McNees Wallace & Nurick LLC

100 Pine Street • PO Box 1166 • Harrisburg, PA 17108-1166
Tel: 717.232.8000 • Fax: 717.237.5300

Charis Mincavage
Direct Dial: 717.237.5437
cmincavage@mcneeslaw.com

August 20, 2020

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

**VIA ELECTRONIC FILING**

**RE: Petition of PECO Energy Company for Approval of Its Default Service Program for the Period From June 1, 2021 Through May 31, 2025; Docket No. P-2020-3019290**

Dear Secretary Chiavetta:

Attached please find for filing with the Pennsylvania Public Utility Commission the Main Brief of the Philadelphia Area Industrial Energy Users Group ("PAIEUG") in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to these proceedings are being duly served via email only due to the current COVID-19 pandemic. Upon lifting of the aforementioned Emergency Order, we can provide parties with a hard copy.

Sincerely,

McNEES WALLACE & NURICK LLC

By Charis Mincavage
Charis Mincavage

Counsel to the Philadelphia Area Industrial Energy Users Group

Enclosure
c: Administrative Law Judge Eranda Vero (via E-mail)
Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of Section 1.54 (relating to service by a participant).

**VIA E-MAIL**

Kenneth M. Kulak, Esq.
Brooke E. McGlinn, Esq.
Morgan, Lewis and Bockius LLP
1701 Market Street
Philadelphia, PA 19103
ken.kulak@morganlewis.com
brooke.mcglinn@morganlewis.com

W. Craig Williams, Esq.
Anthony Gay, Esq.
Jack Garfinkle, Esq.
Exelon Business Services Company
2301 Market Street, S23-1
P.O. Box 8699
Philadelphia, PA 19101-8699
craig.williams@exeloncorp.com
anthony.gay@exeloncorp.com
jack.garfinkle@exeloncorp.com

Aron J. Beatty, Esq.
David Evrard, Esq.
Office of Consumer Advocate
555 Walnut Street, Forum Place, 5th Floor
Harrisburg, PA 17101
abeatty@paoca.org
devrard@paoca.org

Richard Kanaskie, Esq.
Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265
rkanaskie@pa.gov

Erin Fure, Esq.
Office of Small Business Advocate
Commerce Building, Suite 1102
300 North Second Street
Harrisburg, PA 17101
efure@pa.gov

Deanne M. O'Dell, Esq.
Karen O'Moury, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
dodell@eckertseamans.com
kmoury@eckertseamans.com

Elizabeth R. Marx, Esq.
John Sweet, Esq.
Ria Pereira, Esq.
PA Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@palegalaid.net

Christopher O'Hara, Esq.
PJM Interconnection
2750 Monroe Boulevard
Audubon, PA 19403-2497
christopher.ohara@pjm.com

Robert W. Ballenger, Esq.
Josie B. H. Pickens, Esq.
Joline Price, Esq.
Kintéshia Scott, Esq.
Community Legal Services Inc.
1424 Chestnut Street
Philadelphia, PA 19102
rballenger@clsphila.org
jpickens@clsphila.org
jprice@clsphila.org
kscott@clsphila.org

John F. Lushis, Jr., Esq.
Norris McLaughlin P.A.
515 West Hamilton Street, Suite 502
Allentown, PA 18101
jlushis@norris-law.com

Logan Welde, Esq.
Joseph Minott, Esq.
Clean Air Council
135 S. 19th Street, Suite 300
Philadelphia, PA 19103
lwelde@cleanair.org
joe_minott@cleanair.org

Devin McDougall, Esq.
Rebecca Barker, Esq.
Earth Justice
476 Clinton Avenue, Apt. 6F
Brooklyn, NY 11238
dmcdougall@earthjustice.org
rbarker@earthjustice.org

Kevin C. Blake, Esq.
Thomas F. Puchner, Esq.
Gregory Peterson, Esq.
Phillips Lytle LLP
201 West Third Street, Suite 205
Jamestown, NY 14701
kblake@phillipslytle.com
tpuchner@phillipslytle.com
gpeterson@phillipslytle.com

James Laskey, Esq.
Becky Merola, Esq.
Norris McLaughlin
400 Crossing Boulevard, 8th Floor
Bridgewater, NJ 08807
jlaskey@norris-law.com
becky.merola@calpinesolutions.com

Charis Mincavage

Charis Mincavage

Counsel to the Philadelphia Area Industrial Energy Users Group

Dated this 20th day of August, 2020, in Harrisburg, Pennsylvania

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---|---|---|
| Petition of PECO Energy Company | : | |
| for Approval of Its Default Service Program | : | Docket No. P-2020-3019290 |
| for the Period From June 1, 2021 Through | : | |
| May 31, 2025 | : | |

# MAIN BRIEF OF THE PHILADELPHIA AREA INDUSTRIAL ENERGY USERS GROUP

Airgas USA, LLC, an Air Liquide Company
The Boeing Company
Drexel University
Einstein Healthcare Network
GlaxoSmithKline
Kimberly-Clark Corporation
Main Line Health
Merck & Co., Inc.
Philadelphia College of Osteopathic Medicine
Saint Joseph's University
Temple University
Thomas Jefferson University
Villanova University

Charis Mincavage (I.D. No. 82039)
Adeolu A. Bakare (I.D. No. 208541)
Jo-Anne S. Thompson (I.D. No. 325956)
McNEES WALLACE & NURICK LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
717.232.8000 (p)
717.237.5300 (f)

