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October 21, 2016

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

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Reply Exceptions 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

DMO/lww
Enclosure

cc: Hon. Cynthia Fordham w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Reply Exceptions 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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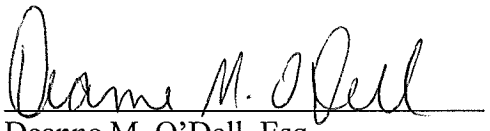

Deanne M. O'Dell, Esq.

Dated: October 21, 2016

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2017 through May 31, 2021	:	Docket No. P-2016-2534980

REPLY EXCEPTIONS OF RETAIL ENERGY SUPPLY ASSOCIATION

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Date: October 21, 2016

Attorneys for Retail Energy Supply Association

TABLE OF CONTENTS

I. INTRODUCTION

This case addresses the default service plan filed by PECO Energy Company ("PECO") on March 17, 2016. On July 28, 2016, PECO, the 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")[1] filed a Joint Petition for Partial Settlement ("Settlement Petition") which set forth their proposed resolution regarding nearly all of the issues in this proceeding. The two open issues – which are addressed by the Exceptions of Noble Americas Energy Solutions LLC ("Noble"), OCA, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA") and the Tentative Union Representative Network and Action Alliance of Senior Citizens of greater Philadelphia ("TURN et al.") – are:

> (1) the jurisdictional authority of the Commission to permit the continuation of PECO's current use of a non-bypassable cost recovery mechanism for the following PJM transmission charges: Generation Deactivation/Reliability Must Run ("RMR") charges, Expansion Cost Recovery charges and Transmission Enhancement (a/k/a Regional Transmission Expansion Plan "RTEP") charges (collectively, "RMR et al.");[2] and,
>
> (2) whether the Commission should address in this proceeding the ability of customers participating in PECO's customer assistance program ("CAP") to shop for competitive generation supply from an electric generation supplier ("EGS") and, if so, whether the Commission should require EGSs to provide service to CAP customers at a price that is always

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1 The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) 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.

2 Noble Exception at 4-10.

initially 7% lower than PECO's price-to-compare ("PTC") to be further lowered if PECO's PTC drops another 7%.[3]

In her September 23, 2016 Recommended Decision ("RD"), Administrative Law Judge ("ALJ") Cynthia William Fordham recommends that the Commission: (1) approve the Settlement Petition as filed; (2) deny the objections to the Settlement Petition submitted by Noble; and, (3) not address issues in this proceeding regarding shopping for CAP customers as they are being addressed in another proceeding.[4] RESA fully supports all the recommendations of the ALJ for the reasons set forth more fully in RESA's Main Brief, Reply Brief and Response to Objections of Noble. In contrast, Noble, OCA, CAUSE-PA/TURN et al. filed exceptions regarding the two issues referenced above. As explained more fully below, all of these exceptions should be denied.

Regarding Noble's objection to the settlement, the ALJ soundly concluded that the Commission has jurisdiction to approve continuation of PECO's current cost recovery mechanism (which was approved by the Commission in PECO's prior default service proceeding) and no evidence on the record supports a revision of this provision.[5] Setting aside that Noble's Exception offers nothing to support rejecting the ALJ's reasoning on this point, it is important to note that Noble is raising an objection to a single issue in the Settlement Petition. The ALJ, as she was required to do, reviewed all of the terms of the Settlement Petition and correctly concluded that the proposed terms and conditions of the settlement are in the public interest.[6]

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3 CAUSE-PA and TURN et al. Joint Exceptions at 8-16; OCA Exceptions at 2-10.

