



An Exelon Company

W. Craig Williams  
Assistant General Counsel  
2301 Market Street / S23-1  
Philadelphia, PA 19103

Direct Dial: 215-841-5974

August 25, 2016

**VIA eFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
P. O. Box 3265  
Harrisburg, PA 17105-3265

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

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Dear Secretary Chiavetta:

Enclosed for filing is the **Reply Brief of PECO Energy Company ("Reply Brief")** in the above-referenced matter.

As evidenced by the attached Certificate of Service, a copy of the Reply Brief has been served upon Administrative Law Judge Cynthia Williams Fordham and all parties of record. Should you have any questions, please contact me directly at 215-841-5974.

Very truly yours,

A handwritten signature in black ink, appearing to read "Craig Williams", written over a horizontal line.

W. Craig Williams

Enclosures

cc: Per Certificate of Service (w/encs.)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY** :  
**COMPANY FOR APPROVAL OF ITS** :  
**DEFAULT SERVICE PROGRAM FOR** : **Docket No. P-2016-2534980**  
**THE PERIOD FROM JUNE 1, 2017** :  
**THROUGH MAY 31, 2019** :

**CERTIFICATE OF SERVICE**

I hereby certify and affirm that I have this day served a copy of the Reply Brief of PECO Energy Company on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

**VIA FEDERAL EXPRESS**

The Honorable Cynthia Williams Fordham  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
801 Market Street, Suite 4063  
Philadelphia, PA 19107  
[cfordham@pa.gov](mailto:cfordham@pa.gov)

**VIA ELECTRONIC MAIL AND FIRST CLASS MAIL**

Phillip C. Kirchner  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commerce Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17105-3265  
[phikirchne@pa.gov](mailto:phikirchne@pa.gov)

Elizabeth Rose Triscari  
Deputy Small Business Advocate  
Office of Small Business Advocate  
Suite 202, Commerce Building  
300 North Second Street  
Harrisburg, PA 17101  
[etriscari@pa.gov](mailto:etriscari@pa.gov)

Aron J. Beatty  
Senior Assistant Consumer Advocate  
Candis A. Tunilo  
Assistant Consumer Advocate  
Christy M. Appleby  
Office of Consumer Advocate  
5th Floor, Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
[abeatty@paoca.org](mailto:abeatty@paoca.org)  
[ctunilo@paoca.org](mailto:ctunilo@paoca.org)  
[cappleby@paoca.org](mailto:cappleby@paoca.org)

Charis Mincavage  
Adeolu A. Bakare  
Alessandra L. Hylander  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, PA 17108-1166  
[cmincavage@mcneeslaw.com](mailto:cmincavage@mcneeslaw.com)  
[abakare@mcneeslaw.com](mailto:abakare@mcneeslaw.com)  
[ahylander@mcneeslaw.com](mailto:ahylander@mcneeslaw.com)  
*Counsel for the Philadelphia Area  
Industrial Energy Users Group*

Charles E. Thomas, III  
Thomas, Niesen & Thomas, LLC  
212 Locust Street, Suite 600  
Harrisburg, PA 17101  
[cet3@tntlawfirm.com](mailto:cet3@tntlawfirm.com)  
*Counsel for Noble Americas Energy  
Solutions LLC*

Daniel Clearfield  
Deanne M. O'Dell  
Sarah C. Stoner  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8th Floor  
Harrisburg, PA 17101  
[dclearfield@eckertseamans.com](mailto:dclearfield@eckertseamans.com)  
[dodell@eckertseamans.com](mailto:dodell@eckertseamans.com)  
[sstoner@eckertseamans.com](mailto:sstoner@eckertseamans.com)  
*Counsel for Retail Energy Supply  
Association & Direct Energy Services  
LLC*

Becky Merola  
Government Affairs East  
Noble Americas Energy Solutions LLC  
5325 Sheffield Avenue  
Powell, OH 43065  
[bmerola@noblesolutions.com](mailto:bmerola@noblesolutions.com)  
*Counsel for Noble Americas Energy  
Solutions LLC*

Patrick M. Cicero  
Elizabeth R. Marx  
Joline Price  
Pennsylvania Utility Law Project  
118 Locust Street  
Harrisburg, PA 17101  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)  
*Counsel for the Coalition for Affordable  
Utility Services and Energy Efficiency in  
Pennsylvania*