Counsel to Philadelphia Area Industrial Energy Users Group

Dated: August 20, 2020

## TABLE OF CONTENTS

Page

# I. INTRODUCTION

On March 13, 2020, PECO Energy Company ("PECO" or the "Company") filed with the Pennsylvania Public Utility Commission ("PUC" or "Commission") a Petition for Approval of the Company's Fifth Default Service Program ("DSP V"). *Petition of PECO Energy Company for Approval of Its Default Service Program for the Period from June 1, 2021 through May 31, 2025*, Docket No. P-2020-3019290 (Mar. 13, 2020) (hereinafter, "Petition"). On April 1, 2020, the Philadelphia Area Industrial Energy Users Group ("PAIEUG")[1] filed a Petition to Intervene to the Company's Petition. A Prehearing Conference was held on May 5, 2020, before Administrative Law Judge ("ALJ") Eranda Vero.

PAIEUG received the Company's Direct Testimony on March 13, 2020. Pursuant to the procedural schedule, on June 16, 2020, PAIEUG received Direct Testimony from the following parties: the Office of Consumer Advocate ("OCA"); the Office of Small Business Advocate ("OSBA"); Sierra Club, Clean Air Council and Philadelphia Solar Energy Association (collectively, the "Environmental Stakeholders"); NRG Energy, Inc., Direct Energy Services LLC, Interstate Gas Supply, Inc. d/b/a IGS Energy, Vistra Energy Corp., Shipley Choice LLC, ENGIE Resources LLC, and WGL Energy Services, Inc. (collectively, the "Electric Supplier Coalition" or "ESC"); Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (collectively, "TURN, *et al*."); and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA").

On July 9, 2020, PAIEUG submitted Rebuttal Testimony and received Rebuttal Testimony from the following parties: PECO; OCA; OSBA; TURN, *et al*.; CAUSE-PA; and Calpine Retail Holdings, LLC ("Calpine"). On July 23, 2020, PAIEUG received Surrebuttal Testimony from the

[1] PAIEUG's compilation is listed on the cover page of this Main Brief.

Company; OCA; OSBA; the Environmental Stakeholders; the Electric Supplier Coalition; and TURN, *et al*.

Evidentiary hearings were held in this proceeding on July 30, 2020, at which time the parties informed the ALJ that a partial settlement had been achieved. On August 13, 2020, the Joint Petition for Partial Settlement ("Joint Petition") was filed noting two issues were reserved for litigation: (1) how the allocation of costs PECO incurs to implement new time-of-use ("TOU") default service rate options should be implemented; and (2) whether changes to the current assignment of responsibility for PJM Interconnection, LLC ("PJM") charges for Network Integration Transmission Service ("NITS") from all load-serving entities to PECO, as proposed by the ESC, is just, reasonable, and appropriate.

PAIEUG submits this Main Brief to respond to the Electric Supplier Coalition's unfounded proposal that PECO alter the method by which NITS costs are collected. Although PECO's DSP V filing did not propose a change in the status quo with respect to the collection of NITS charges, the Electric Supplier Coalition has proposed transferring NITS cost collection responsibility from Electric Generation Suppliers ("EGSs") to PECO for all shopping customers through a non-bypassable charge. As discussed more fully herein, ESC bears the burden of proof in this proceeding to show that a change in the status quo is justified. *See* Section II.A., *infra*. Record evidence indicates, however, that such burden has not been met, as ESC's proposal, from a legal standpoint, would contravene the terms of the Electricity Generation Customer Choice and Competition Act ("Competition Act") and disregard PUC precedent. *See* Section II.B., *infra*. Moreover, ESC has failed to present evidence indicating any significant changes have occurred since the PUC correctly declared that EGSs should continue to collect NITS charges for shopping customers on PECO's system. *See* Section II.C., *infra*. Rather, ESC's proposal would limit customer shopping options, create problems with respect to customer contracts, and give rise to the potential for double collection of NITS charges from customers. *Id*.

For these reasons, ESC's proposal must be rejected, and EGSs should continue to collect NITS charges for shopping customers on PECO's system. If, however, the PUC determines that a change should be made to the manner in which NITS costs are recovered in this proceeding, then the Commission to should consider implementing a carve-out for Large Commercial and Industrial ("Large C&I") Customers.

## II. ARGUMENT

### A. Because ESC Is Seeking to Change the Status Quo Related to NITS Collection, ESC Bears the Burden of Proof in this Proceeding.

PECO's Tariff currently provides that non-shopping customers have their NITS collected by PECO pursuant to the Company's Transmission Service Charge ("TSC") Rider. PECO Tariff Electric – Pa. PUC No. 6, Fourth Revised Page No. 43. Conversely, shopping customers on PECO's system have their NITS collected by their EGSs. Because ESC is seeking to change the status quo by having PECO collect NITS from all customers, ESC bears the burden of proof in this proceeding.

Section 332(a) of the Public Utility Code requires the following with respect to burden of proof: "the proponent of a rule or order has the burden of proof." 66 Pa. C.S. § 332(a). According to the PUC, the "party seeking a rule or order from the Commission has the burden of proof" in a proceeding. *Pa. Pub. Util. Comm'n v. Jackson Sewer Corp.*, Docket No. R-00005997, (Nov. 13, 2001), p. 5. In carrying this burden, a complainant must establish a case before an administrative tribunal using a preponderance of evidence as the requisite degree of proof. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990). The standard of preponderance of the evidence is defined as the greater weight of the evidence, in view of all of the facts and circumstances of the case. *See Se-Lin Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 n.1 (Pa. 1950).

