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October 17, 2017

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: PECO Energy Company's Petition for Plan for an Advance Payments Program Submitted Pursuant to 52 Pa. Code § 56.17

PECO Energy Company's Petition for Temporary Waiver of Portions of the Commission's Regulations with Respect to the Plan
Docket No. P-2016-2573023

Dear Secretary Chiavetta:

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

Sincerely,

Deanne M. O'Dell

Deanne M. O'Dell

DMO/lww
Enclosure
cc: Certificate of Service w/o enclosure

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Main Brief to the Commission filing pre-served Testimony upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: October 17, 2017

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

PECO Energy Company Pilot Plan for an Advance Payments Program and Petition for Temporary Waiver of Portions of the Commission's Regulations with Respect to the Plan	:	Docket No. P-2016-2573023

MAIN BRIEF OF
RETAIL ENERGY SUPPLY ASSOCIATION

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I. INTRODUCTION

The overarching goal of the Electricity Generation Customer Choice and Competition Act ("Competition Act") is competition.[1] The Commission is required to ensure the proper functioning of a fully competitive retail electricity market[2] to ensure that all consumers shall have the opportunity to purchase electricity from their choice of electric generation supplier ("EGS").[3] In furtherance of this goal, historical monopolies (such as PECO Energy Company ("PECO")) are prohibited from engaging in discriminatory and anti-competitive behavior regarding the EGSs.[4] Granting PECO's Prepay Pilot Program Petition will result in discriminatory and anti-competitive behavior as prohibited by the Competition Act and, therefore, the petition must be denied. Moreover, granting PECO's Petition would deprive consumers of the benefits of competitive prepay plans which – if the fundamental market structure were in place to enable such offerings – would provide much more value to consumers while being consistent with the goals of the Competition Act to provide consumers with a choice of EGSs.

II. STATEMENT OF THE CASE

On October 26, 2016, PECO filed a petition seeking to implement a prepayment meter program ("Prepay Pilot Program") with the Commission in which it proposed to allow certain residential customers/applicants to voluntarily enter a program in which they pay their bills for

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1 *Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania v. PUC*, 120 A.3d 1103-1104, 1106 (Pa. Commw. Ct. 2015), appeals denied, 136 A.3d 982 and 136 A.3d 983 (Pa. 2016) ("*Choice Order*.").

2 66 Pa.C.S. §§ 2811(a) and (b)(empowers the Commission to investigate and take steps to prevent anticompetitive or discriminatory conduct affecting the retail distribution of electricity).

3 66 Pa. C.S. §2806(a).

4 66 Pa. C.S. §§ 2803 and 2804(6).

utility service in advance of receiving service. A Notice of the Petition was published in the Pennsylvania Bulletin on November 12, 2016. 46 Pa.B. 7232. The Notice directed comments to be filed with the Commission by no later than December 15, 2016, and reply comments to be filed by January 16, 2017. Simultaneously with the receipt of comments from various parties (including RESA), the Commission referred this matter to the Office of Administrative Law Judge. By Notice dated December 16, 2016, Administrative Law Judge Angela T. Jones was assigned to the proceeding.

Notice of appearance and interventions were filed by the Commission's Bureau of Investigation and Enforcement ("BI&E") and the Office of Consumer Advocate ("OCA"). Pursuant to Prehearing Conference Order #2 dated January 24, 2017, a litigation schedule was established and the following petitions to intervene of the following parties were granted: the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (collectively, "TURN"), Direct Energy Services, LLC, Direct Energy Business, LLC, Direct Energy Business Marketing, LLC, Direct Energy Small Business, LLC, Bounce Energy PA LLC, and Gateway Energy Services Corporation (collectively, "Direct Energy"), and the Retail Energy Supply Association ("RESA")[5]. Prehearing Conference Order #3 issued on March 7, 2017 and Prehearing Conference Order #4 issued on May 9, 2017 made adjustments to the litigation schedule. Public input hearings were held on April 24, 2017.

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[5] The comments expressed in this filing represent the position of the Retail Energy Supply Association as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

On July 5, 2017, a Joint Motion for Protective Order was filed by the parties to the proceeding, which was granted as unopposed by Order issued July 6, 2017. The evidentiary hearing commenced on August 30, 2017. At the hearing, pre-filed written testimony and exhibits of all parties were admitted into the record. The following testimony of Norman Levine was admitted on behalf of RESA: (1) RESA St. No. 1; (2) RESA St. No. 1-R; and (3) RESA St. No. 1-SR.

RESA is filing this main brief in support of its recommendation that the Commission deny PECO's petition and reject its proposal to implement a Prepay Pilot Program.

III. LEGAL STANDARDS

A. COMPETITION ACT

As a creation of the Legislature, the Commission has only the powers and authority granted to it by the Legislature and contained in the Public Utility Code, 66 Pa.C.S. §§ 101 et seq.[6] A part of the Public Utility Code, the Competition Act, directs the Commission to create a competitive market for the generation of electricity through a separation of the distribution and generation services that had been previously provided exclusively by the EDCs on a monopoly basis.[7] The purpose of this restructuring is to ensure that "all customers of electric distribution companies in this Commonwealth shall have the opportunity to purchase electricity from their choice of electric generation suppliers ["EGSs"]"[8] Further, the Competition Act states that

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6 *See City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984) ("We begin our inquiry by recognizing that the authority of the Commission must arise from the express words of the pertinent statutes or by strong and necessary implication therefrom...It is axiomatic that the Commission's power is statutory; and the legislative grant of power in any particular case must be clear."); *see also Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); *Shedlosky v. Pennsylvania Electric Co.*, Docket No. C-20066937, Order entered May 28, 2008.

7 66 Pa.C.S. §§ 2801-2812.