Thu B. Tran  
Robert W. Ballenger  
Josie B. H. Pickens  
Community Legal Services, Inc.  
1424 Chestnut Street  
Philadelphia, PA 19102  
[ttran@clsphila.org](mailto:ttran@clsphila.org)  
[rballenger@clsphila.org](mailto:rballenger@clsphila.org)  
[jpickens@clsphila.org](mailto:jpickens@clsphila.org)  
*Counsel for Tenant Union Representative  
Network and Action Alliance of Senior  
Citizens of Greater Philadelphia*

Dr. Serhan Ogur  
Dr. Steven L. Estomin  
Exeter Associates, Inc.  
Suite 300  
10480 Little Patuxent Parkway  
Columbia, MD 21044  
[sogur@exeterassociates.com](mailto:sogur@exeterassociates.com)  
[sestomin@exeterassociates.com](mailto:sestomin@exeterassociates.com)

Barbara Alexander  
Consumer Affairs Consultant  
83 Wedgewood Drive  
Winthrop, ME 04364  
[barbalex@ctel.net](mailto:barbalex@ctel.net)

Brian Kalcic  
Excel Consulting  
Suite 702-T  
225 S. Meramec Avenue  
St. Louis, MO 63105  
[excel.consulting@sbcglobal.net](mailto:excel.consulting@sbcglobal.net)

Respectfully submitted,



---

Thomas P. Gadsden (Pa. No. 28478)  
Kenneth M. Kulak (Pa. No. 75509)  
Brooke E. McGlinn (Pa. No. 204918)  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
215.963.5234 (bus)  
215.963.5001 (fax)  
[thomas.gadsden@morganlewis.com](mailto:thomas.gadsden@morganlewis.com)  
[ken.kulak@morganlewis.com](mailto:ken.kulak@morganlewis.com)  
[brooke.mcglinn@morganlewis.com](mailto:brooke.mcglinn@morganlewis.com)

*Counsel for PECO Energy Company*

Dated: August 25, 2016

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY :  
COMPANY FOR APPROVAL OF ITS :  
DEFAULT SERVICE PROGRAM FOR : DOCKET NO. P-2016-2534980  
THE PERIOD FROM JUNE 1, 2017 :  
THROUGH MAY 31, 2019 :**

**REPLY BRIEF OF  
PECO ENERGY COMPANY**

**Before Administrative Law Judge  
Cynthia W. Fordham**

Romulo L. Diaz, Jr.  
(Pa. No. 88795)  
W. Craig Williams  
(Pa. No. 306405)  
PECO Energy Company  
2301 Market Street  
Philadelphia, PA 19101

Thomas P. Gadsden  
(Pa. No. 28478)  
Kenneth M. Kulak  
(Pa. No. 75509)  
Brooke E. McGlinn  
(Pa. No. 204918)  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921

*Counsel for PECO Energy Company*

August 25, 2016

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## I. INTRODUCTION

PECO Energy Company (“PECO” or the “Company”) files this Reply Brief in response to the Main Briefs filed by the Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”), the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (“TURN *et al.*”), and the Retail Energy Supply Association (“RESA”) addressing PECO’s plan to allow customers enrolled in the Company’s Customer Assistance Program (“CAP”) to shop for electric generation supply. This issue was reserved for briefing in the Joint Petition for Partial Settlement (“Settlement” or “Joint Petition”) filed on July 28, 2016.<sup>1</sup>

As explained in PECO’s Initial Brief, the Pennsylvania Public Utility Commission (the “Commission”) issued a Secretarial Letter (the “May 11th Secretarial Letter”)<sup>2</sup> directing PECO to file a CAP proposed rule revision (the “CAP Proposed Rule Revision”) in the docket of PECO’s current default service program (“DSP III”)<sup>3</sup> to implement the decision of the Commonwealth Court in *Coalition for Affordable Util. Serv. and Energy Efficiency in Pennsylvania, et al. v. Pa. P.U.C.*, 120 A.3d 1087 (Pa. Cmwlth. 2015) (the “CAUSE-PA Order”). The CAUSE-PA Order affirmed a Commission decision in PECO’s second default service

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<sup>1</sup> The parties to the Settlement are PECO, I&E, the OCA, the Office of Small Business Advocate (“OSBA”), the Philadelphia Area Industrial Energy Users Group (“PAIEUG”) and RESA. CAUSE-PA, Direct Energy Services, LLC (“Direct Energy”), and TURN *et al.* do not oppose the Settlement, while Noble Americas Energy Solutions, LLC (“Noble”) opposes the Settlement and filed objections as discussed *infra*. Direct Energy, the OSBA, and PAIEUG did not file Main Briefs.

