

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

Public Meeting held December 8, 2016

Commissioners Present:

Gladys M. Brown, Chairman, Statement
Andrew G. Place, Vice Chairman
John F. Coleman, Jr.
Robert F. Powelson
David W. Sweet

Petition of PECO Energy Company for
Approval of its Default Service Program
for the Period from June 1, 2017 through
May 31, 2021

P-2016-2534980

OPINION AND ORDER

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BY THE COMMISSION:

I. Matter Before the Commission

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of the Office of Consumer Advocate (OCA) and Noble Americas Energy Solutions LLC (Noble), and the Joint Exceptions of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) and the Tenant Union Representative Network and the Action Alliance of Senior Citizens of Greater Philadelphia (TURN *et al.*) (Collectively, CAUSE/TURN), all filed on October 14, 2016, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Cynthia Williams Fordham, which was issued on October 4, 2016, in the above-captioned proceeding. Replies to Exceptions were filed by PECO Energy Company (PECO or the Company) and the Retail Energy Supply Association (RESA) on October 21, 2016. The Philadelphia Area Industrial Energy Users Group (PAIEUG) also filed a Letter In Lieu of Reply Exceptions on October 21, 2016.

II. Background

PECO is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office in Philadelphia, Pennsylvania. PECO provides electric delivery service to approximately 1.6 million customers. PECO is a public utility as that term is defined in Section 102 of the Public Utility Code (Code), 66 Pa. C.S. § 102, and serves as an electric distribution company (EDC) and a default service provider (DSP) as those terms are defined in Section 2803 of the Code, 66 Pa. C.S. § 2803.

III. History of the Proceeding

On March 17, 2016, PECO filed with the Commission a Petition for Approval of a Default Service Program (DSP IV) for the period June 1, 2017 through May 31, 2021 (Petition). The Petition was filed pursuant to 66 Pa. C.S. § 2807, the Commission's Default Service Regulations at 52 Pa. Code §§ 54.181-190, and the Commission's Policy Statement on Default Service at 52 Pa. Code §§ 69.1801-1817. Petition at 1. The applicable statute requires that the Commission issue its decision on this matter no later than nine months after the filing date of the proposed DSP, or on or before December 19, 2016. 66 Pa. C.S. § 2807(e)(3.6).

In its Petition, PECO requested that the Commission: (1) approve its DSP IV, including its procurement plan, implementation plan, contingency plan, and associated procurement documents and agreements for default service supply for all PECO customers who do not take generation service from an alternative electric generation supplier (EGS) or who contract for energy with an EGS that is not delivered; (2) approve PECO's proposed default service rate design and affirm PECO's right to recover all of its default service costs in accordance with 66 Pa.C.S. § 2807(e)(3.9); (3) approve NERA Economic Consulting, Inc. to continue as the independent third-party evaluator for PECO's default supply procurements; (4) grant a waiver of the rate design provisions of 52 Pa. Code § 54.187, to the extent necessary; (5) find that the DSP IV includes prudent steps necessary to negotiate favorable generation supply contracts; (6) find that the DSP IV includes prudent steps necessary to obtain least-cost generation supply on a long-term, short-term and spot market basis; (7) find that neither PECO nor its affiliates have withheld from the market any generation supply in a manner that violates federal law; (8) approve continuation of PECO's existing EGS Standard Offer Program, including the associated cost recovery mechanism approved in PECO's prior default service proceedings; and (9) approve PECO's proposed revised uniform Supply

Master Agreement as an affiliated interest agreement under 66 Pa.C.S. § 2102. Petition at 1-2.

On March 28, 2016, the Commission's Bureau of Investigation and Enforcement (I&E) filed a Notice of Appearance. On April 4, 2016, the Office of Small Business Advocate (OSBA) filed a Notice of Intervention, Public Statement and Notice of Appearance, as well as an Answer to the Petition. On April 13, 2016, the OCA filed a Notice of Intervention, Public Statement and an Answer to the Petition. Petitions to Intervene were filed by PAIEUG on April 8, 2016, and by CAUSE-PA, Noble, RESA, and Direct Energy Services, LLC (Direct Energy) on April 19, 2016. At a prehearing conference held on April 22, 2016, ALJ Fordham granted the Petitions to Intervene.

On May 13, 2016, TURN *et al.* filed a Petition to Intervene. TURN *et al.* acknowledged that the deadline for filing formal protests, petitions to intervene, and answers to PECO's Petition was April 19, 2016, as established in the public notice of the Petition published in the *Pennsylvania Bulletin* on April 9, 2016. However, TURN *et al.* requested that their Petition to Intervene be granted pursuant to 52 Pa. Code § 5.74(b)(2), which provides that petitions to intervene shall be filed no later than the date fixed for filing protests as published in the *Pennsylvania Bulletin* except for good cause shown. TURN *et al.* explained that on May 11, 2016, two days before they filed their Petition to Intervene, the Commission issued a Secretarial Letter at PECO's DSP II docket,¹ (*May 2016 Secretarial Letter*) directing PECO to file with the Secretary and serve on the parties in its current Default Service Plan and Universal Service and Energy Conservation Plan dockets a proposed rule revision to its Customer Assistance Program (CAP)

¹ PECO's DSP II, effective June 1, 2013 through May 31, 2015, was approved with modifications by the Commission in *Petition of PECO Energy Company for Approval of its Default Service Program*, Docket No. P-2012-2283641 (Order entered October 12, 2012) (*PECO DSP II October 2012 Order*).

Shopping Plan in its current DSP III,² consistent with the Commonwealth Court's Order in *Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania v. Pa. PUC*, 120 A.3d 1087 (Pa. Cmwlth. 2015) (*CAUSE-PA*). TURN *et al.* argued that they have a direct, immediate, substantial and distinct interest in the impact of the currently proposed DSP IV and the manner in which PECO will implement CAP shopping as it relates to moderate and low-income residential customers who are tenants and/or senior citizens, whose interests are not adequately represented by other parties in this proceeding. Accordingly, TURN *et al.* asked that the Commission find that good cause existed to grant the late-filed Petition to Intervene.

None of the active Parties objected to TURN *et al.*'s Petition to Intervene. In her Prehearing Order No. 2, issued on May 27, 2016, the ALJ found that TURN *et al.* showed good cause to intervene after the April 19, 2016 deadline, and granted the Petition to Intervene.

An evidentiary hearing was held on July 14, 2016. The written testimony and exhibits of PECO, the OCA, OSBA, CAUSE-PA, RESA, and TURN *et al.* were admitted into evidence. After the submission of written testimony, the Parties engaged in settlement discussions which resulted in a settlement resolving all but one issue involving the ability of CAP customers to shop for electric generation supply. The Parties waived cross-examination of all witnesses and the evidentiary hearing scheduled for July 15, 2016 was cancelled.

On July 28, 2016, a Joint Petition for Partial Settlement (Settlement or Partial Settlement) was filed by PECO, I&E, the OCA, OSBA, PAIEUG, and RESA

² PECO's DSP III, effective June 1, 2015 through May 31, 2017, was approved by the Commission in *Petition of PECO Energy Company for Approval of its Default Service Program*, Docket No. P-2014-2409362 (Order entered December 4, 2014) (*PECO DSP III Order*).

(collectively, Joint Petitioners or Settling Parties). Also on July 28, 2016, the Settling Parties filed Statements in Support of the Partial Settlement, CAUSE-PA and TURN *et al.* submitted letters of non-opposition to the Partial Settlement, and Noble filed a letter opposing the Partial Settlement.

On August 11, 2016, Main Briefs were filed by PECO, I&E, the OCA, CAUSE-PA, RESA and TURN *et al.* Also on August 11, 2016, Noble filed Objections to the Partial Settlement with regard to a provision relating to PECO's recovery of certain PJM charges from all distribution customers in its service territory through its Non-Bypassable Transmission Charge (NBT).

On August 25, 2016, Reply Briefs were filed by PECO, the OCA, CAUSE-PA, RESA and TURN *et al.* Also on August 25, 2016, I&E, PAIEUG and RESA filed Responses to Noble's Objections to the Partial Settlement. PECO responded to Noble's Objections to the Partial Settlement in its Reply Brief. The record closed on August 25, 2016.

On October 4, 2016, ALJ Fordham issued her Recommended Decision, wherein she, *inter alia*, recommended approval of the Partial Settlement without modification, denied Noble's Objections to the Partial Settlement, and declined to address the CAP shopping issue due to PECO's filing of a CAP shopping plan in a separate proceeding.

As previously noted, Exceptions were filed by the OCA, CAUSE/TURN, and Noble on October 14, 2016. Replies to Exceptions were filed by PECO and RESA on October 21, 2016, and a Letter In Lieu of Reply Exceptions was filed by PAIEUG on October 21, 2016.

IV. Legal Standards

A. Burden of Proof

In this proceeding, the Company seeks approval of its plan to procure default service supply and, as such, has the burden of proving that its proposed DSP IV complies with the legal requirements. The proponent of a rule or order in any Commission proceeding bears the burden of proof, 66 Pa. C.S. § 332(a), and therefore, the Company has the burden of proving its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, the Company's evidence must be more convincing, by even the smallest amount, than the evidence presented by the other parties. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 49 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by a utility of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence to rebut the evidence of the utility shifts to the other parties. If the evidence presented by the other parties is of co-equal value or "weight," the burden of proof has not been satisfied. The Company now has to provide some additional evidence to rebut that of the other parties. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of going forward with the evidence may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always

remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001). However, a party that offers a proposal in addition to what is sought by the original filing bears the burden of proof for such a proposal. *Pa. PUC, et al., v. Metropolitan Edison Co.*, Docket No. R-00061366C0001 (Order entered January 11, 2007); *Joint Default Service Plan for Citizens' Electric Co. of Lewisburg, PA and Wellsboro Electric Company for the Period of June 1, 2010 through May 31, 2013*, Docket Nos. P-2009-2110798 and P-2009-2110780 (Order entered February 26, 2010).

B. Standards Applicable to Default Service

The Electricity Generation Customer Choice and Competition Act (Competition Act or Choice Act)³ requires that default service providers acquire electric energy through a “prudent mix” of resources that are designed: (i) to provide adequate and reliable service; (ii) to provide the least cost to customers over time; and (iii) to achieve these results through competitive processes that include auctions, requests for proposals and/or bilateral agreements. 66 Pa. C.S. §§ 2807(e)(3.1) and 2807(e)(3.4).

The Competition Act also mandates that customers have direct access to a competitive retail generation market. 66 Pa. C.S. § 2802(3). This mandate is based on the legislative finding that “[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity.” 66 Pa. C.S. § 2802(5). *See, Green Mountain Energy Company v. Pa. PUC*, 812 A.2d 740, 742 (Pa. Cmwlth. 2002). Thus, a fundamental policy underlying the Competition Act is that competition is more effective than economic regulation in controlling the costs of generating electricity. 66 Pa. C.S. § 2802(5).

³ Act 138 of 1996, as amended by Act 129 of 2008 (Act 129), codified at 66 Pa. C.S. §§ 2801, *et seq.*

In addition to the foregoing statutory guidelines, the Commission has enacted default service Regulations, 52 Pa. Code §§ 54.181 to 54.190, and a policy statement, 52 Pa. Code §§ 69.1801 to 69.1817, addressing DSPs. The Regulations first became effective in 2007, and were amended in 2011 to incorporate the Act 129 amendments to the Competition Act. *Implementation of Act 129 of October 15, 2008; Default Service and Retail Electric Markets*, Docket No. L 2009-2095604 (Final Rulemaking Order entered October 4, 2011) (*Act 129 Final Rulemaking Order*). The Commission has directed that EDCs consider the incorporation of certain market enhancement programs into their DSPs in order to foster a more robust retail competitive market. *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952 (Order entered December 16, 2011), and *Intermediate Work Plan* (Final Order entered March 2, 2012) (*IWP Order*).

V. The Partial Settlement

A. Terms and Conditions of the Partial Settlement

The Joint Petitioners have agreed to the Partial Settlement, which resolves all issues among the settling Parties with the exception of one issue reserved for litigation, the CAP customer shopping issue. The Joint Petitioners assert that Direct Energy, CAUSE-PA and TURN *et al.* have authorized them to represent that they do not oppose the Partial Settlement. The Joint Petitioners assert that the Partial Settlement is only contested by one Party to this proceeding, Noble. Partial Settlement at 1.

The Partial Settlement consists of the Joint Petition containing the terms and conditions of the Settlement, Exhibit A, which is the DSP IV Procurement Schedule, and Exhibit B, which is the DSP IV Request for Proposals. Statements in Support of the Partial Settlement were submitted by each of the Joint Petitioners and were denoted as Statements A, B, C, D, E and F, respectively.

The essential terms and conditions of the Partial Settlement are set forth in Section II. Settlement ¶¶ 12-45 at 5-17. The Joint Petitioners agreed to the following terms and conditions, with the original paragraph numbers maintained, as follows:

A. Procurement Plan

12. The Joint Petitioners agree that the DSP IV Program shall be in effect for a period of four years, from June 1, 2017 through May 31, 2021.