8 66 Pa.C.S. § 2806(a).

consumers "should be able to choose among alternatives such as . . . flexible pricing" and these "alternatives may be provided by different" EGSs.[9] Thus, the "overarching goal of the [Competition] Act is competition."[10]

Recognizing the then-existing monopoly market structure in place and the need to create a pathway for EGSs to be able to offer competitive generation services (which had been previously offered by the EDCs), the Competition Act sets forth specific directives regarding interactions between the EDCs and EGSs. More specifically, the Competition Act requires that EDCs provide EGSs nondiscriminatory access to the EDC's transmission and distribution system on "rates, terms of access and conditions that are comparable to the utilities own use of its system."[11] The Competition Act also empowers the Commission to take steps to prevent anticompetitive or discriminatory conduct and to investigate "the impact on the proper functioning of a fully competitive retail electricity market. . . anticompetitive or discriminatory conduct affecting the retail distribution of electricity."[12] Thus – as required by the Competition Act – when an EDC proposes to undertake an action that will impact ability of consumers to choose a competitive option, the Commission must consider whether the proposal is

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9 66 Pa. C.S. § 2804(2).

10 *Choice Order* at 1103-1104, 1106.

11 66 Pa. C.S. § 2803(Direct Access is defined as "The right of electric generation suppliers and end-use customers to utilize and interconnect with the electric transmission and distribution system on a nondiscriminatory basis at rates, terms and conditions of service comparable to the transmission and distribution companies' own use of the system to transport electricity from any generator of electricity to any end-use customer.)(emphasis added); 66 Pa. C.S. § 2804(6) ("A public utility that owns or operates jurisdictional transmission and distribution facilities shall provide transmission and distribution service to all retail electric customers in their service territory and to electric cooperative corporations and electric generation suppliers, affiliated or nonaffiliated, on rates, terms of access and conditions that are comparable to the utilities own use of its system.") (emphasis added).

12 66 Pa. C.S. §§ 2811(a) and (b).

anticompetitive or discriminatory and whether or not it will have a negative impact on competition.

PECO relies on the Commission's advance payment regulations at 52 Pa. Code § 56.17 to support its petition.[13] The existence of regulations, however, does not absolve the Commission of addressing whether approval of PECO's Prepay Pilot Program would depart from the Competition Act's mandates and policy objectives. These regulations became effective June 17, 1978 and were last amended in 1995.[14] They predate the Competition Act which became effective January 1, 1997.[15] This means that at the time the Commission adopted its advance payment regulations, retail competition did not exist in Pennsylvania and, therefore, no possibility of competitively provided prepay services existed. The marketplace that exists today, however, is one in which competitive suppliers are present and offering services.[16] This reality, in combination with the requirements of the Competition Act, means that the Commission cannot look at PECO's petition in a vacuum without taking into consideration how approving it would impact the competitive market. As explained more fully in the sections below, PECO's petition is anticompetitive and discriminatory and will have a negative impact on competition. As such, it must be denied.

B. Burden of Proof

PECO has the ultimate burden of proof in this proceeding and the initial burden of going forward with evidence showing that its proposals are lawful and reasonable. Section 332(a) of

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[13] PECO St. No. 1 at 8.

[14] 25 Pa.B. 145.

[15] 66 Pa. C.S. § 2801.

[16] RESA St. No. 1-SR at 4; *See also*, http://www.pa-power-switch.net/shop-for-electricity/shop-for-your-home (a search of the Philadelphia area code 19102 yielded 184 competitive supplier offers available).

the Public Utility Code provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.[17] It is axiomatic that "[a] litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible."[18] A preponderance of the evidence means evidence which is more convincing, by even the smallest amount, than that presented by the other party.[19] Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence.[20] More information is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.[21]

PECO has not met its burden of submitting substantial evidence to prove, by a preponderance of evidence, that its petition should be granted. PECO's proposal is not legally required and, indeed would perpetuate an unequal playing field between default service and EGS service. Moreover, PECO has not provided any evidence to show why its proposal is necessary and that it is reasonable. PECO's proposal, if adopted, will have a chilling effect on competition in PECO's service territory.

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17 66 Pa. C.S. § 332(a).

18 *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990).

19 *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

20 *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Commw. Ct. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Commw. Ct. 1993).

21 *Norfolk and Western Ry. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. Ct. 1960); *Murphy v. Commonwealth, Dep't. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Commw. Ct. 1984).

IV. SUMMARY OF ARGUMENT

RESA recommends that the Commission deny PECO's petition on the basis that permitting the utility to be the exclusive provider of prepay plans is inconsistent with the Competition Act. Contrary to the goals and objectives of the Competition Act, PECO's proposal is anticompetitive and discriminatory and will negatively impact the ability of EGSs to offer their own prepay plans in Pennsylvania. PECO seeks to utilize ratepayer funding to develop an electric distribution company ("EDC") prepay option which results in a competitive disadvantage for EGSs. The availability of an EDC prepay option produces an immediate preference for the EDC's offering, due to the EDC direct billing relationship with customers and status as the monopoly distribution provider. Moreover, an EDC prepay option would deter the desire and ability of EGSs to provide competitive prepay options. PECO's proposal would interfere with the ability of the EGS to develop its relationship with its customer as the prepay offering could not be modified by EGSs and customer communications and inquiries would be routed through PECO.

PECO's petition is also inconsistent with the Commission's policy of supporting a vibrant competitive market that delivers innovative products to consumers. Consumer-focused innovation stems from the competitive market and many EGSs have successful experience deploying prepay service plans without relying on ratepayer funding. EGSs' expertise and technological capabilities can be utilized by suppliers in Pennsylvania without forcing PECO's ratepayers to fund the development and testing of a prepay program. If EGSs are permitted to develop their own prepay plans and compete with other EGSs in the market, they will refine their offerings to meet the needs and demands of their customers. Therefore, the better use of Commission and stakeholder resources is to focus on ways to incent competitive market development of the products and services consumers want rather than requiring all ratepayers to fund an EDC's "trial and error" of such product development.