<sup>2</sup> See *Petition of PECO Energy Co. for Approval of its Default Serv. Program*, Docket No. P-2012-2283641 (Secretarial Letter issued May 11, 2016).

<sup>3</sup> PECO’s DSP III was approved by the Commission on December 4, 2014. See *Petition of PECO Energy Co. for Approval of its Default Serv. Plan for the Period from June 1, 2015 through May 31, 2017*, Docket No. P-2014-2409362 (Order entered Dec. 4, 2014) (“DSP III Order”).

program (“DSP II”)<sup>4</sup> rejecting a ceiling on the price CAP customers could be charged by electric generation suppliers (“EGSs”) which CAUSE-PA and TURN *et al.* had appealed.<sup>5</sup> On September 1, 2016, in accordance with the *CAUSE-PA Order* and the May 11th Secretarial Letter, PECO will be filing its CAP Proposed Rule Revision in the DSP III docket to permit CAP customers to shop for electric generation supply without pricing restrictions during DSP III. The revision will be subject to public comment, review and approval by the Commission.<sup>6</sup>

In their Main Briefs, CAUSE-PA, joined by the OCA and TURN *et al.*, oppose implementation of the *CAUSE-PA Order* in DSP III and, instead, seek approval of an alternative CAP Standard Offer Program (“CAP-SOP”) in DSP IV that would permit CAP shopping after June 1, 2017 only as part of PECO’s Standard Offer Program, prohibit EGS prices for CAP customers that are greater than seven percent (7%) below PECO’s Price-to-Compare (the “PTC”) at any time, and impose other new EGS restrictions. I&E states that it has supported price ceilings in other proceedings but concedes that the Commission will likely find there is insufficient evidence of direct harm to PECO customers necessary to support CAUSE-PA’s CAP-SOP proposal. RESA, in turn, opposes CAUSE-PA’s proposal in its entirety.

To a large extent, the principal reasons for rejecting the CAP-SOP proposal endorsed by CAUSE-PA, the OCA and TURN *et al.* (the “CAP-SOP Advocates”) in this proceeding were addressed in PECO’s Initial Brief and therefore this Reply Brief will only revisit key areas of disagreement and arguments of the CAP-SOP Advocates on the reserved issue. In addition,

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<sup>4</sup> See Order, *Petition of PECO Energy Co. for Approval of its Default Serv. Program*, Docket No. P-2012-2283641 (Order entered Jan. 24, 2014) (“*DSP II Order*”).

<sup>5</sup> CAUSE-PA and TURN *et al.* subsequently sought review of the Commonwealth Court decision in the Pennsylvania Supreme Court, which was denied on April 5, 2016. See *Coalition for Affordable Util. Serv. and Energy Efficiency in Pennsylvania, et al. v. Pa. P.U.C.*, 136 A.3d 983 (Pa. 2016).

<sup>6</sup> See May 11th Secretarial Letter, p. 2.

PECO responds below to the objections to the Settlement (“Objections”) filed by Noble on July 28, 2016. In those Objections, Noble belatedly seeks to raise issues regarding PECO’s collection of certain transmission costs imposed by PJM Interconnection, L.L.C. (“PJM”) on PJM load-serving entities in the same manner approved by the Commission in DSP III and which the parties to the Settlement agreed should continue in DSP IV. Because Noble failed to provide any supporting testimony or valid reasons to support a change in the collection mechanism for these transmission costs previously approved by the Commission, Noble’s Objections should be denied.