- (a) PECO agrees to hold a stakeholder collaborative in January 2018, with a follow-up collaborative in February 2018, if necessary, open to all parties to this proceeding, to discuss any aspect of the products or programs approved in the DSP IV

Program, as well as other retail market enhancement issues as they relate to PECO's provision of default service.

- (b) In the event any party believes market conditions have significantly changed during the period following the Commission's issuance of its final Order in this proceeding to January 2018, the parties may present such information supporting their position and recommendations for changes to the DSP IV Program during the collaborative.
- (c) Within 60 days from the date of the January 2018 collaborative (or the February 2018 collaborative, if held), PECO will submit a report at this Docket summarizing the collaborative.
- (d) Nothing herein restricts any party's rights under law to make any filing regarding (a) or (b) above, nor does anything herein restrict any position any party may take in any such proceeding or in any other proceeding. The Parties acknowledge that nothing contained herein is intended to expand or limit the Commission's subject matter jurisdiction or to foreclose implementation of future Commission-approved retail market programs.
- (e) Nothing contained herein is intended to limit the use of information presented during the collaborative for other appropriate purposes, including as set forth in paragraph (d).

13. PECO's default service customers shall be divided into three classes for purposes of default service procurement: the Residential Class, the Small Commercial Class, and the Consolidated Large Commercial and Industrial Class. The Residential and Small Commercial classes are the same as those established in PECO's three prior default service programs. The current Medium Commercial and Large Commercial and Industrial classes, which both receive hourly-priced default service as of June 1, 2016, will be consolidated into a single procurement class – the Consolidated Large Commercial and Industrial Class.

14. The Residential Class includes all residential customers' currently receiving service under PECO rate schedules R and RH.

15. The Small Commercial Class includes customers with annual peak demands of up to 100 kW served under rate schedules GS, PD and HT plus lighting customers on schedules AL, POL, SLE, SLS and TLCL.

16. The Consolidated Large Commercial and Industrial Class includes customers with annual peak demands greater than 100 kW on schedules GS, HT, PD and EP.

(1) Residential Class

17. For the Residential Class, PECO will continue to procure a mix of one-year and two-year fixed-price full requirements ("FPFR") contracts for approximately 96% of the supply, with six months spacing between the commencement of contract delivery periods. During the Revised DSP IV period, the remaining approximately 4% of Residential Class supply currently obtained through 17-month FPFR products (and residual spot-market purchases), will be replaced with 24-month FPFR products (approximately 3.2% of residential default service load) and spot purchases (approximately 0.8%) directly from the energy markets operated by PJM. These 24-month FPFR products will be procured in the scheduled Spring 2017 procurements, and again in the scheduled Spring 2019 procurements, under the stipulated four-year procurement plan.

18. Suppliers will bid in a competitive, sealed-bid request for proposals ("RFP") process on "tranches" corresponding to a percentage of the actual Residential default service customer load. Winning suppliers will be obligated to supply full requirements load-following service, which includes energy, capacity, ancillary services, and all other services or products necessary to serve a specified percentage of PECO's default service load in all hours during the supply product's delivery period. In addition, the full requirements product requires the supplier to provide PECO all necessary alternative energy credits ("AECs") described in Paragraph 30, *infra*, for

compliance with Pennsylvania’s Alternative Energy Portfolio Standards (“AEPS”) Act. 73 P.S. § 1648.1 *et seq.* Each of the contracts will be procured approximately two months prior to the beginning of the applicable contract delivery period. As in DSP III, PECO will continue to nominate PJM Auction Revenue Rights (“ARRs”) for the default service load. To facilitate selection and transfer of ARR to wholesale default service suppliers, PECO will continue to employ a consultant for ARR analysis and selection.

19. The procurement terms and schedule for the Residential Class FPCR contracts are set forth in Exhibit A.

(2) Small Commercial Class

20. The Small Commercial Class load will be supplied by equal shares of one-year and two-year FPCR products. Each of the contracts for the Small Commercial Class will be procured through a competitive sealed-bid process in the same manner as FPCR products for the Residential Class approximately two months prior to delivery of energy under the contract.

21. The procurement terms and schedule for the Small Commercial Class portfolio are set forth in Exhibit A.

(3) Consolidated Large Commercial and Industrial Class

22. For its Consolidated Large Commercial and Industrial customers, PECO will continue to solicit hourly-priced default service contracts for full requirements products for all default service supply.

23. PECO will procure default service supply for the Consolidated Large Commercial and Industrial Class annually as shown on Exhibit A.

B. Contingency Plans

24. PECO will continue utilizing the contingency plans approved in prior default service programs. Specifically, in the event PECO fails to obtain sufficient approved bids for all

offered tranches for a product in a solicitation, the tranches will be included in PECO's next default supply solicitation for that product. If necessary, PECO will supply any unserved portion of its default service load from the PJM-administered markets for energy, capacity and ancillary services and procure sufficient AECs at market prices to satisfy any near-term obligations under the AEPS Act.

25. In the event of a supplier default and the immediate need to obtain supply for default service, PECO will initially rely on filling that supplier's portion of PECO's default service load through the PJM-administered markets for energy, capacity, and ancillary services. If the default occurs within a reasonable time before a scheduled procurement, the load served by the defaulting supplier will be incorporated into that next procurement. Otherwise, PECO will file a plan with the Commission for an alternative procurement.

C. Default Service Implementation Plan and Independent Evaluator

26. The Joint Petitioners agree to the form of the Supplier Master Agreement ("SMA") that PECO will execute with wholesale suppliers that are successful bidders in PECO's default service supply procurements set forth in PECO Exhibit JJM-3.

27. The Joint Petitioners agree to the RFP for PECO's competitive sealed-bid solicitations attached to the Joint Petition as Exhibit B. Exhibit B is a revised version of PECO Exhibit CL-2 to reflect the procurement plan and products set forth in this Settlement. The Joint Petitioners also agree to the RFP protocol set forth in PECO Exhibit CL-3.

28. PECO will again appoint NERA Economic Consulting, Inc. ("NERA") as the independent third-party evaluator for PECO's default service procurements.

29. The Commission has previously approved PECO's SMA as an affiliated interest agreement so that PECO's affiliates may participate in default service supply procurements, and PECO is maintaining the same protocols and other protections in its Revised DSP IV to be administered by the

Independent Evaluator. In the event that an affiliate of PECO is a winning bidder in a default supply procurement, it will need to execute the SMA in the same manner and time period as other bidders. PECO therefore requests advance approval of the SMA (PECO Exhibit JJM-3) by the Commission as an affiliated interest agreement.

D. Alternative Energy Portfolio Standards Act Compliance

30. Under the SMA, as in DSP III, PECO will continue to require each full requirements default service supplier to transfer Tier I and Tier II AECs to PECO corresponding to PECO's AEPS obligations associated with the amount of default service load served by that supplier.

31. In addition, PECO will continue to allocate AECs obtained through its AEC procurements to suppliers in accordance with the percentage of load served by each supplier. PECO will retain any portion of its AEC inventory to meet AEPS obligations not provided for by fixed-price full requirements suppliers, and procure any additional required AECs through PECO's Tier I and Tier II "balancing" procurements previously authorized by the Commission.

E. Rate Design And Cost Recovery

(1) Generation Supply Adjustment ("GSA")

32. PECO will continue to recover the cost of default service from default service customers through a GSA charge. For each customer class with peak loads up to 100 kW – i.e., the Residential and Small Commercial Classes – default service rates established pursuant to the GSA will continue to change quarterly and over/undercollections of default service costs will continue to be reconciled on a semi-annual basis. Such rates will continue to recover: (1) generation costs, certain transmission costs and ancillary service costs established through PECO's competitive procurements; (2) supply management, administrative costs (including costs incurred by PECO to implement Commission-approved retail market enhancement programs) and working capital, as provided in

52 Pa. Code § 69.1808; and (3) applicable taxes. The projected GSA for each quarter, which forms the basis of the Price-to-Compare (“PTC”), will be filed by PECO 45 days before the start of each quarter.

33. PECO’s default service rates for the Consolidated Large Commercial and Industrial Class will also continue to be charged through the GSA. For those customers, default service rates will continue to be based upon the price paid to winning suppliers in PECO’s hourly-priced service procurements, which includes the PJM day-ahead hourly locational marginal price (“LMP”) for the PJM PECO Zone, plus associated costs, such as capacity, ancillary services, PJM administrative expenses and costs to comply with AEPS requirements that are incurred to provide hourly-priced service. To align the filing schedule for Consolidated Large Commercial and Industrial Class default service rates with PECO’s other procurement classes, the Joint Petitioners agree that PECO will file the Hourly Pricing Adder on a quarterly, instead of monthly, basis.

34. The default service rates for the Large Commercial and Industrial Class also include a reconciliation component to refund or recoup GSA over/under collections from prior periods. The Joint Petitioners agree that over/under collections of default service costs for the Consolidated Large Commercial and Industrial Class will be reconciled on a semi-annual basis instead of a monthly basis.

35. PECO shall be permitted to file the GSA and Reconciliation tariff pages set forth in PECO Exhibits ABC-2 and ABC-3 to become effective as of June 1, 2017, subject to resolution of PECO’s plan to enable CAP customers to shop for electric generation supply.

(2) Other Tariff Changes

36. Effective June 1, 2017, PECO shall be permitted to implement tariff changes set forth in PECO Exhibits ABC-2 and ABC-3 related to the consolidation of the Medium Commercial and Large Commercial and Industrial procurement classes, subject to resolution of PECO’s plan to enable CAP customers to shop for electric generation supply.

(3) Recovery of Certain PJM Charges

37. Wholesale suppliers will continue to be responsible for those PJM bill line items specified in the SMA.

38. PECO will continue to be responsible for and recover the following PJM charges from all distribution customers in PECO's service territory through its Non-Bypassable Transmission Charge: Generation Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014; RTEP charges (PJM bill line 1108); and Expansion Cost Recovery charges (PJM bill line 1730). During DSP IV, PECO will continue to be responsible for and recover Network Integration Transmission Service ("NITS") and Non-Firm Point-to-Point Transmission costs associated with default service customers through its unbundled, bypassable Transmission Service Charge.

39. Transparency of NITS rates and charges will be enhanced in the following ways:

- (a) PECO will provide notice to EGSs and default service suppliers of any public, docketed Federal Energy Regulatory Commission ("FERC") filings that modify the NITS rate for any transmission company providing service to PECO. This includes but is not limited to any informational filings implementing annual rate changes under a formula rate. All such notices will be provided through publication on SUCCESS, or its successor portal, and the Supplier Information webpage on PECO's procurement website (www.pecoprocurement.com) not later than ten days after such filing is made at the FERC. All communications will be archived on SUCCESS, or its successor portal, as well as PECO's procurement website.
- (b) PECO will add a page to SUCCESS, or its successor portal, and the Supplier Information webpage on PECO's procurement website titled "NITS Rate Information." This page will include

the information and notices referenced in the foregoing provision. The website will also include a prominent table displaying the currently-effective NITS rate for PECO, the effective date of the NITS rate, and a document labeled “Future NITS Rate.” The “Future NITS Rate” will reflect any proposed rate filed at the FERC as well as the proposed effective date of the rate.

F. Standard Offer Program

40. The currently-effective Standard Offer Program (“SOP”), including the cost recovery mechanisms last approved by the Commission in PECO’s DSP III proceeding, will continue until May 31, 2021.

41. Within ninety days of Commission approval of this settlement, SOP procedures, scripts and training documents shall be revised in the following manner:

- (a) PECO customer service representatives will be required to complete the transaction that was the subject of the customer’s call to the PECO Care Center and provide all information relevant to the call (e.g., account numbers) prior to initiating any transfer to Allconnect.
- (b) PECO’s SOP script initiating the transfer to Allconnect will provide the following language: “Your new account number is [12345-67899]. In Pennsylvania, you can choose the supplier that provides your electricity without impacting the quality of service provided by PECO. PECO is sponsoring a program called the Smart Energy Choice Program which may be able to offer you a potential savings opportunity by enrolling with an electric generation supplier. Would you like to hear more? If response is no: Close the call. If response is yes: Please hold while I transfer you to a specialist that can help you.”
- (c) The Allconnect script will be revised to include the following language, which replaces the

language required in the DSP III Settlement: “Hi, My name is [Allconnect NAME]. I understand you would like to learn more about the PECO Smart Energy Choice Program. Is that correct? PECO is responsible for delivering your electricity. The actual generation of the electricity you receive can be provided by PECO or a participating supplier of your choice. The PECO Program offers a fixed price of [SOP rate] cents/kWh for one year provided by an Electric Generation Supplier. The fixed Program price provides a 7% discount off of today’s Price to Compare which is [PTC Rate] cents/kWh. PECO’s Price to Compare changes quarterly in March, June, September and December. The PECO Smart Energy Choice Program price will not change during the 12 monthly bills, but the Price to Compare could be higher or lower than the PECO Program price during this period.”

