



THOMAS, NIESEN & THOMAS, LLC

Attorneys and Counsellors at Law

CHARLES E. THOMAS, III
Direct Dial: 717.255.7611
cet3@tntlawfirm.com

October 14, 2016

Via Electronic Filing

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

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

Dear Secretary Chiavetta:

Enclosed for filing on behalf of Noble Americas Energy Solutions LLC is its Exception to the Recommended Decision in the above-referenced proceeding. Copies are being served on the parties to this proceeding in accordance with the attached certificate of service.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

THOMAS, NIESEN & THOMAS, LLC

By

Charles E. Thomas, III

Enclosure

cc: Honorable Cynthia Williams Fordham
Per Certificate of Service
Becky Merola

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 June 1, 2017 through May 31, 2019 :

**EXCEPTION OF
NOBLE AMERICAS ENERGY SOLUTIONS LLC**

Pursuant to 52 Pa. Code § 5.533, Noble Americas Energy Solutions LLC (“Noble”), by its attorney, files the following Exception to the Recommended Decision (“R.D.”) of Administrative Law Judge Cynthia Williams Fordham (“ALJ Fordham”) dated September 23, 2016, and transmitted to the parties by Secretarial Letter dated October 4, 2016.

I. INTRODUCTION

On March 17, 2016, PECO Energy Company (“PECO”) filed a petition seeking Commission approval of its fourth Default Service Program (“DSP IV”) to establish terms and conditions under which PECO will acquire and supply default service for a two-year period, from June 1, 2017 through May 31, 2019. On April 19, 2016, Noble timely filed a Petition to Intervene.¹ A Prehearing Conference was held before ALJ Fordham on April 22, 2016.

On August 28, 2016, PECO, along with the Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate, the Office of Small Business Advocate, the

¹ Noble is an independent non-utility or generation-affiliated competitive Electric Generation Supplier (“EGS”) and PJM Interconnection, L.L.C. (“PJM”) Load Serving Entity (“LSE”) licensed by the Commission to offer, render, furnish or supply electricity and electric generation supplier services to large commercial (over 25kW), industrial, and governmental customers, and to residential and small commercial (25kW and under) customers (limited to mixed meters), throughout the Commonwealth of Pennsylvania, including PECO’s service territory. Noble offers commodity products and services to commercial and industrial customers that specifically enable customers to successfully manage costs in volatile energy markets. Noble provides Pennsylvania customers with an integrated mix of services, including commodity supply, physical risk and portfolio management, energy information management, scheduling, settlement and billing management.

Philadelphia Area Industrial Energy Users Group (“PAIEUG”), and the Retail Energy Supply Association (“RESA”) (collectively, the “Joint Petitioners”), submitted a Joint Petition for Partial Settlement (“Partial Settlement”) purporting to resolve all issues, except one,² related to PECO’s DSP IV. On even date therewith, Noble filed a letter confirming its opposition to the Partial Settlement and identifying the issue it opposed.

On August 11, 2016, Noble filed formal written Objections to the Partial Settlement opposing Paragraph 38 of the Partial Settlement’s treatment and recovery of Federal Energy Regulatory Commission (“FERC”) jurisdictional wholesale market charges at the retail shopping level during the duration of DSP IV.³ Pursuant to Paragraph 38, PECO would “continue to be responsible for and recover the following PJM charges from all distribution customers in PECO’s service territory through its Non-Bypassable Transmission Charge [(“NBT”): Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014; RTEP charges (PJM bill line 1108), and Expansion Cost Recovery charges [(“ECRCs”)] (PJM bill line 1730).”⁴ Noble’s objections argued that: (1) The PJM transmission charges subject to the NBT fall squarely within the FERC’s jurisdiction and PECO’s continued recovery of these charges from shopping customers on a non-bypassable basis violates the terms of the PJM Open Access Transmission Tariff (“OATT”) and FERC orders; (2) PECO’s NBT is unjust, unreasonable, and unduly discriminatory and violates the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801-2812 (the “Competition Act”); and (3) the NBT interferes with an

² That issue, concerning PECO’s proposed plan to allow Customer Assistance Program (“CAP”) customers to shop for electric generation supply, was reserved for briefing.

³ Under the terms of the Partial Settlement, DSP IV will be in effect for a period of four years, from June 1, 2017 through May 31, 2021. R.D. at 21.

⁴ Partial Settlement ¶ 38. While the Partial Settlement would permit the NBT to be collected from “all distribution customers” (i.e., shopping and non-shopping), Noble’s objections pertain only to shopping customers.