## II. PECO’S CUSTOMER ASSISTANCE PROGRAM SHOPPING PLAN

In its Initial Brief, PECO explained that its forthcoming CAP Proposed Rule Revision will comply with the *CAUSE-PA Order* and the May 11th Secretarial Order and permit CAP customers to procure generation service from EGSs without any pricing restrictions and with the protection of a prohibition on early cancellation or termination fees. In addition, PECO’s CAP Proposed Rule Revision will contain a plan for collection of data in consultation with the Commission’s Office of Competitive Market Oversight (“OCMO”) for analysis of CAP shopping experiences and future evaluations and recommendations.<sup>7</sup> None of the arguments offered by the CAP-SOP Advocates in their Main Briefs justify a different approach that would undermine the procedure which the Commission has already established for implementation of the *CAUSE-PA Order*.

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<sup>7</sup> PECO Initial Br., pp. 6-7.

**A. The Commission Is Properly Seeking Actual Data On PECO CAP Customer Shopping**

In the appeal of the *DSP II Order*, the CAUSE-SOP Advocates challenged the Commission's rejection of a ceiling on prices that EGSs could charge PECO CAP customers and asserted that shopping limitations were necessary to maintain both the affordability and cost-effectiveness of service for CAP customers. The CAUSE-SOP Advocates pointed to testimony discussing the PTC as a "baseline" for affordability, as well as data indicating that nearly two-thirds of CAP customers in another electric distribution company's ("EDC's") service territory were charged prices above the PTC for generation service from EGSs.<sup>8</sup> After due consideration, the Commonwealth Court concluded it would not substitute its judgment for the Commission's expertise and upheld the Commission's rejection of a price limitation for EGSs serving CAP customers.<sup>9</sup>

Even though the Commission was not persuaded in the DSP II proceedings, the CAP-SOP Advocates again assert that PECO CAP customers will be harmed, because they are likely to pay prices to EGSs above PECO's PTC. As PECO explained in its Initial Brief, the Commission was clearly affirmed under the *CAUSE-PA Order* as to EGS pricing limitations (other than limitations on early termination or cancellation fees) for PECO CAP customers at this time. Rather, as the Commission made clear in the May 11th Secretarial Letter, the proper time

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<sup>8</sup> See *CAUSE-PA Order*, pp. 1104-1105.

<sup>9</sup> *Id.*, p. 1107 ("Simply put, the PUC was not persuaded that Petitioners' evidence provided a substantial reason to justify limiting competition by imposing a price ceiling on EGSs as part of the PECO CAP Shopping Plan. Similarly, Petitioners failed to convince the PUC that customer education programs are inadequate (i.e., not a reasonable alternative to price regulation) to the task of ensuring that CAP participants, and by extension non-CAP participants, benefit from the opportunity to shop for their EGS.") (citations omitted).

for consideration of programmatic changes is after actual data on PECO CAP customer shopping experiences have been collected.<sup>10</sup>

**B. The DSP IV Proceedings Are Not The Forum For Implementation Of The CAUSE-PA Order**

The CAP-SOP Advocates offer various arguments that this DSP IV proceeding is the proper forum in which to resolve implementation of the *CAUSE-PA Order*, including the “interrelationship” of default service and CAP rates and the potential adverse effects of the introduction of CAP shopping at the same time PECO is introducing its Commission-approved Fixed Credit Option (“FCO”) CAP design. The OCA and TURN *et al.* also argue that DSP IV constitutes the “future proceeding” for consideration of CAP limitations envisioned by the Commission under in its May 11th Secretarial Letter. In addition, TURN *et al.* assert that their due process rights may be violated because they are not parties to the DSP III proceedings in which PECO’s CAP Rule Revision will be considered.<sup>11</sup> None of these arguments have merit.

First, despite the purported “interrelationship” of CAP rates and default service, the Commission has adopted regulations that require a universal service plan and proceedings separate and apart from default service proceedings in which the full range of issues and needs of CAP customers are considered.<sup>12</sup> In fact, PECO’s new Commission-approved FCO design – which the OCA, CAUSE-PA and TURN *et al.* supported in a joint settlement – expressly contemplated that CAP customers would eventually be shopping:

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<sup>10</sup> For these reasons, PECO also disagrees with the proposal of I&E (Main Br., p. 14) for a statewide stakeholder process and the OCA’s proposal (Main Br., pp. 22-23) for a PECO-specific stakeholder process in the absence of actual CAP customer shopping data from PECO’s service territory.

