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May 23, 2018

**Via Electronic Filing**

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

Re: Pennsylvania Public Utility Commission v. PECO Energy Company,  
Docket Nos. R-2018-3000164

Dear Secretary Chiavetta:

Enclosed for electronic filing please find NRG Energy, Inc.'s ("NRG") Reply to PECO Energy Company's Answer to Petition to Intervene with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury

KOM/lww  
Enclosure

cc: Hon. Christopher P. Pell w/enc.  
Hon. F. Joseph Brady w/enc.  
Cert. of Service w/enc.

**CERTIFICATE OF SERVICE**

I hereby certify that this day I served a copy of NRG Energy's Reply to PECO Energy's Answer to Petition to Intervene upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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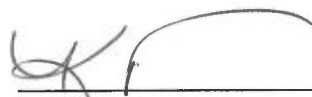
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Dated: May 23, 2018



Karen O. Moury, Esq.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission

v.

PECO Energy Company

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R-2018-3000164

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**REPLY OF NRG ENERGY, INC.  
TO PECO ENERGY COMPANY'S ANSWER  
TO PETITION TO INTERVENE**

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Pursuant to the Prehearing Order dated May 10, 2018, NRG Energy, Inc. (“NRG”) files this Reply to the Answer of PECO Energy Company (“PECO”) filed on May 16, 2018 opposing NRG’s Petition to Intervene. For the reasons stated more fully below, applicable law and precedent demonstrate that NRG has fully satisfied the intervention standards set forth in the regulations of the Pennsylvania Public Utility Commission (“Commission”) at 52 Pa. Code § 5.72. With four affiliate companies actively participating in the retail electric market in Pennsylvania and serving retail customers in PECO’s service territory, NRG has a substantial and direct interest in this proceeding. Further, NRG’s positions cannot be effectively represented by any other parties, including the Retail Energy Supply Association (“RESA”), which does not speak for individual members and whose positions cannot be controlled by NRG. Moreover, PECO has not presented any valid basis for its efforts to unduly limit issues that NRG may pursue and to restrict the subject matter of discovery that NRG may serve. As any concerns about the relevance of issues pursued by NRG through discovery or testimony may be adequately addressed at such time as they are raised, no justification exists to support PECO’s preemptive tactics. NRG should be granted intervention status without restriction.

## I. BACKGROUND

On March 29, 2018, PECO filed a request for a base rate increase of approximately \$82 million. By Order entered on April 19, 2018, the Commission suspended the base rate filing for investigation until December 28, 2018.

By Prehearing Conference Notice dated April 20, 2018, the Commission scheduled a prehearing conference for May 8, 2018. Deputy Chief Administrative Law Judge Christopher P. Pell and Administrative Law Judge F. Joseph Brady (“ALJs”) issued a Prehearing Order dated April 20, 2018 directing the filing of prehearing memoranda no later than 12:00 p.m. on May 4, 2018.

NRG filed a Petition to Intervene and a Prehearing Memorandum prior to 12:00 p.m. on May 4, 2018. NRG also participated in the prehearing conference on May 8, 2018.

At the prehearing conference, PECO requested an opportunity to answer NRG’s Petition to Intervene. By Prehearing Order dated May 10, 2018 the presiding officers directed that PECO’s written answer/objection to NRG’s Petition to Intervene be filed by May 16, 2018 and further directed that NRG’s response be filed by May 24, 2018.

Consistent with the May 10, 2018 Prehearing Order, PECO filed an Answer to the Petition to Intervene of NRG. This Reply is also timely filed in accordance with that Prehearing Order.

## II. RESPONSE

### A. NRG Meets the Legal Standards for Intervention

As a threshold matter, it is significant that the right to participate in proceedings before an administrative agency is primarily within the discretion of the agency.<sup>1</sup> This discretion is exercised on a case-by-case basis, and given the quasi-judicial nature of the Commission, allows

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<sup>1</sup> See *City of Pittsburgh v. Pa. P.U.C.*, 153 Pa. Super. 983, 33 A.2d 641 (1943).

for intervention determinations that are less strict than those imposed by courts.<sup>2</sup> The Commission exercises this discretion through application of its regulations at Section 5.72 which allow intervention where a person has an “interest in the proceeding which may be directly affected, and which is not adequately represented by existing participants, and as to which the petitioner may be bound by the action of the Commission.”<sup>3</sup> Intervention is also permitted where participation of the person may be in the public interest.<sup>4</sup> A “person” includes a corporation and an association.<sup>5</sup>

NRG has four affiliate companies that are licensed by the Commission as electric generation suppliers (“EGSs”) and providing electricity or electric generation supply services to retail customers in PECO’s service territory.<sup>6</sup> As a result of these activities, NRG has a substantial and direct interest in this proceeding, through which distribution charges will be set and other PECO proposals will be examined. In particular, some of PECO’s initiatives make it difficult for NRG’s affiliate EGSs to participate in the electric retail market and significantly interfere with their abilities to present competitive and attractive offers to consumers.