- (d) The term “constant” will be eliminated from any communications with customers describing the program’s initial discount of 7% from the current PTC by both PECO and Allconnect customer service representatives.
- (e) PECO reserves the right to propose additional script changes following advance notice to the parties to this settlement and provide an opportunity for interested parties to submit written comments. Proposed changes may be implemented upon agreement of the interested parties, or approval by the Commission if no agreement is reached.

42. At the same time that it implements the foregoing script changes, PECO will incorporate the following topics into Allconnect’s ongoing refresher training sessions for its customer service representatives: (1) PECO’s PTC; (2) the potential for savings through enrollment in the SOP; (3) the appropriate time to cease marketing the SOP on a transferred call; (4) PECO’s obligation to provide default service; and (5) the presentation of home services, which include an

appropriate transition to non-electricity related services such as telephone and cable, at the end of a transferred call that are not related to, or endorsed by, PECO.

43. PECO will convene an EGS workshop to discuss potential operational enhancements to improve administration of the SOP. Topics will include sharing accurate customer account information associated with customers who have affirmatively selected to enroll in the SOP.

G. Request for Waivers

44. The Commission's regulations (52 Pa.Code § 54.187) and Policy Statement (52 Pa.Code § 69.1805) provide that default service providers should design procurement classes based upon peak loads of 0-25 kW, 25-500 kW, and 500 kW and greater, but default service providers may propose to depart from these specific ranges, including to "preserve existing customer classes." If necessary, the Joint Petitioners respectfully request that the Commission grant PECO a waiver of 52 Pa.Code § 54.187 to allow PECO's procurement classes to be as delineated in Section II.A, *supra*.

45. To the extent necessary, the Joint Petitioners also respectfully request that the Commission grant PECO a waiver of 52 Pa.Code §§ 54.187(i) and (j) to allow PECO to implement quarterly filing of hourly-priced default service rates and semi-annual reconciliation of the over/under collection component of the GSA for all default service customers as explained in Section II.E, *supra*.

Settlement at 5-17.

In addition to the specific terms to which the Joint Petitioners have agreed, the Partial Settlement contains certain additional general terms. The Joint Petitioners state that the Partial Settlement is in the public interest and will provide substantial affirmative public benefits. Settlement ¶ 47 at 17. In addition, the Partial Settlement states that the Settlement does not constitute an admission against, or prejudice to, any

position which any of the Joint Petitioners might adopt during subsequent litigation of this case or any other case. Settlement ¶ 49 at 18. The Partial Settlement is conditioned upon Commission approval of the terms and conditions without modification. The Partial Settlement establishes the procedure by which any of the Settling Parties may withdraw from the Partial Settlement and proceed to litigate this case, if the Commission should act to modify the Settlement. Settlement ¶ 50 at 19.

The Joint Petitioners respectfully request that the ALJ and the Commission approve the proposed Partial Settlement without modification, and approve the proposals set forth in PECO's Revised DSP IV Program. Settlement at 20.

B. Legal Standards Relative to Settlements

This Commission has a policy of encouraging settlements. *See* 52 Pa. Code § 5.231(a); *see also* 52 Pa. Code §§ 69.401, *et seq.*, relating to settlement guidelines for major rate cases, and our Statement of Policy relating to the Alternative Dispute Resolution Process (Mediation), 52 Pa. Code § 69.391, *et seq.* Settlements lessen the time and expense that parties must expend litigating a case and, at the same time, conserve administrative resources. This Commission has stated that results achieved through settlement are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401.

This Commission's evaluation of whether to approve a settlement is not based on a "burden of proof" standard, as is utilized for contested matters. *Pa. PUC, et al. v. City of Lancaster - Bureau of Water*, Docket Nos. R-2010-2179103, *et al.* (Order entered July 14, 2011) at 11. The Commission must review proposed settlements to determine whether the terms are in the public interest. *Pa. PUC v. York Water Co.*, Docket No. R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C.S. Water and Sewer Assocs.*, 74 Pa. P.U.C. 767 (1991); *Pa. PUC v. PPL Electric Utilities Corporation*,

Docket No. M-2009-2058182 (Order entered November 23, 2009); *Pa. PUC v. Philadelphia Gas Works*, Docket No. M-00031768 (Order entered January 7, 2004); *Warner v. GTE North, Inc.*, Docket No. C-00902815 (Order entered April 1, 1996); 52 Pa. Code § 69.1201.

C. ALJ's Recommendation

In her Recommended Decision, the ALJ reached twenty-two Conclusions of Law. R.D. at 73-77. The Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

In her Recommended Decision, the ALJ first noted that Noble is the only Party that filed an objection to the Partial Settlement, as it objected to Paragraph No. 38 of the Joint Petition involving the recovery of certain PJM charges. However, the ALJ stated that the Joint Petitioners have shown that the provisions in the Joint Petition are reasonable compromises and that the Joint Petition reduces litigation expenses because only one issue was reserved for briefing. Furthermore, the ALJ noted that the OCA, the OSBA, I&E, PAIEUG and RESA all stated that the Joint Petition was of benefit and was in the public interest. R.D. at 35.

The ALJ found that after considering the Joint Petition, including the compromises on procurement plans, the change in the length of the DSP term, the additional SOP disclosures and stakeholder meetings, the continuation of programs approved during the DSP III proceeding, the transparency of the NITS rates and charges and the savings achieved by not litigating the case fully, the Partial Settlement is fair, just, reasonable and in the public interest. R.D. at 35-36. Accordingly, the ALJ recommended that the Partial Settlement be approved without modification. R.D. at 36.

With regard to the recovery of certain PJM charges provision of the Partial Settlement, the ALJ noted that Noble filed a letter on July 28, 2016, indicating that it opposed the Partial Settlement. The ALJ further noted that Noble filed Objections to the Joint Petition on August 11, 2016. The ALJ pointed out that Noble's objections to the Partial Settlement concern the treatment and recovery of FERC-jurisdictional wholesale market charges at the retail shopping level during the duration of DSP IV. The ALJ explained that Noble objected to paragraph number 38 of the Partial Settlement for the following reasons: (1) The PJM transmission charges subject to the NBT fall squarely within the FERC's jurisdiction and PECO's continued recovery of these charges from shopping customers on a non-bypassable basis violates the terms of the PJM Open Access Transmission Tariff (OATT) and FERC orders; (2) PECO's NBT is unjust, unreasonable, and unduly discriminatory and violates the Competition Act; and (3) the NBT interferes with an EGS's rights as a PJM Load Serving Entity (LSE) to directly bill their shopping customers for their PJM transmission charges in connection with customized product and service offerings. *See Noble Objection at 4, 5. R.D. at 58.*

The ALJ further noted that even though this non-bypassable recovery mechanism was approved as part of PECO's DSP III case, Noble contended that the Commission should reject the continued use of the NBT in DSP IV as it relates to all shopping customers for the reasons it explained, and should modify the Partial Settlement to prohibit the NBT from being used to collect PJM transmission charges on a non-bypassable basis from shopping customers. *R.D. at 62.*

According to the ALJ, with respect to the jurisdiction issue, Noble failed to present authority to show that the Commission does not have jurisdiction. The ALJ pointed out that a review of the evidence of record shows that no party presented evidence contesting PECO's proposal. The ALJ explained that Noble did not submit direct, rebuttal or surrebuttal testimony opposing PECO's proposal and that its objections were filed on August 11, 2016, the same date that the main briefs were due. The ALJ

noted her agreement with PECO that Noble cannot raise this issue after the evidentiary record has been closed, citing 52 Pa. Code § 5.431(b). The ALJ found that this deprives the other Parties of the opportunity to present evidence in response. Also, the ALJ noted her agreement with RESA that Noble was relying on facts not in the record. R.D. at 72.

Next, the ALJ explained that PAIEUG objected to the cost recovery proposal in PECO's DSP III, and as such, the arguments regarding a continuation of PECO's non-bypassable recovery of non-market based (NMB) transmission costs and the rebundling of transmission and distribution costs were considered and rejected in the DSP III proceeding. According to the ALJ, Noble was a party in that proceeding but it did not submit a brief or exception on these issues. Also, the ALJ noted that no party requested reconsideration of the cost recovery issue in the DSP III proceeding and the final order was not appealed. R.D. at 72.

The ALJ found that Noble has failed to present grounds for reconsideration in the instant proceeding. The ALJ asserted that the cost recovery of these charges was implemented in DSP III and that PECO submitted the same proposal in this DSP IV proceeding. The ALJ concluded that the Commission has jurisdiction, that the cost recovery was approved in the DSP III proceeding and that there was no evidence in the record to support a revision of the proposal and the record is closed. Accordingly, the ALJ recommended that Noble's Objections to the Joint Petition be denied. R.D. at 72-73.

D. Exceptions and Replies

Initially, we note that any issue or Exception that we do not specifically address should be deemed to have been duly considered and rejected without further discussion. It is well settled that the Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail*

Corporation v. Pa. PUC, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, Univ. of Pa. v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

1. Noble's Exceptions

Noble is the only Party that objects to the Partial Settlement and filed Exceptions to the ALJ's recommendation to approve the Partial Settlement. In its Exceptions, Noble states that the ALJ erred in concluding that Noble failed to present authority showing that the Commission does not have jurisdiction over the PJM transmission charges subject to PECO's NBT. To the contrary, Noble asserts that it presented substantial authority demonstrating that the subject PJM transmission charges fall squarely within FERC's jurisdiction. In response to the ALJ's criticism that Noble did not present testimony on this issue, Noble responds that to do so was not necessary for a jurisdictional issue of this nature. Noble avers that jurisdiction is not an evidentiary issue, and, thus, it is an error for the ALJ to conclude that Noble is prohibited from raising this issue after the evidentiary record has been closed. Noble Exc. at 3-4.

Noble states that it is axiomatic that subject matter jurisdiction can be raised at any time, even after the record closes in a proceeding. Noble Exc. at 4 (citing *Dept. of Transp., Bur. of Traffic Safety v. Ehret*, 405 A.2d 1355, 1357 (Pa. Cmwlth. 1979)). Accordingly, Noble asserts that it did not need to submit testimony or other evidence contesting PECO's proposal or raising the question of jurisdiction during the evidentiary phase of this proceeding. According to Noble, its decision to raise the jurisdictional issue in its Objections to the Partial Settlement was permissible and timely, and its arguments in this regard must be considered and may serve as basis for rejection of Paragraph 38 of the Partial Settlement. Noble Exc. at 4.

Next, Noble asserts that the PJM wholesale market charges subject to PECO's NBT fall squarely within FERC's jurisdiction. Noble explains that PECO is

seeking approval for the continuation of its NBT to collect and recover from all distribution customers, including shopping customers, certain FERC-approved OATT wholesale market charges, Generation Deactivation/Reliability Must Run (RMR) charges, Expansion Cost Recovery charges (ECRCs) and Regional Transmission Expansion Plan (RTEP) charges. Noble opines that the continuation of the NBT would relieve PJM LSEs of their responsibilities with respect to these charges and directly infringe on the rights of LSEs under the OATT, in contravention of federal law. Noble further opines that the fact that this cost recovery proposal has been included as part of this DSP IV proceeding does not automatically confer jurisdiction over these charges to the Commission. Noble Exc. at 5.

Next, Noble avers that the fact that the Commission previously approved the recovery of these transmission charges on a non-bypassable basis in PECO's DSP III proceeding does not confer jurisdiction. According to Noble, such prior approval has no bearing on the jurisdictional issue now raised by it, as that issue was never considered by the Commission in the DSP III case. As such, Noble opines that the ALJ's reliance on Commission precedent as a basis for rejecting Noble's jurisdictional argument is improper. Furthermore, Noble asserts that the ALJ provided no discussion or analysis of the jurisdictional arguments it presented but simply concluded that Noble failed to present authority to show that the Commission does not have jurisdiction over the PJM wholesale market subject to PECO's NBT. Noble avers that the ALJ's rejection of its position was erroneous and overlooked the substantial authority it presented demonstrating that matters governing these charges fall squarely within FERC's jurisdiction. Noble Exc. at 5-6.

Next, Noble explains that since unbundled transmission services are FERC-jurisdictional, the terms and conditions under which such services are to be provided, billed and collected are controlled by FERC and the PJM OATT and may not be altered except as permitted by FERC. As such, Noble opines that all of the PJM wholesale

market charges subject to PECO's NBT, Deactivation/RMR charges (PJM bill line 1930) set after December 4, 2014, RTEP charges (PJM bill line 1108) and ECRCs (PJM bill line 1730), must be billed and collected in accordance with the controlling PJM OATT, which permits LSEs/EGSs to recover these costs from their customers. According to Noble, there are various transmission and transmission-related costs that comprise PJM wholesale market charges that are included as line items on PJM bills. Noble asserts that PECO has selectively chosen certain of these billing line items, artificially labeled them as "non-market based" charges, and implemented a non-bypassable rider to transfer the collection of these costs from LSEs/EGSs to PECO, all in violation of the controlling PJM OATT. Noble Exc. at 8-9.