<sup>11</sup> CAUSE-PA Main Br., pp. 22-23; OCA Main Br., pp. 23-27; and TURN *et al.* Main Br., pp. 16-17.

<sup>12</sup> See 52 Pa.Code § 54.74 (requiring EDC submission of universal service plans).

PECO's CAP Shopping program is currently on appeal to the Commonwealth Court, and that Court has stayed implementation of the Commission's Orders regarding CAP Shopping. However, the FCO program as set forth in the Term Sheet is structured so that, when CAP customers are allowed to shop, CAP customers will bear both the risks and benefits of their own shopping decisions. If they make a shopping decision that decreases their overall utility costs, they will be allowed to retain that benefit; if they make a shopping decision that increases their overall utility costs, they will be required to pay for those additional costs. This approach makes CAP customers similarly-situated to other residential customers in the retail shopping market.<sup>13</sup>

Moreover, while the CAP-SOP Advocates contend that CAP shopping should not commence at the same time as the FCO is implemented in light of the potential for customer confusion, PECO notes that PECO's CAP Proposed Rule Revision will recommend an effective date for CAP Shopping in the first quarter or early in the second quarter of 2017. Since the FCO program will go live in October 2016, that schedule provides an interim period after FCO implementation but before CAP Shopping implementation during which CAP shopping communications can occur.

Second, any suggestion that the Commission envisioned PECO's DSP IV docket as a "future proceeding" for pricing limitations is inconsistent with the plain language of the Secretarial Letter itself, which explicitly addressed the termination/cancellation issue.<sup>14</sup> Neither the OCA nor TURN *et al.* explain how this DSP IV docket could be a "future proceeding" when PECO filed its original DSP IV petition well *before* the May 11th Secretarial Letter and the Commission has not yet received (nor issued a final approval of) PECO's CAP Proposed Rule Revision. Furthermore, nothing in the Secretarial Letter suggests that the Commission

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<sup>13</sup> PECO Energy Co. *Universal Serv. and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4*, Docket No. M-2012-2290911 (Recommended Decision issued June 11, 2015 and approved by Order entered July 8, 2015) ("*FCO Order*"), p. 25.

<sup>14</sup> See May 11th Secretarial Letter, p. 2 n.2 ("The Commission's final approval of the rule revision ordered by the Court in this matter does not prejudice any Party's ability to raise the termination/cancellation issue, and to provide evidence regarding its impacts on the retail electric shopping market, in a future proceeding.").

envisioned concurrent implementation of the *CAUSE-PA Order* in both the PECO DSP III and DSP IV dockets.

Finally, TURN *et al.*'s claim that its due process rights will be violated if the Commission proceeds with the CAP Rule Revision in DSP III is simply incorrect. The May 11th Secretarial Letter makes clear that PECO's CAP Proposed Rule Revision will be subject to public comment (not only comment by the parties to the DSP III proceeding), and nothing in the May 11th Secretarial Letter suggests that TURN *et al.*'s ability to provide materials to the Commission for consideration of the CAP Rule Revision is limited. Nor does TURN *et al.* explain how its decision not to intervene in DSP III (as CAUSE-PA did) can somehow belatedly require the Commission to defer implementation of the *CAUSE-PA Order* or take additional steps to ensure that TURN *et al.* has rights to appeal orders from DSP III after it chose not to participate in that proceeding. To the extent TURN *et al.* believes that PECO's DSP IV proceeding is the proper forum to litigate the CAP Proposed Rule Revision, TURN *et al.* has also had every opportunity to develop a full record for consideration by the Commission – including with respect to whether or not DSP III or DSP IV is the proper forum.

**C. The Commission Should Reject Proposals To Impose Additional Data Collection Obligations On PECO**

In the *PECO DSP II Order*, the Commission directed PECO to consult with OCMO to submit semi-annual reports to the Commission that reflect the net benefits of allowing CAP customers to shop.<sup>15</sup> To that end, and consistent with the May 11th Secretarial Letter, PECO's CAP Proposed Rule Revision will contain a plan for collection of data in consultation with OCMO for analysis of CAP shopping experiences and future evaluations and recommendations.

