PECO
An Exelon Company

Legal Department
2301 Market Street / S23-1
Philadelphia, PA 19103

Direct Dial: 215.841.6863

November 5, 2018

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

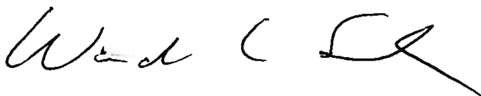
Re: Arthur Larson v. PECO Energy Company
Docket No. C-2017-2615206

Dear Secretary Chiavetta:

PECO's ***Reply Exceptions*** in this matter are enclosed for filing.

On October 4, 2018, the Commission issued the Initial Decision in this matter via Secretarial Letter which stated that exceptions, if any, must be filed within 20 days (October 24, 2018), with reply exceptions due 10 days after the date on which exceptions were due. In this case, because the tenth day after the exceptions due date fell on a weekend, reply exceptions are due today, Monday, November 5, 2018.

Very truly yours,



Ward L. Smith
Counsel for PECO Energy Company

WS/adz
Enclosures

c: Honorable Darlene D. Heep, ALJ
Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Arthur Larson	:	
	:	
v.	:	Docket No. C-2017-2615206
	:	
PECO Energy Company	:	

CERTIFICATE OF SERVICE

I, Ward L. Smith hereby certify that I served a copy of PECO Energy Company's ***Reply Exceptions*** in the above matter, upon all interested parties via email and overnight delivery to:

Arthur L. Jenkins, Jr., Esquire
325 DeKalb Street
P.O. Box 710
Norristown, PA 19404
c.a.zurek@verizon.net
Counsel for Arthur Larson

Dated: November 5, 2018

Ward L. Smith
Counsel for PECO Energy Company
2301 Market Street, S23-1
Philadelphia, PA 19103
Phone: (215) 841-6863
Fax: 215.568.3389
Ward.Smith@exeloncorp.com

BEFORE THE
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Arthur Larson	:	
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	:	
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Reply Exceptions of PECO Energy Company

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Reply Exceptions of PECO Energy Company

On October 4, 2018, the Commission issued the Initial Decision ("I.D.") of Administrative Law Judge ("ALJ") Darlene Heep in this docket via Secretarial Letter. Pursuant to that Secretarial Letter, Exceptions were due 20 days after issuance of the Secretarial Letter, or October 24, 2018. The Secretarial Letter further stated that Reply Exceptions were due "within 10 days of the date when Exceptions were due." Nominally, Reply Exceptions were thus due on Saturday, November 3, 2018. However, since that date fell on a weekend, by Commission Rule, 52 Pa. Code §1.12, the date for Reply Exceptions automatically extended to Monday, November 5, 2018.

On October 17, 2018, 2018, Mr. Larson filed his Exceptions. On October 24, 2018, PECO informed the Commission by letter that it would not file Exceptions. Pursuant to the Secretarial Letter and 52 Pa. Code §5.533, PECO hereby files its Reply Exceptions.

Mr. Larson presented fourteen numbered exceptions.

I. Overall reply to Exceptions – Mr. Larson's Exceptions do not meet the requirement that exceptions must include "supporting reasons for the exceptions"

The Commission's regulations, 52 Pa. Code §5.533, describe the procedure for excepting to an Initial Decision and state in relevant part (emphasis added) that each exception must be accompanied by a "supporting reason":

> (b) Each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. *Supporting reasons for the exceptions shall follow each specific exception.*

Mr. Larson's exceptions do not conform to this requirement. In each of his 14 Exceptions, he simply identifies a statement or conclusion in the Initial Decision (sometimes\ providing a citation and page number; sometimes not) and states that "exception is taken" to each identified statement, without providing any supporting reasons for his disagreement.

This is not a trivial omission. By failing to state his supporting reasons for each specific exception, Mr. Larson leaves it to PECO and the Commission to guess his rationale for each argument and to respond to that inferred supporting reason. This is not fair, and it is not an efficient method of resolving the issues raised by Mr. Larson. Put simply, the Commission's rules require supporting reasons for exceptions so that the Commission can concretely address and resolve the litigant's concern; Mr. Larson's failure to provide supporting reasons strips the concreteness from the exception process and makes it impossible for the Commission to know what it is being asked to evaluate.

