) the fact that the PJM Charges are separate from the market-based energy commodity and treatment of PJM Charges does not impact this right in any way; and, (2) creating a situation where suppliers are required to absorb the costs of the PJM Charges either

supports requiring PECO to assume the cost responsibility for all of the PJM Charges (including NITS) and recovering the costs from all customers through a non-bypassable charge and, therefore, PAIEUG's Exception Number 1 should be denied.

PAIEUG's other criticism that the *Fixed Price Label Order* does not demonstrate a change in circumstances to justify requiring PECO to assume the cost responsibility for all PJM Charges for all load and recover the costs from all customers through a non-bypassable charge is without merit. As explained by RESA Witness Richard J. Hudson, Jr., the *Fixed Price Label Order* places practical constraints on the ability of EGSs to recover the costs of future rate increases in NMB Charges.[45] This is because – under the present process – there is only one way for an EGS to guarantee its ability to recover from customers the future, unpredictable rate changes in PJM Charges and that is to offer a variable priced product.[46] An EGS offering a fixed price product cannot adjust the contract during the term to recover the costs from customers for unpredictable rate changes to the PJM Charges – regardless of whether or not such right is reserved in the contract.[47] EGSs also cannot rely on a "regulatory out" clause in the contract to recover the cost from the fixed price customer because the *Fixed Price Label Order* requires an EGS dealing with an unpredicted rate increase in NMB Charges (that it did not already factor

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because it did not factor in the correct risk premium or negotiated away its right to do so is not sustainable and will have a negative long-term impact on the market. RESA Exceptions at 12-14.

45 RESA St. No. 1 at 27-28.

46 Notably, the Commission has expressed "particular concern for customers receiving their electric supply service from an EGS under a contract with a monthly adjusted variable rate" and has undertaken numerous measures (including implementing new regulations) to help ensure that consumers are more informed about variable rate products. *See, e.g., Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices to Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Final-Omitted Rulemaking Order, Docket No. L-2014-2409385, Final-Omitted Rulemaking Order entered April 3, 2014 at 6-8 ("*Final-Omitted Rulemaking Order*").

47 *Fixed Price Label Order* at 24 ("a 'fixed price' product must not change in price during the term of the agreement").

into the fixed price product) to provide the customer prior notice of the EGS's intent to pass on the charge to the customer. If the customer does not affirmatively agree to the price increase, then the EGS must cancel the contract.[48] The likely outcome of this action is for the EGS to lose the customer.

For all these reasons, the practical impact of the *Fixed Price Label Order* for the competitive market is that EGSs assessing how to deal with unpredictable future rate changes in PJM Charges need to determine whether to: (1) rely exclusively on variable contracts to recover these costs; or, (2) take the risk of offering fixed price contracts knowing that the contracts will likely be cancelled if the EGS attempts to recover the costs from the customer. Neither result is good for customers because each limits the variety of potential competitive products and competitive pricing that could be offered. The Commission acknowledged this reality in the *Fixed Price Label Order* when it stated:

> We. . . understand that if EGSs are not able to recover costs that are imposed upon them, they may indeed limit the variety of long-term fixed price offers they make available. Additionally, such offers may have to include a substantial risk-premium that would increase customer costs.[49]

Thus, and despite the efforts of PAIEUG to argue otherwise, the *Fixed Price Label Order* has presented new practical obstacles to the ability of customers to have a variety of competitive products available to them. In the *Fixed Price Label Order*, the Commission noted that "there may be mechanisms to help address this concern that are more legally tenable than allowing a 'fixed' price to change."[50] RESA's recommendation here presents the Commission one of those

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48 *Id.* at 26.

49 *Id.* at 25-26.

50 *Id.* at 26.

more legally tenable alternate mechanisms[51] because the end result would be to remove the need for EGSs to factor into their pricing and product decisions the risk of future unpredictable price increases related to PJM Charges thereby giving them more flexibility to design a greater array of competitive products and pricing.

In sum, requiring PECO to assume the cost responsibility for all load would lead to significant positive impacts for customers especially given the practical effect of the *Fixed Price Label Order*. First, the resulting price paid by customers (whether default service customers or shopping customers) will not include any amount to account for the risk of future rate changes in the PJM Charges. Second, EGSs would have more flexibility to design their products and pricing without factoring in the risk of unpredictable increases in PJM Charges which would benefit customers with a greater variety of competitive products. Finally, the wholesale default service supplier and the EGS would have equal and non-discriminatory access to the EDC's ability to ensure that only actual costs of the PJM Charges are paid by all customers.[52] Thus, for all these reasons, PAIEUG's Exception Number 1 should be denied.

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51 As explained in RESA's Exceptions, requiring the EDCs to assume the cost responsibility for all load (shopping and default service) is consistent Sections 2803 and 2804(6) which require equal access on a nondiscriminatory basis to the EDC's own use of its transmission and distribution system. 66 Pa. C.S. § 2803 and 2804(6). RESA Exceptions at 8-10.

52 RESA Initial Brief at 12-14.

IV. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission grant these exceptions and direct that: (1) PECO assume the cost responsibility for NITS for all load; and that, (2) PECO's assumption of cost responsibility for all the PJM Charges (including NITS) applies to all customer classes. All other recommendations set forth in the RD should be approved.

Respectfully submitted,

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