NRG further submits that its participation in this proceeding is in the public interest. Through exploration of the issues that have been preliminarily identified by NRG and others that it addresses as additional information is reviewed in this proceeding, the Commission can best serve the public interest through the development of a more complete record. Further, since the

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<sup>2</sup> See *Application of Metropolitan Edison Co. for Approval to Construct an Electric Generating Unit Fueled by Natural Gas*, Docket No. A-110300, 1994 Pa. PUC LEXIS 52 (Order entered February 25, 1994) (citing *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975)).

<sup>3</sup> 52 Pa. Code § 5.72(a)(2).

<sup>4</sup> 52 Pa. Code § 5.72(a)(3).

<sup>5</sup> 52 Pa. Code § 1.8.

<sup>6</sup> *Reliant Energy Northeast LLC d/b/a NRG Home and NRG Business*, Docket No. A-2010-2192350 (December 2, 2010); *Green Mountain Energy Company*, Docket No. A-2011-2229050 (February 16, 2012); *Energy Plus Holdings LLC*, Docket No. A-2009-2139745 (January 15, 2010); *Independence Energy Group d/b/a/ Cirro Energy*, Docket No. A-2011-2262337 (October 31, 2011).

outcome of this proceeding will be binding on NRG and its affiliates serving retail customers in the PECO service territory, it is necessary for NRG to have an opportunity to raise issues arising from its review of PECO's proposals contained in the base rate filing. Accordingly, pursuant to Section 5.72 of the Commission's regulations, 52 Pa. Code § 5.72, NRG should be permitted to intervene in this proceeding.<sup>7</sup>

B. RESA Does Not Represent NRG

Notwithstanding NRG's substantial and direct interest in this proceeding, PECO requests that NRG's intervention be denied in light of RESA's participation and investigation of the identical issues presented by NRG, and NRG's membership in RESA. Alternatively, PECO contends that the ALJs should limit NRG's participation to specific issues involving (i) PECO's proposed Electric Vehicle Direct Current Fast Charger Pilot Rider; (ii) the allocation of costs between PECO's distribution and default service functions; (iii) PECO's proposed changes to net metering tariff provisions; and (iv) the Company's fulfillment of commitments made in the settlement of its 2015 electric base rate proceeding concerning the interconnection of distributed generation and other existing interconnection improvements. In addition, PECO seeks to restrict NRG's participation in this proceeding so that it may not duplicate discovery by RESA.

RESA does not represent NRG. Accordingly, NRG's membership in RESA provides no assurance that NRG's interests will be sufficiently represented through RESA's participation in this proceeding. Notably, RESA's Petition to Intervene filed on May 4, 2018 indicates that the comments expressed in the filing represent the position of RESA but may not represent the views of any particular member of the association.<sup>8</sup> Further, RESA's Petition to Intervene explains that

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<sup>7</sup> NRG fully incorporates by reference its Petition to Intervene filed on May 4, 2018, which addresses in greater detail each of the standards relied upon by the Commission in deciding whether to grant parties intervention status.

<sup>8</sup> RESA Petition to Intervene at 1, footnote 1.

the association's interests are unique from and not adequately represented by other parties that may seek to intervene, including individual EGSs, because RESA represents the interests of a diverse and broad group of EGSs in general, and not the interests of any individual member.<sup>9</sup>

As of May 18, 2018, NRG has served discovery on PECO and has identified consultants that it has engaged for this proceeding. Given its role of serving retail customers in PECO's service territory, through four affiliate EGSs, NRG is entitled to pursue its own issues, with the assistance of its consultants, and to advance its own positions without having to negotiate or collaborate with other EGSs who are members of RESA. NRG has no way of knowing whether its views on these issues will be aligned with those of RESA and has no control over whether RESA takes positions that reflect NRG's views. Also, while RESA and NRG expressed interest in pursuing the same issues as part of this proceeding, both Petitions to Intervene reserved the right to present other issues that are identified during the course of the proceeding, such as through the review of discovery responses or as a result of proposals advanced by other parties. Simply stated, given the inability of RESA to represent NRG and NRG's lack of control over positions taken by RESA during the proceeding, NRG should not be forced to rely on RESA to advance its positions through litigation and during settlement discussions.