Noble states that if PECO wants to recover these unbundled wholesale market charges on terms and conditions that vary from the PJM OATT, then PECO must seek authorization from FERC and/or through the PJM stakeholder process. Noble maintains that PECO has not done so, circumventing the FERC's jurisdiction under FERC Orders No. 888 and No. 2000 and the PJM OATT, and directly interfering with LSEs' authorized rights under the OATT. Noble opines that such interference harms existing LSEs/EGSs that have in good faith followed FERC rules and the PJM OATT, and opines that this shifts LSEs/EGSs' risk and responsibility from the LSE/EGS to Pennsylvania shopping customers, who are held captive. Noble Exc. at 9.

Next, Noble avers that the NBT effectively bars EGSs/LSEs and their customers from securing unbundled transmission services under the PJM OATT, contravening the right of PJM LSEs to direct bill their shopping customers for their PJM wholesale market charges as part of their individual and propriety contracts with those customers. According to Noble, unlawfully forcing retail EGSs to unilaterally transfer certain billing responsibility and rights to PECO interferes with an EGS's ability to offer unique billing products to its shopping customers. Additionally, Noble claims that this also ignores and alters the billing determinants used for transmission service available to

shopping customers/LSEs through the PJM tariff and removes an EGS/LSE's billing services available to its shopping customers and harms customer choice. Noble Exc. at 9-10.

2. PECO's Replies to Noble's Exceptions

In its Replies to the Exceptions of Noble, PECO states that in the *PECO DSP III Order*, the Commission agreed that PECO, in its capacity as an EDC, should acquire NMB transmission service on behalf of all distribution customers, including default service and shopping customers, and recover the associated costs on a non-bypassable basis through its NBT.⁴ PECO submits that under this arrangement, EGSs are relieved of both the obligation to obtain and pay for NMB transmission services, an outcome that was strongly favored by EGSs in that case and, except for Noble, the EGSs in this case as well. PECO explains that the Commission concluded in that proceeding that PECO's acquisition of NMB transmission services for all customers, with cost recovery through its NBT, benefits customers and is consistent with the Commission's decisions in other EDCs' default service proceedings.⁵ PECO further explains that for DSP IV, the Company proposed, and the Joint Petitioners agreed, to continue this assignment of responsibility and cost recovery. Also, PECO asserts that under the Settlement, the Company committed to implement additional measures to enhance the transparency of NITS costs. PECO R. Exc. at 8.

Next, PECO notes that no party presented any testimony contesting continuation of the NBT, as approved by the Commission in the *PECO DSP III Order*.

⁴ The PJM charges approved for NBT recovery include: (1) generation Deactivation/Reliability Must Run charges (PJM bill line 1930) set after December 4, 2014; (2) Regional Transmission Expansion Plan charges (PJM bill line 1108); and (3) Expansion Cost Recovery charges (PJM bill line 1730). *See PECO DSP III Order at 46, 61.*

⁵ *See PECO DSP III Order at 46.*

However, PECO further notes that after the close of the record, Noble expressed objection to the non-bypassable treatment of NMB transmission charges under the Settlement. PECO states that Noble is the only Party that excepted to the ALJ's approval of the Partial Settlement and opines that its Exception should be rejected. First, PECO avers that Noble has merely repackaged the same jurisdictional arguments that the ALJ found unconvincing. Furthermore, PECO asserts that Noble has not provided any legal basis for its claim that FERC has exclusive jurisdiction over whether an EGS or EDC should acquire transmission-related services on behalf of the EDC's distribution service load and pay the rates imposed by PJM and approved by the FERC for those services. According to PECO, these are matters that are part of the inherent power of states to regulate the local distribution of electricity and, as such, are expressly excluded from the preemptive effect of the Federal Power Act.⁶ PECO R. Exc. at 8-10.

Next, PECO avers that contrary to Noble's assertions, continuing the NBT under the Partial Settlement does not change FERC rates or limit the recovery of costs associated with FERC-regulated transmission service in retail rates. PECO further avers that any suggestion by Noble that the Commission's approval of the NBT contravenes the terms of PJM's OATT is wrong. PECO explains that it purchases NMB transmission services on behalf of its default service and shopping load as directed by the Commission and, therefore, it is the PJM transmission customer billed for those services under the OATT. According to PECO, Noble does not provide any examples of violations of the Federal Power Act, FERC Orders or applicable PJM rules and agreements arising from the non-bypassable treatment of NMB transmission charges. Accordingly, PECO maintains that the ALJ properly found that the Commission has jurisdiction to determine

⁶ PECO states that "[t]he Federal Power Act provides that the scope of federal regulation 'extends only to those matters which are not subject to regulation by the States' and states further that the FERC 'shall not have jurisdiction . . . over facilities used in local distribution.'" PECO R. Exc. at 10, n.23 (quoting 16 U.S.C. §§ 824(a) and (b)).

how PJM charges incurred by PECO to acquire NMB transmission-related services on behalf of all customers are recovered in retail rates. PECO R. Exc. at 10.

In response to Noble's argument that the NBT is discriminatory and interferes with the ability of EGSs to offer innovative products and direct billing services to retail customers, PECO claims that this objection is not supported by the record even though Noble had full opportunity to raise its concerns during the evidentiary phase of this proceeding. PECO opines that putting aside the inappropriate manner in which Noble's Objections were raised, there is simply no basis for a change to the Commission-approved NBT. According to PECO, Noble did not present any evidence that it has been or would be adversely affected by non-bypassable treatment of NMB transmission charges in terms of either financial impact or limitations on competitive market opportunities. PECO R. Exc. at 10-11.

3. RESA's Replies to Noble's Exceptions

In its Replies to Noble's Exceptions, RESA states that Noble's arguments are not persuasive and opines that the Commission should adopt the ALJ's recommendation to approve the Partial Settlement without modification. In response to Noble's jurisdiction argument, RESA asserts that 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 through retail rates, 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. RESA avers that the dispute is about how these charges will be recovered from retail customers. RESA submits that nothing in the Partial Settlement 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. Therefore, RESA opines that the ALJ's conclusion that the

Commission has jurisdiction to approve this settlement term without modification is legally sound. RESA R. Exc. at 4-5.

Next, RESA submits that at the same time Noble claims it did not need to submit testimony or evidence to support its legal view regarding jurisdiction, it presented facts to support its objection. RESA explains that while jurisdiction is a legal issue, Noble relies on a number of very specific facts, which were offered for the first time in its Objections to the Partial Settlement, to support its view that continuing the current treatment would somehow be harmful. RESA asserts that in this case, PECO proposed to continue the current cost recovery mechanism and Noble proposed to reverse this status quo. According to RESA, 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. RESA maintains that 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. RESA opines that 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. RESA R. Exc. at 5-6.

In response to Noble's argument that the Commission's prior approval of the cost recovery mechanism at issue here has no bearing on its jurisdictional issue, RESA avers that Noble misses the point. RESA asserts that in the *PECO DSP III Order*, the Commission has already specifically concluded that this cost recovery mechanism "is beneficial to customers." Noble R. Exc. at 6 (citing *PECO DSP III Order at 46*). RESA notes that no party requested reconsideration of that issue and the final order was not appealed. Thus, RESA maintains that 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. RESA opines that, in other words, the fact that Noble did not raise and the Commission did not directly

address the legal question of jurisdiction in the prior case does not obscure the fact that the Commission did make a clear finding of facts opposite from what Noble set forth in its Objections. Because of this, RESA opines that Noble had an obligation to provide testimony and/or other valid record evidence if it wanted to challenge the Commission's prior factual findings. RESA points out that, as the ALJ noted, Noble did not do this. Therefore, RESA avers that the *PECO DSP III Order* cannot be as easily dismissed as Noble suggests. RESA R. Exc. at 6-7.

4. PAIEUG's Letter in Lieu of Reply Exceptions

In its Letter in Lieu of Reply Exceptions, PAIEUG asserts that, for the reasons set forth in its Response to Noble's Objections to the Partial Settlement,⁷ the ALJ appropriately determined that the Partial Settlement should be approved without modification. PAIEUG Letter in Lieu of Reply Exceptions at 1.

⁷ In its Response to Noble's Objections to the Partial Settlement, PAIEUG noted that in PECO's DSP III proceeding, it opposed changing the collection of NBT costs from EGSs to the EDC, raising many of the same arguments set forth by Noble in the instant proceeding. However, PAIEUG noted that the Commission rejected PAIEUG's arguments and determined that PECO could impose a non-bypassable transmission service charge for the collection of NBT costs. PAIEUG Response to Noble's Objections at 4 (citing *PECO DSP III Order* at 40-54). In light of the Commission's determination in the *PECO DSP III Order*, PAIEUG asserted that Noble's Objections to the Partial Settlement did not directly reflect any of the terms specifically addressed in the Partial Settlement, or any of the issues raised in PECO's DSP IV proceeding. Therefore, PAIEUG stated that it supported the Partial Settlement and asserted that it should be approved without modification. PAIEUG Response to Noble's Objections at 4.

E. Disposition

1. Recovery of Certain PJM Charges

Based upon our review of the record, the Exceptions, and Replies thereto, we are not convinced by the arguments of Noble that our prior approval of the existing recovery mechanism utilized by PECO to recover certain PJM transmission-related charges should be revised in this proceeding. In PECO's DSP III proceeding, we approved the recovery of certain transmission costs known as non-market based charges, or NMB charges, which are incurred by both PECO as a default service provider and EGSs serving customers within PECO's service territory. In approving the collection of these charges through a non-bypassable charge, PECO's NBT, we specifically concluded that the recovery of such costs from all customers was appropriate and, moreover, consistent with the Commission's determinations in other default service proceedings.⁸ Therefore, we conclude that the Commission has already considered and rejected Noble's argument, and that Noble offered no grounds for reconsideration of the Commission's determination in this proceeding.

We also conclude that Noble's contention that the recovery of the NMB Charges are within the exclusive jurisdiction of the FERC is unfounded. We find that Noble did not cite any authority for its claim that that the FERC has exclusive jurisdiction over whether the load-serving entity or EDC should assume the cost responsibility for rates imposed by PJM and approved by the FERC for transmission-related services. We further find that Noble did not provide any examples of violations of the Federal Power Act or PJM's OATT arising from the non-bypassable treatment of PJM charges. It is

⁸ See DSP III Order at 46; *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of their Default Service Programs*, Docket Nos. P-2013-2391368, P-2013-2391372, P-2013-2391375 and P-2013-2391378 (Order entered July 24, 2014) at 22-23.

important to note that the issue here is not about the rates but rather how these charges, once they are set by FERC, should be recovered from retail customers. As nothing in the Joint Petition proposed to regulate the “rates, terms, and conditions” of these charges in contravention of the jurisdiction of FERC, we conclude that there is no jurisdictional issue here barring the Commission from approving Paragraph 38 of the Partial Settlement. Instead, we are in agreement with the positions expressed by PECO and RESA that this Commission does possess jurisdiction over how these FERC jurisdictional charges are recovered from retail end users. As such we conclude that the ALJ properly found that this Commission has jurisdiction to determine how PJM charges incurred by PECO to acquire NMB transmission-related services on behalf of all customers are recovered in retail rates.

Additionally, we are troubled by the fact that Noble did not raise this issue until after the evidentiary record was closed. 52 Pa. Code § 5.431(b). As pointed out by PECO and RESA, this deprives the other Parties in this proceeding of the opportunity to present evidence in response to Noble’s arguments. We are in agreement with RESA, which noted that in making its argument, Noble was relying on facts not in the record.

Accordingly, we shall deny the Exceptions of Noble in regard to Paragraph No. 38 of the Partial Settlement and adopt the recommendation of the ALJ on this issue.

2. The Partial Settlement

Upon our review of the Partial Settlement, we find it is reasonable and in the public interest and, therefore, we shall approve it without modification. We agree with the ALJ that the provisions within the Partial Settlement represent reasonable compromises and that the Settlement has served to reduce litigation expenses of all involved Parties. We also agree with the ALJ that the terms of the Partial Settlement will

benefit residential customers, small and medium commercial customers, as well as large commercial and industrial customers.

The benefits of the Partial Settlement are numerous and will result in significant savings of time and expenses for all Parties involved by avoiding the necessity of further administrative proceedings, as well as possible appellate court proceedings. The beneficial aspects of the Partial Settlement include: (1) the avoidance of substantial litigation and associated costs; (2) the inclusion of a Revised DSP consistent with the Company's original proposal and existing DSP III; (3) the extension of DSP IV from two years to four years to minimize future litigation expenses and reduce administrative costs; (4) the protection of Residential and Small Commercial customers from risks associated with the procurement of a large amount of default service supply during a short time period; (5) the replacement of PECO's currently existing 17-month FPFR contracts for the Residential procurement with 24-month FPFR products; (6) the agreement by PECO to provide notice to EGSs and default service suppliers of any public, docketed FERC filings that modify the NITS rate for any transmission company providing service to PECO; (7) the agreement on procedures for the acquisition and use of AECs; (8) the agreement on contingency plans in the event of failure to fully subscribe the default service load for any class, or for Commission rejection of the bid results for any procurement, or supplier default; (9) the appointment of NERA Economic Consulting, Inc. as the independent third-party evaluator of the Companies' default service procurements; (10) the agreement upon tariff and rate design changes to implement the Revised DSP with semi-annual reconciliations of the E-factor for the Residential, Small Commercial and Large Commercial and Industrial Classes; (11) the continuance of the Company's Commission-approved existing SOP as well as an agreement on a process to revise SOP procedures, scripts and training documents within ninety days of Commission approval of the Partial Settlement; and (12) the agreement to convene a stakeholder collaborative process in January 2018, with a follow-up collaborative in February 2018,

to discuss any aspects of the products or programs approved in DSP IV, as well as other retail market enhancement issues as they relate to PECO's provision of default service.