If, nonetheless, the Commission elects to permit PECO to offer a Prepay Pilot Program (over RESA's objections), then RESA recommends that this approval should be conditioned on the following requirements:

- Require PECO (based on collaborative consultation with interested EGSs) to submit a report to the Commission within six months after a final order in this matter that identifies the specific level of investment in basic infrastructure that PECO will undertake prior to the end of the pilot to structurally allow for prepay to work;
- Limit the number of customers and time period of the pilot to one year;
- Require PECO to incorporate retail choice messaging in communications regarding the prepay pilot and also through a direct mailing of EGS offers similar to the program utilized by the FirstEnergy companies; and,
- Require PECO to include in its impact evaluation an evaluation of how the pilot has impacted retail choice.

RESA recommends these conditions only in the event the Commission elects to approve PECO's petition. Permitting PECO to implement a prepay offering must be done with caution due to the significant harms associated with allowing PECO to provide the only prepay billing option available in the market.

V. ARGUMENT

A. PECO'S PETITION IS ANTICOMPETITIVE AND DISCRIMINATORY

The mostly unrebutted testimony in this proceeding makes clear that granting PECO's petition would violate the anticompetitive and discriminatory requirements of the Competition Act and have a negative impact on the ability of the competitive market to offer their own prepay plans in Pennsylvania. As such, PECO's petition must be denied.

1. PECO would have the opportunity to leverage its right to full cost recovery (which EGSs do not have) to strengthen its historical relationship with consumers at expense of competitive market development

PECO identified the purposes of its pilot to determine: (1) whether there is a substantial portion of its customers who would prefer and utilize prepayment and whether its availability would increase customer satisfaction; (2) whether a prepay plan can reduce existing delinquencies; and, (3) whether the prepay plan can assist customers conserve energy.[22] PECO initially estimated that the total cost of its proposed two-year pilot would be less than $500,000 and proposed to account for these costs as normal operating expenses and include them in a future rate base claim.[23] Thus, in sum, PECO is seeking to utilize ratepayer funding to develop a new EDC prepay option, gauge customer desirability for the platform, reduce uncollectible expense, and assess conservation impacts.

PECO's proposal is anticompetitive and discriminatory. EGSs do not have the same cost recovery ability regarding the products and services they offer customers.[24] Rather, innovation from EGSs is largely driven by competitive companies investing shareholder dollars and putting

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22 RESA St. No. 1 at 4.

23 PECO St. No. 1 at 23.

24 RESA St. No. 1 at 9-10.

their own capital at risk.[25] The investment decision for an EGS that does not have a base of captive ratepayers from which to seek cost recovery is very different than for a utility. Specifically, the EGS's decision to invest is based on whether there is demand for the offering and a cost-benefit analysis regarding the investment. EGSs have no ability to seek funding from captive customers for research and development or to ensure a return on investment. Giving the historical monopoly provider an opportunity to draw upon funding from captive ratepayers to offer something that can and should be offered by the competitive market creates a competitive disadvantage for EGSs and decreases the likelihood that any EGS would be inclined to offer their own competitive alternative. The Competition Act prohibits EDCs from engaging in anticompetitive or discriminatory behavior and nothing in PECO's petition is offered to address the inequities that occur as a result of its ability to seek ratepayer funding for its initiative.

Moreover, because the ratepayers already know the EDC, continue to receive their electricity bill each month from the EDC (even for EGS charges) and have a long-standing relationship with the EDC, the availability of an EDC-provided prepay option creates an immediate preference for the EDC's offering.[26] PECO has numerous opportunities – due to its direct billing relationship with customers and its status as a monopoly distribution provider – to steer its captive customers to its own product offerings rather than competitive market options.[27] Further, the presence of an EDC-only prepay product could result in consumers being more likely to perceive that prepay options are only available from the traditional monopoly

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25 RESA St. No. 1 at 9-10. As explained more fully in Section V.B, in a competitive marketplace where all entities have an equal opportunity to serve customers and all are risking shareholder dollars to develop products and services, consumers receive maximum value.

26 RESA St. No. 1 at 10.

27 RESA St. No. 1 at 10.

provider.[28] Consumers may also mistakenly believe that the EDC-provided default service is superior.[29] This perception could occur because the consumer recognizes the EDC as the traditional monopoly provider, and based on that historical relationship, concludes that the products and services offered by the EDC are superior.[30] Following this mistaken logic, the consumer may also wrongly assume that because there are no other competitive options for prepay services, the EDC and its default service in general must be superior.[31] This could further be extended (in the minds of consumers) to a misbelief that they would receive better reliability and/or faster restoration should they take default service; or perceive worse reliability and/or a lower place in the queue when it comes to restoration if they take service from an EGS. As the Commission has rightly concluded in other contexts, endorsement of default service over competitive EGS supply products "would not be commensurate with the intent of the Competition Act and [the Commission's] duty to promote and assist in the development of the retail electric supply market."[32]

The net result of all of these factors would have a chilling effect on the desire and ability of EGSs to provide competitive prepay options.[33] Such result is not consistent with the Competition Act which requires that all consumers shall have the opportunity to purchase generation from their choice of EGSs and should be able to choose among alternatives that may

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28 RESA St. No. 1 at 10.

29 RESA St. No. 1 at 11.

30 RESA St. No. 1 at 11.

31 RESA St. No. 1 at 11.

32 *See* 66 Pa. C.S. § 2802. *Petition of Duquesne Light Company For A Waiver Of The Three Business Day Switching Requirements Under 52 Pa. Code § 57.174*, Docket No. P-2014-2448863, Order entered December 4, 2014 at 11.