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<sup>15</sup> See *DSP II Order*, pp. 31-34, 49.

In its Main Brief (pp. 34-35), TURN *et al.* supports PECO's data collection efforts, but asserts that the Commission should order PECO to compile additional categories of data, including: (1) the savings to CAP customers and non-CAP customers generated by EGS rates below PECO's PTC; and (2) the number of CAP customers interested in and the terms of EGS offers above PECO's PTC. In light of the procedure the Commission has already established for review of PECO's data collection plan in the May 11th Secretarial Letter and the ability of TURN *et al.* and others to comment upon PECO's CAP Proposed Rule Revision, there is no reason for a separate (and potentially inconsistent) data collection mandate to be established in this proceeding.<sup>16</sup>

For all the reasons set forth above and in PECO's Initial Brief (pp. 5-9), the Commission should not adopt the CAP-SOP as part of this proceeding and should reject TURN *et al.*'s separate proposal for additional data collection on shopping by CAP customers.

### **III. OBJECTIONS TO THE JOINT PETITION FOR PARTIAL SETTLEMENT**

In PECO's DSP III proceedings, the Commission approved recovery of certain transmission costs (known as non-market based charges, or "NMB Charges"), which are incurred by both PECO (as default service provider) and EGSs serving customers within PECO's service territory.<sup>17</sup> In approving the collection of these charges through a non-bypassable charge, the Commission concluded that the recovery of such costs from all customers was appropriate and,

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<sup>16</sup> TURN *et al.* do not explain how some of the data they seek (e.g., the number of CAP customers seeking to enter contracts with competitive suppliers offering prices above PECO's PTC) could be collected by PECO. To the extent such data could be useful, the Commission's original direction to develop a data collection plan with OCMO will facilitate the collection of data within PECO's control and data that EGSs must provide.

<sup>17</sup> The PJM charges approved for NBT recovery include: (1) Generation Deactivation/Reliability Must Run charges (PJM bill line 1930) set after December 4, 2014; (2) Regional Transmission Expansion Plan charges (PJM bill line 1108); and (3) Expansion Cost Recovery charges (PJM bill line 1730). See *DSP III Order*, pp. 46, 61; Joint Petition, ¶ 38.

moreover, consistent with the Commission's determinations in other default service proceedings.<sup>18</sup>

No party presented evidence contesting PECO's proposal to continue the non-bypassable collection of NMB Charges, as approved by the Commission in the *DSP III Order*. Rather, Noble contends in its Objections, for the first time in this proceeding, that the Commission should no longer permit recovery of NMB charges on a non-bypassable basis. Noble's decision to delay raising this issue until the briefing stage has prejudiced PECO and other parties by foreclosing any opportunity to present evidence in response. Understandably, this tactic is contrary to law.

Section 504 of Pennsylvania's Administrative Agency Law, 2 Pa.C.S. § 504, provides that an agency's adjudication is not valid unless the adjudication is based on a record created after the parties have been given reasonable notice and the opportunity to be heard.<sup>19</sup> In *Kowenhoven*, the Pennsylvania Supreme Court held:

Due process principles apply to quasi-judicial or administrative proceedings, and require an opportunity, inter alia, to hear the evidence adduced by the opposing party, cross-examine witnesses, introduce evidence on one's own behalf, and present argument. *Id.* (internal citation omitted).

As a Commonwealth agency, the Commission must comply with the Administrative Agency Law, and Pennsylvania appellate courts have reversed Commission orders that were based, even in part, on facts outside the administrative record.<sup>20</sup>

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<sup>18</sup> See *DSP III Order*, p. 46.

<sup>19</sup> See, e.g., *Kowenhoven v. County of Allegheny*, 901 A.2d 1003, 1010 (Pa. 2006) ("*Kowenhoven*").

<sup>20</sup> *Equitable Gas Co. v. Pa. P.U.C.*, 405 A.2d 1055, 1059 (Pa. Cmwlth. 1979); *United Nat. Gas Co. v. Pa. P.U.C.*, 33 A.2d 752, 758 (Pa. Super. 1943) ("None of these figures appear in the record . . . No opportunity was afforded appellant to dispute or discuss them or show their inapplicability to the question.")