4 RD at 77-78, Ordering Paragraphs 2, 3, 9, and 10.

5 RD at 72-73.

6 RD at 35-36. Despite the long-standing contentiousness of the issue raised by Noble's objection, none of the parties active in those prior litigations (namely PECO, RESA and PAIEUG) sought to re-open the

Regarding shopping for CAP customers, the ALJ rightly concluded that these issues are more appropriately addressed in the already open proceeding already specifically intended to address the process through which PECO's CAP customers will finally be offered their statutory right to shop.[7] Also important for the Commission to take into consideration when reviewing the Exceptions filed by OCA, CAUSE-PA and TURN et al. is that the Commonwealth Court has specifically detailed the legal burden that must be satisfied before restrictions on shopping may be considered.[8] This legal burden specifically requires that – because the "overarching goal of the Choice Act is competition" – restrictions on the right of all customers to freely shop can only be considered upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.[9] Only if this initial legal burden is satisfied, then the Commonwealth Court further requires a careful review of the specific restrictions imposed to ensure that the restrictions do not adversely affect shopping choices for CAP customers. The proponents of restrictions on the shopping rights of CAP customers have not satisfied these legal burdens providing further support for the ALJ's ultimate recommendation on this issue.

Commission's prior determinations here. As such, the Settlement Petition (supported by these three parties) does not offer either RESA or PAIEUG with their preferred resolution of this issue (as set forth in their prior on-the-record litigation positions). Rather, it represents a reasonable compromise of this issue (and taking into consideration all of the other issues addressed in the settlement).

7 RD at 57-58.

8 *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1106-1107 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016) at 1104, 1106 ("*Commonwealth Court CAP Shopping Decision*").

9 *Commonwealth Court CAP Shopping Decision* at 1104, 1106

II. REPLY TO EXCEPTIONS

A. The ALJ Soundly Recommends That The Settlement Petition Be Approved Without Modification And That Noble's Objection to Continuing the Current Cost Recovery Mechanism for Certain PJM Charges Be Denied

The ALJ recommends that Noble's Objections to the Settlement Petition be denied and the Settlement Petition be adopted without modification.[10] Noble objects to this recommendation on the basis that the ALJ erred in concluding that Noble failed to present authority to show that the Commission does not have jurisdiction over the issue. According to Noble, it "presented substantial authority demonstrating that the subject PJM transmission charges fall squarely within FERC's jurisdiction."[11] Thus, in support of its Exception, Noble restates its arguments regarding jurisdiction that were set forth in Noble's Objection to the Settlement. In response to the ALJ's conclusions that Noble untimely raised its objection and that the record contains no evidence to support Noble's objection, Noble argues that the issue of jurisdiction is not an evidentiary issue and, therefore, Noble may raise the issue at any time even after the evidentiary record has been closed.[12] Neither of these positions, however, is persuasive and the Commission should adopt the ALJ's recommendation to approve the Settlement Petition without modification.

First, Noble argues that the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over all issues related to these charges and the Partial Settlement infringes on this jurisdiction.[13] While there is no dispute that states do not have the authority to disregard an interstate wholesale rate required by FERC or to prevent recovery of the wholesale rate

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10 RD at 72-73.

11 Noble Exception at 3.

12 Noble Exception at 4-9.

13 Noble Exception at 6-9.

through retail rates,[14] the issue raised by Noble here is not about the rate of the charges nor an allegation that the charges will not be recovered through retail rates. Rather, the dispute is about how these charges will be recovered from retail customers.[15] Importantly, nothing in the Settlement Petition proposes to regulate the "rates, terms, and conditions" of these charges and no authority has been provided by Noble to support its erroneous view that the Commission lacks jurisdiction over how the costs of certain FERC-regulated charges will be recovered from Pennsylvania customers. Thus, the ALJ's conclusion that the Commission has jurisdiction to approve this settlement term without modification is legally sound.

Second, at the same time Noble claims it did not need to submit testimony or evidence in support of its legal view regarding jurisdiction, Noble presents facts to support its objection.[16] While jurisdiction is a legal issue, Noble relies on a number of very specific facts (offered for the first time in its objections to the settlement) to support its view that continuing the current treatment would somehow be harmful.[17] Section 332(a) of the Public Utility Code provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.[18] It is well-established 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."[19] In this case, PECO proposed to continue the current cost recovery mechanism and Noble – through its objections – proposed to reverse

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14 *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 at 1298-1299 (U.S. 2016).