33 RESA St. No. 1 at 10.

be provided by different EGSs.[34] However, for the reasons previously discussed, the consequences of allowing PECO to leverage ratepayer funding to develop a new EDC provided prepay plan (which can and should be offered by the competitive market) would only benefit PECO by strengthening its historical relationship with consumers while shutting down any possibility of allowing consumers the freedom to choose prepay options from the competitive market. As such, granting PECO's petition would have a discriminatory and anticompetitive outcome in violation of the requirements of the Competition Act. Thus, PECO's petition must be denied. Doing so will make clear to EDCs that they should utilize ratepayer funds to focus their efforts on their core competency – operating a safe and reliable electric distribution grid – rather than erecting further barriers on the ability of the competitive market to focus on its core competency – delivering innovative products and service choices to Pennsylvania consumers.[35]

2. PECO would be leveraging its direct billing relationship (which EGSs do not have) and placing itself as the gatekeeper between EGSs and their customers

PECO proposes to undertake a voluntary pilot open to 2,000 participants to provide an alternative mechanism for customer payment of utility & EGS charges to PECO.[36] PECO proposes that participants will: (1) "load" funds into their PECO accounts prior to receiving service; (2) have the ability each day to log on to their PECO account to see the status of the

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[34] 66 Pa. C.S. §§2806(a), 2804(2).

[35] Also worth noting, is that both PPL Electric Utilities Corporation ("PPL") and Duquesne Light Company have stated in comments that they are interested in prepay options. Comments of Duquesne Light Company dated December 14, 2016; Comments of PPL Electric Utility Corporation dated December 15, 2016 at 1. Moving forward here would send the message to other utilities that they can/should develop their own prepay options. The ratepayer cost to develop EDC-specific prepay options for each EDC is not a reasonable use of resources given the value and consumer-focused products the competitive market can develop. In addition, differing rules and requirements for various EDC prepay options across the Commonwealth would be confusing for consumers (and the EGSs attempting to interact with the various EDC offerings). RESA St. No. 1 at 12.

[36] PECO St. No. 1 at 4.

available funding compared with energy usage; and, (3) have the ability to add additional funds to their PECO account or decrease usage as deemed appropriate.[37] If the account balance decreases so that only approximately five days of usage can be funded by the remaining balance, the participant will receive notifications from PECO.[38] If the participant takes no action and the account balance goes to $0, after a five day grace period, PECO will remotely discontinue electricity service.[39] PECO's proposal is anticompetitive and discriminatory and would only serve to further entrench the significant advantage EDCs already have with consumers by using the prepay "customer touch points" to continuously send the message that PECO is control of the customer's energy services regardless of whether the customer has contracted with a competitive supplier for generation.

The fact that EDCs continue to bill all of their distribution residential customers for electricity services, including charges incurred for competitive supply (through utility consolidated billing ("UCB")) provides EDCs a tremendous advantage as direct billing is the primary vehicle for maintaining the utility/customer relationship.[40] EGSs do not have the same opportunity to establish a direct billing relationship with their residential customers.[41] Unlike EDCs, EGSs must build their customer relationships from scratch and in competition with one another.[42] As long as EDCs are the entities sending monthly (EDC branded) bills to consumers,

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37 PECO St. No. 1 at 5.

38 PECO St. No. 1 at 5.

39 PECO St. No. 1 at 6.

40 RESA St. No. 1 at 17-18.

41 The structural impediments preventing EGSs from directly billing their customers are discussed further in Section V.C.1. Unless and until these structural issues are addressed, EGSs will not be in a position to offer prepay products to Pennsylvania and moving forward to permit an EDC-provided prepay offering (which is contrary to the requirements of the Competition Act) is a wasteful use of resources, time and ratepayer money. RESA St. No. 1 at 18.

42 RESA St. No. 1 at 10.

they have the ability to reinforce their relationship to the customer every month and will continue to enjoy competitive advantages over EGSs. Adopting PECO's petition will not only maintain this current reality (which denies EGSs access to a direct billing relationship with their customers) but structuring its prepay option as proposed will enable PECO to deepen its relationship with consumers – to include those who have contracted with an EGS for generation service.

PECO's proposal will allow shopping customers to avail themselves of PECO's prepay option and the only type of prepay offering EGS customers will be able to receive is the one offered by PECO with the rules and requirements as dictated by PECO.[43] PECO's proposal does not permit EGSs any chance to innovate or tweak the PECO provided prepay offering available for their customers to distinguish themselves from competitors.[44] As structured, an EGS customer would be required to check with PECO about how much money he or she has in her prepay account (which includes EGS charges) and would receive communications from PECO about his or her supply usage even though he or she is contracted with an EGS. This is analogous to having your cable television service with DishTV but receiving usage messages from Comcast and being required to contact Comcast to see if you have sufficient funds in your prepay account for the DishTV charges.

Allowing the EDC in this role does not foster the development of a competitive market because it interferes with the ability of the EGS to develop its own relationship with <u>its</u> customer. As the Commission has already admonished PECO, it does not "own" its distribution customers – a mindset the Commission described as "a relic from the pre-competition days of vertically

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43 PECO St. No. 1 at 11-12.

44 RESA St. No. 1 at 11.

integrated service provided by a single entity."[45] Developing an EDC-branded prepay option where the EDC inserts itself even more prominently in the middle of the contractual relationship between the customer and his or her contracted EGS is directly contrary to the purpose of the Competition Act to ensure that EDCs do not engage in anticompetitive and discriminatory behavior so as to provide consumers with competitive alternatives. For these reasons, PECO's petition must be denied.