EGS's rights as a PJM LSE to directly bill their shopping customers for their PJM transmission charges in connection with customized product and service offerings.⁵

On August 25, 2016, PECO, I&E, RESA, and PAIEUG filed responses to Noble's Objections.

On September 23, 2016, ALJ Fordham issued the subject R.D. addressing the Partial Settlement, Noble's Objections and the recovery of certain PJM charges, and the CAP shopping issue. In the R.D., ALJ Fordham recommends: (i) the Partial Settlement be approved without modification; (ii) Noble's Objections be denied; and (iii) PECO's CAP proposal be approved.

Noble files this Exception challenging the R.D.'s denial of Noble's Objections. Specifically, the R.D. erred in concluding that Noble failed to present authority showing that the Commission does not have jurisdiction over the PJM transmission charges subject to PECO's NBT. To the contrary, Noble presented substantial authority demonstrating that the subject PJM transmission charges fall squarely within FERC's jurisdiction. For the reasons set forth herein, the Commission should grant Noble's Exception and deny the recommendation to allow PECO to continue using its NBT to collect and recover the following PJM transmission charges from shopping customers pursuant to the terms of Paragraph 38 of the Partial Settlement: Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014, RTEP charges (PJM bill line 1108), and ECRCs (PJM bill line 1730).

⁵ R.D. at 58.

II. NOBLE'S EXCEPTION

Exception No. 1 – The Recommended Decision Erred in Concluding That Noble Failed to Present Authority To Show That the Commission Does Not Have Jurisdiction Over the PJM Wholesale Market Charges subject to PECO's NBT.

A. Noble Did Not Need to Present Evidence Raising Jurisdictional Concerns with PECO's Proposal

As the R.D. correctly observes, no party to this proceeding presented evidence contesting PECO's proposal to continue using its NBT to recover the subject PJM wholesale market charges from shopping customers. Noble, in particular, did not submit any direct, rebuttal, or surrebuttal testimony because it was not necessary to do so for a jurisdictional issue of this nature.⁶ Jurisdiction is not an evidentiary issue, and, thus, it is an error for the R.D. to conclude that Noble is prohibited from raising this issue after the evidentiary record has been closed.⁷

It is axiomatic that subject matter jurisdiction can be raised at any time, even after the record closes in a proceeding. *Dept. of Transp., Bur. Of Traffic Safety v. Ehret*, 405 A.2d 1355, 1357 (Pa. Cmwlth. 1979) (“[A]n objection to the lack of subject matter jurisdiction can never be waived; it may be raised at any stage of a case, even on the appellate level, by the parties or by a court on its own motion.”). Accordingly, Noble did not need to submit testimony or other evidence contesting PECO's proposal or raising the question of jurisdiction during the evidentiary phase of this proceeding. Noble's decision to raise the jurisdictional issue in its Objections to the Partial Settlement was permissible and timely, and its arguments in this regard must be considered and may serve as basis for rejection of Paragraph 38 of the Partial Settlement.

⁶ R.D. at 72.

⁷ *Id.*

B. The PJM Wholesale Market Charges Subject to PECO's NBT Fall Squarely Within FERC's Jurisdiction

In determining where jurisdiction properly lies, the Commission must look beyond the form of the action and the manner in which it is titled and instead focus on the essence of the underlying claims. *DeFrancesco v. Western Pennsylvania Water Co.*, 453 A.2d 595 (Pa. 1982). Here, PECO is seeking approval for the continuation of its NBT to collect and recover from all distribution customers, including shopping customers, certain FERC-approved OATT wholesale market charges, *viz.* Generation Deactivation/RMR charges, ECRCs, and RTEP charges. The continuation of the NBT would relieve PJM LSEs of their responsibilities with respect to these charges and directly infringe on the rights of LSEs under the OATT, in contravention of federal law. The fact that this cost recovery proposal has been included as part of this DSP IV proceeding does not automatically confer jurisdiction over these charges to the Commission.

Nor does the fact that the Commission previously approved the recovery of these PJM transmission charges on a non-bypassable basis in PECO's DSP III proceeding confer jurisdiction.⁸ Although several Joint Petitioners were quick to point out the Commission's prior approval of this cost recovery mechanism, such approval has no bearing on the jurisdictional issue now raised by Noble, as that issue was never considered by the Commission in the DSP III case. Accordingly, the R.D.'s reliance on Commission precedent as a basis for rejecting Noble's jurisdictional argument is improper.