For the reasons stated herein and in the Joint Petitioners' Statements in Support, we agree with the ALJ's conclusion that the Partial Settlement is in the public interest. We agree with the ALJ that PECO's proposed generation supply procurement plan, as set forth in its DSP IV program and modified by the terms of the Partial Settlement, encompasses a prudent mix of supply methods, which is anticipated to result in adequate, reasonable and reliable service to customers, as well as service that is provided at the least cost over time. In addition, we agree that AECs are provided for in a competitive fashion, and a contingency plan is properly established.

Accordingly, we shall adopt the ALJ's recommendation to grant the Joint Petition for Partial Settlement and approve the Partial Settlement without modification.

VI. Contested Issue – CAP Shopping

As noted above, the Partial Settlement resolved all issues among the Settling Parties except for the issue relating to the ability of CAP customers in PECO's service territory to shop for electric generation supply. Specifically, this issue involved the question of whether the Commission should adopt a CAP shopping plan proposed by CAUSE-PA in this proceeding, or whether the Commission should, instead, defer the matter of CAP shopping to a separate proceeding addressing new CAP shopping rules filed by PECO on September 1, 2016, under its DSP II docket, in response to the *May 2016 Secretarial Letter*. This issue was reserved for litigation and will now be discussed in detail. We will begin by presenting the background history to the CAP shopping issue in PECO's service territory.

A. Background

Unlike the majority of the Pennsylvania EDCs' CAP customers, PECO's CAP customers are not currently eligible to purchase electric generation supply from an EGS. In the *PECO DSP II October 2012 Order*, the Commission directed PECO to allow its CAP customers to shop for electric generation supply. *PECO DSP II October 2012 Order* at 156. In accordance with that directive, on May 1, 2013, PECO filed a CAP Shopping Plan (Original Plan) to enable its CAP customers to purchase electric generation supply from EGSs in the same manner as non-CAP customers, but without exceeding PECO's Residential Price to Compare (PTC). In its final Order regarding the Original Plan, the Commission rejected the Original Plan's requirement that EGSs not charge CAP customers a price for generation supply in excess of the prevailing PTC. In its ruling, the Commission concluded that it did not have authority under the Code to limit prices charged by EGSs and also agreed with the EGSs opposing the CAP pricing ceiling that such proposal would limit the diversity of shopping options available to CAP customers. *Petition of PECO Energy Company for Approval of its Default Service*

Program, Docket No. P-2012-2283641 (Order entered January 24, 2014) (*PECO DSP II January 2014 Order*) at 14. In addition, the Commission declined to adopt the OCA's proposal to prohibit EGSs from imposing early cancellation or termination fees on CAP customers on the grounds that it lacked the legal authority to impose such restrictions on EGSs. *PECO DSP II January 2014 Order* at 16. Appeals of the *PECO DSP II January 2014 Order* were taken by the OCA and CAUSE-PA.

In its Opinion issued in *CAUSE-PA*, the Commonwealth Court determined that the Commission had the authority to impose or approve CAP rules that limit the terms of offers from EGSs to ensure adequately-funded, cost-effective and affordable universal service programs. *CAUSE-PA* at 1087, 1103-1104. Nevertheless, in the case before it, the Court concluded that record evidence supported the Commission's finding that an EGS price ceiling would be anti-competitive and limit the choices available to PECO's CAP customers. However, the Court found that there was a statutory basis and sufficient record evidence to support the OCA's proposed prohibition against early termination and cancellation fees. *Id.* at 1106-1108. Therefore, the Court remanded the case to the Commission for further proceedings. *Id.* at 1109. Petitions for review of the Commonwealth Court's decision by the Pennsylvania Supreme Court were denied.

As noted above, the Commission, in its *May 2016 Secretarial Letter*, directed PECO to file with the Secretary and serve on the parties in its current Default Service Plan and Universal Service and Energy Conservation Plan dockets a proposed rule revision to its CAP Shopping Plan in its current DSP III, consistent with the Commonwealth Court's Order in *CAUSE-PA*. *May 2016 Secretarial Letter* at 2. Specifically, the *May 2016 Secretarial Letter* stated:

PECO's filing should include: (1) proposed language of the rule; (2) a proposed timeline and effective date; and (3) a proposed plan to collect data upon which to base an analysis of the CAP shopping program experiences, evaluations, and

recommendations. PECO's filing will be subject to public comment and final review and approval by the Commission.

Id. (footnote omitted).

On July 19, 2016, PECO filed a letter with the Commission at its DSP II docket advising that the Company intended to submit, by September 1, 2016, its proposed CAP rule revision in conformance with the Commonwealth Court's Order in *CAUSE-PA* and the *May 2016 Secretarial Letter*. On September 1, 2016, PECO filed its proposed CAP rule revision to implement CAP shopping in its service territory (September 2016 CAP Rule Change Filing). This filing included, *inter alia*, a tariff supplement to the Company's EGS Tariff containing language prohibiting EGSs that serve CAP customers from entering into any contract that imposes early cancellation or termination fees. September 2016 CAP Rule Change Filing, Exh. B. The tariff supplement also includes language indicating that semi-annual reports will be filed with the Commission to describe the net impact of CAP shopping, pursuant to a data collection and reporting protocol developed through a collaborative with interested stakeholders convened by the Commission's Office of Competitive Market Oversight (OCMO) and Bureau of Consumer Services. *Id.*

In its September 2016 CAP Rule Change Filing, PECO noted that it was moving from its existing "tiered" CAP program to a new Fixed Credit Option (FCO) CAP program, which the Commission approved on August 11, 2016, in *PECO Energy Company Universal Service and Energy Conservation Plan for 2016-2018*, Docket No. M-2015-2507139 (Final Order entered August 11, 2016) (*PECO 2016 USECP Order*). September 2016 CAP Rule Change Filing at 3-4. PECO stated that, ultimately, it will need to file changes to its Electric Service Tariff to make clear that CAP customers may shop. However, PECO asserted that those changes would have to be structured as edits to the new FCO CAP tariff language. Thus, PECO stated that, after consultation with the

Commission's Bureau of Technical Utility Services and Bureau of Audits, the Company determined that it would wait until the FCO language is approved⁹ before making an additional compliance filing at the DSP II docket to include language in its Electric Services Tariff clarifying that CAP customers may shop. September 2016 CAP Rule Change Filing at 4.

PECO averred that it would be easier for it to implement the new FCO CAP and the new CAP shopping program if there is some gap between the two implementation dates. Thus, while the FCO CAP was to begin in October of 2016, PECO's EGS tariff supplement implementing the CAP shopping program was proposed to become effective on April 14, 2017,¹⁰ under the Company's current DSP III plan. PECO asserted that it will use that same effective date when it files the revisions to its Electric Services Tariff. September 2016 CAP Rule Change Filing at 4.

On November 18, 2016, the Commission issued a Secretarial Letter at Docket No. P-2012-2283641 (*November 2016 Secretarial Letter*), which confirmed that interested parties may file written comments at that docket regarding PECO's September 2016 CAP Rule Change Filing. The *November 2016 Secretarial Letter* indicated that Comments would be due on or before December 2, 2016, and Reply Comments would be due on or before December 12, 2016. *November 2016 Secretarial Letter* at 2.

⁹ On September 12, 2016, in compliance with the *PECO 2016 USECP Order*, PECO filed tariff supplements to become effective October 14, 2016. By Secretarial Letter issued October 7, 2016, the Commission indicated that the tariff supplements would become effective by operation of law, according to the effective dates contained on each page of the supplements.

¹⁰ PECO stated that the April 14, 2014 effective date will coincide with its planned Information Technology "push," during which all systems will be tested overnight to ensure that the new program language does not cause any unforeseen interactions with other programs. September 2016 CAP Rule Change Filing at 4.

B. Positions of the Parties

1. CAUSE-PA's Position

CAUSE-PA stated that any plan to allow PECO's CAP customers to shop for electric generation supply from an EGS "must tie the affordability of electric service to a customer's ability to pay for that service through policies, practices, and services that help low income customers maintain utility service." CAUSE-PA M.B. at 5. CAUSE-PA asserted that the Commission recognized this principal in its Final Order approving PECO's Universal Service and Energy Conservation Plan for 2013-2015. *Id.* at 12-13 (citing *PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015*, Docket No. M-2012-2290911 (Final Order entered April 4, 2013)). Moreover, CAUSE-PA stated that in *CAUSE-PA*, the Commonwealth Court clarified how the Commission must balance the goals of encouraging deregulation to allow consumers to purchase electricity from EGSs, and maintaining programs to assist low-income customers to afford electric service. CAUSE-PA M.B. at 13, (citing *CAUSE-PA* at 1103-04). CAUSE-PA noted the Commonwealth Court's determination that "the Choice Act 'does not demand absolute and unbridled competition'." CAUSE-PA M.B. at 13, (quoting *CAUSE-PA* at 1101). CAUSE-PA further noted the Court's conclusion that the Commission has the authority under Section 2804(9) of the Choice Act¹¹ to impose CAP rules that would limit the terms of any offer from an EGS that a customer can accept and remain eligible for CAP benefits, in order to ensure that universal service

¹¹ Section 2804(9) of the Choice Act provides, in part:

The commission shall ensure that universal service and energy conservation policies, activities and services are appropriately funded and available in each electric distribution territory.

66 Pa. C.S. § 2804(9).

plans are adequately funded and cost effective. CAUSE-PA M.B. at 13-14 (citing *CAUSE-PA* at 1103-04).

CAUSE-PA asserted that under PECO's new FCO CAP design, CAP customers who shop and pay more than PECO's PTC will not receive an affordable utility bill, because the amount of the CAP credit allotted to a customer under the FCO program is based on PECO's default service rate, regardless of whether or not the customer shops for electricity. CAUSE-PA M.B. at 15-18. Furthermore, CAUSE-PA contended that "CAP-eligible customers are economically vulnerable and unable to pay for essential services including electricity without substantial and meaningful assistance." *Id.* at 19-20. Thus, CAUSE-PA argued that the Commission should develop protections for PECO's CAP customers who shop. *Id.* at 20.

CAUSE-PA also opined that the implementation of CAP shopping should be delayed until the beginning of PECO's DSP IV on June 1, 2017, rather than allowing PECO to introduce CAP shopping in its current DSP III period as the Company proposed. CAUSE-PA argued that it would be inefficient and lead to customer confusion if CAP shopping is implemented during the remaining DSP III period, since the CAP shopping structure would change on June 1, 2017 as a result of this DSP IV proceeding. *Id.* at 22. Moreover, CAUSE-PA argued that PECO must allow time to educate its CAP customers on the changes established under its new FCO CAP design before further educating CAP customers on how to effectively shop for competitive generation supply for the first time. *Id.* at 23. CAUSE-PA also contended that this DSP IV proceeding allows the Commission the opportunity to consider significant new information regarding CAP shopping before approving a shopping plan for CAP customers. According to CAUSE-PA, such information includes the Commonwealth Court's guidance issued in *CAUSE-PA*, as well as new data and information gathered in other EDCs' DSP proceedings concerning the issue of CAP shopping. *Id.* at 24-25.

CAUSE-PA contended that experience with allowing CAP customers to shop without limitations on price or terms of service in other EDC service territories demonstrates the serious affordability issues such customers face. *Id.* at 25-26. CAUSE-PA pointed to evidence provided in this proceeding regarding the effects of unrestricted CAP shopping on customers in the service territory of PPL Electric Utilities Corporation (PPL). CAUSE-PA noted that in PPL's recent default service proceeding,¹² PPL provided evidence demonstrating that for the forty-six month period from January, 2012 through October, 2015, PPL's CAP customers who shopped paid a net amount of \$2,743,872 per year over PPL's PTC, which amounts to more than \$10.5 million in additional costs for PPL's CAP customers and other ratepayers over the full forty-six month period. CAUSE-PA M.B. at 28-29. CAUSE-PA further asserted that similar data was produced in the FirstEnergy Companies Service territories. According to CAUSE-PA, reported data from FirstEnergy's DSP proceeding¹³ shows that, as of November 2015, more than 77% of Met-Ed's CAP customers, more than 50% of Penelec's CAP customers, and more than 65% of West Penn's CAP customers who are shopping are paying a price higher than the price to compare. *Id.* at 29.