B. CONSUMERS RECEIVE THE FULL VALUE OF PREPAY PLANS WHEN OFFERED EXCLUSIVELY BY EGSS – A RESULT THAT CANNOT OCCUR IF PECO'S PETITION IS GRANTED

For all the reasons discussed in the previous sections, PECO's petition is anticompetitive and discriminatory and must be denied. Apart from all of the reasons why PECO's petition violates the Competition Act is the reality that granting it would deprive consumers of the full value of prepay plans offered through the competitive market. RESA fully supports the ability of consumers to avail themselves of prepay plans offered in the competitive retail market.[46] Consumer-focused innovation comes from the competitive market and many EGSs (including ones with operations in Pennsylvania) have already successfully developed prepay plans without reliance on ratepayer funding.[47] As of May 14, 2017, there were 23 prepay service plans available in the Houston, Texas area.[48] Of these 23 offers, 11 are from different electric suppliers of all sizes and consist of fixed, indexed and variable products, as well as time-of-use

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45 *Petition of PECO Energy Company for Expedited Approval of its Dynamic Pricing Plan Vendor Selection and Dynamic Pricing Plan Supplement*, Docket No. P-2012-2297304, Opinion and Order entered September 26, 2012 at 13.

46 RESA St. No. 1 at 5.

47 RESA St. No. 1 at 5.

48 RESA St. No. 1 at 6.

products.[49] EGSs offering prepay products are providing consumers meaningful, timely and actionable information about their usage.[50] This is evidenced by the fact that consumer adoption of prepay energy offerings has been steadily increasing as part of an intensifying mega-trend for consumers adopting all types of prepayment.[51] These existing technological capabilities can be deployed by EGSs in Pennsylvania without the need to force captive ratepayers to pay PECO to separately develop, implement, and maintain duplicative capabilities that will hinder the growth of competitive markets.

One of the major benefits of competition is that it encourages the development of innovative, consumer-driven products and services that add value to customers beyond the electric commodity.[52] If EGSs are free to develop their own prepay plans and compete with other EGSs in the market, they will be incentivized to fine tune their offerings so as to meet the specific needs and demands of their target customers.[53] In order to be viable, the competitive

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49 RESA St. No. 1 at 6. In Texas, prepay service is compatible with all of these product offerings, which allows for an even wider array of choices for consumers. Another important feature of the Texas market is that competitive supplier offerings do not "compete" with a utility-provided product because the utilities in Texas do not provide default service.

50 RESA St. No. 1-R at 6. The ability of consumers to access utility-provided data during the month while on a post-pay product (even if such access were seamless) is separate from the electricity plan. This tool is different from prepay products where there is a real-time correlation between the consumer taking action on the information and the amount the customer will be required to pay as a result of that action. RESA St. No. 1-SR at 15.

51 RESA St. No. 1 at 5, 14. *See* EcoPinion Consumer Survey Report No. 28: "Prepay Energy: Past the Tipping Point and Scaling Up for Success" dated January 2017 at 27 available at: http://defgllc.com/publication/prepay-energy-past-the-tipping-point-and-scaling-up-for-success/. Nearly seven in ten respondents in a 2016 annual survey stated that they had used some sort of prepayment, representing a small increase of 3% since 2015.

52 RESA St. No. 1 at 7.

53 RESA St. No. 1 at 7; RESA St. No. 1-R at 3. An example of this type of consumer-driven change is illustrated by the recent launch of Deposit Freedom® by Direct Energy's prepay affiliate, First Choice Power. RESA St. No. 1 at 7-8. This newly offered product is an example of how the competitive market works to find solutions to assist consumers in making service available to them in the manner they prefer. In this example, consumers wanted a prepay product that would not require them to provide a deposit and the competitive community has responded. RESA St. No. 1-R at 3-4.

market has to continually evolve its products and services to design ones that consumers desire.[54] If EGSs do not respond and evolve, then consumers simply will not choose the EGS's products and services.[55] Regarding prepay products, this type of competitive process has occurred among EGSs in Texas regarding minimum initial connection balance, auto-payment (tolltag) functionality, and daily information provided (over minimum requirements).[56]

Importantly, though, a competitive market where all market players are on equal footing to develop products and services that are desired by customers is needed to incent market development because EGS product decisions will be based on what consumers want and do not want.[57]

Utilities are not similarly situated given their historical monopoly role and opportunity to seek full cost recovery.[58] Real-time responsiveness to customer demands and innovation simply cannot occur through the traditional regulatory model under which EDCs must operate.[59] Rather, the utility is subject to cost based regulation through which every expense must be scrutinized, justified and approved in a rate case and regulators (not consumers) make decisions about what they think consumers want and do not want.[60] In contrast, EGSs are able to quickly respond to changing consumer preferences and desires as they are not required to undertake a lengthy regulatory review and approval process to implement such changes.[61] Moreover,

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54 RESA St. No. 1 at 8-9; RESA St. No. 1-R at 4.

55 RESA St. No. 1-R at 4.

56 RESA St. No. 1 at 8-9.

57 RESA St. No. 1-SR at 9.

58 RESA St. No. 1-SR at 8.

59 RESA St. No. 1 at 7-8.

60 RESA St. No. 1 at 7-8; RESA St. No. 1-SR at 8-9.

61 RESA St. No. 1 at 8-9.

because of the presence of competitive market forces, there is every reason to believe that any objectionable concerns about the structure of various prepay products offered by the competitive market would eventually be phased out as EGSs continue to design and create products and services that consumers desire.[62] Also important to note is that in a competitive market, consumers have choices.[63] They do not have to select prepay options and – at least in the current structure as exists today in Pennsylvania – they can remain with the EDC.[64]