Moreover, Mr. Larson is not appearing *pro se* in this matter; he is represented by Mr. Arthur L. Jenkins, Esq., who has decades of experience as an attorney. Mr. Larson therefore should not be given latitude in the application of this requirement.

PECO therefore requests that the Commission hold, independently of the specific reasons set forth below, that Mr. Larson's Exceptions are each denied for failure to provide a supporting reason for each specific exception, as required by 52 Pa. Code §5.533.

II. Reply to Individual Exceptions

a. Exceptions 1 and 14

Mr. Larson's first Exception and his fourteenth Exception are both broad challenges to the I.D.'s conclusion that he did not meet his burden of proof.

Exception 1 (p. 1) is: "Exception is taken to the conclusion that the complainant did not establish his case by a preponderance of the evidence. (See Conclusion of Law No. 4.)"

Exception 14 (p. 3) is: "Exception is taken to the conclusion of the Administrative Law Judge that the Complainant has failed to establish that the installation of an AMI Meter is unsafe and unreasonable in violation of 66 Pa. C.S. §1501 or that PECO did not violate the Public

Utility Code, Regulations, or a Commission Order by issuing a shut-off notice to the Complainant."

The I.D. sets forth the factual testimony on these issues (pp. 3-5), and then provides a detailed discussion of the required standard of proof and a demonstration of why Mr. Larson did not meet his burden of proof (pp. 5-15). Mr. Larson's unexplained Exceptions provide no basis to overturn the I.D.'s reasoning or conclusions.

b. Reply to Exception 2

Mr. Larson's second Exception (p. 1) is: "Exception is taken to the conclusion that the complainant by virtue of his expert testimony failed to shift the burden of going forward with evidence to PECO (See Conclusion of Law No. 4)."

Frankly, PECO is at a loss to understand what Mr. Larson is excepting to in this argument. Neither PECO nor the I.D. ever argued or concluded that Mr. Larson failed to shift the burden of going forward; indeed, the hearing progressed on the assumption that he had done so. Mr. Larson thus appears to be challenging a non-existent statement.

Specifically, Conclusion of Law No. 4 makes no reference whatsoever to the burden of going forward.[1] The only reference in the I.D. to the burden of going forward is found at pages 5-6, where the I.D. notes that, under Commission law, if a Complainant presents sufficient evidence to establish a *prima fac*ie case, the burden of going forward shifts to the utility.

At the hearing, after Complainant concluded his case-in-chief, PECO took on the burden of going forward and presented its case. As noted, no argument was ever made by PECO or in the I.D. that Mr. Larson failed to shift the burden of going forward.

[1] Conclusion of Law 4 states: "There is insufficient evidence to support a finding that Complainant will be adversely affected by the smart meter or that PECO's use of a smart meter will constitute unsafe or unreasonable service in violation of 66 Pa. C.S. § 1501. Kreider v PECO Energy Co., Docket No. P-2015-2495064 at 23 (Order entered January 28, 2016) (citing Woodbourne-Heaton, 1992 PaPUC Lexis 160 at * 12-13."

Moreover, Mr. Larson did not make any argument regarding the burden of going forward in either his Main Brief or Reply Brief. Consequently, no controversy on "burden of going forward" was ever presented to the ALJ and, because Mr. Larson's Exception does not provide a supporting reason, it is not possible to determine what controversy Mr. Larson wishes the Commission to resolve.

c. Reply to Exception 3

Mr. Larson's third Exception (p. 1) is: "Exception is taken to the failure of the trier of fact to recognize that the complainant need only establish his case by substantial evidence where the safety of the PECO proposed Smart Meter is at issue. (See Conclusion of Law No. 5)."

Mr. Larson originally presented this argument in his Main Brief (p. 3), where he argued that he is only required to provide substantial (or sometimes "substantive") evidence, not a preponderance of evidence, citing *Lansberry v PaPUC*, 134 Pa. Cmwlth. 218, 578 A. 2d 600.

PECO responded in its Main Brief (pp. 11-12), where it demonstrated that:

> It's as simple as this: Mr. Larson is making the same argument that Lansberry made *and lost* before the Commonwealth Court. Lansberry also claimed that the Commission should use a "substantial evidence" standard rather than a "preponderance of the evidence" standard. The *Lansberry* Court rejected the argument made then by Lansberry then, and being made now by Mr. Larson . . .

