

# Morgan Lewis

**Kenneth M. Kulak**

Partner  
+1.215.963.5384  
ken.kulak@morganlewis.com

November 3, 2020

## **VIA eFILING**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17105-3265

**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**

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Dear Secretary Chiavetta:

Enclosed please find the **Reply of PECO Energy Company to Exceptions to the Recommended Decision (“Reply”) of Administrative Law Judge Eranda Vero (“ALJ”)** issued on October 20, 2020, in the above-referenced matter.

As evidenced by the enclosed Certificate of Service, copies of the Reply are being served on Judge Eranda Vero and all parties of record.

Sincerely,



Kenneth M. Kulak

KMK/tp  
Enclosures

c: Per Certificate of Service (w/encls.)

**Morgan, Lewis & Bockius LLP**

1701 Market Street  
Philadelphia, PA 19103-2921  
United States

**T** +1.215.963.5000  
**F** +1.215.963.5001

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PETITION OF PECO ENERGY** :  
**COMPANY FOR APPROVAL OF ITS** :  
**DEFAULT SERVICE PROGRAM FOR** : **Docket No. P-2020-3019290**  
**THE PERIOD FROM JUNE 1, 2021** :  
**THROUGH MAY 31, 2025** :

**CERTIFICATE OF SERVICE**

I hereby certify and affirm that I have this day served a copy of the **Reply of PECO Energy Company to Exceptions to the Recommended Decision**, on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

**VIA ELECTRONIC MAIL**

The Honorable Eranda Vero  
Philadelphia Administrative Law Judge  
Commonwealth of Pennsylvania  
Pennsylvania Public Utility Commission  
801 Market Street  
Philadelphia, PA 19107  
[evero@pa.gov](mailto:evero@pa.gov)

Aron J. Beatty  
David T. Evrard  
Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
[abeatty@paoca.org](mailto:abeatty@paoca.org)  
[devrard@paoca.org](mailto:devrard@paoca.org)

Steven C. Gray  
Erin K. Fure  
Pennsylvania Office of Small Business  
Advocate  
555 Walnut Street, First Floor  
Harrisburg, PA 17101  
[sgray@pa.gov](mailto:sgray@pa.gov)  
[efure@pa.gov](mailto:efure@pa.gov)

Richard Kanaskie  
Director & Chief Prosecutor  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
Commerce Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17105-3265  
[rkanaskie@pa.gov](mailto:rkanaskie@pa.gov)

Elizabeth R. Marx  
John Sweet  
Ria Pereira  
Pennsylvania Utility Law Project  
118 Locust Street  
Harrisburg, PA 17101  
[emarxpulp@palegalaid.net](mailto:emarxpulp@palegalaid.net)  
[jsweetpulp@palegalaid.net](mailto:jsweetpulp@palegalaid.net)  
[rpereirapulp@palegalaid.net](mailto:rpereirapulp@palegalaid.net)  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)  
*Counsel for CAUSE-PA*

Robert W. Ballenger  
Josie B. H. Pickens  
Joline R. Price  
Kintéshia Scott  
Community Legal Services  
1424 Chestnut Street  
Philadelphia, PA 19102  
[rballenger@clsphila.org](mailto:rballenger@clsphila.org)  
[jpickens@clsphila.org](mailto:jpickens@clsphila.org)  
[jprice@clsphila.org](mailto:jprice@clsphila.org)  
[kscott@clsphila.org](mailto:kscott@clsphila.org)  
*Counsel for TURN and Action Alliance  
Community Legal Services, Inc.*

Charis Mincavage  
Adeolu A. Bakare  
Jo-Anne Thompson  
McNees, Wallace & Nurick LLC  
100 Pine Street  
Harrisburg, PA 17108-1166  
[cmincavage@mcneeslaw.com](mailto:cmincavage@mcneeslaw.com)  
[abakare@mcneeslaw.com](mailto:abakare@mcneeslaw.com)  
[jthompson@mcneeslaw.com](mailto:jthompson@mcneeslaw.com)  
*Counsel for PAIEUG*

John F. Lushis, Jr.  
Norris McLaughlin, P.A.  
515 West Hamilton Street – Suite 502  
Allentown, PA 18101  
[jlushis@norris-law.com](mailto:jlushis@norris-law.com)  
*Counsel for Calpine Retail Holdings, LLC*