For all these reasons, the full value to consumers of prepay offerings lies in the ability of the competitive market to provide them and approving PECO's petition here will only chill the competitive market development of prepay products (as discussed in the previous section.)[65] Thus, the first step toward the development of truly competitive market innovations like prepay programs is to deny PECO's petition. Rather than embarking down a ratepayer funded "trial and error" path to develop a utility-specific product that will stifle competitive market innovation and – in the end – not offer consumers maximum benefit, the Commission and stakeholders' time would be better utilized by focusing on other ways to incent the competitive market development of prepay services like enabling EGSs the option to build and maintain a direct billing relationship with their customers.[66]

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62 RESA St. No. 1-R at 4. Consumer protections are an important and necessary underpinning of a successful retail market and should be taken into consideration in designing retail market policies. Notably, in Pennsylvania as well as in other jurisdictions, a significant number of consumer protection regulations and policies already exist governing electricity service. Therefore, to achieve a good result for consumers, a better focus for the Commission would be on how to enable the competitive market to provide prepay products and preserve the appropriate consumer protections applicable to a competitively provided prepay product. RESA St. No. 1 at 12-13. This is how Texas has approached this issue. *See* 16 Tex. Admin. Code § 25.498.

63 RESA St. No. 1-SR at 9.

64 RESA St. No. 1-SR at 9.

65 RESA St. No. 1-SR at 1.

66 RESA St. No. 1 at 17; RESA St. No. 1-SR at 5-6. The supplier consolidated billing ("SCB") petition filed recently by NRG is one pathway to achieve the result RESA supports here. *Petition of NRG Energy, Inc.*

C. If The Commission Approves PECO's Petition (Which It Should Not), Then Conditions Must Be Imposed To Address The Anti-Competitive Impact Of That Decision

If the Commission elects to permit PECO to offer its prepay program over RESA's objections, then RESA recommends that this approval should be conditioned on the following requirements:

- Require PECO (based on collaborative consultation with interested EGSs) to submit a report to the Commission within six months after a final order in this matter that identifies the specific level of investment in basic infrastructure that PECO will undertake prior to the end of the pilot to structurally allow for prepay to work;
- Limit the number of customers and time period of the pilot to one year;
- Require PECO to incorporate retail choice messaging in communications regarding the prepay pilot and also through a direct mailing of EGS offers similar to the program utilized by the FirstEnergy companies; and,
- Require PECO to include in its impact evaluation an evaluation of how the pilot has impacted retail choice.[67]

To be clear, however, PECO's petition is anticompetitive and discriminatory in violation of the Competition and must be denied. There are no competitive (or other) prepay electric programs currently available in Pennsylvania.[68] As discussed above, there are significant retail market harms associated with permitting PECO to provide the only prepay billing option available in the market and RESA strenuously opposes approval of the petition. These

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for Implementation of Electric Generation Supplier Consolidated Billing, Docket No. P-2016-2579249, Petition filed December 8, 2016. Through supplier consolidated billing, a qualified EGS interested in offering SCB would be empowered to bill the customers directly for all energy charges (including those of the EDC) and other non-commodity value-added products and services allowing EGSs to message, develop, and more proactively maintain their customer relationships to demonstrate to customers they are more than just a "line item" on the EDC's consolidated bill. RESA believes that SCB would spur innovation and lead to an even greater variety of EGS-provided products and services for the benefit of consumers. And, perhaps more importantly, the end result of implementing SCB will be far more positive and beneficial to a greater range of Pennsylvania consumers than PECO's proposal. RESA St. No. 1 at 18-19.

67 RESA St. No. 1 at 3-4, 19-22.

68 RESA St. No. 1 at 7.

conditions are only offered in the event the Commission elects to approve PECO's petition as allowing PECO to implement a prepay offering must be done with caution given the significant harm to the competitive market that would occur.

1. <u>As a condition of approval, PECO must be directed to start making the necessary infrastructure changes to enable competitive prepay</u>

As discussed more fully in Section V.A.2, PECO already has a significant competitive advantage by direct billing all of its ratepayers for all electricity charges even those ratepayers who have entered into contractual relationships with competitive suppliers for generation. Granting PECO's petition here will deepen this advantage by using the prepay "customer touch points" to continuously send the message that PECO is control of the customer's energy services even though the customer has contracted with a competitive supplier for generation. There is no way for EGSs to counterbalance this EDC competitive advantage because the infrastructure in Pennsylvania today does not allow for EGSs to offer their own prepay plans.

For residential customers, utility consolidated billing ("UCB") is the only viable billing option available for EGSs.[69] Most EDCs require EGSs wishing to participate in the Purchase of Receivables ("POR") program to utilize UCB for all EGS residential customers.[70] This means that if EGSs want to utilize the POR program for any residential customer, then they are required to utilize UCB for all residential customers.[71] While POR is an effort to mitigate the competitive advantages that utilities enjoy with respect to customer care and billing costs, the reality of Pennsylvania's current UCB/POR structure is that it prevents EGSs from establishing direct relationships with their customers or offering them non-commodity based value-added products

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69 RESA St. No. 1 at 17-18.

70 See, e.g., PECO Supplier Tariff Page 96, Billing Service Options, Section 19; RESA St. No. 1 at 17-18.

71 RESA St. No. 1 at 17-18.

and services.[72] In addition, even if an EGS did elect not to utilize POR and to direct bill its residential customers, the EGS cannot disconnect service to a nonpaying customer.[73] This lack of ability in the current environment is another barrier to EGSs providing prepay products.[74] Finally, while PECO and other EDCs are in the process of providing real-time usage data to EGSs, these systems are just starting to be implemented and tweaked.[75] Lack of reasonable and timely access to this data presents another barrier to EGSs seeking to provide prepay services.[76]

Unless and until these structural issues are addressed, EGSs will not be in a position to offer prepay products to Pennsylvania consumers.[77] As discussed further above in footnote 66, supplier consolidated billing ("SCB") is one pathway to address these structural issues and spending time focusing on how to implement SCB (which would open the market to a plethora of new innovation and products) rather than how to pave the way for an EDC-provided prepay option is a more efficient and reasonable use of resources.[78] And, perhaps more importantly, the end result of implementing SCB will be far more positive and beneficial to a greater range of Pennsylvania consumers than PECO's proposal.[79]

If, however, the Commission grants PECO's petition here, then such approval must be conditional on requiring PECO to start making the necessary infrastructure changes to enable competitive prepay. Therefore, in the context of this proceeding, the Commission should require

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72 RESA St. No. 1 at 17-18.