It is noteworthy that in the recent base rate case of Philadelphia Gas Works, the presiding officers found that the participation by the Office of Consumer Advocate ("OCA") did not serve as a bar to the intervention of other consumer advocate groups since OCA's broad-based presence may not adequately accommodate the specific concerns of those other groups. Even though the parties' interests may overlap to some degree, it was noted that OCA and other consumer

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<sup>9</sup> RESA Petition to Intervene at ¶ 6.

advocates may also present different perspectives on the issues.<sup>10</sup> In the same way, RESA's broad-based presence in this proceeding will not adequately accommodate the specific issues that NRG wishes to pursue in this case or the specific positions it chooses to advance. Moreover, NRG is aware that in other utility proceedings, both RESA and multiple EGSs have intervened, including members of RESA.<sup>11</sup>

C. It Is Premature to Limit the Issues NRG May Raise

To the extent that NRG is permitted to intervene in this proceeding, PECO seeks to preemptively preclude NRG from raising issues beyond a limited subset of those identified in its Petition to Intervene. PECO's challenges are premature and should be rejected by the ALJs. PECO cites no case law in support of its position that the scope of NRG's participation in this proceeding should be so narrowly and unduly restricted, or restricted at all at this time.

Moreover, PECO has offered no valid rationale for preventing NRG from examining billing initiatives that are designed to improve PECO's relationship with its distribution customers and to strengthen its role as their "energy company." While PECO seems to be of the view that NRG's interest in this proceeding is to explore the implementation of supplier consolidated billing ("SCB"),<sup>12</sup> NRG notes that SCB appears nowhere in its Petition to Intervene or Prehearing Memorandum.<sup>13</sup> To the contrary, NRG is concerned – as explained in its Petition to Intervene – that PECO's billing initiatives, which appear to be subsidized by distribution

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<sup>10</sup> *Pa. P.U.C. v. Philadelphia Gas Works*, Docket No. R-2017-2586783 (Prehearing Order #2 dated April 7, 2017), at 7-8.

<sup>11</sup> *See, e.g., Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company*, Docket Nos. P-2017-2637855, P-2017-2637857, P-2017-2637858 and P-2017-2637866 (Prehearing Order dated January 19, 2018 and Interim Order dated February 14, 2018).

<sup>12</sup> PECO Answer at ¶ 10, pages 4-5.

<sup>13</sup> Indeed, NRG does not intend to pursue SCB in this proceeding, as it agrees that the *en banc* proceeding initiated by the Commission at Docket No. M-2018-2645254 is a preferable forum for this topic, given the importance of uniformity in the rules and a statewide solution that enables EGSs to offer SCB in all electric utility territories.



charges imposed on ratepayers, are further exacerbating the situation caused by PECO's monopoly billing status. NRG should not be prevented from examining these issues, particularly in light of the potential subsidization and their possible negative effect on the retail market.

Similarly, while NRG's Petition to Intervene refers to having an interest in PECO's "proposals to streamline the interconnection process for distributed generation technologies,"<sup>14</sup> PECO would have NRG limited in this proceeding to only considering whether the Company fulfilled its commitments made in the settlement of its 2015 electric base rate proceeding and other interconnection improvements discussed in PECO's direct testimony. Again, PECO is seeking to prematurely and unnecessarily limit the scope of NRG's participation in this proceeding without any rationale or legal basis.

To the extent that NRG serves discovery or makes proposals in testimony that PECO believes exceed the scope of a base rate proceeding, PECO is free to raise its objections at that time. However, PECO should not be permitted to effectively use an objection to NRG's intervention as a motion in limine to preclude certain issues from even being raised. The legal standard for such motions is that exclusion of certain evidence is necessary "to remove extraneous issues from the underlying proceeding, to preclude references to prejudicial matters, or to prevent encumbering the record with immaterial matters."<sup>15</sup> Here, NRG has not even propounded any discovery or proffered any testimony on the topics that PECO is seeking to have excluded.<sup>16</sup> The mere mention of an issue in a Petition to Intervene does not make it "evidence" or justify the exclusion of entire topics from discovery or testimony.