Reliance on non-record evidence is also specifically precluded by the Commission's own regulations, which provide: "After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion." 52 Pa. Code § 5.431(b). In accordance with these regulations and basic principles of due process, Administrative Law Judges have struck new "evidence" that a party seeks to introduce after the close of the record.<sup>21</sup>

Noble offers no reason why it could not have challenged PECO's proposal to continue non-bypassable collection of NMB Charges in written testimony in this proceeding. In the event that the Commission nevertheless considers Noble's Objections, each of the arguments offered by Noble in opposition to continuation of PECO's non-bypassable recovery of NMB Charges under the Settlement should be rejected for the reasons explained below.

First, Noble's contention (Objections, pp. 5-7) that recovery of the NMB Charges are within the exclusive jurisdiction of the Federal Regulatory Energy Commission ("FERC") is unfounded. Noble does not cite any authority for its claim that that the FERC has exclusive jurisdiction over whether the load-serving entity or EDC should assume the cost responsibility for rates imposed by PJM and approved by the FERC for transmission-related services. Nor does Noble provide any examples of violations of the Federal Power Act or PJM's Open Access Transmission Tariff arising from the non-bypassable treatment of PJM charges.

Noble also argues that continuation of the non-bypassable collection of NMB Charges amounts to "re-bundling" of "transmission" in violation of the Electricity Generation Customer Choice and Competition Act ("Competition Act"). Objections, pp. 7-8. This same argument

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<sup>21</sup> See, e.g., *Third Ave. Realty Ltd. Partners v. Pennsylvania-American Water Co.*, Docket No. C-2008-2072920, p. 10 (Initial Decision issued Oct. 13, 2010) ("I will strike off those portions of the Complainant's reply brief that improperly attempt to introduce new evidence or raise arguments contrary to evidence presented by its witness.").

was advanced by large commercial and industrial customer groups in opposition to non-bypassable treatment of PJM charges for Network Integration Transmission Service in the FirstEnergy EDCs' third default service proceedings.<sup>22</sup> In those proceedings, the Commission determined that "neither the Competition Act nor any other provision of the Public Utility Code preclude [recovery of NITS on a non-bypassable basis]."<sup>23</sup> In short, the Commission has already considered and rejected Noble's argument, and Noble offers no grounds for reconsideration of the Commission's determination in this proceeding.

Finally, Noble asserts that the non-bypassable collection of NMB Charges is "unduly discriminatory" and interferes with the ability of EGSs to offer innovative products and direct billing services to retail customers. *Objections*, pp. 7-9. In particular, Noble argues that shifting responsibility for PJM-imposed costs for delivering generation to PECO's load zone to the Company discourages load-serving entities from making the investments necessary to hedge wholesale cost obligations and cost-effectively manage load. *Id.* However, Noble has presented no evidence whatsoever of any financial impact on EGSs or limitation on competitive retail market opportunities resulting from non-bypassable treatment of NMB Charges.

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<sup>22</sup> See, *Joint Petition of Metro. Edison Co., Pennsylvania Elec. Co., Pennsylvania Power Co. and West Penn Power Co. for Approval of their Default Serv. Programs*, Docket Nos. P-2013-2391368, et al. (Order entered July 24, 2014), pp. 32-38.

<sup>23</sup> *Id.* at 38.

#### IV. CONCLUSION

For the reasons set forth above and in the Company's Initial Brief, the Commission should approve the Joint Petition for Partial Settlement filed on July 28, 2016 without modification.

Respectfully submitted,



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Romulo L. Diaz, Jr. (Pa. No. 88795)  
W. Craig Williams (Pa. No. 306405)  
PECO Energy Company  
2301 Market Street  
Philadelphia, PA 19103  
Phone: 215.841.5974  
Fax: 215.568.3389  
E-mail: [Craig.Williams@Exeloncorp.com](mailto:Craig.Williams@Exeloncorp.com)

Thomas P. Gadsden (Pa. No. 28478)  
Kenneth M. Kulak (Pa. No. 75509)  
Brooke E. McGlinn (Pa. No. 204918)  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
Phone: 215.963.5234  
Fax: 215.963.5001  
E-mail: [thomas.gadsden@morganlewis.com](mailto:thomas.gadsden@morganlewis.com)

*Counsel for PECO Energy Company*

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