CAUSE-PA opined that there is no reason to believe that the results of allowing unrestricted CAP shopping in PECO's service territory would be any different from those that occurred in other EDCs' territories. Rather, CAUSE-PA asserted that such results may very well be worse, "given PECO's significantly larger CAP and CAP-eligible population, their lack of prior shopping education and experience, the

¹² See *Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2017 Through May 31, 2021*, Docket No. P-2016-2526627 (Order entered October 27, 2016) (*PPL DSP IV*).

¹³ See *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs for the Period Beginning June 1, 2017, through May 31, 2019*, Docket Nos. P-2015-2511333, P-2015-2511351, P-2015-2511355, and P-2015-2511356 (Order entered May 19, 2016) (*FirstEnergy DSP*).

complications emanating from a concurrent change in CAP design, and the structure of PECO's new FCO CAP design . . ." *Id.* at 30.

CAUSE-PA argued that PECO's CAP customers must be permitted to shop under a program that maintains affordability of electric service for these customers, as required under the Choice Act. Therefore, CAUSE-PA proposed that a CAP Standard Offer Program (CAP-SOP) with the following criteria be adopted for PECO's CAP customers in this proceeding:

- The CAP-SOP would be the only means through which a CAP customer could shop and remain eligible for CAP benefits. Any shopping request from a CAP customer that does not get processed through the SOP would be denied.
- EGSs which volunteer to participate would have to agree to serve these CAP customers at a 7% discount off the PTC at the time of enrollment and, if the PTC drops more than 7% at any time during the customer's enrollment, the EGS would have to either re-enroll the customer in a new CAP-SOP enrollment with a new 7% off the then applicable PTC or return the customer to default service.
- If returned to default service, the customer could affirmatively re-enroll in the CAP-SOP with another supplier, if they so desire. Suppliers are already monitoring the PTC to determine whether to participate in the SOP and what offers to make to customers. As such, they will be able to readily determine when the PTC price drops by more than 7%, triggering their obligation to either adjust their CAP enrollee's contract terms or return the customer to default service.
- At the end of the 12-month CAP-SOP contract, participating EGSs would either re-enroll the CAP customers in a new CAP-SOP contract that is 7% off the then-applicable PTC (subject to the same terms noted above). Or, if they decide to stop serving CAP customers, the customer would be returned to default service. EGSs

would not be allowed to enroll the CAP customer in a contract outside of the SOP.

- Like all SOP customers, CAP customers would be able to leave the SOP contract at any time, without facing termination or cancellation fees.

CAUSE-PA M.B. at 31.

CAUSE-PA asserted that EGSs could choose to participate or not participate in this program based on their own needs and goals. CAUSE-PA argued that under the CAP-SOP, CAP customers who pay less than the PTC would benefit by extending the life of their CAP credits, and ratepayers who pay for the CAP subsidy would benefit through reduced costs. CAUSE-PA also stated that participating suppliers would compete with one another under the same set of rules. *Id.* at 32.

2. OCA's Position

Like CAUSE-PA, the OCA contended that the Commission has the authority to impose program rules for CAP customer shopping in accordance with the Choice Act and the Commonwealth Court's decision in *CAUSE-PA*. OCA M.B. at 13-16. The OCA also agreed with CAUSE-PA that evidence presented in this proceeding demonstrates that the affordability of electricity for CAP customers has been negatively impacted by unrestricted CAP shopping in other EDCs' service territories, and that the resulting increased costs of CAP programs flow through to non-CAP ratepayers. *Id.* at 16-20. Thus, the OCA supported CAUSE-PA's CAP-SOP proposal. *Id.* at 20-22.

The OCA also recommended that a stakeholder group be established to discuss the implementation details of the CAP-SOP. *Id.* at 22-23. In addition, the OCA agreed with CAUSE-PA that CAP shopping should not be implemented in PECO's

service territory until the beginning of the PECO's DSP IV period on June 1, 2017, in order to avoid unnecessary confusion among CAP customers as they adapt to PECO's new FCO CAP program. *Id.* at 23-27.

3. TURN *et al.*'s Position

TURN *et al.* also agreed with CAUSE-PA that the Commonwealth Court's decision in *CAUSE-PA* clarified that the Commission has the authority under the Choice Act to impose restrictions on the ability of CAP customers to shop for electric supply. TURN *et al.* M.B. at 8-9. TURN *et al.* supported CAUSE-PA's proposed CAP-SOP based on the evidence provided by CAUSE-PA that, according to TURN *et al.*, demonstrates the significant harm suffered by CAP customers in other EDCs' service territories as a result of unrestricted CAP shopping. TURN *et al.* contended that PECO should not be allowed to delay the implementation of restrictions on CAP shopping simply because CAP customers have not yet been permitted to shop, and therefore, there is no evidence that CAP customers in PECO's service territory have been harmed. TURN *et al.* argued that there is no reason to believe that the same widespread harm experienced in other EDCs' service territories will not be duplicated in PECO's service territory if unrestricted CAP shopping is implemented. *Id.* at 18-26. TURN *et al.* also supported CAUSE-PA's position that CAP shopping in PECO's service territory should not be implemented until June 1, 2017. *Id.* at 26-33.

TURN *et al.* also contended that the Parties must not be foreclosed from addressing CAP shopping issues in this proceeding, even though the *May 2016 Secretarial Letter* directed PECO to file a CAP shopping rule revision to be effective in the Company's current DSP III. According to TURN *et al.*, nothing in the Commonwealth Court's decision in *CAUSE-PA* or in the Commission's *May 2016 Secretarial Letter* should be interpreted as prejudicing the positions of Parties as argued in this DSP IV proceeding. *Id.* at 12-15. Moreover, TURN *et al.* argued that the *May*

2016 Secretarial Letter contemplated that evidentiary review of PECO's CAP shopping program may be undertaken in a future proceeding. According to TURN *et al.*, the instant DSP IV proceeding "*is exactly such a future proceeding.*" *Id.* at 17 (emphasis in original).

TURN *et al.* also opined that addressing the CAP shopping issue within the context of PECO's DSP III may present due process issues, because TURN *et al.* was not a party in the DSP III proceeding due to the fact that CAP shopping could not be addressed in that proceeding while the Commonwealth Court's supersedeas was in effect and litigation was still in progress. *Id.* at 14-16. Moreover, TURN *et al.* argued that consideration of PECO's CAP shopping rule revision in DSP III would appear to violate the Commonwealth Court's ruling in *CAUSE-PA* that the Commission's determination on CAP shopping must be based on substantial evidence. TURN *et al.* contended that it would not be appropriate for the Commission to enter an order regarding PECO's CAP shopping program without an adequate evidentiary basis on a closed record in PECO's DSP III proceeding. *Id.* at 16.

Finally, TURN *et al.* proposed that PECO be required to collect and maintain, at a minimum, the following data regarding CAP shopping in its service territory:

- The number of CAP customers shopping,
- The rates CAP customers pay for generation service,
- The portion of the aggregate CAP credit amount paid for by residential customers,
- The savings to CAP customers and non-CAP customers generated by EGS rates below PECO's PTC,

- The number of CAP customers seeking to enter contracts with competitive suppliers offering prices above PECO’s PTC (or that do not comply with the terms and conditions of PECO’s CAP-SOP), and the terms of such offers.

Id. at 35. TURN *et al.* stated that “[a]ll of the foregoing data should be collected and maintained by customer address, in order to be able to determine the extent to which EGSs are serving the diverse communities within PECO’s service territory.” *Id.*

4. I&E’s Position

I&E asserted that the Commission has the authority to impose shopping restrictions on CAP customers based on the Choice Act, the Commission’s Regulations governing Universal Service Programs,¹⁴ and the Commonwealth Court’s decision in *CAUSE-PA*. I&E M.B. at 8-11. However, I&E stated that there is no direct evidence in this proceeding that PECO’s customers have been harmed by CAP shopping because CAP customers have not yet been permitted to shop in PECO’s service territory. *Id.* at 7. Therefore, I&E opined that “the Commission would likely find an insufficient amount of evidence to place further restrictions on CAP shopping beyond what has been implemented as a result of PECO’s DSP II proceedings.” *Id.* at 12. I&E urged the Commission to initiate a state-wide collaborative open to all interested stakeholders, or a new rulemaking proceeding to address CAP shopping issues throughout the Commonwealth. *Id.* at 13-14.

5. RESA’s Position

RESA asserted that the CAP shopping restrictions proposed in this proceeding must be rejected. RESA contended that the ability of CAP customers to shop in PECO’s service territory has already been fully addressed in proceedings under

¹⁴ See 52 Pa. Code §§ 54.71 – 54.78.

PECO's DSP II docket and by the Commonwealth Court in *CAUSE-PA*. Thus, RESA argued that reasonable restrictions on CAP shopping have already been determined and there is no reason to adopt the further restrictions proposed in this proceeding, or to delay the implementation of CAP shopping until June 1, 2017. RESA M.B. at 9-11. RESA opined that the proponents of more restricted CAP shopping in this proceeding have ignored the Commonwealth Court's determination that "bending" competition to impose rule restrictions can only be done upon a showing of substantial reasons why there are no reasonable alternatives to doing so. RESA M.B. at 13; R.B. at 3 (citing *CAUSE-PA* at 1104, 1106). RESA argued that the CAP shopping plan litigated in prior proceedings represents a reasonable alternative to the restrictions proposed in the instant proceeding, and that the proponents of those restrictions "provide no legitimate basis to upend the Commonwealth Court's decision that a price ceiling would be anti-competitive and limit the choices available to PECO CAP participants." RESA R.B. at 7-8 (footnote omitted). Moreover, RESA contended that the CAP shopping restrictions proposed in this proceeding are significantly more onerous than the price ceiling rejected by the Commonwealth Court in ruling that such a price ceiling would be anti-competitive and would restrict shopping choices available to PECO's CAP customers. RESA R.B. at 8-9 (citing *CAUSE-PA* at 1107-1109).

RESA also asserted that there is no evidence in this proceeding regarding how PECO's CAP customers have been harmed by allowing them to shop. RESA contended that the data offered from other utilities is not relevant to this proceeding, because the CAP programs and market structure in each EDC's service territory are unique. RESA M.B. at 14. Moreover, RESA argued that the data from other utilities cited in this proceeding reflect conditions at a certain point in time rather than over the entire term of a contract between a CAP customer and an EGS. *Id.* at 14-15.

RESA also contended that requiring EGSs to provide a guaranteed 7% discount off the PTC to serve CAP customers, as well as requiring them to pay the \$30

SOP referral fee, would serve as a disincentive for EGSs to serve CAP customers. Such a disincentive would result in CAP customers having no shopping opportunities, leaving them with only the default service rate, according to RESA. RESA M.B. at 17-19. Furthermore, RESA argued that if no EGSs participate in the proposed CAP-SOP, then the costs of implementing the program would not be adequately recovered through the referral fee, and such costs would then be passed on to all customers and all EGSs through PECO's Purchase of Receivables program. RESA R.B. at 10-11.

6. PECO's Position

PECO objected to the assertions of CAUSE-PA, the OCA, and TURN *et al.* that the ability of PECO's CAP customers to shop must be addressed in this proceeding through the adoption of CAUSE-PA's proposed CAP-SOP. PECO argued that the Commission will consider the CAP shopping issue when it addresses the Company's September 2016 CAP Rule Change Filing, which it filed under its DSP II docket. PECO asserted that the September 2016 CAP Rule Change Filing is consistent with the *PECO DSP II January 2014 Order* and the *May 2016 Secretarial Letter*, and therefore, it would not be appropriate for the Commission to consider the proposed CAP-SOP in this proceeding. PECO M.B. at 9; R.B. at 3. PECO also disagreed with the contention that the *May 2016 Secretarial Letter* envisioned that the Commission may consider the CAP shopping issue in PECO's DSP IV proceeding. PECO R.B. at 6. PECO opined that the appropriate time for the Commission to consider any modifications to the Company's proposed revised CAP shopping plan will be after data is available regarding the shopping experience of CAP customers under that revised plan. PECO M.B. at 9.

In addition, PECO dismissed TURN *et al.*'s concern that its due process rights will be violated if the Commission proceeds with the Company's CAP rule revision in DSP III. PECO noted that the *May 2016 Secretarial Letter* stated that PECO's filing would be subject to public comment, and that nothing in the *May 2016*

Secretarial Letter suggests that TURN *et al.*'s ability to provide materials for the Commission's consideration would be limited. PECO also asserted that TURN *et al.* did not explain how its decision not to intervene in the DSP III proceeding should require the Commission to defer implementation of the *CAUSE-PA* decision, or take additional steps to ensure that TURN *et al.* has rights to appeal orders from DSP III after it chose not to participate in that proceeding. PECO R.B. at 7.