PECO also notes that, in his Reply Brief (p. 3), Mr. Larson "[C]onceded that the complainant must maintain his burden of proof by a preponderance of the evidence. . ." Mr. Larson has *conceded* that he must maintain his burden of proof by a preponderance of evidence; he cannot now *except* to the holding that he must maintain his burden of proof by a preponderance of the evidence.

The I.D. correctly concluded (p. 16, Conclusion of Law 2) that Mr. Larson must prove his case by a preponderance of evidence, citing *Lansberry*. Mr. Larson's cursory statement that he

takes exception to this conclusion provides no reason for the Commission to revise the I.D.'s correct statement of law on the burden of proof.

d. Reply to Exceptions 4 and 9

In Mr. Larson's fourth and ninth Exceptions, he argues that the ALJ erred in accepting the testimony of PECO's witnesses because they are PECO employees.

Mr. Larson's fourth Exception (p. 1) is: "Exception is taken to the conclusion that PECO established the safety of the Smart Meter through the testimony of Glen[n] Pritchard in that he is a PECO employee, has acknowledged that he has an interest in the outcome of the proceedings and he has failed to opine with a reasonable degree of certainty that the proposed PECO Smart Meter is safe. (See Conclusion of Law No. 4) (See T-83 to T-98)."[2]

Mr. Larson's ninth Exception (p. 2) is: "Exception is taken to the failure of the Administrative Law Judge to recognize that the testimony of all witnesses for the defense appeared rehearsed, undocumented and biased in that all witnesses were employed by PECO."

Mr. Larson made this argument in his Main Brief (pp. 4-5). PECO responded in its Main Brief (p. 14):

> Glenn Pritchard is the manager of PECO's Advanced Grid Operations & Technology Group. Tr. 83; Exh. GP-1. For nearly 10 years, he has been responsible for researching and identifying smart grid products and advanced metering infrastructure systems and the associated hardware, including advanced meters. Tr. 84. He has worked with the actual meters, reviewing the meters to insure that they function as intended and that they adhere to safety standards. Tr. 84. Mr. Pritchard was offered and accepted, without objection,

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[2] Mr. Larson also appears to be making a separate argument that Mr. Pritchard's opinion should not be accepted because he did not "opine with a reasonable degree of certainty." Mr. Larson did not make this argument in his Brief, and thus has not preserved it for Exceptions. Moreover, Mr. Pritchard was specifically asked what he had reviewed prior to reaching his expert opinion (test results from the American National Standards Institute and Underwriters' Laboratory and a battery of additional tests on the PECO system), and he specifically stated that no further research needed to be done to reach a conclusion with respect to whether the Aclara meter is safe for installation on the PECO system. Tr. 111. In other words, his expert opinion clearly was expressed to a reasonable degree of certainty.

as an expert in the design, operations, and technology of advanced meter installations. Tr. 85. PECO respectfully submits that Mr. Pritchard's expert opinions with respect to AMI meters should be given substantial weight, and certainly should be given more weight than Mr. Larson's testimony.

At hearing, Mr. Pritchard stated that he is an employee of PECO. Tr. 83. In Mr. Larson's Main Brief (pp. 4-5), Mr. Larson argues that Mr. Pritchard's testimony should not be believed because he is an employee of PECO and thus has an interest in the outcome of the case. In actuality, Mr. Pritchard's employment with PECO is one of the primary reasons that his testimony should be given substantial weight. It is because of his employment role that he has been integrally involved in the design, operations, and technology of advanced meter installations; it is through his employment with PECO that he has become familiar with the specific meters in question.

The I.D. accepted PECO's view of Mr. Pritchard's qualifications, stating (p. 14) that: "The Complainant questioned the objectivity of Mr. Pritchard given that he is a PECO employee. Mr. Pritchard's testimony was knowledgeable, credible and convincing in this hearing . . . . [his testimony is] based on his extensive knowledge of the PECO meters and system at issue."

Mr. Larson's fourth and ninth Exceptions rehash his argument without providing any additional rationale or supporting reason to conclude that the ALJ was incorrect in her assessment of Mr. Pritchard's credibility and expertise. These Exceptions should therefore be denied.

e. Reply to Exceptions 5 and 6

Mr. Larson's fifth and sixth Exceptions are virtually identical and raise an argument regarding quality control reports.

