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October 21, 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  
For the Period from June 1, 2017 through May 31, 2019  
Docket No. P-2016-2534980**

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Dear Secretary Chiavetta:

Enclosed is the **Reply of PECO Energy Company to Exceptions ("Reply Exceptions") to the Recommended Decision of Administrative Law Judge Cynthia Williams Fordham** in the above-referenced matter.

As evidenced by the attached Certificate of Service, a copy of the Reply Exceptions has been served upon Administrative Law Judge Cynthia W. Fordham and all parties. In addition, a courtesy copy has been e-mailed to the Commission's Office of Special Assistants.

Should you have any questions, please contact me directly at 215.841.5974. Thank you.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Craig Williams".

W. Craig Williams

Enclosures

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

**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 **Letter to Secretary Rosemary Chiavetta indicating that PECO will not be filing Reply Exceptions to the Recommended Decision issued by Administrative Law Judge Cynthia Williams Fordham** on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

**VIA ELECTRONIC MAIL AND FIRST CLASS MAIL**

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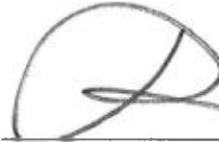
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Respectfully submitted,



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Dated: October 21, 2016



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## I. INTRODUCTION

On September 23, 2016, Administrative Law Judge Cynthia W. Fordham (“ALJ”) issued her Recommended Decision (“R.D.”) in this proceeding in which she recommended that the Pennsylvania Public Utility Commission (“Commission”) approve the Joint Petition for Partial Settlement (“Settlement”) of PECO Energy Company’s (“PECO’s” or “the Company’s”) fourth Default Service Program (“DSP IV”) filed on August 28, 2016. In her R.D., the ALJ found and determined that PECO’s DSP IV, as amended by the Settlement, satisfies all the requirements of a default service program imposed by the Commission’s default service regulations.<sup>1</sup> Indeed, the ALJ specifically found that the Company's proposed competitive procurement plan is designed to ensure adequate and reliable service to customers at the least cost over time.

The Settlement was executed by PECO, the Commission’s Bureau of Investigation and Enforcement (“I&E”), the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the Philadelphia Area Industrial Energy Users Group (“PAIEUG”) and the Retail Energy Supply Association (“RESA”) (collectively, “Joint Petitioners”). 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 (collectively, “TURN”) and Direct Energy Services LLC (“Direct Energy”) authorized the Joint Petitioners to represent that they did not oppose the Settlement. As explained hereafter, a single issue was reserved for briefing.

Noble Americas Energy Solutions LLC (“Noble”) is the only party that opposed the Settlement. Noble's opposition is based solely on its belated objection to the Joint Petitioners’ agreement to continue the Commission-approved assignment of responsibility to PECO to obtain

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<sup>1</sup> See R.D., pp. 35-36 & 73-78.

certain non-market based (“NMB”) transmission services from PJM Interconnection, L.L.C. (“PJM”) on behalf all customers and to recover the associated costs through its Non-Bypassable Transmission Charge (“NBT”).

The issue reserved for briefing involves PECO’s plan to allow low-income customers enrolled in its Customer Assistance Program (“CAP”) to shop for electric generation supply. In the R.D., the ALJ adopted PECO’s position that issues pertaining to CAP shopping should not be addressed as part of DSP IV but, instead, are properly considered in a separate proceeding initiated by the Commission’s May 11, 2016 Secretarial Letter (the “May 11 Secretarial Letter”).<sup>2</sup> The May 11 Secretarial Letter specifically directed PECO to file a proposed rule revision (the “CAP Rule Revision”) in the docket of PECO’s current default service program (“DSP III”)<sup>3</sup> to allow CAP customers to shop for electric generation supply during the term of DSP III. In adopting PECO’s position, the ALJ correctly declined to consider another CAP shopping plan for DSP IV offered by CAUSE-PA and endorsed by TURN and the OCA (collectively the “CAP-SOP Advocates”). That plan (the “CAP-SOP Proposal”) is modeled on PECO’s Standard Offer Program with the addition of a ceiling on the prices electric generation suppliers (“EGSs”) would be permitted to charge.