James H. Laskey  
Becky Merola  
Norris McLaughlin, P.A.  
P.O. Box 5933  
400 Crossing Boulevard, 8th Floor  
Bridgewater, NJ 08807-5933  
[jlasky@norris-law.com](mailto:jlasky@norris-law.com)  
[becky.merola@calpinesolutions.com](mailto:becky.merola@calpinesolutions.com)  
*Counsel for Calpine Retail Holdings, LLC*

Gregory L. Peterson  
Phillips Lytle LLP  
201 West Third Street, Suite 205  
Jamestown, NY 14701-4907  
[gpeterson@phillipslytle.com](mailto:gpeterson@phillipslytle.com)  
*Counsel for StateWise Energy Pennsylvania  
LLC and SFE Energy Pennsylvania, Inc.*

Kevin C. Blake  
Thomas F. Puchner  
Phillips Lytle LLP  
One Canalside  
125 Main Street  
Buffalo, NY 14203-2887  
[kblake@phillipslytle.com](mailto:kblake@phillipslytle.com)  
[tpuchner@phillipslytle.com](mailto:tpuchner@phillipslytle.com)  
*Counsel for StateWise Energy  
Pennsylvania LLC and SFE Energy  
Pennsylvania, Inc.*

Karen O. Moury  
Deanne M. O'Dell  
Eckert Seamans Cherin & Mellott, LLC  
P.O. Box 1248  
213 Market Street, 8th Floor  
Harrisburg, PA 17101  
[kmoury@eckertseamans.com](mailto:kmoury@eckertseamans.com)  
[dodell@eckertseamans.com](mailto:dodell@eckertseamans.com)  
*Counsel for Electric Supplier Coalition*

Brian Kalcic  
Excel Consulting  
225 South Meramec Avenue, Suite 720  
St. Louis, MO 63105  
[excel.consulting@sbcglobal.net](mailto:excel.consulting@sbcglobal.net)  
*Consultant for OSBA*

Joseph Otis Minott  
Ernest Logan Welde,  
Clean Air Council  
135 South 19th Street, Suite 300  
Philadelphia, PA 19103  
[joe\\_minott@cleanair.org](mailto:joe_minott@cleanair.org)  
[lwelde@cleanair.org](mailto:lwelde@cleanair.org)  
*Counsel for Clean Air Council*

Joseph Otis Minott  
Ernest Logan Welde,  
Clean Air Council  
135 South 19th Street, Suite 300  
Philadelphia, PA 19103  
[joe\\_minott@cleanair.org](mailto:joe_minott@cleanair.org)  
[lwelde@cleanair.org](mailto:lwelde@cleanair.org)  
*Counsel for Environmental Stakeholders*

Devin McDougall  
Earth Justice  
476 Clinton Avenue, Apt. 6F  
Brooklyn, NY 11238  
[d874164@gmail.com](mailto:d874164@gmail.com)  
*Counsel for Environmental Stakeholders*

Devin McDougall  
Rebecca Barker  
Clean Energy Program  
Philadelphia Office  
1617 John F. Kennedy Blvd., Suite 1130  
Philadelphia, PA 19103  
[dmcdougall@earthjustice.org](mailto:dmcdougall@earthjustice.org)  
[rbarker@earthjustice.org](mailto:rbarker@earthjustice.org)  
*Counsel for Environmental Stakeholders*



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Kenneth M. Kulak (Pa. No. 75509)  
Brooke E. McGlinn (Pa. No. 204918)  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
215.963.5384 (bus)  
215.963.5001 (fax)  
[ken.kulak@morganlewis.com](mailto:ken.kulak@morganlewis.com)  
[brooke.mcglinn@morganlewis.com](mailto:brooke.mcglinn@morganlewis.com)