In the R.D., the ALJ correctly summarizes the positions of the parties with respect to the jurisdictional issue raised by Noble. The R.D., however, provides no discussion or analysis of the jurisdictional arguments presented and summarily concludes that Noble "failed to present

⁸ R.D. at 72-73. See also Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2015 through May 31, 2017, Docket No. P-2014-2409362 (Order entered Dec. 4, 2014), slip op. at 40-46.

authority to show that the Commission does not have jurisdiction” over the PJM wholesale market subject to PECO’s NBT.⁹ The R.D.’s rejection of Noble’s position was erroneous and overlooks the substantial authority presented by Noble demonstrating that matters governing these charges fall squarely within FERC’s jurisdiction.

In its Objections, Noble explained that PECO’s DSP IV must not only comply with the provisions of the Competition Act and the Commission’s regulations, but it also cannot violate federal regulatory laws and authorizations, including those of the FERC, as well as applicable PJM agreements and rules. As a “public utility” as that term is defined in Section 201(e) of the Federal Power Act (“FPA”), 16 U.S.C. § 824(e), PECO is subject to FERC’s jurisdiction and the terms and conditions of the PJM OATT¹⁰ and Operating Agreement,¹¹ including the terms and conditions that require the provision of transmission service to eligible customers.¹² PECO and LSEs (like Noble) are wholesale market participants under the OATT.

Noble further explained that PECO’s continued recovery of LSEs’ wholesale market charges from shopping customers on a non-bypassable basis would be unlawful because it would violate the terms of FERC orders and the PJM OATT.¹³ Noble summarized the bases for FERC’s exclusive jurisdiction over the NBT in its Objection as follows:

FERC Order No. 888 and Order No. 2000 provide clear directives regarding wholesale transmission service: all customers must take service

⁹ R.D. at 72.

¹⁰ PJM Open Access Transmission Tariff, *available at* <http://www.pjm.com/media/documents/merged-tariffs/oatt.pdf> (last visited Oct. 14, 2016).

¹¹ Amended and Restated Operating Agreement of PJM, *available at* <http://www.pjm.com/media/documents/merged-tariffs/oa.pdf> (last visited Oct. 14, 2016).

¹² PJM is a “public utility” as that term is identified in Section 201(e) of the FPA. PJM provides transmission and other services under the FERC-approved OATT. PJM is a duly authorized regional transmission organization (“RTO”) approved by FERC pursuant to 18 C.F.R. §35.34. PJM is the Transmission Provider as that term is defined in the PJM OATT, and as such, is responsible for the administration of the PJM OATT. PJM’s footprint covers thirteen states, including Pennsylvania and the District of Columbia.

¹³ R.D. at 58-59.

pursuant to an OATT, and each RTO must control and administer its own transmission tariff pursuant to such requirements.¹⁴ Further, in Order No. 888, FERC gave guidance on the issue of Federal versus State jurisdiction over transmission in interstate commerce and distribution, concluding that its jurisdiction under Section 201(b) of the FPA extends to the provision of transmission service when the sale of retail electric service is unbundled, as unbundled transmission service is within the FERC's exclusive jurisdiction.¹⁵

As a result, FERC found:

The [FERC]'s assertion of jurisdiction is that if retail transmission in interstate commerce by a public utility occurs voluntarily or as a result of a state retail wheeling program, the [FERC] has exclusive jurisdiction over the rates, terms, and conditions of such transmission and public utilities offering such transmission must comply with the FPA by filing proposed rate schedules under section 205.¹⁶

PECO's NBT is exactly the type of wholesale transmission charge that falls clearly within FERC's jurisdiction, as FERC and courts have repeatedly found in similar situations. In *New York v. FERC*, the U.S. Supreme Court specifically noted that FERC's jurisdiction is broad in regard to transmission and affirmed FERC's assertion of jurisdiction over retail transmission:

It is true that FERC's jurisdiction over the *sale* of power has been specifically confined to the wholesale market. However, FERC's jurisdiction over electricity *transmissions* contains no such limitation. Because the FPA authorizes FERC's jurisdiction over interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer, FERC's exercise of this power is valid.¹⁷

While PECO's DSP IV includes certain wholesale products and may be impacted by changes in either the retail or wholesale market, that should not be

¹⁴ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048, order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir 2000), *aff'd sub nom. New York v. FERC*, 535 U.S.1 (2002); *Regional Transmission Organizations*, Order No. 2000, 65 FR 809, (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub Util. Dist. No. 1 of Snohomish Country, Washington v. FERC*, 272 F.3d 607 (D.C. Circuit. 2001) ("Order No. 2000").

¹⁵ Order No. 888, slip op. at 431.