Finally, PECO objected to TURN *et al.*'s suggestion that PECO be required to compile additional categories of data on CAP shopping beyond that which it intends to collect in consultation with OCMO, consistent with the *PECO DSP II January 2014 Order* and the *May 2016 Secretarial Letter*. PECO asserted that, given the procedures the Commission has already established for review of its data collection plan and the ability of TURN *et al.* and others to comment on the PECO's September 2016 CAP Rule Change Filing, there is no reason for a separate and potentially inconsistent data collection directive in this proceeding. PECO R.B. at 7-8.

C. ALJ's Recommendation

The ALJ found that CAUSE-PA, the OCA and TURN *et al.* made valid points regarding CAP Shopping. However, the ALJ noted that PECO did not submit a CAP Shopping Plan in this proceeding, but rather, was filing its plan in another proceeding based on the *May 2016 Secretarial Letter*. The ALJ asserted that it is important that PECO be allowed to present its plan before a ruling is made, and expressed concern that if she ruled on the proposals submitted in this proceeding, it might conflict with a ruling in the other proceeding. Accordingly, the ALJ recommended that PECO's proposal to file its plan in a separate proceeding be approved, and declined to address the CAP shopping issue in this proceeding. R.D. at 57-58.

D. Exceptions and Replies

1. CAUSE/TURN's Exceptions

In their first Exception, CAUSE/TURN object to the ALJ's refusal to act on CAUSE-PA's proposed CAP-SOP in this proceeding, and her recommendation that the matter of CAP shopping be referred to a different proceeding. CAUSE/TURN complain that, after they expended a considerable amount of time and resources to present evidence and brief the issue of CAP shopping in this proceeding, the ALJ recommended that the matter be referred to a closed docket for PECO's soon-to-expire DSP III, where it appears that the Commission may limit participation to unverified comments that will not be subject to cross examination. CAUSE/TURN Exc. at 8. CAUSE/TURN assert that if the Commission does not rule on CAP shopping in the instant proceeding, they will be deprived of due process because they will be not be given the ability to pursue a rule or order, to present evidence, and to obtain a decision based on current facts and circumstances. According to CAUSE/TURN, the "valid points" about CAP shopping, which the ALJ found were raised by CAUSE-PA, the OCA and TURN *et al.*, must be considered in this proceeding, where a record has been fully developed, the Parties have thoroughly engaged in an on-the-record proceeding, and the matter was properly presented to the Commission for a decision. *Id.* at 10.

CAUSE/TURN opine that the fact that PECO did not submit a CAP shopping plan in this proceeding should not preclude consideration of their own CAP shopping proposals. CAUSE/TURN assert that PECO had ample time and opportunity to present a CAP shopping plan in this proceeding, but chose not to do so. *Id.* CAUSE/TURN argue that the applicable standards of review clearly contemplate that non-utility parties are entitled to raise proposals in litigated proceedings, and that "[t]here is no legal basis for the [Commission] to conclude that, in the context of a PECO's DSP IV proceeding, and without any objection or other articulated basis, a proponent of a rule

or order may simply be disregarded.” *Id.* at 11 (citing 66 Pa. C.S. § 332(a)).

CAUSE/TURN contend that they are entitled to a ruling on the merits of their CAP shopping proposals and consideration of the evidence. CAUSE/TURN Exc. at 11.

CAUSE/TURN submit that, at a minimum, if the Commission is going to consider the issue of CAP shopping in PECO’s DSP III, the record of the instant proceeding must be transferred and considered on the record in the DSP III proceeding, and the parties to this proceeding must be permitted to intervene. *Id.* at 11-12.

CAUSE/TURN also disagree with the ALJ’s determination that a ruling on the CAP shopping proposals offered in this proceeding may interfere with the Commission’s ruling in the alternate proceeding. CAUSE/TURN contend that a ruling relating to PECO’s DSP III will not interfere with a ruling in the current DSP IV because each successive DSP proceeding is based on the facts and circumstances applicable at the time of the plan’s filing, and changes implemented in DSP IV will not conflict with approved provisions in DSP III program, which is effective for a different period. According to CAUSE/TURN, asserting that a Commission order in a successive, subsequently submitted DSP proceeding could not modify aspects of a previously issued order in a prior DSP proceeding would result in a stagnant and unchanging DSP, which would undermine the purpose of periodic plan review. *Id.* at 12.

In their second Exception, CAUSE/TURN contend that the ALJ’s refusal to rule on CAP shopping in this proceeding was not only procedurally defective, but also ignored the substantial evidence presented in support of CAUSE-PA’s CAP-SOP proposal to address the substantial harm that will occur to both CAP customers and non-CAP residential ratepayers if the Commission fails to require implementation of reasonable price protections for CAP customers who shop. CAUSE/TURN assert that, pursuant to the Choice Act, the Commission has an obligation to ensure that Universal Services such as CAP are appropriately funded to protect the affordability of electric service for low income customers, and to ensure that Universal Services are provided in a

cost-effective manner. CAUSE/TURN Exc. at 13 (citing 66 Pa. C.S. §§ 2802(10) and (17); 2803; 2804(9); and 52 Pa. Code § 69.265). CAUSE/TURN further assert that the Commonwealth Court held that in fulfilling these duties, the Commission has the legal authority to “bend competition” and impose rules to restrict CAP customer shopping in order to protect CAP customers and residential ratepayers from financial harm. CAUSE/TURN Exc. at 13 (citing *CAUSE-PA* at 1101, 1103-04).

According to CAUSE/TURN, the record in this proceeding shows that harm is occurring to CAP customers and residential ratepayers in every service territory where CAP shopping is allowed, including PPL’s service territory, where the CAP program has suffered a net harm of \$2,743,872 every year for nearly four years. When extrapolated over time, unrestricted CAP shopping in PPL’s service territory has cost residential ratepayers a net amount of \$10.5 million in additional program costs, according to CAUSE/TURN. CAUSE/TURN Exc. at 14 (citing *CAUSE-PA M.B.* at 27-30; *TURN et al. M.B.* at 20-23). CAUSE/TURN further aver that substantially similar data was produced in the FirstEnergy Company Service territories, which show that as of November 2015, more than 77% of Met-Ed’s CAP customers, more than 50% of Penelec’s customers, and more than 65% of West Penn’s CAP customers who are shopping are paying more than the PTC. CAUSE/TURN Exc. at 14 (citing *CAUSE-PA MB* at 29; *TURN et al. MB* at 22-23). CAUSE/TURN submit that there is no record evidence that the harm will be any different in PECO’s service territory than it is in the PPL and FirstEnergy service territories. CAUSE/TURN Exc. at 14.

CAUSE/TURN contend that it is critical that the Commission approve CAUSE-PA’s proposed CAP-SOP for inclusion in PECO’s DSP IV, “[g]iven the substantial and un rebutted evidence of harm to ratepayers as a result of unrestricted CAP shopping.” *Id.* According to CAUSE/TURN, waiting for harm to befall PECO’s CAP customers and non-CAP ratepayers is not an acceptable option. CAUSE/TURN assert that no other party to this proceeding offered a substantial argument against the CAP-

SOP that would outweigh CAUSE/TURN's evidence of the harm that could result if the proposal is not adopted. CAUSE/TURN submit that RESA's assertions that no suppliers will participate in the CAP-SOP, and that the CAP-SOP would be too hard to implement, are speculative, and are not supported by any evidence. *Id.* at 15. CAUSE/TURN conclude that "there is ample evidence to support the necessity and the reasonableness of the CAP-SOP and, as such, the proposal has met the evidentiary burden applicable in this case and should be approved by the Commission for inclusion in PECO's DSP IV." *Id.* at 16.

2. OCA's Exceptions

In its first Exception, the OCA asserts that the ALJ erred in recommending that the CAP shopping issue be deferred to a future proceeding. The OSA asserts that new evidence regarding the shopping experience of CAP customers in the PPL and FirstEnergy Companies service territories was presented in this proceeding that was not available in prior proceedings. According to the OCA, it is not reasonable to defer action on CAP shopping protections applicable to PECO's DSP IV to a proceeding addressing DSP II and DSP III when a full record and a reasonable plan have been presented in this proceeding. OCA Exc. at 5.

The OCA contends that the fact that PECO did not propose a specific CAP shopping plan in this proceeding does not represent a procedural bar to addressing the CAP shopping issue herein as the ALJ concluded. The OCA opines that the *May 2016 Secretarial Letter* left open the opportunity for parties to address CAP shopping for PECO's DSP IV and should not be interpreted as prohibiting the Commission from addressing the issue on a going-forward basis. *Id.* at 6. Moreover, the OCA asserts that the issue of CAP shopping has been addressed this year in the 2017 DSP proceedings of PPL and the FirstEnergy Companies. *Id.* at 6-7 (citing *PPL DSP IV, FirstEnergy DSP*). The OCA submits that a full and complete record regarding the need for additional CAP

shopping protections has been developed in this proceeding and requests that the Commission address the proposed CAP shopping proposal herein. OCA Exc. at 7.

In its second Exception, the OCA contends that the ALJ erred by not finding that CAP shopping protections are necessary for PECO's upcoming DSP IV period. The OCA points to testimony offered by CAUSE-PA witness Harry Geller that CAP customers are low-income, economically vulnerable customers who require a discounted CAP rate, subsidized by all other non-CAP ratepayers, in order to be able to afford essential utility service. OCA Exc. at 8 (citing CAUSE-PA St. 1 at 6, 15-17, 22-24, 30; CAUSE-PA M.B. at 18-20; TURN *et al.* M.B. at 18-19). The OCA further contends that CAUSE-PA identified significant harms to both CAP customers and non-CAP residential ratepayers relating to unrestricted CAP shopping in the service territories of PPL and the FirstEnergy Companies. According to the OCA:

. . . Mr. Geller demonstrated that in 2015, an average of 46% of PPL's CAP shopping customers paid more than the Price to Compare (PTC). CAUSE-PA St. 1 at 27. In addition, for every month from January 2012 to February 2016, on average, at least 42% of PPL's CAP Shopping customers paid more than the PTC, and in six of those months, on average, 88% to 99% of PPL's CAP shopping customers paid more than the PTC. CAUSE-PA St. 1 at 27.

OCA Exc. at 9. The OCA also notes the following additional testimony of Mr. Geller relating to CAP shopping in PPL's service territory:

The data also shows that those customers who paid more than the price to compare paid significantly more, as compared to the savings achieved by customers who paid less than the price to compare. In the month in which CAP customers who shopped paid the highest percentage more than the price to compare, they paid on average 101% more per kWh. But in the month when CAP customers who shopped achieved the

greatest savings, they paid only 14% less than the price to compare.

OCA Exc. at 9 (quoting CAUSE-PA St. No. 1 at 28).

In addition, the OCA argues that the amount paid by non-CAP ratepayers—referred to as the CAP Shortfall—will increase when the customer is charged a price by an EGS that is higher than PECO’s PTC. The OCA points to the testimony of Mr. Geller that PPL’s non-CAP residential customers have annually paid a net \$2.74 million more for the CAP program due to CAP shopping. OCA Exc. at 9-10 (citing CAUSE-PA St. 1 at 29). The OCA also contends that the experiences of the FirstEnergy Companies’ CAP customers have been consistent with those of PPL, quoting Mr. Geller’s testimony that “more than 77% of Met-Ed’s CAP customers, more than 50% of Penelec’s CAP customers, and more than 65% of West Penn’s CAP customers who are shopping are paying a price higher than the price to compare.” OCA Exc. at 10 (citing CAUSE-PA St. No. 1 at 29).

The OCA concludes that the experiences of the PPL and FirstEnergy Companies’ customers demonstrate a clear need for additional protections to be provided for PECO’s CAP customers. According to the OCA, the CAP-SOP is a reasonable solution that will allow CAP customers to access the retail choice market while being protected from the potential and realized harms that have occurred in PPL’s and FirstEnergy’s service territories. Thus, the OCA maintains that the ALJ erred in not recommending that CAUSE PA’s CAP-SOP proposal be implemented as part of PECO’s DSP IV. OCA Exc. at 10.

3. RESA's Replies to CAUSE/TURN's and the OCA's Exceptions

In its Replies to the Exceptions of CAUSE/TURN and the OCA, RESA first challenges CAUSE/TURN's contention that they will be deprived of due process if the Commission does not rule on the CAP shopping issue based on relevant and current data presented in this proceeding. RESA contends that there is no current data on the record in this proceeding regarding shopping for PECO's CAP customers because those customers have not yet been permitted to shop. RESA R. Exc. at 8-9. RESA criticizes CAUSE/TURN's reliance on data from other EDCs' service territories, stating that it is not instructive for PECO, and is not sufficient to satisfy the legal burden, as established by the Commonwealth Court, that must be met before restrictions can be placed on the right of CAP customers to shop. According to RESA, this legal burden requires that such restrictions can only be considered upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restrictions on competition. *Id.* at 9 (citing *CAUSE-PA* at 1104, 1106). RESA further asserts that even if this legal threshold is met, 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. RESA R. Exc. at 9 (citing *CAUSE-PA* at 1107-1108). RESA concludes that the proponents of CAP shopping restrictions in this proceeding have satisfied neither their initial legal burden nor the burden that follows if the initial threshold is met. RESA R. Exc. at 9.