ESC's proposal does not meet the above-described burden of proof because ESC has failed to show by a preponderance of evidence that a change in the status quo with respect to the collection of NITS costs is justifiable. Rather, as discussed more fully in Section II B. - C., *infra*, ESC's proposal would be in conflict with both the Competition Act and PUC precedent, create substantial risk that customers with existing EGS contracts could be overcharged for NITS, and eliminate market opportunities, especially for Large C&I customers. Because ESC fails to meet its burden of proof by not providing evidence required to overcome legal precedent and logistical challenges outlined herein, the status quo of collection of NITS costs by EGSs on PECO's system must be retained.

### B. The Competition Act, Commission Precedent, and PUC Regulations Mandate that EGSs Collect NITS Costs From Shopping Customers.

In 1996, Pennsylvania adopted the Competition Act to encourage more affordable, safe, and reliable electric service, as well as promote business and industry throughout the Commonwealth. *See generally* 66 Pa. C.S. § 2802. In order to allow EGSs to sell electricity directly to customers in the Commonwealth, the Competition Act provided for an unbundling of generation, transmission,[2] and distribution services, which had previously been offered as a bundled product by Electric Distribution Companies ("EDCs"). *Id.* at § 2802(13); *see also id.* at § 2804(3). As a result of this unbundling, customers could negotiate with competitive retail suppliers (*i.e.*, EGSs) who would provide such "shopping" customers with both generation and transmission service, while customers would continue to receive distribution service from the

[2] Any references to "transmission" herein means NITS, as those are the largest component of transmission costs.

EDC. Conversely, "non-shopping" customers, who chose to remain with the EDC, would receive generation, transmission, and distribution service under the EDC's "provider of last resort" default service. *See id.* § 2802(16). Moreover, the PUC adopted regulations, consistent with the Competition Act, that assign responsibility for generation and transmission service to the same entity, *i.e.*, the EDC must provide generation and transmission service for non-shopping customers, and the EGS must provide generation and transmission service for shopping customers. 52 Pa. Code § 54.182; *see also id.* at § 54.187(d). Stated another way, Commission regulations designate transmission service as a load-following expense, meaning that the entity providing a customer's generation service must also take responsibility for the provision of transmission services and collection of the associated costs.

Unbundling was meant to stimulate increased retail competition among the component parts of electric service, with the goal of spurring innovation and efficiencies. *See generally id.* § 2802. With the unbundling of generation and transmission costs, EGSs may offer a range of products to attract Large C&I customers, as well as customers in smaller customer classes. By contrast, having EDCs collect NITS costs constitutes rebundling of transmission and distribution service for certain groups of customers in clear contravention of the Competition Act. Consequently, ESC's proposal to shift collection of NITS to PECO is contrary to the plain language of the Competition Act.

Similarly, removal of NITS costs from products in the competitive market is contrary to the intent of the Competition Act. The framers of the Competition Act understood that benefits could accrue to customers if they have the right to negotiate with their EGSs on the terms and conditions under which they receive transmission service. Since the inception of the retail electric market in Pennsylvania, Large C&I customers have been able to make business decisions to tailor the terms and conditions under which they purchase transmission service by negotiating with an EGS. With respect to NITS costs, a customer can structure a pass-through arrangement under which its EGS passes through the cost of NITS based on the customer's own transmission obligation. *Rebuttal Testimony of Jeffry Pollock*, PAIEUG Statement No. 1 ("PAIEUG St. 1"), p. 5. This approach benefits Large C&I customers in particular who may be willing to assume additional risk in order to retain a number of pricing components that may be negotiated with EGSs. Alternately, an EGS may offer a fixed price for electric service, including both generation and NITS costs, that does not vary, but which may also include an additional risk premium to compensate the EGS for any risk associated with potentially increasing costs. *See id*. To that end, ESC's proposal runs afoul of the Competition Act because Large C&I customers would no longer have the option to elect a pricing methodology that meets their energy purchasing objectives.

PUC precedent has also held that the collection of NITS for shopping customers should remain with the customer's EGS. As recently as PECO's DSP III, the PUC rejected a similar request by the Retail Energy Supply Association ("RESA"), which asserted that the unpredictability of NITS costs lends itself to collection by PECO instead of EGSs. *Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2015 through May 31, 2017*, Docket No. P-2014-2409362, (Dec. 4, 2014) ("PECO DSP III Order"), p. 51. Among the grounds for RESA's proposal in that proceeding was the fact that utilities (other than PECO) within PJM experienced large increases in NITS costs. *Id*. The Commission, however, rejected RESA's basis for its proposal, finding that RESA "failed to provide sufficient evidence that PECO's NITS costs are of such a volatile nature in PECO's service territory that it would render them unpredictable and difficult for the EGSs to hedge." *Id*. at 53-54. The

Commission concluded that "NITS related costs should not be collected within [PECO's] non-bypassable rider mechanism." *Id*. at 53.