Mr. Larson's fifth Exception (pp. 1-2) is: "Exception is taken to the trier of fact not drawing an adverse inference from the failure of Glenn Pritchard to produce any quality control reports showing the safety of the Smart Meter. (See T-104-107) (See T-109)."

Mr. Larson's sixth Exception (p. 2) is: "Exception is taken to the failure of the trier of fact not drawing an adverse inference from the failure of PECO to document a single quality control report on the Aclara I-210+C Meter. (See T-123)."

Mr. Larson originally raised the argument that PECO was required to provide quality control reports in his Main Brief (pp. 5-6), and briefly reiterated it in his Reply Brief (p. 3).

PECO responded in its Main Brief (pp. 16-17), where it established that: (1) Mr. Larson did not provide any citation or rationale for the view that Mr. Pritchard was required to provide a copy of a "quality control report" as part of his testimony; and (2) in forming his expert opinion regarding the safety of an AMI meter, Mr. Pritchard reviewed the relevant standards and the manufacturers' specifications, tested the meters through a battery of PECO-specific tests and researched the track record of the meters, and testified that he has done sufficient review to reach an expert conclusion as to whether the Aclara I210+C meter is safe for installation on the PECO system – and he has accepted the Alcara I210+C meter as a safe meter for the PECO system and for its customers.

Simply, there is no requirement that an expert must produce a "quality control report" at hearing to support his expert opinion. Mr. Pritchard provided a reasonable basis for expert opinion – he relied upon the manufacturers' specifications that state that the Aclara meters meet the relevant standards, as well as additional tests conducted by PECO.

The I.D. (p. 13) recounted this testimony and concluded (p. 14) that Mr. Pritchard's expert testimony was "knowledgeable, credible and convincing." Mr. Larson has not demonstrated, at hearing, in brief, or in his Exceptions, that Mr. Pritchard's was required to produce a "quality control report" in support of his testimony.

f. Reply to Exception 7

Mr. Larson's seventh Exception (p. 2) is: "Exception is taken to the failure of the trier of fact to draw an adverse conclusion from the failure of Mr. Pritchard to investigate whether the proposed Smart Meter has a record of setting off alarms to PECO indicating electrical trouble. (See T-123)."

Mr. Larson originally raised the argument that Mr. Pritchard should have investigated whether PECO's AMI meters have a record of setting off alarms in his Main Brief (pp. 5-6).

PECO responded to this argument in its Main Brief (p. 17), where it established that Mr. Pritchard would be informed of hot socket alarms if they occurred; he has not received any such notification for the Aclara I210+C meter; that even if a hot socket notification was received via an Aclara I210+C meter, that would not suggest that the meter itself is overheating, but instead would provide warning that the customer's equipment is overheating, as the thermocouple measures heat increases from the customer meter socket; and that if and when an overheating alarm is generated by an Aclara I210+C meter, that will simply be a demonstration that the new thermocouple technology is working to allow PECO to deploy field crews to remediate the issue *before* any catastrophic results occur.

The I.D. (p. 14) properly recounted this testimony and properly concluded that Mr. Larson did not meet his burden of proof on this issue. His Exception does not explain why the I.D. was incorrect in that conclusion.

g. Reply to Exception 8

Ms. Larson's eighth Exception (p. 2) is: "Exception is taken to the failure of the Administrative Law Judge to sequester the witnesses for the defense in that prejudice resulted to the Complainant."

Mr. Larson originally made his sequestration request at the hearing, and briefly restated it in his Main Brief (p. 4).

PECO replied to this argument extensively in its Main Brief (pp. 18-20), where it established that sequestration requests are controlled by Rule of Evidence 615; that under Rule 615 sequestration is discretionary, not mandatory; that Mr. Larson did not demonstrate an abuse of discretion; that a sequestration order may not be issued against company employees who are designated as a party's representative (which PECO did at hearing); that Pennsylvania courts have held that sequestration of expert witnesses, like Mr. Pritchard, is not appropriate; that a sequestration order may not be issued with respect to witnesses whose presence is essential to presenting a party's claim or defense; and that Mr. Larson did not even attempt to demonstrate that he had been damaged by having the PECO witnesses present in the hearing room for his testimony. PECO concluded (p. 20) that:

> In *Albrecht*, the Supreme Court rejected the sequestration claim in part because "Appellant fails to show specifically what damage occurred by this witness not being sequestered. He argues merely in boilerplate fashion . . . . " 511 A. 2d 764,774; 510 Pa.603, 620. Mr. Larson also made this argument "in boilerplate fashion," and it should likewise be rejected.