RESA also dismisses CAUSE/TURN's contention that they will be precluded from providing input into PECO's September 2016 CAP Rule Change Filing filed under the DSP II docket because that docket is now closed. RESA points out that the *May 2016 Secretarial Letter* specifically directed that PECO serve its CAP shopping rule revision on the parties in both its current DSP III and Universal Service and Energy Conservation Plan dockets, and that the filing will be subject to public comment. RESA R. Exc. at 10 (citing *May 2016 Secretarial Letter* at 2). Thus, RESA asserts that the

Commission clearly intended to 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.” RESA R. Exc. at 10. RESA also states that PECO does not lose the right to decide how to implement a CAP shopping plan in its service territory because it did not submit a plan in this proceeding, as CAUSE/TURN appeared to suggest. *Id.*

Finally, RESA contends that, rather than meeting the clear legal burdens necessary to prevail in their attempt to implement restricted CAP shopping in PECO’s service territory, CAUSE/TURN and the OCA focus on an analysis of data from non-PECO service territories, and criticize PECO for not submitting a CAP shopping plan in this proceeding. RESA further contends that CAUSE/TURN and the OCA attempt to support their positions by criticizing RESA for presenting substantial evidence showing that the proposed CAP-SOP would adversely affect available choices for CAP customers by discouraging EGSs from participating in the proposed program. RESA R. Exc. at 11-12. RESA opines that “[t]he ALJ’s decision to not be persuaded by these smoke and mirror tactics is sound,” and concludes that the ALJ was correct to recommend that the issue not be addressed in this proceeding. *Id.* at 12.

4. PECO’s Replies to CAUSE/TURN’s and OCA’s Exceptions

In its Replies to the Exceptions of CAUSE/TURN and the OCA, PECO criticizes the arguments of these Parties that they are entitled to a decision on the merits of the CAP-SOP proposal because they developed an evidentiary record that allegedly supports it. PECO contends that these Parties’ decision to litigate CAP shopping issues in this proceeding does not justify deviating from the procedure already established in the *May 2016 Secretarial Letter*. PECO R. Exc. at 5. Moreover, PECO argues that the data presented by these Parties from the default service proceedings of other EDCs is not relevant in this proceeding, because PECO is subject to an express Commission directive

to file a CAP rule revision in another proceeding. PECO asserts that the ALJ correctly concluded that considering CAP shopping issues in two separate proceedings would create the potential for inconsistent decisions. *Id.* at 5-6.

PECO also dismisses the argument that the due process rights of CAUSE/TURN will be violated if the Commission adopts the ALJ's recommendation to defer the CAP shopping issue to another proceeding. Like RESA, PECO points out that its 2016 CAP Rule Change Filing, submitted pursuant to the *May 2016 Secretarial Letter*, will be subject to public comment, and interested parties will be allowed to submit comments even if they did not participate in PECO's DSP III proceeding. PECO R. Exc. at 6 (citing *May 2016 Secretarial Letter* at 2). Thus, PECO contends that the ability of the Parties in this proceeding to present current data and other materials for the Commission's consideration in the alternate proceeding will not be foreclosed. PECO R. Exc. at 6.

PECO also disagrees with the OCA's assertion that the *May 2016 Secretarial Letter* left open the opportunity for parties to address CAP shopping in the DSP IV proceeding. PECO argues that the *May 2016 Secretarial Letter's* reference to the ability of parties to raise issues in a "future proceeding," on which the OCA relies for its assertion, did not relate to all conceivable CAP shopping issues. Rather, PECO asserts that the only issues comprehended by the "future proceeding" referenced in the *May 2016 Secretarial Letter* were those relating to termination/cancellation fees. Thus, PECO states that the *May 2016 Secretarial Letter* was not an invitation for submitting alternative CAP shopping proposals. PECO R. Exc. at 6-7 (citing *May 2016 Secretarial Letter* at 2, n.2). Moreover, PECO argues that its DSP IV docket cannot reasonably be interpreted as a "future proceeding" because PECO filed its DSP IV Petition before the *May 2016 Secretarial Letter* was issued, and the Commission has not yet approved the Company's 2016 CAP Rule Change Filing. PECO R. Exc. at 7.

Finally, PECO argues that the ALJ did not fail to consider the concerns of CAUSE/TURN and the OCA, as evidenced by the ALJ's assertion that these parties raised "valid points" regarding CAP shopping. PECO R. Exc. at 7 (citing R.D. at 57). However, PECO avers that the ALJ did not err by rejecting the CAP-SOP proposal, because the price ceiling imposed under that proposal is inconsistent with the Commonwealth Court's decision in *CAUSE-PA*. PECO contends that the argument for price restrictions on CAP shopping was already rejected by the Commission with the affirmance of the Commonwealth Court. PECO R. Exc. at 7 (citing *CAUSE-PA* at 1104-1105, 1107). Thus, PECO argues that it would not be appropriate for the Commission to consider changes to PECO's CAP shopping program until after CAP shopping data from PECO's own service territory are available, pursuant to the data collection efforts required by the *May 2016 Secretarial Letter*. PECO R. Exc. at 7-8.

5. Disposition

Based upon our review and analysis of the evidence of record, the Exceptions and Replies thereto, and applicable law, we will adopt the ALJ's recommendation to defer the issue of CAP shopping in PECO's service territory to the proceeding under PECO's DSP II proceeding at Docket No. P-2012-2283641, wherein we intend to fully address the matter when we consider PECO's 2016 CAP Rule Change Filing.

As set forth above, PECO submitted its 2016 CAP Rule Change Filing pursuant to our *May 2016 Secretarial Letter*, in which we directed PECO to submit a proposed rule revision to its CAP Shopping Plan. That directive was issued pursuant to the Commonwealth Court's Order in *CAUSE-PA*, which, *inter alia*, remanded to the Commission the CAP shopping issue that was addressed in the Company's DSP II proceeding, and instructed the Commission to approve a rule revision to the PECO CAP Shopping Plan that would prohibit CAP participants from entering into any contract with

an EGS that imposes early cancellation/termination fees. Because PECO's 2016 CAP Rule Change Filing is still pending before this Commission, we do not believe it appropriate for us to decide issues relating to the ability of PECO's CAP customers to shop in this DSP IV proceeding, particularly as we are awaiting the receipt of comments from the parties in the DSP II proceeding. Rather, we intend to fully address the matter of CAP shopping in PECO's service territory in the context of the remanded proceeding under PECO's DSP II docket, wherein we will consider PECO's 2016 CAP Rule Change Filing.

Although we decline, at this time, to address the CAP shopping issue and the proposals set forth herein, we wish to make clear that we have every intention of fully considering the positions of all interested parties, including all parties to this proceeding, regarding PECO's 2016 CAP Rule Change Filing and the ability of PECO's CAP customers to shop for competitive generation supply. As set forth in the *May 2016 Secretarial Letter* and the *November 2016 Secretarial Letter*, PECO's 2016 CAP Rule Change Filing is subject to public comment. CAUSE/TURN and all other interested stakeholders will be free to present their positions on PECO's CAP shopping plan through the submission of comments to the 2016 CAP Rule Change Filing at Docket No. P-2012-2283641. In addition, we will take official notice of the documents constituting the record in this proceeding when we consider PECO's 2016 CAP Rule Change Filing in the proceeding at Docket No. P-2012-2283641, pursuant to 52 Pa. Code § 5.406 relating to public documents, 52 Pa. Code § 5.407 relating to records of other proceedings, and 52 Pa. Code § 5.408 relating to official and judicial notice of fact. We find that this process will address the due process concerns of CAUSE/TURN.

Consistent with the above discussion, we shall adopt the ALJ's recommendation on this issue and deny the Exceptions of the OCA. We shall also grant, in part, the Exceptions of CAUSE/TURN, to the extent their Exceptions request that we incorporate the record developed in this proceeding into the DSP II proceeding at Docket

No. P-2012-2283641, and permit TURN *et al.* to participate in that proceeding. In all other respects, the Exceptions of CAUSE/TURN on this issue shall be denied.

VII. Conclusion

Based on the foregoing, we shall deny the Exceptions of Noble and the OCA, and grant, in part, and deny, in part the Joint Exceptions of CAUSE/TURN, consistent with this Opinion and Order. We shall also adopt the ALJ's Recommended Decision, consistent with this Opinion and Order; **THEREFORE,**

VIII. Order

IT IS ORDERED:

1. That the Exceptions of the Office of Consumer Advocate filed on October 14, 2016, to the Recommended Decision of Administrative Law Judge Cynthia Williams Fordham, are denied, consistent with this Opinion and Order.
2. That the Exceptions of Noble Americas Energy Solutions LLC filed on October 14, 2016, to the Recommended Decision of Administrative Law Judge Cynthia Williams Fordham, are denied, consistent with this Opinion and Order.
3. That the Joint Exceptions of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania and the Tenant Union Representative Network and the Action Alliance of Senior Citizens of Greater Philadelphia filed on October 14, 2016, to the Recommended Decision of Administrative Law Judge Cynthia Williams Fordham, are granted, in part, and denied, in part, consistent with this Opinion and Order.
4. That the Recommended Decision of Administrative Law Judge Cynthia Williams Fordham, issued on October 4, 2016, is adopted, consistent with this Opinion and Order.
5. That the Joint Petition for Partial Settlement filed in this proceeding on July 28, 2016, by PECO Energy Company, the Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate, the Office of Small Business Advocate, the Philadelphia Area Industrial Energy Users Group, and the Retail Energy Supply Association, is approved without modification.

6. That the Objections of Noble Americas Energy Solutions LLC to the Joint Petition for Partial Settlement, filed on August 11, 2016, are denied, consistent with this Opinion and Order.

7. That the Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2017 through May 31, 2021 is approved as modified by the Joint Petition for Partial Settlement.

8. That PECO Energy Company's DSP IV program, as modified by the Joint Petition for Partial Settlement and approved herein, contains all of the elements of a default service plan required by the Public Utility Code, the Commission's Default Service Regulations (52 Pa. Code §§ 54.181 – 54.190), and the Commission's Policy Statement on Default Service (52 Pa. Code §§ 69.1801-69.1817), including procurement plan, implementation plan, contingency plan, default service rate design, and associated procurement documents and agreements for default service supply for all PECO Energy Company customers who do not take generation service from an alternative electric generation supplier or who contract for energy with an EGS that is not delivered.

9. That PECO Energy Company's DSP IV program, as modified by the Joint Petition for Partial Settlement and approved herein, is in compliance with 66 Pa. C.S. § 2807(e)(3.7) in that: (1) it includes prudent steps necessary to negotiate favorable generation supply contracts; (2) it includes prudent steps necessary to obtain least cost generation supply contracts on a long-term, short-term and spot market basis; and (3) neither PECO Energy Company nor its affiliated interests have withheld from the market any generation supply in a manner that violates Federal law.

10. That PECO Energy Company's request for a waiver of the rate design provisions of 52 Pa. Code § 54.187 is granted to the extent necessary to permit

PECO Energy Company to (1) procure generation for three procurement classes; (2) implement quarterly filing of hourly-priced default service rates; and (3) implement semi-annual reconciliation of the over/under collection component of the GSA for all default service customers; as set forth in the Joint Petition for Partial Settlement.

11. That the *pro forma* Default Service Program Supply Master Agreement set forth in PECO Energy Company's Exhibit JJM-3 is approved as an affiliated interest agreement pursuant to 66 Pa. C.S. § 2102.

12. That NERA Economic Consulting, Inc. is approved to continue as the independent third-party evaluator for PECO Energy Company's default supply procurements.

13. That PECO Energy Company's currently-effective Standard Offer Program, including the associated cost recovery mechanism approved in PECO's prior default service proceedings, is permitted to continue, subject to the applicable provisions set forth in the Joint Petition for Partial Settlement.

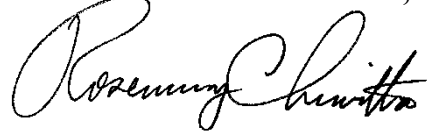
14. That the *pro forma* tariff provisions set forth in PECO Energy Company's Exhibits ABC-2 and ABC-3, as clarified in the Joint Petition for Partial Settlement, are approved to become effective as of June 1, 2017, subject to resolution of PECO Energy Company's plan to enable Customer Assistance Program customers to shop for electric generation supply.

15. That all issues relating to PECO Energy Company's plan to permit Customer Assistance Program customers to shop for electric generation supply are deferred to the proceeding at Docket No. P-2012-2283641, consistent with this Opinion and Order.

16. That any directive, requirement, disposition, or the like contained in the body of this Opinion and Order, which is not the subject of an individual Ordering Paragraph, shall have the full force and effect as if fully contained in this part.

17. That the proceeding at Docket No. P-2016-2534980 be marked closed following a decision by this Commission on the issue of PECO Energy Company's plan to permit Customer Assistance Program customers to shop for electric generation supply.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta", written in a cursive style.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: December 8, 2016

ORDER ENTERED: December 8, 2016