*Counsel for PECO Energy Company*

Dated: November 3, 2020



## I. INTRODUCTION

On October 20, 2020, Administrative Law Judge Eranda Vero (“ALJ”) issued her Recommended Decision (“R.D.”) in this proceeding in which she recommended that the Pennsylvania Public Utility Commission (“Commission”) approve the Joint Petition for Partial Settlement (“Settlement”) of PECO Energy Company’s (“PECO’s” or “the Company’s”) fifth Default Service Program (“DSP V”) filed on August 13, 2020. In her R.D., the ALJ found and determined that PECO’s DSP V, as amended by the Settlement, complies with the Commission’s default service regulations and incorporates all of the requirements of a default service program, including a procurement plan with prudent steps necessary to obtain least cost generation supply contracts.<sup>1</sup>

The Settlement was executed by PECO, the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”), Calpine Retail Holdings, LLC (“Calpine”), the Electric Supplier Coalition (“ESC”),<sup>2</sup> the Philadelphia Area Industrial Energy Users Group (“PAIEUG”), and Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (together, “TURN et al.”) (collectively, “Joint Petitioners”).<sup>3</sup> As explained hereafter, a single issue was expressly reserved for briefing by the terms of the Settlement.

Three parties who operated collectively in this proceeding – the Sierra Club/PA Chapter, the Clean Air Council, and the Philadelphia Solar Energy Association (together, the

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<sup>1</sup> See R.D., p. 112.

<sup>2</sup> ESC’s members are 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.

<sup>3</sup> StateWise Energy Pennsylvania LLC and SFE Energy Pennsylvania, Inc., which are parties to this proceeding, did not oppose the Settlement.

“Environmental Stakeholders”) – did not join the Settlement. The Environmental Stakeholders opposed PECO’s DSP V on the grounds that it purportedly was a “short-term procurement plan” and did not meet “least cost over time” requirements for default service plans under Section 2807(e) of the Public Utility Code (the “Code”).<sup>4</sup> The Environmental Stakeholders did not oppose new time-of-use rates that PECO proposed to introduce, but did assert that the Commission should require PECO to conduct a “benefit-cost analysis” of those rates as a condition for approval.<sup>5</sup> The ALJ considered and rejected each of the Environmental Stakeholders’ claims and arguments in the R.D.,<sup>6</sup> and the Environmental Stakeholders did not file exceptions to the ALJ’s decision.

The single issue reserved for briefing by the Joint Petitioners involves network integration transmission service (“NITS”) costs, which are transmission-related charges imposed on load-serving entities by PJM Interconnection, L.L.C. (“PJM”).<sup>7</sup> Currently, PJM charges for NITS are included in PECO’s Price-to-Compare (“PTC”) for default service.<sup>8</sup> Electric generation suppliers (“EGSs”) providing generation supply to PECO distribution customers are responsible for the NITS charges that they incur as load-serving entities (“LSEs”).<sup>9</sup> In DSP V, PECO proposed to continue to be responsible for and recover NITS costs associated with PECO’s default service load through its unbundled, bypassable Transmission Service Charge

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<sup>4</sup> R.D., pp. 53-56.

<sup>5</sup> *Id.*, pp. 63-66.

<sup>6</sup> *Id.*, pp. 53-83.

<sup>7</sup> *Id.*, p. 83.

<sup>8</sup> *Id.*, pp. 83-84.

<sup>9</sup> *Id.*

(“TSC”).<sup>10</sup> The Commission had directed this treatment for NITS costs after the issue of assignment of responsibility for PJM transmission-related costs was litigated in PECO’s third default service proceeding, and PECO’s proposal in DSP V would continue its current Commission-approved allocation of NITS cost responsibility.<sup>11</sup>

In this proceeding, ESC recognized that the Commission previously considered and rejected a proposal to shift the cost responsibility for NITS from LSEs, including EGSs, to the electric distribution company (“EDC”) in PECO’s third default service proceeding.<sup>12</sup> Nonetheless, ESC proposed that PECO recover NITS with certain other PJM costs through PECO’s separate non-bypassable transmission charge (“NBT”) paid by all distribution service customers primarily because NITS costs were, in ESC’s view, “unpredictable.”<sup>13</sup> ESC’s proposal was opposed by PECO, PAIEUG, and Calpine (an EGS) on various grounds, including the undisputed ability of EGSs to manage NITS costs<sup>14</sup> and the benefits of preserving incentives in the competitive retail market for EGSs to cost-effectively manage their wholesale cost obligations (including NITS) and load.<sup>15</sup> After detailed consideration of the arguments of the parties, the ALJ rejected ESC’s proposal and recommended that the Commission continue to

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<sup>10</sup> R.D., pp. 83-84.