15 Noble Exception at 6 ("Noble further explained that PECOs continued recovery of LSEs' wholesale market charges from shopping customers on a non-bypassable basis would be unlawful)" (emphasis added).

16 Noble Exception at 9-10; See also Noble Objections at 7-9.

17 RESA Response to Objections at 7-8.

18 66 Pa.C.S. §332(a),

19 *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

this status quo. As such, Noble was required to present some evidence or analysis tending to demonstrate the reasonableness of its proposals and bears the burden of proving that its proposals should be adopted.[20] Noble failed to sustain this burden as it failed to present any testimony to support its position and no evidence on the record supports the position.[21] The ALJ rightly rejected Noble's effort to claim that the issue is legal because it involves a question of jurisdiction while at the same time attempting to rely on facts not properly admitted into the record to support its claim about jurisdiction.

Third, Noble argues that the Commission's prior approval of the cost recovery mechanism at issue here "has no bearing on the jurisdictional issue now raised by Noble as that issue was never considered by the Commission."[22] Again, though, Noble misses the point. In its *PECO DSP III Order*, the Commission has already specifically concluded that this cost recovery mechanism "is beneficial to customers."[23] As the ALJ rightly noted, no party (including Noble) requested reconsideration of that issue and the final order was not appealed. Thus, the ALJ was correct to reject Noble's view on the basis that it failed to properly offer – for admission into the record – the factual claims made in its objections to support reversal of the Commission's prior findings. In other words, the fact that Noble did not raise and the Commission did not directly

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20 *See Brockway Glass Co. v. Pa. Pub. Util. Comm'n*,437 A.2d 1067 (Pa.Cmwlth. 1981); *Pa. Pub. Util. Comm'n v. Duquesne Light Company*, Docket Nos. R-2013-2372129, et al. (Opinion and Order entered April 23, 2014); *Pennsylvania Pub. Util. Comm'n v. Aqua Pennsylvania, Inc.*, Docket No. R-00072711 (Commission Opinion and Order entered July 17, 2008).

21 On the contrary, as explained more fully in RESA's Response to Noble's Objections, the only evidence on the record addressing this issue (and presented in the testimony of RESA's witness) directly contradicts Noble's factual statements and no party submitted testimony disputing this evidence. RESA Response to Noble's Objections at 8 referencing RESA St. No. 1 at 3 (Mr. White testified that non-bypassable recover of these costs is "a fair and equitable way to ensure that all customers [whether default service customers or shopping customers] are only required to pay the actual costs of these non-market based charges.")

22 Noble Exception at 5.

23 *Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2015 through May 31, 2017,* Docket No. P-2014-2409362, Opinion and Order entered December 4, 2014 at 46 (*"PECO DSP III Order"*).

address the legal question of jurisdiction in the prior case does not obfuscate the fact that the Commission did – relying on the record evidence in that case – make a clear finding of facts opposite from what Noble set forth in its objections. Because of this, Noble had an obligation to provide testimony and/or other valid record evidence if it wanted to challenge the Commission's prior factual findings. As the ALJ rightly noted, Noble did not do this. Therefore and consistent with the RD, the *PECO DSP III Order* cannot be as flippantly dismissed as Noble suggests.

In conclusion, for all the reasons discussed above, the ALJ properly concluded that Noble's objection should be denied and Noble's exception fails to offer any reason to reject the ALJ's recommendation on this issue. Moreover, and consistent with the ALJ's review of the settlement and all its terms, the RD correctly recommends that the Settlement Petition be approved without modification as in the public interest. Noble has not provided any legal justification nor record support for any other outcome and, therefore, the Commission must deny Noble's Exception.