On October 14, 2016, CAUSE and TURN (jointly) and the OCA filed Exceptions to the ALJ’s recommendation to reject the CAP-SOP Proposal. In addition, Noble filed an Exception contending the ALJ improperly rejected its objection to PECO continuing to procure NMB transmission service on behalf of all customers and recovering the associated costs through its

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<sup>2</sup> See *Petition of PECO Energy Co. for Approval of its Default Serv. Plan*, 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*”).

NBT.

For the most part, the other parties' Exceptions revisit arguments that were considered by the ALJ in her R.D. They were also addressed in PECO's Initial and Reply Briefs, which the Commission is urged to review. Accordingly, the Exceptions filed by CAUSE/TURN, the OCA and Noble should be rejected for the reasons set forth below and the R.D. should be approved without modification.

## II. REPLY TO EXCEPTIONS

### A. **Exceptions To PECO's Customer Assistance Program Shopping Plan (CAUSE-PA/TURN Exc. 1-2; OCA Exc. 1-2)**

PECO's CAP customers are not currently eligible to purchase electric generation supply from an EGS. In its second default service program ("DSP II"), PECO proposed to allow CAP customers to shop for generation supply with EGSs that agreed not to charge a price above PECO's Price-to-Compare ("PTC"). The Commission rejected PECO's proposed price ceiling,<sup>4</sup> and the OCA, CAUSE-PA, and TURN appealed.

The Commonwealth Court affirmed the portion of the Commission's order rejecting PECO's proposed EGS pricing limitation 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) ("*CAP Shopping Order*") because the record evidence supported the Commission's finding that an EGS price ceiling would be anti-competitive and would improperly limit the choices available to PECO's CAP customers. The Court reversed the portion of the Commission's Order that rejected the OCA's proposal to prohibit imposing early termination and cancellation fees on

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<sup>4</sup> See *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*"), pp. 14, 16-17.

CAP customers that shop.<sup>5</sup> Therefore, the Court remanded the case to the Commission for further proceedings.<sup>6</sup>

In response to the Court's remand, the Commission issued the May 11 Secretarial Letter, which directed PECO to file the CAP Rule Revision to permit CAP customers to shop during DSP III. By that time, PECO had already filed its petition and accompanying direct testimony in this case.

On June 3, 2016, CAUSE-PA submitted written direct testimony in which its witness objected to implementing the *CAP Shopping Order* in DSP III as directed by the May 11 Secretarial Letter.<sup>7</sup> In contravention of the May 11 Secretarial Letter, CAUSE-PA's witness offered the CAP-SOP Proposal for consideration in this case. The CAP-SOP Proposal would permit PECO's CAP customers to purchase electric generation supply from an EGS after June 1, 2017 only as part of PECO's Standard Offer Program subject to additional CAP-specific program rules, including a requirement that CAP-SOP suppliers guarantee a 7% discount off the PTC.<sup>8</sup> As previously noted, the OCA and TURN supported CAUSE-PA's recommendations.<sup>9</sup>

CAUSE-PA's alternative CAP shopping platform is inconsistent with the *CAP Shopping Order* and the May 11 Secretarial Letter.<sup>10</sup> The Company's CAP Rule Revision, on the other hand, was filed in the appropriate docket and will implement CAP shopping in PECO's service territory during DSP III without pricing restrictions and prohibit early cancellation or termination

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<sup>5</sup> *CAP Shopping Order*, 120 A.3d at 1106-1108.

<sup>6</sup> *Id.* at 1109. CAUSE-PA and TURN subsequently sought review of the Commonwealth Court decision in the Pennsylvania Supreme Court, which was denied on April 5, 2016. See *Coal. for Affordable Util. Serv. and Energy Efficiency in Pennsylvania, et al. v. Pa. P.U.C.*, 136 A.3d 983 (Pa. 2016).

<sup>7</sup> See CAUSE-PA St. No. 1, pp. 13-15, 19-26 & No. 1-SR, pp. 2-6.

<sup>8</sup> See CAUSE-PA St. No. 1, pp. 31-34.

<sup>9</sup> See OCA St. No. 2-R, pp. 2-5 & No. 2-SR, pp. 1-4; TURN *et al.* St. No. 1-SR, pp. 4-11.