<sup>11</sup> *Id.*

<sup>12</sup> *Petition of PECO Energy Co. for Approval of its Default Serv. Program for the Period from June 1, 2015 through May 31, 2017*, Docket No. P-2014-2409362 (Opinion and Order entered Dec. 4, 2014) (“DSP III Order”), pp. 51-54; *see also* *Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2017 through May 31, 2021*, Docket No. P-2016-2534980 (Opinion and Order entered Dec. 8, 2016) (“DSP IV Order”), pp. 33-35 (approving PECO’s continued recovery of NITS costs for default service customer load through its bypassable Transmission Service Charge under the DSP IV settlement consistent with the DSP III Order).

<sup>13</sup> *Id.*, p. 88.

<sup>14</sup> Exceptions of Electric Supplier Coalition (“Exceptions”), p. 11 (noting that the ALJ’s finding that EGSs can manage costs is “a point with which the ESC does not disagree”).

<sup>15</sup> R.D., pp. 91-105.



require LSEs, including EGSs, to maintain responsibility for NITS for the customers they serve consistent with the DSP III and DSP IV Orders.<sup>16</sup>

ESC raises two Exceptions to the R.D., namely (i) the ALJ purportedly erred in concluding that ESC's proposal would contravene the Electricity Generation Customer Choice and Competition Act ("the Competition Act")<sup>17</sup> and Commission regulations, and (ii) the ALJ erred in "overlooking or misinterpreting" evidence of "market inequities" which ESC believes its proposal would address.<sup>18</sup> In addition, and separate from its Exceptions, ESC resurrects a proposal for a statewide investigation of non-market based PJM charges (such as NITS) that its witness had discussed in testimony but which ESC failed to present in its briefs to the ALJ.<sup>19</sup>

The Commission should deny ESC's Exceptions. ESC is simply trying to continue the efforts of some EGSs since DSP III to shift cost responsibility for NITS, which the Commission has repeatedly determined should be the responsibility of EGSs. Denial of ESC's Exceptions is particularly appropriate where, as here, the ALJ carefully considered all of ESC's arguments and found that another EGS (Calpine) credibly explained how ESC's proposal to change current NITS cost recovery arrangements will harm the competitive retail market.<sup>20</sup>

Similarly, the Commission should reject ESC's proposal for a new statewide investigation into PJM costs, as ESC concedes the Commission already *has* an ongoing

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<sup>16</sup> *Id.*, pp. 83-108.

<sup>17</sup> 66 Pa.C.S. §§ 2801 *et seq.*

<sup>18</sup> Exceptions, pp. 3-11.

<sup>19</sup> *Id.*, pp. 11-14.

<sup>20</sup> *See* R.D, pp. 93-95 (summarizing Calpine's arguments, noting Calpine's explanation that ESC's proposal is "nothing more than a bailout and predatory attempt to remove a competitor's products and services from the market.") and p. 107 (concluding that "Calpine paints a grim picture of the competitive retail market if ESC's proposal is adopted").

investigation of the very issues ESC wants the Commission to consider.<sup>21</sup> While ESC may consider the earlier investigation “stalled,”<sup>22</sup> ESC’s belief that the Commission should move more quickly is no basis to start another investigation while an existing statewide investigation remains open.

## II. REPLY TO EXCEPTIONS

In its first Exception, ESC contends that the ALJ erred in characterizing ESC’s proposal for inclusion of NITS costs in PECO’s NBT as “unbundling,” noting that the Commission had previously stated that “neither the Competition Act nor the [Public Utility Code (“Code”)] preclude the implementation of [EDC collection of NITS costs], if we [determined] that changed circumstances caused us to reconsider our prior decisions on this issue.”<sup>23</sup> However, there is no need to resolve that legal issue in this proceeding. ESC’s second Exception reflects its principal contention that PECO’s recovery of NITS costs for default service customers through PECO’s TSC is “inequitable,” and the ALJ properly analyzed and rejected each of ESC’s arguments for any change in NITS cost recovery based on the record evidence.<sup>24</sup>