Similar to PECO's DSP III proceeding, the ESC provides no evidence in the current proceeding that NITS costs in PECO's service territory are so volatile that they cannot be predicted. *See* Section II.C.1., *infra*. Moreover, the data set forth by the ESC does not demonstrate that "annual rate changes are in fact a significant burden for EGSs in light of the other costs that EGSs must consider in competing to provide electric generation supply." *Rebuttal Testimony of John J. McCawley*, PECO Statement No. 1-R ("PECO St. 1-R"), pp. 16-19. Rather, the ESC can only cite to changes in the NITS rates of other transmission owners, which are irrelevant because changes in NITS charges experienced by other transmission owners has no bearing on customers taking competitive supply service behind PECO. PAIEUG St. 1, p. 7-8. In fact, evidence shows that, not only have PECO NITS costs not been volatile, but, they have actually decreased over the past two years. *Id*.

In an attempt to unreasonably set aside PUC precedent, the ESC wrongly claims that the PUC's decision to maintain the status quo for NITS, while allowing PECO to collect Non-Market Based Transmission ("NMBT") costs from all customers, presents two very different approaches for transmission costs. *See Direct Testimony of Travis Kavulla*, Electric Supplier Coalition Statement No. 1 ("ESC St. 1"), p. 33. In an effort to do so, ESC suggests that NITS and NMBT costs are grouped together as a single entity. *Id*. at 31. In actuality, however, and as determined in PECO's DSP III, the Commission found that the nature of NITS costs are significantly different than those of NMBT costs, resulting in the Commission's correct and differing approach to such collection. *PECO DSP III Order*, pp. 53-54. To suggest that NITS must be collected in the same manner as NMBT costs ignores the PUC's understanding of differences between these costs.

The ESC proposal to shift the collection of NITS from EGSs to PECO ignores the intent of the Competition Act, runs afoul of PUC regulations, disregards Commission precedent, and fails to recognize that nothing has changed on PECO's system that would warrant a change in the status quo of NITS collection. Because ESC has failed to meet its burden of proof, ESC's proposal must be rejected.

### C. ESC Has Not Provided Any Factual Evidence Supporting a Change in the Status Quo.

#### *1. Because PECO's NITS Are Not Volatile, ESC's Claim to the Contrary Must Be Rejected.*

ESC alleges that, because NITS charges are volatile and unpredictable, EGSs cannot adequately manage the risks surrounding unanticipated changes in NITS rates. As set forth herein, however, PECO's NITS have no evidence of volatility. Moreover, the use of a direct pass-through for these charges merely seeks to eliminate the need for EGSs to perform any type of risk management analysis. This lack of evidence is further magnified by the fact that an EGS on PECO's system supports maintaining the status quo. Accordingly, the Electric Supplier Coalition has not presented any evidence regarding either the volatility of PECO's NITS costs or the inability of EGSs to manage such risk. For these reasons, the status quo with respect to NITS collection on PECO's system must remain.

The Federal Energy Regulatory Commission ("FERC") regulates the terms and conditions of NITS, while PJM is charged with the safe and reliable operation of the PJM transmission region, which includes PECO's service territories. *See Operating Agreement of PJM*, Third Revised Rate Schedule FERC No. 24, Second Revised Sheet No. 32, Section 7.7(i)(A). As part of this responsibility, PJM determines each transmission owner's (*i.e.*, also the EDC in the case of PECO) transmission obligation for the forthcoming year as set during the one coincident peak ("1-CP") during the previous year. Specifically, prior to January 1 of each year, PJM alerts an EDC as to its transmission obligation for the previous year. The EDC then determines each customer's individual obligation (*i.e.*, the customer's Network Service Peak Load) based upon that customer's 1-CP usage. *See PECO Tariff Supplement No. 31*– Electric Pa. P.U.C. No. 6, p. 42. The EDC is then able to provide PJM with the overall transmission obligations of all the EGSs on the EDC's system, in addition to the EDC's transmission obligation as it relates to the provision of default service. For customers that do not receive default supply, PJM bills each load-serving-entity ("LSE") (which serve as EGSs under Pennsylvania's rules) for the transmission costs incurred during the year based upon that LSE's transmission obligation.[3]

PECO's NITS are based upon a formula rate, which periodically sets a transmission provider's wholesale transmission rate using a cost-of-service formula, rather than separate rate cases, to determine the resulting NITS charge. *See* PAIEUG St. 1, p. 6. The formula emulates how transmission rates are set using a standard revenue requirement calculation and the applicable load. The formula uses FERC Form 1 data, and the formula are detailed and well-documented. Further, even though a formula rate may be forward-looking, there is a true-up that reconciles the forward-looking rate with the actual costs incurred to provide NITS, as published in each utility's FERC Form 1. *Id.* In addition, the protocols that accompany a formula transmission rate specify when rates are to be reset. For PECO, new NITS rates are implemented on June 1 of each calendar year. *Id.*

As a result, not only does no question exist regarding when periodic changes in NITS rates will become effective, but, EGSs can anticipate changes in NITS rates. NITS rates are based on a

---

[3] PJM Open Access Transmission Tariff, July 1, 2020 ***available at*** https://pjm.com/directory/merged-tariffs/oatt.pdf (last visited August 18, 2020).

standard cost-of-service calculation using the same type of information typically found in an EDC's FERC Form 1. Thus, the primary drivers of the NITS rates are transmission investment, transmission-related operating expenses, cost of capital, applicable income tax rates, and peak demand. Further, because the formula rate includes a true-up provision, a utility is allowed to recover only its actually incurred costs as reported in FERC Form 1. *Id*. Finally, as recognized by Calpine Retail Holdings, LLC ("Calpine"), an EGS on PECO's system, the regulatory process in place at FERC does not negate the ability of EGSs to manage their loads and NITS costs. *Rebuttal Testimony of Becky Merola*, Calpine Retail Statement No. 1 ("Calpine St. 1"), p. 3.