B. The ALJ Rightly Concludes That Issues Regarding Opening Shopping For CAP Customers Should Be Addressed In The Already Open Proceeding Specifically Intended To Address This Specific Issue

When it filed its petition in this proceeding on March 17, 2016, PECO did not propose to address the mechanics of opening up shopping to its CAP customers in this proceeding. Currently, PECO's CAP customers cannot shop. The issue of permitting PECO's CAP customers to shop was first raised in the proceeding involving PECO's default service plan in effect from June 1, 2013 through May 31, 2015 ("DSP II"). Ultimately, the matter was appealed to the Commonwealth Court, petitions for review to the Supreme Court were denied and the Commission directed PECO to file its CAP Shopping Plan consistent with the directives of the

Commonwealth Court.[24] By the time of the Commission's directive, PECO was implementing its default service plan in effect from June 1, 2015 through May 31, 2017 ("DSP III") which is still currently in effect. Also on-going at the time of the Commission's directive was this proceeding regarding PECO's default service plan to be effective on June 1, 2017. In this case, CAUSE-PA proposed that PECO not allow CAP customers to shop until the effective date of this default service plan (June 1, 2017) and then only under specific restrictions that would require EGSs to limit the prices that could be offered to CAP customers. OCA and TURN et al. supported CAUSE-PA's proposal. RESA and PECO opposed CAUSE-PA's proposal.

Upon her review of all these positions, the ALJ recommends that the Commission address all issues related to opening shopping for PECO's CAP customers in the context of the prior litigation, i.e. the DSP II docket where the Commission issued the Secretarial Letter directing PECO to file a CAP Shopping Plan consistent with the Commonwealth Court's directive. Importantly, as the ALJ correctly noted, PECO will be presenting its proposal in that proceeding.[25] Moreover, as the Commission made clear in its Secretarial Letter, PECO's CAP Shopping Plan will be subject to public comment. For these reasons, RESA supports the RD and none of the issues raised in the Exceptions of CAUSE-PA/TURN et al. and OCA justify a rejection of the RD's recommendation on this issue.

First, OCA, CAUSE-PA/TURN et al. argue that they will be deprived of procedural due process if the Commission does not address CAP shopping in this proceeding. According to this line of reasoning, the record in this case includes relevant and current data to support their

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24 *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641, Secretarial Letter dated May 11, 2016 ("*DSP II CAP Shopping Secretarial Letter*").

25 RD at 57-58.

position.[26] A serious flaw with this reasoning is that there is no current data on the record in this proceeding regarding shopping for PECO's CAP customers as those customers have never been able to shop. Rather, CAUSE-PA/TURN et al. are relying on data from other service territories where CAP customers are permitted to shop to support their claim that "there is no record evidence that the harm" (which is based on their analysis of the data) "will be any different in PECO's service territory."[27] As is obvious but is explained more fully in RESA's briefs, data from other utilities is not instructive for PECO and reliance on such data is not sufficient to satisfy the legal burden clearly laid out by the Commonwealth Court before restrictions on the right of CAP customers to shop can be implemented.[28] This legal burden specifically requires that – because the "overarching goal of the Choice Act is competition" – restrictions on the right of all customers to freely shop can only be considered upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.[29] Then, even if this legal threshold is met (which it has not been here), the Commission may rely on substantial evidence showing why the proposed restrictions should be rejected which can include a showing that the restrictions would adversely affect available choices for CAP participants.[30] The proponents of restricting shopping for CAP customers have not satisfied either their initial legal burden or the burden that follows if the initial threshold is satisfied.

Second, CAUSE-PA/TURN et al. argue that because the DSP II docket is closed, the Commission direction for PECO to file a CAP Shopping Plan in that docket somehow takes

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26 CAUSE-PA/TURN et al. Joint Exceptions at 8-10; OCA Exceptions at 5.

27 More specifically, CAUSE-PA/TURN et al. cite to data regarding PPL and FirstEnergy. CAUSE-PA/TURN et al. Joint Exceptions at 14; OCA Exceptions at 5.