Contrary to ESC’s claims, the ALJ considered each of ESC’s arguments in detail, including ESC’s assertion of an “inequitable” treatment of NITS costs, an “unlevel playing field,” and ESC’s views of the manner in which default service customers and shopping

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<sup>21</sup> See Secretarial Letter, *Informal Review of PJM Non-Market Based Charges* (May 15, 2015). As ESC notes (Exceptions, p.1 n.1), the letter is included with the April 21, 2017 CHARGE Call Recap available on the Commission’s website at <https://www.puc.pa.gov/electricity/retail-markets/office-of-competitive-market-oversight-ocmo/charge/>.

<sup>22</sup> Exceptions, p. 11.

<sup>23</sup> See *Joint Petition of Metropolitan Edison Company, 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 (Opinion and Order entered July 24, 2014).

<sup>24</sup> See R.D., p. 106 (explaining that ESC “contends that it is inequitable for EGSs to have to pay NITS costs while PECO assumes those charges for default service customer load and fully recovers the expense through the TSC”).

customers are assessed NITS charges.<sup>25</sup> The ALJ also examined ESC's claims and data regarding the "unpredictable" nature of NITS costs, the development of formula rates by PECO and other EDCs, NITS costs incurred by other utilities in PJM, compliance of PECO's NITS cost recovery mechanism with other provisions of the Code, and ESC's solutions to potential customer transition issues in the event the Commission were to change PECO's method of recovering NITS costs.<sup>26</sup>

In rejecting ESC's claims, the ALJ made detailed findings that ESC had failed to show that NITS costs were unpredictable even if an EDC recovered transmission costs through a FERC-approved formula rate. The ALJ noted that none of ESC's examples of NITS rate volatility pertained to PECO, and that PECO's NITS rates have been stable after PECO implemented a transmission formula rate.<sup>27</sup> Based on testimony presented by PAIEUG, the ALJ found that commercial and industrial customers opposed ESC's proposal, as those customers paid actual NITS costs under pass-through provisions in their EGS contracts and thereby eliminated the risk that EGSs would over or under-recover NITS costs.<sup>28</sup>

The ALJ also concluded that the "strongest argument" against ESC's proposal was made by Calpine, which explained that the management of NITS costs was an aspect of the

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<sup>25</sup> *Compare* Exceptions, p. 8 (asserting that "[t]he RD does not include any discussion about the status quo in PECO's service territory regarding how default service customers and shopping customers are assessed NITS charges") and R.D., p. 85 (describing NITS costs for both shopping and default service customers in PECO's service territory).

<sup>26</sup> R.D., pp. 85-91.

<sup>27</sup> R.D., p. 107. While ESC asserts that the ALJ "plainly misapprehended" the volatility of NITS costs in light of an 18% decline in NITS costs in a single year, ESC ignores the ALJ's detailed discussion of formula ratemaking and the predictable nature of NITS costs, as well as formula rate provisions that ensure a utility recovers only its actual costs. *See* R.D., p. 106.

<sup>28</sup> R.D., pp. 106-107.

competitive retail market and ESC's proposal would remove incentives and opportunities for EGSs to create customized products and services to help EGS customers manage these costs.<sup>29</sup>

ESC's repeated assertion of "inequitable" treatment of shopping customers and default service customers in its Exceptions does not justify any change in recovery of NITS costs from prior DSP proceedings. In fact, ESC continues to ignore Commission precedent stating that an EDC's recovery of PJM transmission-related costs, including NITS, for only default service load does not amount to discriminatory access in violation of Section 2804(6) of the Code:

Under the current approach, both PPL [Electric Utilities Corp. ("PPL")] and the EGSs are responsible for paying [non-market based] charges to PJM relating to the respective loads they serve. While the methods used to recover these charges from customers differ between PPL and the EGSs, there is no evidence of record to indicate that the "rates, terms of access and conditions" under which EGSs incur these charges are not comparable to those under which PPL incurs them.<sup>30</sup>

Similarly, ESC's assertion that the Commission's guidelines for pass-through clauses in contracts (the "*Fixed Price Order*")<sup>31</sup> precludes ESC members from managing NITS costs was already considered and rejected by the Commission in considering an earlier proposal by the Retail Energy Supply Association ("RESA"):