Even with these guides, the ESC claims that PECO's formula rates have created "volatility that EGSs cannot manage." ESC St. 1, p. 35. In setting forth this claim, however, the ESC does not provide any evidence of volatility for PECO's NITS rates. Rather, the ESC spends several pages highlighting the NITS rates of other transmission owners. *Id*. at 37-39. Most likely, the ESC chose not to reference PECO's NITS rates, as doing so would show that the trend of PECO's NITS rates since implementation of a formula rate is not volatile, but also, that the NITS rates have decreased over the past two years. PAIEUG St. 1, p. 7. Accordingly, because the ESC can provide no evidence of volatility in PECO's NITS rates, the ESC's argument to change the status quo based upon this claim must fail.

Similarly, ESC argues that EGSs must take on the risk of such volatility. Even if such volatility existed (and, as discussed above, it does not), EGSs do not have to take on such risk, especially with respect to Large C&I customers, as most Large C&I customers procure generation from EGSs under contracts in which NITS costs are a direct pass-through based on each customer's Network Service Peak Load ("NSPL"). PAIEUG St. 1, p. 3. Thus, the use of the pass-through eliminates the risk that EGSs would over (or under) recover actual NITS costs allocated to a Large

C&I customer. *Id*. at 5. Moreover, as noted by Calpine, the ESC proposal is nothing more than an attempt to shrug responsibility for certain EGS's business decisions, level of risk management expertise, and valuation of risk. Calpine St. 1, p. 3. Unfortunately, the ESC proposal is nothing more than an attempt to shed and shift market risk associated with these EGSs' demand driven costs. Rather than using expertise to manage these costs and associated risks, these EGSs are inappropriately seeking a bail-out from customers. *Id*. at 4.

As set forth above, ESC fails to provide a preponderance of evidence that justifies modification to the current collection of NITS costs by EGSs for shopping customers on PECO's system. Specifically, the ESC has not shown any evidence of volatility in PECO's NITS rates. Similarly, the ESC has not presented any evidence regarding the inability to anticipate changes in NITS rates. Rather, the ESC is only seeking a means by which to shift any decision making responsibility onto shopping customers, even though such customers have already provided EGSs a means by which to eliminate any such risk through the use of a pass-through for NITS costs. For these reasons, the status quo regarding the collection of NITS from shopping customers on PECO's system must remain, and ESC's proposal must be denied.

### ***2. Because Collection of NITS Costs through a Non-Bypassable Mechanism Would Raise Significant Contractual and Double Collection Concerns for Large C&I Customers, ESC's Proposal Must Be Rejected.***

As discussed more fully in Section II.C.1., *supra*, ESC's proposal is nothing more than a short-sighted attempt to shift any business management decisions onto shopping customers. Unfortunately, in doing so, such customers would be significantly penalized through the loss of products in the market, the need to renegotiate long-term contracts with EGSs, and the potential for double collection if such renegotiation is not possible. Because the significant harm that would come to customers is much greater than the benefits that would be achieved by certain EGSs, ESC's proposal must be rejected.

The Electric Supplier Coalition contends that shifting collection responsibility for shopping customers' NITS costs to PECO through non-bypassable means would benefit EGSs because those entities would no longer have to forecast NITS rates and, therefore, have no need to place a risk premium into customers' contracts. ESC St. 1, p. 39. In doing so, however, the ESC ignores the fact that the ability of Large C&I customers to continue to utilize pass-through options for NITS rates would be eliminated. PAIEUG St. 1, p. 9. In fact, as noted by Calpine, one of the principle benefits of moving to retail competition would be eliminated, as ESC's proposal would remove products and services from the marketplace. Calpine St. 1, p. 4.

PECO's default service is based on a uniform master supply agreement with no individually negotiated terms of service. In other words, PECO's default service is one size fits all. *Id.* In contrast, the Competition Act provides EGSs with a market that continues to work so that EGSs have the freedom to choose the products and services they offer into the marketplace. Moreover, each EGS has the freedom to build, establish, and promote innovative products and services to meet its individual customer's needs, as well as the structure and timing of those services based on the EGS's own business and management decisions. *Id.* By implementing ESC's proposal, EGSs would lose the opportunity to offer certain products into the marketplace, while customers would lose the ability to purchase products that meet their individual needs. In other words, ESC's proposal would effectively rebundle transmission and distribution, contrary to the terms of the Competition Act. *See* Section II.B., *supra*.

In addition, ESC fails to recognize the gravity of the resulting problems that will occur for customers, especially Large C&I customers, that have entered into long-term fixed price contracts with EGSs. While most Large C&I customers seek to utilize a pass-through for NITS rates, some Large C&I customers prefer the option of requesting a fixed price contract that would include generation and NITS charges. PAIEUG St. 1, p. 5. For those customers, shifting costs collection responsibility for NITS to PECO could have the perverse impact of recovering NITS charges twice. *Id.* at 6. Specifically, if PECO begins collection of NITS costs from all customers through a non-bypassable charge, but certain customers have fixed price EGS contracts that extend beyond that date, the contract would still reflect the NITS price. If a customer pay the NITS charge via the fixed price to its EGS and also remits the NITS charge to PECO via the non-bypassable rider, the customer would pay for NITS twice. PECO St. 1-R, p. 17-18.