73 RESA St. No. 1 at 17-18.

74 RESA St. No. 1 at 17-18.

75 RESA St. No. 1 at 17-18.

76 RESA St. No. 1 at 17-18.

77 RESA St. No. 1 at 17-18.

78 RESA St. No. 1 at 18-19.

79 RESA St. No. 1 at 18-19.

PECO to engage in a collaborative consultation with EGSs to identify the basic infrastructure changes that need to be implemented to accomplish the goal of allowing competitive prepay options.[80] To ensure that this process moves forward in a meaningful way, PECO should be directed to submit a report to the Commission within six months after the final order in this matter which identifies both: (1) the specific level of investment that PECO will undertake prior to the end of the pilot; and, (2) a timeline for the tasks to be completed.[81]

2. <u>As a condition of approval, the pilot must have a specific end date of one year from implementation</u>

Although PECO initially proposed to limit the Prepay Pilot Program to 1,000 customer in its initial petition, PECO has since revised this number to 2,000 after determining that the costs are the same for each.[82] If the Commission permits PECO's Prepay Pilot Program to go forward, it must ensure that PECO's proposal truly is a "pilot" that is in no way intended to establish a precedent that the pilot will be continued.[83] The greater the number of participants, the more likely this pilot will become an embedded program.[84] Thus, as a further condition of approval, the pilot should have a specific end date of one year from implementation to ensure that the program does not become permanent by default.[85]

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80 RESA St. No. 1 at 20.

81 RESA St. No. 1 at 20.

82 PECO St. No. 1 at 4.

83 RESA St. No. 1 at 20-21.

84 RESA St. No. 1 at 20-21.

85 RESA St. No. 1 at 20-21.

3. <u>As a condition of approval, PECO must incorporate messaging about retail choice in its communications with potential and actual future prepay customers and undertake a direct mailing of EGS offers</u>

If the Commission is inclined to move forward with PECO's proposal over RESA's objections, then the Commission should direct PECO to incorporate messaging about retail choice in its communications with potential and actual future prepay customers.[86] For the reasons discussed above, it is extremely important that messaging about the pilot include additional information about retail choice so that consumers understand that just because PECO is making this offering that does not mean that: (1) the customer cannot shop; (2) that PECO's default service is somehow superior to EGS-provided service; and, (3) EGSs will not offer prepay products in the future.[87]

In addition, the Commission should also require PECO to undertake a direct mailing of EGS offers similar to the direct mail program implemented by the FirstEnergy EDCs.[88] The direct mail program is a way to leverage the direct billing relationship PECO has to provide EGS

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86 RESA St. No. 1 at 21-22.

87 RESA St. No. 1 at 21-22.

88 The FirstEnergy companies directly mailed individual EGS offers to approximately 1.6 million residential customers and 186,000 small C&I customers. The mailings directed consumers to contact one of the EGSs providing information in the offer to commence service and were paid for by the EGSs and received these mailing from their specific FirstEnergy EDC and were paid for by the participating EGSs. *See, e.g, Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of Their Default Service Programs* Docket Nos. P-2009-2093053 and P-2009-2093054, Opinion and Order entered November 6, 2009 at 20-21 (mailings were sent in 2011 and 2012); *Petition of Pennsylvania Power Company for approval of default service program for period from January 1, 2011 through May 31, 2013*, Docket No. P-2010-2157862, Opinion and Order entered on November 17, 2010 (the approved settlement provided for mailings that were first sent in November 2012 and an additional mailing was scheduled for February 2013); *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company*, Docket Nos. A-2010-2176520; A-2010-2176732, Opinion and Order entered March 8, 2011 (the approved settlement provided for mailings to customers regarding competitive offers and promotion of shopping opportunities which were sent in September 2012).

offers directly to consumers.[89] While this does not address the core concerns regarding PECO's proposal, if the Commission elects to move forward with PECO's petition, then the direct mailing option at least provides consumers some "balancing" information about competitive offers.[90]

4. As a condition of approval, the evaluation of the pilot must assess its effect on retail choice

As discussed previously, permitting PECO's proposal to go forward will have negative effects on the competitive retail market.[91] If, nonetheless, PECO's proposal is approved, then it must be conditioned on a requirement that the pilot's evaluation include a broader look at the retail market impacts of the Prepay Pilot Program.[92]

VI. CONCLUSION

PECO's petition must be denied because it is anticompetitive and discriminatory in violation of the requirements of the Competition Act. More specifically, the petition leverages PECO's opportunity to seek ratepayer funding for the plan's development, evaluation and implementation. Also, granting this petition would allow PECO to further deepen its existing relationships with EGS customers by regularly interfacing with these customers about supplier's charges. The result of allowing an EDC prepay product will be to stifle the ability of EGSs to offer such programs in Pennsylvania despite the fact that they have already been developed, tested and implemented by EGSs in Texas. Rather than embarking down a ratepayer funded "trial and error" path to develop a utility-specific product that will stifle competitive market

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89 RESA St. No. 1 at 21-22.