The I.D. (pp. 9-10) generally concurred with PECO's analysis, and specifically concluded that: "The Complainant has not shown prejudice to him as a result of the denial of the sequestration of these witnesses or a possibility of collusion by the witnesses on material facts and claims. Therefore, denying the request for sequestration was not in error."

In his Exceptions, Mr. Larson now claims, once again using boilerplate language, that he was prejudiced by the denial of his sequestration request. But he just makes that bald claim; he provides no analysis or explanation of how or why such sequestration prejudiced him. His additional boilerplate claim does not provide a basis for overturning the I.D.s well-reasoned conclusion.

h. Reply to Exceptions 10 and 11

Mr. Larson's tenth and eleventh exceptions are examples of how his failure to state supporting reasons for his exceptions renders the exceptions meaningless.

Mr. Larson's tenth Exception (p. 2) is: "Exception is taken to the failure of the Administrative Law Judge to find as fact the proposed findings of fact submitted by complainant from number 1 to 16 inclusive in his brief."

Mr. Larson's eleventh Exception (p. 2) is: "Exception is taken to the failure of the Administrative Law Judge to adopt the proposed conclusions of law set forth by the complainant from paragraphs 1 through 5 inclusive in his brief."

As noted, these two Exceptions are clear examples of the unreasoned nature of Mr. Larson's exceptions in general. To give but one example of many that are available, Mr. Larson's Proposed Finding of Fact 4 is: "His curriculum vitae recites forty years of experience in the field of micro circuitry." The Initial Decision's actual Finding of Fact 5 is: "Mr. Larson has 40 years of experience in the field of micro circuitry." Yet even though the I.D. made a Finding of Fact that is materially identical to Mr. Larson's Proposed Finding of Fact, his wholesale tenth Exception claims (and complains) that it did not!

Mr. Larson did not provide any supporting reason that the ALJ should have adopted his Proposed Findings of Fact or Proposed Conclusions of Law, and these Exceptions should thus be denied.

i. Reply to Exception 12

Mr. Larson's twelfth Exception (pp. 2-3) is: "Exception is taken to the failure of the trier of fact to recognize that absent proof of mailing pursuant to Pennsylvania law, it was error to

conclude that Complainant received all documents from PECO except those he admitted to receiving."

At the hearing, Mr. Larson testified that he did not receive safety information about AMI meters from PECO. *See* I.D., p. 10.

In reply, PECO presented the testimony of Bryan Uber, who testified regarding a series of communications sent by PECO to Mr. Larson. *See* I.D., pp. 10-11. During cross-examination of Mr. Uber, Mr. Larson's counsel attempted to demonstrate that Mr. Uber did not personally place letters in the mail to Mr. Larson, in an apparent attempt to support Mr. Larson's claim that he had not received letters from PECO.

Mr. Larson did not raise any arguments regarding this issue in his Main Brief. Since PECO filed and served its Main Brief after Mr. Larson filed his Main Brief, it addressed Mr. Larson's failure to raise this issue as follows (p. 6, fn 3):

> Mr. Uber's testimony was offered in response to the potential claim that PECO had not offered, in its communications with Mr. Larson, to speak to him about his safety concerns. Since Mr. Larson did not make that argument in his Main Brief, PECO will not provide detail on Mr. Uber's testimony in its Brief. Similarly, at hearing Mr. Larson's counsel objected to Mr. Uber's testimony on the grounds that it violated the Parol Evidence Rule, Tr. 56, 57, 59, 61; the Best Evidence Rule, Tr.55, 58; the Business Records Act, Tr. 55, 70; and that the business records must be shown to have an "input *ante litem motam.*" Tr. 70. None of those objections were argued or preserved in Mr. Larson's Main Brief. Your Honor directed briefing on these issues, Tr. 72, but since Mr. Larson did not brief or preserve the objections, PECO does not believe that it is necessary to brief its response to the objections.