Finally, we do not agree with RESA's contention that the Fixed Price Order now limits an EGS's ability to account for changes in [non-market based costs, or NMBs] in the prices it charges customers. The Fixed Price Order prohibits a "fixed price" product from changing in price during the term of the agreement, but permits an EGS "the option of including in disclosure statements a provision that allows the EGS to, in the event of an

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<sup>29</sup> *Id.*

<sup>30</sup> *Petition of PPL Elec. Utils Corp. for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2015 through May 31, 2017*, Docket No. P-2014-2417907 (Opinion and Order entered Jan. 15, 2015) ("PPL DSP III Order"), p. 65.

<sup>31</sup> *Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Order entered Nov. 14, 2013).

unanticipated cost, reformulate the contract by proposing new contract terms to the customer, as long as the customer affirmatively consents.” Fixed Price Order at 32. Similar to our finding in FirstEnergy III with regard to the inclusion of NITS in a non-bypassable charge, we find the Fixed Price Order does not amount to “changed circumstances” that would cause us to reconsider our prior decision on the issue of NMB costs in PPL DSP II. See, FirstEnergy III Order at 31.<sup>32</sup>

In short, the ALJ fully considered ESC’s latest proposal to shift responsibility for NITS costs in PECO’s service territory and concluded correctly that nothing had changed since the Commission’s decisions in earlier PECO default service proceedings that now merited a change in NITS cost recovery. The Commission should again reject ESC’s proposal and deny ESC’s Exceptions.

**III. THE COMMISSION SHOULD REJECT THE ESC’S PROPOSAL TO INITIATE A STATEWIDE PROCEEDING TO REVIEW THE RECOVERY OF NETWORK INTEGRATION TRANSMISSION SERVICE COSTS**

In testimony in this proceeding, ESC’s witness Travis Kavulla noted that the Commission had initiated an informal investigation of non-market-based PJM charges in May 2015 and restarted that investigation in April 2017.<sup>33</sup> In light of the ALJ’s rejection of its proposal, ESC has now asked the Commission to initiate a new statewide investigation of such charges. The ALJ did not have the opportunity to consider this proposal, as ESC did not make its recommendations in briefing the issue reserved for litigation under the Settlement.

The Commission should reject ESC’s belated proposal. As ESC concedes, an investigation of non-market based PJM charges *is already underway* at the Commission. While ESC may consider that investigation “stalled,”<sup>34</sup> ESC’s belief that the Commission should move

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<sup>32</sup> PPL DSP III Order, pp. 65-66.

<sup>33</sup> ESC Statement No. 1 (Direct Testimony of Travis Kavulla), pp. 32-33.

<sup>34</sup> Exceptions, p. 3.

more quickly is no basis to start another investigation while an existing statewide investigation remains open. Furthermore, in light of the repeated failure of both RESA and ESC to demonstrate any need to revisit allocation of NITS costs in several default service proceedings, there is clearly no need for the Commission to expand its consideration of these issues at this time.

#### IV. CONCLUSION

For the reasons set forth above, the Commission should (i) deny ESC's Exceptions and adopt the Recommended Decision of Administrative Law Judge Eranda Vero, without modification; and (ii) reject ESC's proposal for a new statewide proceeding to review the recovery of NITS costs.

Respectfully submitted,



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Anthony E. Gay (Pa. No. 74624)  
Jack R. Garfinkle (Pa. No. 81892)  
PECO Energy Company  
2301 Market Street  
P.O. Box 8699  
Philadelphia, PA 19101-8699  
Phone: 215.841.4608  
Fax: 215.568.3389  
E-mail: [Jack.Garfinkle@exeloncorp.com](mailto:Jack.Garfinkle@exeloncorp.com)

Kenneth M. Kulak (Pa. No. 75509)  
Brooke E. McGlinn (Pa. No. 204918)  
Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
Phone: 215.963.5384  
Fax: 215.963.5001  
E-mail: [ken.kulak@morganlewis.com](mailto:ken.kulak@morganlewis.com)

*Counsel For PECO Energy Company*

Dated: November 3, 2020