90 RESA St. No. 1 at 21-22.

91 RESA St. No. 1 at 22.

92 RESA St. No. 1 at 22.

innovation and – in the end – not offer consumers maximum benefit, the Commission and stakeholders' time would be better utilized by focusing on other ways to incent the competitive market development of prepay services like enabling EGSs the option to build and maintain a direct billing relationship with their customers. The first step toward this goal, however, is to deny PECO's petition here.

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Date: October 17, 2017

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VII. APPENDIX A – PROPOSED FINDINGS OF FACT

1. There are no competitive (or other) prepay electric programs currently available in Pennsylvania. RESA St. No. 1 at 7.
2. A number of EGSs are offering competitive prepay plans in other jurisdictions. Specifically, as of May 14, 2017, there were 23 prepay service plans available in the Houston, Texas area. RESA St. No. 1 at 6.
3. PECO proposes to undertake a two-year voluntary pilot program open to 2,000 participants to provide an alternative prepay mechanism for customer payment of utility bills to PECO. PECO St. No. 1 at 4, 23.
4. PECO seeks to provide the only prepay billing option available in the market. RESA St. No. 1 at 7.
5. PECO has a historical monopoly role and the opportunity to seek full cost recovery for research and development. RESA St. No. 1-SR at 8.
6. EGSs do not have the same cost recovery ability that EDCs do regarding the products and services they offer. RESA St. No. 1 at 9-10.
7. PECO intends to seek full cost recovery for the development and implementation of its proposed Prepay Pilot Plan. PECO St. No. 1 at 23.
8. PECO relies on the Commission's advance payment regulations at 52 Pa. Code § 56.17 to support its petition. PECO St. No. 1 at 8.
9. The Commission's regulations at 52 Pa. Code § 56.17 predate the Competition Act. 66 Pa. C.S. § 2801; 25 Pa.B. 145.
10. When the Commission adopted its advance payment regulations, retail competition did not exist in Pennsylvania. 66 Pa. C.S. § 2801; 25 Pa.B. 145.
11. PECO's proposal would allow shopping customers to avail themselves of only one prepay offering - PECO's prepay option. PECO St. No. 1 at 11-12.
12. As structured, PECO's proposed prepay offering would require shopping customers to communicate with PECO regarding funds in his or her prepay account and would receive communications from PECO about his or her supply usage. RESA St. No. 1 at 11.
13. Competition encourages the development of innovative, consumer-driven products and services that provided value to customers beyond the electric commodity. RESA St. No. 1 at 7.
14. If EGSs are free to develop their own prepay plans and compete with other EGSs in the market, they will be incentivized to fine tune their offerings to meet the specific needs and demands of their target customers. RESA St. No. 1 at 7; RESA St. No. 1-R at 3.
15. A competitive market where all market players are on equal footing to develop products and services is needed to incent market development. RESA St. No. 1-SR at 9.
16. EDCs are not able to respond in real-time to customer demands due to the regulatory model under which they operate. RESA St. No. 1 at 7-8.

17. EGSs are able to quickly respond to changing consumer preferences and desires as they are not subject to the lengthy regulatory review and approval process to implement changes. RESA St. No. 1 at 8-9.

18. Most EDCs require EGSs wishing to participate in the Purchase of Receivables ("POR") program to utilize utility consolidated billing ("UCB") for all EGS residential customers. See, e.g., PECO Supplier Tariff Page 96, Billing Service Options, Section 19; RESA St. No. 1 at 17-18.

19. If EGSs want to utilize the POR program for any residential customer, then they are required to utilize UCB for all residential customers. RESA St. No. 1 at 17-18.

20. Pennsylvania's current UCB/POR structure prevents EGSs from establishing direct relationships with their customers or offering them non-commodity based value-added products and services. RESA St. No. 1 at 18.

21. An EDC prepay product will negatively impact the desire and ability of EGSs to provide competitive prepay options. RESA St. No. 1 at 10.

VIII. APPENDIX B – PROPOSED CONCLUSIONS OF LAW

1. The Electricity Generation Customer Choice and Competition Act ("Competition Act") addresses the requirements that PECO, as the default service provider, must meet. 66 Pa. C.S. § 2807(e).

2. The Competition Act requires the Commission to "allow customers to choose among electric generation suppliers in a competitive generation market through direct access." 66 Pa.C.S. § 2804(2).

3. The Competition Act recognizes that greater competition in the electricity generation market benefits all classes of customers. 66 Pa. C.S. § 2802(7); *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1106 (Pa. Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016).

4. The "overarching goal of the Choice Act is competition through deregulation of the energy supply industry, leading to reduced electricity costs for consumers." *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1101 (Pa. Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016) (emphasis added); 66 Pa.C.S. § 2802(13).

5. The Electricity Generation Customer Choice and Competition Act ("Competition Act") directs the Commission to create a competitive market for the generation of electricity through a separation of the distribution and generation services that had been previously provided exclusively by the EDCs on a monopoly basis. 66 Pa.C.S. §§ 2801-2812.

6. The Competition Act requires that EDCs provide EGSs nondiscriminatory access to the EDC's transmission and distribution system on "rates, terms of access and conditions that are comparable to the utilities own use of its system." 66 Pa. C.S. §§ 2803, 2804(6).

7. The party seeking a rule or order from the Commission has the burden of proof in that proceeding. 66 Pa.C.S. §332(a).

8. PECO bears the burden of proof in this proceeding.

9. PECO must prove by a preponderance of the evidence that its Pilot Plan for an Advance Payments Program is reasonable and prudent. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990).

10. The substantial evidence in this proceeding makes clear that the proposed advance payments program plan submitted by PECO would adversely affect competition in Pennsylvania.

IX. APPENDIX C – PROPOSED ORDERING PARAGRAPHS

THEREFORE, IT IS ORDERED:

1. That the petition filed by PECO Energy Company on October 26, 2016 to establish a prepayment meter program is hereby denied.