28 RESA Main Brief at 14; RESA Reply Brief 6-7.

29 *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

30 *Commonwealth Court CAP Shopping Decision* at 1107-1108.

away their ability to provide input on these issues when PECO files its CAP Shopping Plan.[31] This, however, makes no sense. In its Secretarial Letter directing PECO to file its CAP Shopping Plan, the Commission specifically directed that PECO serve the parties in its Universal Service and Energy Conservation Plan dockets as well as its current DSP III docket and that the filing "will be subject to public comment."[32] Clearly, the Commission has made its intent to invite and consider comments from all interested stakeholders and has taken measures to insure that all parties who have expressed an interest in this matter through their involvement in these dockets be served. As such, there is simply no reason to believe that the Commission's decision to address this matter at another docket number will somehow deprive interested stakeholders of the ability to participate.

Third, OCA, CAUSE-PA/TURN et al. are critical of both the ALJ's view that PECO should be allowed to present its plan before a ruling is made and the ALJ's concern that addressing CAP shopping in this proceeding could conflict with the Commission's decision in the other proceeding specifically intended to deal with CAP shopping. According to CAUSE-PA/TURN et al., "PECO had ample time to present a CAP Shopping plan" and the fact that it did not should not deny the right of CAUSE-PA/TURN et al. to have a ruling on the merits of their proposals.[33] According to OCA, the Commission's Secretarial Letter "left open the opportunity for parties to address CAP Shopping" issues in this proceeding and CAUSE-PA presented a CAP Shopping Plan that should be considered.[34] All of these arguments lack merit. PECO is under a directive to file a CAP Shopping Plan, PECO has stated that it is in the process of filing a CAP

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31 CAUSE-PA/TURN et al. Joint Exceptions at 10-12.

32 *DSP II CAP Shopping Secretarial Letter* at 2.

33 CAUSE-PA/TURN et al. Joint Exceptions at 10-11.

34 OCA Exceptions at 6-7.

Shopping Plan and the Commission has stated that the plan "will be subject to public comment" once it is filed. Therefore, the ALJ's decision to defer to the Commission's clearly expressed process was reasonable and logical. The arguments that such a decision somehow deprives interested parties the right to participate or that PECO loses the right to determine how to propose implementation of CAP shopping in its service territory because it did not submit its CAP Shopping Plan in this proceeding is nonsensical.

Fourth, CAUSE-PA/TURN et al. lament that the ALJ erred by not adopting their proposed restrictions on CAP shopping in light of the alleged "substantial and unrebutted evidence of harm to ratepayers as a result of unrestricted CAP shopping."[35] Similarly, OCA argues that the ALJ erred "by not finding that CAP Shopping consumer protections" must be implemented effective June 1, 2017 at the start of this default service plan.[36] For the reasons set forth more fully in RESA's briefs, the proponents of restricting shopping for CAP customers have failed to meet their initial legal burden of showing substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.[37] Even if, however, this initial legal burden were deemed to have been met (which it has not), the substantial evidence in this proceeding is clear that the proposed restrictions would adversely affect available choices for CAP participants and must be rejected.[38] In lieu of satisfying these clear legal requirements, OCA, CAUSE-PA/TURN et al. focus on their analysis of data from non-PECO service territories and then shift the focus to the actions (or inactions) of other parties. Specifically, they criticize PECO for not submitting a CAP Shopping Plan in this proceeding. They also criticize RESA for

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35 CAUSE-PA/TURN et al. Joint Exceptions at 13-16.

36 OCA Exceptions at 8.

37 RESA Main Brief at 9-16

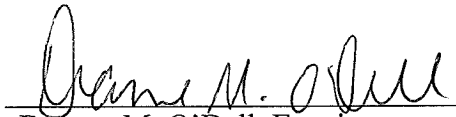
38 RESA Main Brief at 16-19.

presenting substantial evidence showing that the specific proposal advanced by CAUSE-PA would adversely affect available choices for CAP customers as EGSs would likely not participate in the program envisioned by CAUSE-PA. The ALJ's decision to not be persuaded by these smoke and mirror tactics is sound. The proponents of restrictions on CAP shopping in this proceeding have not met their legal burden and, therefore, the ALJ was correct in recommending that the issue not be addressed in this proceeding.

III. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission deny the exceptions of Noble, OCA, CAUSE-PA/TURN et al. and adopt the recommendations of the RD.

Respectfully submitted,



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