In such an example, the EGS may have structured its retail pricing in a way that combines the provision of generation and NITS into a single price for the product bundle, which the customer has agreed to pay. Because the fixed price would not have included a breakdown as to the NITS component, even if the EGS agrees to credit the NITS component upon the implementation of a non-bypassable rider, the resulting credit may not be clear to the customer. PECO St. 1-R, p. 18. Moreover, the burden remains with the customer to petition for the extraction of the NITS charge from the fixed price, recognizing that requesting renegotiation of the EGS contract could open the contract up to other issues that may also be detrimental to the customer, especially if such negotiation were to occur at the beginning or mid-way through the term of the contract. Further, because NITS costs are larger than other NMBT costs that were previously moved to a non-bypassable rider, this double collection could have an even greater negative impact on customers.[4]

[4] *See* 2020 Quarterly State of the Market Report for PJM, 14, Table 1-8, accessible at https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2020/2020q1-som-pjm.pdf (last visited August 20, 2020).

In fact, the Commission has previously recognized the inherent problems that can be faced, especially by Large C&I customers, due to non-bypassable riders. In PPL Electric Utility Corporation's second DSP proceeding, the Commission opposed non-bypassable transmission cost collection, noting the forced renegotiation of shopping contracts and increased likelihood of double cost collection by EDCs and EGSs. *Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. P-2012-2302074 (Jan. 24, 2013), p. 85. Similarly, in Duquesne Light Company's 2012 DSP proceeding, the Commission held that the current collection of transmission costs by EGSs is "consistent with the Commonwealth's continued migration to a more competitive retail market, and that RESA's proposal would be a step backward because it would result in the rebundling of transmission costs with distribution rates." *Petition of Duquesne Light Company For Approval of Default Service Plan For The Period of June 1, 2013 Through May 31, 2015*, Opinion and Order, Docket No. P-2012-2301664 (Jan. 25, 2013), p. 222.

Similarly, the purported "solutions" to the foregoing transitional issues proposed by the ESC fail to resolve the potential for double collection or contract unwinding. ESC proposes to delay the collection of transmission costs by EGSs until one year after PECO's DSP V goes into effect—*i.e.*, June 1, 2022. *Surrebuttal Testimony of Travis Kabulla*, ESC Statement No. 1-S ("ESC St. 1-S"), p. 24. Although ESC contends this additional time period will allow contracts that collect NITS costs to expire, ECS fails to acknowledge that some customers may be currently negotiating contracts or have just finished negotiating contracts that do not necessarily track with the timing of PECO's DSP proceedings.

As recognized by the Commission in the FirstEnergy Companies' third DSP proceeding, the FirstEnergy Companies were permitted to collect RTEP and TEC costs as part of their DSP III proceeding; however, the removal of these costs from EGSs led to disputes between customers and EGSs. *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of a Default Service Program for the Period Commencing June 1, 2015 Through May 31, 2017*, Final Order, Docket Nos. P-2013-2391368, et al. (July 24, 2014) ("FE DSP III Order"), p. 42 (stating that "there is merit in the concerns expressed by [the Industrial Users Group] with regard to a possible double-collection.").

ESC further proposes limiting "change in cost responsibility to new charges associated with NITS occurring after the Commission's final order." ESC St. 1-S, p. 24. Unfortunately, ESC seems to not understand that NITS costs are a single charge updated once a year for all customers, very much unlike NMBT charges that contain numerous components—*i.e.*, Regional Transmission Expansion Plan charges, Expansion Cost Recovery charges, and Generation Deactivation/Reliability Must Run charges. PAIEUG St. 1, pp. 3, 6. ESC's transitional proposal, therefore, not only indicates a fundamental misunderstanding of the nature of NITS costs but also provides no relief to protect customers from double-collection.

Accordingly, because of the contractual concerns raised for customers, especially the Large C&I customer class, any purported benefits claimed by EGSs outweigh the concerns raised by customers. Moreover, none of the "transitional" arguments set forth by ESC accurately and adequately address these concerns but rather raise further issues for such customers, especially in terms of negotiating competitive market products that would meet these customers' needs in a fair and reasonable fashion without implicating double collection concerns. For these reasons, ESC's proposal to collect NITS costs through non-bypassable means must be rejected.

***3. Because ESC's Proposal Would Unreasonably Sever the Link Between Cost Causation and Cost Recovery for NITS, the Status Quo Must Remain With Respect to NITS Collection on PECO's System.***

The Electric Supplier Coalition's proposal must be rejected because, if adopted, it would sever the link between cost recovery and cost causation. Because cost to serve is the polestar that must guide the PUC in ratemaking, the Commission must be cognizant of the inherent problem with ESC's proposal. In order to ensure that the link between cost recovery and cost causation endures, the status quo must remain on PECO's system with respect to NITS collection.

ESC claims that no legal requirement exists mandating that the assessment of wholesale FERC approved charges billed by PJM to LSEs must match the recovery by the LSEs from their customers. ESC St. 1-S, p. 26. ESC, however, ignores the fact that the Commonwealth Court of Pennsylvania previously indicated that the principle of cost causation is the polestar for ratemaking purposes. *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010, 1016 (Pa. Cmwlth. 2006). In this instance, ESC is requesting that the PUC rebundle NITS charges with distribution rates for collection by the EDC. In reviewing this proposal, the PUC must still ensure that cost causation principles are being followed. As discussed more fully herein, ESC's proposal would sever the link between cost recovery and cost causation, thereby ignoring the requirement of *Lloyd*.