¹⁶ *Id.*

¹⁷ *New York v. FERC*, 535 U.S. 1, 20 (2002) (emphasis in original).

construed to somehow extend the Commission's jurisdiction over matters that are properly within the jurisdiction of FERC and PJM. The Commission's jurisdiction is targeted and limited to intrastate retail market matters, and its Orders must not undermine the policies promulgated by, or infringe upon the jurisdiction of, FERC which has exclusive jurisdiction over the interstate wholesale market.

Noble Objections at 5-7. These are not Commission evidentiary matters. They are jurisdictional boundaries.

Since unbundled transmission services are FERC-jurisdictional, the terms and conditions under which such services are to be provided, billed, and collected are controlled by FERC and the PJM OATT and may not be altered except as permitted by FERC.¹⁸ Here, all of the PJM wholesale market charges subject to PECO's NBT – Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014, RTEP charges (PJM bill line 1108), and ECRCs (PJM bill line 1730) – must be billed and collected in accordance with the controlling PJM OATT, which permits LSEs/EGSs (as wholesale market participants) to recover these costs from their customers.¹⁹ As PJM's billing guide illustrates,²⁰ there are various transmission and transmission-related costs that comprise PJM wholesale market charges and are included as line

¹⁸ 18 U.S.C. § 824d(d). One of the terms under the OATT and the PJM Reliability Assurance Agreement provides LSEs with the right to bill and recover their own PJM wholesale market charges. *See* PJM Open Access Transmission Tariff, *supra* n.10; Reliability Assurance Agreement among Load Serving Entities in the PJM Region, Articles 10 (Shared Costs) and 11 (Billing and Payment), *available at* <http://www.pjm.com/media/documents/merged-tariffs/raa.pdf> (last visited Oct. 14, 2016).

¹⁹ Noble notes that Generation Deactivation charges (OATT Part V), in particular, are charges for *generation*, not transmission and, according to PJM's billing guide, are based on revenues:

[C]ollected for generators requesting retirement where PJM studies find reliability issues that require the generation to continue operating. Cost allocations to zonal load and firm withdrawal rights are determined by PJM based on the beneficiaries. These responsible customers pay the generation owners a share of the Deactivation Avoidable Cost Rate or the FERC-approved Cost of Service Recovery Rate. ***Any time that the zonal cost allocations change, notice is provided to the Markets and Reliability Committee, Market Implementation Committee, and Market Settlements Working Group prior to the change being implemented.***

PJM Guide to Billing, *available at* <http://www.pjm.com/markets-and-operations/billing-settlements-and-credit/guide-to-billing.aspx> (last visited Oct. 14, 2016) (emphasis added).

²⁰ *See supra* n.19.

items on PJM bills. PECO has selectively chosen certain of these billing line items, artificially labeled them as “non-market based” charges, and implemented a non-bypassable rider to transfer the collection of these costs from LSEs/EGSs to PECO, all in violation of the controlling PJM OATT.

If PECO wants to recover these unbundled wholesale market charges on terms and conditions that vary from the PJM OATT – which is exactly what the NBT does and would continue to do under Paragraph 38 of the Partial Settlement – then PECO must seek authorization from FERC and/or through the PJM stakeholder process. It has not done so, circumventing the FERC’s jurisdiction under FERC Orders No. 888 and No. 2000 and the PJM OATT and directly interfering with LSEs’ authorized rights under the OATT. Such interference harms existing LSEs/EGSs that have in good faith followed FERC rules and the PJM OATT and shifts LSEs/EGSs’ risk and responsibility from the LSE/EGS to the Pennsylvania shopping customers, who are held captive.²¹

As Noble explained in its Objections, the NBT effectively bars EGSs/LSEs and their customers from securing unbundled transmission services under the PJM OATT, contravening the right of PJM LSEs to direct bill their shopping customers for their PJM wholesale market charges as part of their individual and propriety contracts with those customers.²² Unlawfully forcing retail EGSs to unilaterally transfer certain billing responsibility and rights to PECO interferes with an EGS’s ability to offer unique and innovate billing products to its shopping customers. It also ignores and alters the billing determinants used for transmission service

²¹ See *Electric Power Supply Association, et al. v. FirstEnergy Solutions Corporation, et al.*, Docket No. EL16-34-000, Order Granting Complaint, 155 FERC ¶ 61,101 (April 27, 2016) (concluding that even though retail ratepayers might have a statutory right to choose suppliers, they are nonetheless “captive” because they have no choice as to payment of non-bypassable generation-related charges).

²² R.D. at 61.

available to shopping customers/LSEs through the PJM tariff and removes an EGS/LSE's billing services available to its shopping customers and harms customer choice.