<sup>10</sup> PECO Initial Brief, pp. 6-7.

fees in accordance with the *CAP Shopping Order*. In addition, PECO will develop a data collection plan in consultation with the Commission's Office of Competitive Market Oversight to help analyze and evaluate CAP shopping experiences.<sup>11</sup>

In her R.D., the ALJ properly concluded that the Commission should consider PECO's proposed CAP Rule Revision before it addresses the CAP-SOP Proposal. R.D., pp. 57-58. In their Exceptions, the CAP-SOP Advocates assert that the ALJ erred by declining to address CAP shopping issues and by ignoring evidence they alleged supports the CAP-SOP Proposal. The Commission should dismiss both Exceptions for the reasons discussed below and in PECO's Initial and Reply Briefs.

**1. The ALJ Correctly Concluded That Implementation Of CAP Shopping In PECO's Service Territory Should Be Addressed In Other Proceedings (CAUSE/TURN Exc. 1; OCA Exc. 1)**

In their first Exception, the CAP-SOP Advocates advance three reasons they believe the ALJ erred in declining to address CAP shopping issues in this proceeding. None of those arguments have merit.

First, the CAP-SOP Advocates contend that they are entitled to a Commission decision "on the merits" of the CAP-SOP Proposal in this proceeding because they developed an evidentiary record that allegedly supports it.<sup>12</sup> The CAP-SOP Advocates' unilateral decision to litigate CAP shopping issues in DSP IV does not justify deviating from the procedure already established in the May 11 Secretarial Letter. Moreover, the examples cited by the OCA (Exc., pp. 6-7) of recent default service proceedings of other electric distribution companies ("EDCs")

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<sup>11</sup> In accordance with the May 11 Secretarial Letter, PECO filed its CAP Rule Revision on September 1, 2016. See *Petition of PECO Energy Co. for Approval of its Default Serv. Plan*, Docket No. P-2012-2283641 (CAP Rule Revision and Tariff filed September 1, 2016).

<sup>12</sup> CAUSE-PA/TURN Exc., pp. 8-11; OCA Exc., pp. 2, 5-6.

where the Commission addressed CAP shopping issues are not relevant here because, unlike the EDCs in those cases, PECO is subject to an express Commission directive to file a CAP Rule Revision in another proceeding. In addition, the ALJ correctly concluded that considering CAP shopping issues in two separate proceedings would, in fact, create the potential for inconsistent decisions.

Second, the CAP-SOP Advocates assert that their due process rights will be violated if the Commission adopts the ALJ's recommendation because the CAP shopping issues they raised in this proceeding will not be fully vetted in an "on-the-record" proceeding and there are interested parties who did not participate in PECO's DSP III proceeding.<sup>13</sup> In fact, the May 11 Secretarial Letter (p. 2) makes clear that PECO's CAP Rule Revision will be subject to public comment and does not foreclose the presentation of current data and other materials for the Commission's consideration. Furthermore, contrary to the assertions of CAUSE-PA/TURN, the May 11 Secretarial Letter allows interested parties to submit comments even if they did not participate in PECO's DSP III proceeding.<sup>14</sup>

Finally, the OCA's argument (Exc., p. 6) that the May 11 Secretarial Letter "left open the opportunity" for parties to address CAP shopping within DSP IV must also be rejected. As fully explained in PECO's Reply Brief (pp. 6-7), the OCA is wrong to assert that DSP IV constitutes the "future proceeding" envisioned by the May 11 Secretarial Letter for consideration of all conceivable CAP shopping issues. The only issues comprehended by the "future proceeding" referenced in the Secretarial Letter are those relating to termination/cancellation fees. The May 11 Secretarial Letter was not an invitation for submitting alternative shopping proposals for CAP

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<sup>13</sup> CAUSE-PA/TURN Exc., pp. 8-11.

<sup>14</sup> See May 11 Secretarial Letter, p. 2.

customers.<sup>15</sup> Moreover, the DSP IV docket cannot be reasonably interpreted as a “future proceeding,” because PECO filed its DSP IV Petition *before* the May 11 Secretarial Letter was even issued and the Commission has not yet approved PECO’s CAP Rule Revision.<sup>16</sup>

**2. The ALJ Properly Determined That The CAP-SOP Should Not Be Adopted As Part Of DSP IV (CAUSE-PA/TURN Exc. 2; OCA Exc. 2)**