Currently, most Large C&I shopping customers procure generation from EGSs through contracts under which NITS costs are a direct pass-through. PAIEUG St. 1, p. 3. Under this type of contract, a customer's NITS costs are a direct pass through based on the individual customer's NSPL. *See id*. The individual customer's NSPL is based on a customer's contribution to the annual system peak. Thus, each customer pays for NITS in a manner that reflects the customer's responsibility for network transmission costs. If a customer reduces its energy consumption during the transmission peak or manages its energy consumption to minimize its contribution to the peak during the hours in which the NSPL is determined, the customer would directly benefit, as this lower contribution would correspondingly decrease the customer's cost responsibility. *Id*.

Conversely, non-shopping customers on PECO's system remit their NITS costs through the Company's TSC Rider, which is based upon billed demand. PAIEUG St. 1, p. 3. Billed demand is the same as the billing demand under the delivery service rates applicable to Large C&I customers. *Id*. at 3-4. Under the TSC, rather than paying NITS costs based on an individual customer's NSPL, a Lage C&I customer would pay NITS charges based on the customer's highest demand during a 30-minute time interval in a billing period. This measured demand could occur at any time during the month, not just the peak hours. *Id*.

Unfortunately, having NITS billed through the TSC would sever the link between cost recovery and cost causation. Instead of being directly billed for NITS costs based on the customer's NSPL, recovery through the TSC would bill the customer for its highest measured demand, irrespective of when such demand occurred. Thus, this process would be contrary to the PUC's long-standing policy of setting rates based upon cost-causation principles. *Id*. at 4. Moreover, this process would thwart efforts by individual customers to properly manage their loads around the annual system peak, which, in turn, could increase congestion while causing EDCs to invest in additional transmission capacity in the long run. *Id*.

Even billing NITS through PECO's Non-Bypassable Transmission ("NBT") charge rider would create problems. PECO's NBT Rider collects NMBT charges on the basis of each Large C&I customer's Peak Load Contribution ("PLC"). The PLC is defined as a customer's contribution to the five highest daily peaks of the summer months or 5-CP. *Id.* at p. 5. Collection of NITS costs through the NBT Rider presents similar problems for Large C&I customers because, rather than charging customers on a 1-CP basis, the NBT Rider charges customers based on a customer's

5-CP basis. In other words, use of the NBT Rider for collection of NITS costs would not be a true reflect of the cost causation of NITS costs.

Accordingly, when shopping customers are charged for NITS rates by their EGS, such customers are assured that the cost causation of NITS are correctly reflected in their resulting bill. Unfortunately, any of the collection processes that would be implemented under ESC's proposal would sever the connection between cost causation and cost collection. Because cost causation is a polestar of PUC ratemaking, ESC's proposal must be rejected.

### D. Assuming, Arguendo, that ESC's Proposal Is Adopted, a Carve-Out Should Be Implemented For Large C&I Customers Due to Their Unique Issues.

As discussed in the foregoing sections, a non-bypassable collection of NITS costs for shopping customers is contrary to the intent of the Competition Act, Commission precedent, and Commission regulations. *See* Section II.B., *supra*. Similarly, all purported justifications to support a non-bypassable collection of NITS costs are uncorroborated by evidence and therefore carry very little weight. *See* Section II.C.1., 2., *supra*. In addition, the transition of NITS costs collection from EGSs to EDCs raise significant cost causation concerns, especially for Large C&I shopping customers. *See* Section II.C.3., *supra*. For these reasons, PAIEUG submits that, if the Commission accepts ESC's proposal, the PUC should approve a carve-out for Large C&I customers. PAIEUG St. 1, p. 9.

Although the Electric Supplier Coalition does not oppose PAIEUG's carve-out request, PECO initially claims that PAIEUG has not provided any issues specific to Large C&I customers, and, rather, the status quo should remain for all customer classes. *See Surrebuttal Testimony of John McCawley*, PECO St. No. 1-SR ("PECO St. 1-SR"), p. 3. While PAIEUG agrees with PECO's position that the status quo should remain for all customer classes, PAEIUG disagrees with PECO's claim that Large C&I do not have specific issues of concern warranting a carve-out.

As set forth herein, Large C&I customers are currently able to request a direct pass-through of NITS costs by their EGS. *See* PAIEUG St. 1, p. 5. Through this process, Large C&I customers are able to remit their specific NITS costs to the EGS. *Id*. Moreover, because NITS costs are established on an annual basis, Large C&I customers with a direct pass through are able to budget these costs on a monthly basis.

Moreover, for those Large C&I customers utilizing a direct pass through of NITS costs with their EGS, these NITS costs are based upon a customer's individual NSPL. PAIEUG St. 1, p. 5. The NSPL is based upon a customer's individual contribution to the zonal (in this instance, PECO) peak hour load. *Id*. As a result, Large C&I customers with a direct pass through can ensure that the efforts they undertake to lower their NSPL are directly reflected in their NITS costs. In other words, Large C&I customers do have unique circumstances warranting a carve-out of NITS collection should ESC's proposal be adopted.