C. Conclusion

Noble submits that the R.D.'s summary rejection of Noble's jurisdictional arguments was erroneous. Noble did not need to present evidence raising jurisdictional concerns with PECO's proposal during the evidentiary phase of this proceeding. Moreover, the PJM wholesale market charges subject to PECO's NBT cost recovery mechanism are within the exclusive jurisdiction of the FERC and germane to the FERC-approved PJM OATT. It is unlawful for one wholesale market participant (PECO) to dictate the recovery of wholesale market charges inconsistent with and outside of the OATT and infringe on the rights of other wholesale market participants' rights. Any attempt to bill and collect a wholesale market participant's (*e.g.*, LSE) unbundled transmission charges, including those subject to PECO's NBT, on terms and conditions beyond those set forth in the OATT, requires approval of the FERC. It clearly should not be done in the context of a Commission-based default service proceeding, let alone one that was settled. Yet, the continuation of the NBT under of Paragraph 38 of the Partial Settlement would do just that, directly violating FERC Orders No. 888 and No. 2000 and the PJM OATT.

The R.D. incorrectly concluded that the Commission has jurisdiction to address and approve the continuation of the NBT for the duration of DSP IV. Accordingly, the Commission should reject the R.D.'s recommendation that Noble's objections be denied.

III. CONCLUSION

WHEREFORE, Noble Americas Energy Solutions LLC respectfully requests that the Pennsylvania Public Utility Commission:

- (i) Grant this Exception;
- (ii) Deny the recommendation to allow PECO Energy Company to continue using its Non-Bypassable Transmission Charge to collect and recover the following PJM transmission charges from shopping customers pursuant to Paragraph 38 of the Partial Settlement: Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014, RTEP charges (PJM bill line 1108), and ECRCs (PJM bill line 1730);
- (iii) Modify the Partial Settlement to prohibit the use of the NBT to collect PJM transmission charges from shopping customers on a non-bypassable basis; and
- (iv) Take any other actions that may be deemed necessary and appropriate.

Respectfully submitted,



Charles E. Thomas, III, Esq. (PA ID # 201014)
THOMAS, NIESEN & THOMAS, LLC
212 Locust Street, Suite 600
Harrisburg, PA 17101
Tel: 717.255.7611
cet3@tntlawfirm.com

Counsel for Noble Americas Energy Solutions LLC

DATED: October 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of October, 2016, served a true and correct copy of the foregoing document upon the parties, listed below, via email and first class mail in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant):

VIA EMAIL AND FIRST CLASS MAIL

Romulo L. Diaz, Jr., Esquire
W. Craig Williams, Esquire
Exelon Business Services Company
2301 Market Street, S23-1
Philadelphia, PA 19101-8699
romulo.diaz@exeloncorp.com
craig.williams@exeloncorp.com

Patrick M. Cicero, Esq.
Elizabeth R. Marx, Esq.
Joline Price, Esq.
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net

Thomas P. Gadsden, Esquire
Kenneth M. Kulak, Esquire
Brooke E. McGlinn, Esquire
Morgan, Lewis & Bockius
1701 Market Street
Philadelphia, PA 19103
tgadsden@morganlewis.com
kkulak@morganlewis.com
bmcglinn@morganlewis.com

Charis Mincavage, Esquire
Adeolu A. Bakare, Esquire
Alessandra L. Hylander, Esquire
McNees Wallace & Nurick LLC
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
cmincavage@mwn.com
abakare@mwn.com
ahylander@mwn.com

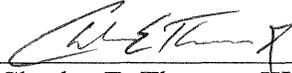
Aron J. Beatty, Esquire
Candis A. Tunilo, Esquire
Christy M. Appleby, Esquire
Office of Consumer Advocate
Forum Place, 5th Floor
555 Walnut Street
Harrisburg, PA 17101-1923
abeatty@paoca.org
ctunilo@paoca.org
cappleby@paoca.org

Daniel Clearfield, Esq.
Deanne M. O'Dell, Esq.
Sarah C. Stoner, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
dclearfield@eckertseamans.com
dodell@eckertseamans.com
sstoner@eckertseamans.com

Elizabeth Rose Triscari, Esquire
Office of Small Business Advocate
300 North Second Street, Suite 202,
Harrisburg, PA 17101
etriscari@pa.gov

Phillip C. Kirchner, Esquire
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
phikirchne@pa.gov

Thu B. Tran, Esquire
Robert W. Ballenger, Esquire
Josie B. H. Pickens, Esquire
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
ttran@clsphila.org
rballenger@clsphila.org
jpickens@clsphila.org



Charles E. Thomas, III (PA ID # 201014)