The CAP-SOP Advocates' Second exception alleges that the ALJ undervalued what they characterize as substantial evidence demonstrating that price limitations are needed to keep service to CAP customers affordable and cost-effective. In support of that proposition, they point to the shopping experience of CAP customers in other EDCs’ service territories who paid more than the applicable PTC.<sup>17</sup> The ALJ clearly considered the CAP-SOP Advocates’ concerns in stating that they raised “valid points” about CAP shopping.<sup>18</sup> However, the ALJ did not err by rejecting the CAP-SOP Proposal, because the price ceiling imposed under the proposed alternative CAP shopping platform is inconsistent with the *CAP Shopping Order*. Indeed, as PECO pointed out in its Reply Brief (p. 4), the Commonwealth Court affirmed the Commission decision to authorize shopping for PECO’s CAP customers without pricing restrictions notwithstanding the Commission’s acknowledgement of data appearing to show that nearly two-thirds of CAP customers in another EDC’s service territory paid prices for generation supply above the PTC.<sup>19</sup> In short, the CAP-SOP Advocates’ argument has already been rejected by the Commission with the affirmance of the Commonwealth Court. Consequently, it would not be

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<sup>15</sup> See May 11 Secretarial Letter, p. 2, n. 2.

<sup>16</sup> For the same reason, CAUSE-PA/TURN err in attacking the ALJ for concluding that “it is important that PECO be allowed to present its [CAP Rule Revision] before a ruling is made,” and suggesting that PECO was somehow required to file its CAP Rule Revision in both this proceeding and DSP III. See CAUSE-PA/TURN Exc., pp. 10-11.

<sup>17</sup> See CAUSE-PA/TURN Exc., pp. 13-16; OCA Exc., pp. 8-10.

<sup>18</sup> See R.D., p. 57.

<sup>19</sup> See also *CAP Shopping Order*, 120 A.3d at 1104-1105, 1107.

appropriate for the Commission to consider programmatic changes until after actual CAP shopping data from PECO's own service territory are available as a product of the data collection efforts required by the May 11 Secretarial Letter.

Accordingly, for all the foregoing reasons, the CAP-SOP Advocates' Exception No. 2 should be dismissed.

**B. Exceptions To The ALJ's Approval Of The Joint Petition For Partial Settlement (Noble Exc. 1)**

In the *DSP III Order*, the Commission agreed that PECO, in its capacity as an EDC, should acquire NMB transmission service on behalf of all distribution customers (i.e., default service and shopping customers) and recover the associated costs on a non-bypassable basis through its NBT.<sup>20</sup> Under this arrangement, EGSs are relieved of both the obligation to obtain and pay for NMB transmission services – an outcome that was strongly favored by EGSs in that case and (except for Noble) the EGSs in this case as well.

The Commission concluded that PECO's acquisition of NMB transmission services for all customers, with cost recovery through its NBT, benefits customers and is consistent with the Commission's decisions in other EDCs' default service proceedings.<sup>21</sup> PECO Reply Br., pp. 8-9. For DSP IV, PECO proposed, and the Joint Petitioners agreed, to continue this assignment of responsibility and cost recovery. Under the Settlement, PECO also committed to implement additional measures to enhance the transparency of Network Integration Transmission Service ("NITS") costs. PECO Initial Br., p. 4.

No party presented any testimony contesting continuation of the NBT, as approved by the

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<sup>20</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.

<sup>21</sup> *Id.*, p. 46.

Commission in the *DSP III Order*. Nonetheless, after the close of the record, Noble objected to non-bypassable treatment of NMB transmission charges under the Settlement. Noble offered three arguments in support of its objections filed on August 11, 2016 (“Objections”): (1) the Commission’s approval of the NBT unlawfully invades the Federal Energy Regulatory Commission’s (“FERC”) exclusive jurisdiction over “unbundled transmission service;” (2) non-bypassable treatment of the NMB transmission charges is unjust, unreasonable and contrary to the Electricity Customer Choice and Competition Act, 66 Pa.C.S. § 2801 *et seq.* (the “Competition Act”); and (3) PECO’s NBT is unduly discriminatory and would preclude an EGS from offering direct billing options for wholesale transmission to retail customers. Noble Objections, pp. 5-9.