With that said, however, PECO also noted that in order to provide for such a carve-out to occur, the Company's billing system would need to be reconfigured, which could result in increased administrative costs. *See* PECO St. 1-SR, p. 3. Because Large C&I customers should not be penalized for the implementation of a proposal that would actually harm such customers, PAIEUG submits that the positions of PECO, PAIEUG, and Calpine, all of which seek to retain the status quo for NITS collection for all customers, should be adopted by the PUC. If, however, the PUC chooses to adopt ESC's position, PAIEUG submits that a carve-out should be implemented for Large C&I customers, the administrative costs of which should be covered by those EGSs seeking to implement this change in the status quo.

## III. CONCLUSION

**WHEREFORE**, the Philadelphia Area Industrial Energy Users Group respectfully requests that the Pennsylvania Public Utility Commission:

(1) Retain the status quo with respect to the collection of Network Integration Transmission Service charges on PECO's system;

(2) Deny the Electric Supplier Coalition's proposal to require PECO to recover NITS from shopping customers via a non-bypassable charge;

(3) Alternatively, approve a carve-out for Large C&I customers applicable to any non-bypassable rider for the recovery of NITS costs;

(4) Grant any additional relief deemed appropriate and consistent with the above recommendations.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By: ______________________________

Charis Mincavage (I.D. No. 82039)
Adeolu A. Bakare (I.D. No. 208541)
Jo-Anne S. Thompson (I.D. No. 325956
100 Pine Street
P. O. Box 1166
Harrisburg, PA 17108-1166
Phone: (717) 232-8000
Fax: (717) 237-5300
cmincavage@mcneeslaw.com
abakare@mcneeslaw.com
jthompson@mcneeslaw.com

Counsel to the Philadelphia Area Industrial Energy Users Group

Dated: August 20, 2020

**APPENDIX A**

**PROPOSED FINDINGS OF FACT**

1. PECO's NITS are based upon a formula rate, which periodically sets a transmission provider's wholesale transmission rate using a cost-of-service formula, rather than separate rate cases, to determine the resulting NITS charge. *See* PAIEUG St. 1, p. 6.
2. The regulatory process in place at FERC does not negate the ability of EGSs to manage their loads and NITS costs. Calpine St. 1, p. 3.
3. The trend of PECO's NITS rates since implementation of a formula rate is not volatile, rather, PECO's NITS rates have decreased over the past two years. PAIEUG St. 1, p. 7.
4. Currently, Large C&I customers have the ability to request that their EGS utilize a pass-through option for NITS rates. PAIEUG St. 1, p. 9.
5. ESC's proposal would remove products and services from the marketplace. Calpine St. 1, p. 4.
6. Shifting costs collection responsibility for NITS to PECO could have the perverse impact of recovering NITS charges twice for those customers whose NITS are collected via a fixed price. PAIEUG St. 1, p. 6.
7. Having NITS billed through the TSC would sever the link between cost recovery and cost causation, as instead of being directly billed for NITS costs based on the customer's NSPL, recovery through the TSC would bill the customer for its highest measured demand, irrespective of when such demand occurred. PAIEUG St. 1, p. 4.
8. Collection of NITS costs through PECO NBT Rider presents problems for Large C&I customers because, rather than charging customers on a 1-CP basis, which is how NITS costs are allocated, the NBT Rider charges customers based on a customer's 5-CP basis. PAIEUG St. 1, p. 5.
9. Large C&I customers have unique circumstances warranting a carve-out of NITS collection should ESC's proposal be adopted. PAIEUG St. 1, p. 5.

## APPENDIX B

## PROPOSED CONCLUSIONS OF LAW

1. Because ESC is seeking to modify the status quo on PECO's system, ESC has the burden of proof in this proceeding. *Pa. Pub. Util. Comm'n v. Jackson Sewer Corp.*, Docket No. R-00005997, (Nov. 13, 2001), p. 5.

2. ESC has not proven by a preponderance of evidence that any change has occurred with respect to PECO's system to warrant a change in NITS collection. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa.Cmwlth. 1990).

3. ESC's proposal to change the collection of NITS costs on PECO's system from EGSs to PECO for shopping customers would inappropriately rebundle transmission and distribution contrary to the Competition Act. 66 C.S. at § 2802(13); *see also id.* at § 2804(3).

4. ESC's proposal to change the collection of NITS costs on PECO's system from EGSs to PECO for shopping customers would contravene previous PUC precedent finding that NITS related costs should not be collected within PECO's non-bypassable rider mechanism. *Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2015 through May 31, 2017*, Docket No. P-2014-2409362, (Dec. 4, 2014) ("PECO DSP III Order"), p. 53.

5. ESC's proposal to change the collection of NITS costs on PECO's system from EGSs to PECO for shopping customers would contradict previous PUC precedent finding that such a process would force the renegotiation of shopping contracts and increase the likelihood of double cost collection by EDCs and EGSs. *Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. P-2012-2302074 (Jan. 24, 2013), p. 85.

6. ESC's proposal to have shopping customers' NITS collected through either PECO's Transmission Service Charge or Non-Market Based Transmission Riders would sever the link between cost recovery and cost causation, contrary to precedent finding that cost causation is the polestar of ratemaking. *Lloyd v. Pa. Pub. Util. Comm'n*, 904 A.2d 1010, 1016 (Pa. Cmwlth. 2006).

# APPENDIX C

## PROPOSED ORDERING PARAGRAPHS

1. The status quo is retained with respect to the collection of Network Integration Transmission Service charges on PECO's system.
2. The Electric Supplier Coalition's proposal to require PECO to recover NITS from shopping customers via a non-bypassable charge is denied.