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<sup>14</sup> NRG Petition to Intervene at ¶ 10.

<sup>15</sup> *Pa. P.U.C. v. PGW*, Docket No. R-00006042 (Order #3 dated April 13, 2001), at 3, citing *Commonwealth of Pa. v. Pikur Enterprises, Inc.*, 596 A.2d 1253 (Pa. Cmwlth. 1991).

<sup>16</sup> See also *Pa. P.U.C. v. PPL Electric Utilities Corporation*, Docket No. R-2015-2469275 (Sixth Prehearing Order dated July 14, 2015) (the ALJ struck pre-served written testimony pursuant to Section 5.403 of the regulations, authorizes the exclusion of evidence that is beyond the proper scope of Commission proceedings).

The Duquesne Light Company proceeding cited in PECO's Answer does not support the notion of unnecessarily limiting NRG's participation at this phase of the proceeding.<sup>17</sup> In that case, NRG companies filed a complaint in a base rate proceeding asserting that a particular tariff provision relating to the purchase of energy from qualifying facilities was discriminatory. Importantly, NRG was not precluded from the outset of the proceeding of pursuing that complaint. Rather, after other parties had reached a settlement of the rate case, the Commission determined that NRG's tariff issues were severable from the base rate settlement and that "there simply was insufficient time to render a thorough and reasoned decision on these issues within the regulatory constraints inherent in a Section 1308(d) base rate proceeding."<sup>18</sup> In part, the Commission's rationale for severing the issue was that Duquesne had not proposed any changes to the tariff in question and that the issue raised by NRG did not have to be addressed before proposed rates could be placed into effect pursuant to the settlement. Notably, however, the Commission did not agree with Duquesne that the issues were beyond the scope of the base rate proceeding. Indeed, the Commission found that a sufficient record had been established during that proceeding to resolve NRG's issues – albeit in a separate recommended decision.<sup>19</sup> Therefore, *Duquesne* should not be relied upon to preclude NRG from raising issues that it has only generally or peripherally mentioned in a Petition to Intervene.

D. It Is Premature to Limit NRG's Discovery Rights

With respect to PECO's proposal to limit NRG's discovery rights in this proceeding in the manner described above and to discovery that does not duplicate requests propounded by

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<sup>17</sup> PECO Answer at ¶ 10, pages 5-6. *See Pa. P.U.C. v. Duquesne Light Company*, Docket No. R-2013-2372129 (Order entered April 23, 2014).

<sup>18</sup> *Duquesne* at 30.

<sup>19</sup> *Duquesne* at 29.

RESA, again PECO's challenges are premature and should be rejected by the ALJs.<sup>20</sup> Under the Commission's regulations, parties may obtain discovery regarding any matter which is relevant to the subject matter involved in the pending action. Further, information must be produced if it appears reasonably calculated to lead to the discovery of admissible evidence.<sup>21</sup> Nothing in the regulations prohibits a party from asking questions that have already been posed by another party.

Although PECO claims that it has responded to over 338 interrogatories as of May 16, 2018, none of those interrogatories were propounded by either NRG or RESA. Moreover, many of those responses referred the propounding parties to standard data request responses submitted with PECO's filing or to discovery responses previously provided to requests submitted by other parties. It is not unusual for this type of overlap to occur in a litigated matter. The simple solution is to do as PECO has done to date in this proceeding of simply referring parties to the earlier response. To the extent that NRG serves discovery requests that PECO views as being duplicative of discovery propounded by RESA, PECO also has the option of serving objections on any of the grounds set forth in the Commission's regulations.<sup>22</sup> However, the mere possibility that NRG might ask a question that PECO views as duplicative of a RESA discovery request does not support taking preemptive action now.

#### IV. CONCLUSION

WHEREFORE, NRG Energy, Inc. respectfully requests that the Pennsylvania Public Utility Commission deny PECO's Answer to NRG's Petition to Intervene and grant NRG's Petition to Intervene without restriction.

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<sup>20</sup> It is noteworthy that NRG's Petition to Intervene was timely filed and that NRG has accepted the other parties' procedural schedule and discovery modifications and has signed the stipulated protective agreement drafted by PECO. In short, NRG has done nothing to warrant imposition of the preemptive rulings proposed by PECO.

<sup>21</sup> 52 Pa. Code § 5.321(c).

<sup>22</sup> 52 Pa. Code §§ 5.342(e) and 5.361.

Respectfully submitted,



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