The ALJ recommended approval of the Settlement and concluded that continuing the NBT and enhancing the transparency of NITS rates is in the public interest. R.D., pp. 29-30, 35-36. The ALJ also determined that the Commission should deny Noble’s Objections because: (1) the Commission has jurisdiction over retail rates and, therefore, the manner in which NMB transmission charges are recovered from retail, end-use customers is not preempted by the Federal Power Act; and (2) the record does not support a revision to the NBT previously approved in the *DSP III Order*. See R.D., pp. 72-73. The ALJ further observed that Noble’s tactic of waiting until the briefing stage of this proceeding to challenge PECO’s proposal to continue the NBT is improper. *Id.*, p. 72.

Noble is the only party that excepted to the ALJ’s approval of the Settlement, and its Exception should be rejected for two reasons. First, Noble merely repackages the same jurisdictional arguments that the ALJ found unconvincing. According to Noble, its jurisdictional challenge does not need to be supported by evidence and therefore its objection to the Settlement

on this ground after the close of the record was timely and appropriate. Noble Exc., p. 4.

However, as the ALJ found, Noble has not provided any legal basis for its claim that FERC has exclusive jurisdiction over whether an EGS or EDC should acquire transmission-related services on behalf of the EDC's distribution service load and pay the rates imposed by PJM and approved by the FERC for those services.<sup>22</sup> These are matters that are part of the inherent power of states to regulate the local distribution of electricity and, as such, are expressly excluded from the preemptive effect of the Federal Power Act.<sup>23</sup> Contrary to Noble's assertions, continuing the NBT under the Settlement does not change FERC rates or limit the recovery of costs associated with FERC-regulated transmission service in retail rates. Moreover, any suggestion by Noble that the Commission's approval of the NBT contravenes the terms of PJM's open access transmission tariff ("OATT") is wrong. PECO purchases NMB transmission services on behalf of its default service and shopping load as directed by the Commission and, therefore, it is the PJM transmission customer billed for those services under the OATT. Indeed, as discussed in PECO's Reply Brief (p. 10), Noble does not provide any examples of violations of the Federal Power Act, FERC Orders or applicable PJM rules and agreements arising from the non-bypassable treatment of NMB transmission charges.<sup>24</sup> Accordingly, the ALJ properly found that the Commission has jurisdiction to determine how PJM charges incurred by PECO to acquire NMB transmission-related services on behalf of all customers are recovered in retail rates.

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<sup>22</sup> Noble does not mention and appears to abandon its argument that the NBT contravenes the Competition Act and harms retail choice. The ALJ correctly concluded that this argument was previously considered and rejected by the Commission in DSP III and other EDCs' default service proceedings, but she did not rely on such precedent as the basis for rejecting Noble's jurisdictional argument (Noble Exc., p. 5).

<sup>23</sup> The Federal Power Act provides that the scope of federal regulation "extends only to those matters which are not subject to regulation by the States" and states further that the FERC "shall not have jurisdiction . . . over facilities used in local distribution." 16 U.S.C. §§ 824(a) and (b).

<sup>24</sup> In fact, the two sections of PJM's Reliability Assurance Agreement (Articles 10 and 11) that Noble relies on as alleged support for its position (*see* Noble Exc., p. 8 n. 18) do not stand for the proposition that load serving entities have "the right to bill and recover [NMB] PJM wholesale market charges."

Noble also argues, as it did in its Objections, that the NBT is discriminatory and interferes with the ability of EGSs to offer innovative products and direct billing services to retail customers. Noble Exc., pp. 9-10. As the ALJ found, this objection is not supported by the record even though Noble had full opportunity to raise its concerns during the evidentiary phase of this proceeding. *See* R.D., pp. 63-64, 71-73. Putting aside the inappropriate manner in which Noble's Objections were raised, there is simply no basis for a change to the Commission-approved NBT. Noble did not present any evidence that it has been or would be adversely affected by non-bypassable treatment NMB transmission charges in terms of either financial impact or limitations on competitive market opportunities. The ALJ understandably rejected Noble's unsupported objection to the Settlement, *see* R.D., pp. 72-73, and the Commission should as well.

### III. CONCLUSION

For the reasons set forth above, the Commission should deny the Exceptions of CAUSE-PA/TURN, the OCA and Noble and adopt the Recommended Decision issued by Administrative Law Judge Fordham on September 23, 2016 without modification.

Respectfully submitted,



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