Mr. Larson again had the opportunity to raise this issue in his Reply Brief, but did not do so. He thus did not present or preserve this claim in any of his briefing materials.

The ALJ nonetheless addressed the issue at length in the I.D. (pp. 10-11) and concluded that "PECO provided information about the meter, referenced the Company belief that the meters

were safe and provided sources for additional information if the Complainant chose to use them. There was no violation by PECO here."

It should be clearly understood that, in this Exception, Mr. Larson is not claiming that he did not receive the referenced materials from PECO. That would be impossible for him to claim, *since he attached one of the referenced communications to his Complaint.* Tr. 79-80. There could not be a more stark admission that he in fact did receive AMI communications from PECO. Instead, he is arguing a procedural issue in which claims that Mr. Uber could not testify about mailing communications to Mr. Larson because Mr. Uber did not mail the letters personally.

Mr. Uber testified as PECO's records custodian. Tr. 66-68. He testified regarding PECO's protocol for mailing letters to customers, recording the date and address to which the letter was sent, determining whether the letter was returned, and that such materials were sent to Mr. Larson. *See, for example*, Tr. 46-82; PECO Exhibits BU-3, 4, 5, 7, 8 and 9. Collectively, this testimony constitutes proof that PECO mailed these materials to Mr. Larson.

When that testimony is coupled with Mr. Larson's admission that he actually received some of those materials (and attached them to his complaint), there can be no doubt that the I.D. was correct when it concluded (p. 10-11) that PECO provided information about the meter, referenced the Company belief that the meters were safe and provided sources for additional information. Mr. Larson's single-sentence claim regarding "proof of mailing" – which he provides without citation, rationale, and without having raised it at any point in his briefs – should not be a basis for overturning the I.D.'s well-reasoned discussion on this issue.

j. Reply to Exception 13

Mr. Larson's thirteenth Exception (p. 3) is: "Exception is taken to the failure of the Administrative Law Judge to conclude that the proposed AMI meter is simply a re-branding of an earlier unsafe meter."

At the hearing, Mr. Larson stated that he is concerned that the Alcara meter is simply a rebranding of an AMI meter that is no longer in use on the PECO system. He did not discuss this issue at any point in his Main Brief. In his Reply Brief (pp. 3-4), he devoted a single sentence to the issue, claiming that: "The transcript in this case demonstrates that but for the allegations in the brief of PECO, it is the re-branded Smart Meter which the complainant justifiably objects to in terms of safety." (Mr. Larson's Reply Brief provides no transcript citations in support of this claim.)

PECO discussed the assertion of rebranding in its Main Brief. It demonstrated (p. 7, Proposed Finding of Fact 14) that: Mr. Pritchard testified that the Aclara I210+C is not a "rebranding" of the Sensus meter. They are made by different manufacturers and are uniquely designed and manufactured. Tr. 86-87."

PECO further demonstrated (pp. 12, 15) that:

> Mr. Larson's overarching opinion is that he has "a reasonable doubt on the safety [of PECO's AMI meters] based on the information that they gave me that it is a Smart Meter which is a spin-off from General Electric which was acquired through Sensus, so this looks like it is a rebranding of the Sensus Smart Meter and my concern is the safety of th[ese] devices." Tr. 35, 41-42. Mr. Larson stated this bald opinion, but provided no rationale or underlying documentation for how he reached this opinion regarding rebranding." * * * "Rebranding": The Aclara I210+C is not a "rebranding" of the Sensus meter. They are made by different manufacturers and are uniquely designed and manufactured. Tr. 86-87.

In sum, Mr. Larson asserted, with no knowledge or information to support his assertion, that PECO was rebranding meters. Mr. Pritchard, who was the lead design engineer for PECO's

AMI system and who has specific personal expert knowledge of the issue, testified that PECO did not rebrand old meters. The I.D. was correct to accept Mr. Pritchard's testimony.

III. Conclusion

PECO respectfully submits that the Commission should reject each of the fourteen Exceptions presented Mr. Larson and adopt the Initial Decision.

Ward Smith
Shawane Lee
Assistant General Counsel
PECO Energy Company
Ward.smith@exeloncorp.com
Shawane.lee@exeloncorp.com
215-841-6863
Romulo L. Diaz, Jr.
Vice-President and General Counsel
PECO Energy Company

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