



Charis Mincavage
Direct Dial: 717.237.5437
cmincavage@mcneeslaw.com

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

November 3, 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 for filing with the Pennsylvania Public Utility Commission are the Reply Exceptions 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

Counsel to the Philadelphia Area Industrial Energy Users Group

Enclosure

c: Administrative Law Judge Eranda Vero (via E-mail)
Office of Special Assistants (ra-OSA@pa.gov)
Certificate of Service

www.McNeesLaw.com

HARRISBURG, PA • LANCASTER, PA • SCRANTON, PA • STATE COLLEGE, PA • YORK, PA • COLUMBUS, OH • FREDERICK, MD • WASHINGTON, DC

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

Certificate of Service

Page 2

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

Counsel to the Philadelphia Area Industrial
Energy Users Group

Dated this 3rd day of November, 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 :

**REPLY EXCEPTIONS 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: November 3, 2020

Table of Contents

	Page
I. INTRODUCTION.....	1
II. REPLY EXCEPTIONS	3
A. <u>Reply Exception No. 1</u> . The Recommended Decision Correctly Finds That the Electric Supplier Coalition Did Not Meet Its Burden of Proof With Respect to a Change in the Status Quo for the Collection of NITS.....	3
B. <u>Reply Exception No. 2</u> : The Recommended Decision Correctly Finds that the Evidence Presented Herein Proves that PECO's NITS Are Not Volatile.	5
C. <u>Reply Exception No. 3</u> : Because ESC's Request for a Statewide Review Is Outside the Purview of This Proceeding, the Commission Must Reject This Request.	7
III. CONCLUSION	9

I. INTRODUCTION

On March 13, 2020, PECO Energy Company ("PECO" or "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.

After the submission of testimony in this proceeding, evidentiary hearings were held 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, with one issue continuing for litigation: whether the assignment of responsibility for PJM Interconnection, LLC ("PJM") charges for Network Integration Transmission Service ("NITS") on PECO's system should be modified from the status quo.

On August 16, 2020, Main Briefs were submitted in this proceeding, with Reply Briefs submitted on September 8, 2020. On October 20, 2020, ALJ Vero's Recommended Decision ("RD") was issued, with ALJ Vero correctly determining that the status quo should remain with respect to the collection of NITS costs on PECO's system. On October 29, 2020, the Electric Supplier Coalition ("ESC" or "Coalition") filed Exceptions to the RD. PAIEUG submits these Reply Exceptions to respond accordingly.

As set forth more fully herein, the ALJ's RD correctly determines that the ESC failed to meet its burden of proof with respect to any change in the status quo regarding the collection of

¹ PAIEUG's compilation is listed on the cover page of these Reply Exceptions.

NITS costs. Unfortunately, ESC's Exceptions fail to respond to that finding, but rather, set forth various arguments that are tangentially addressed in the RD, or, contrary to procedural requirements, raise a claim that was not even referred to in the RD.

For example, the ESC's Exceptions argue that the ALJ erred by not finding that the Electricity Generation Customer Choice and Competition Act ("Competition Act") allows for a collection of NITS by PECO. *See* ESC Exception ("Exc.") No. 1. Regardless of whether the Competition Act allows for such a transfer in the collection of costs, ESC failed to meet its burden of proof with respect to providing any evidence that such a change in the status quo is warranted. *See* Reply Exception No. 1, *infra*.

Moreover, the ESC utilizes its Exceptions to argue whether the Competition Act requires a similar "playing field" for Electric Generation Suppliers ("EGSs") and Electric Distribution Companies ("EDCs"). The ESC fails to recognize that the Competition Act specifically differentiates between EDCs and EGSs, thus rendering such a comparison untenable. ESC seems to set forth this argument as an attempt to overlook the fact that the ALJ correctly determines that the Coalition failed to provide any evidence that PECO's NITS costs are volatile, which would be the driving factor in any change in the status quo. *See* Reply Exception No. 2, *infra*.

Finally, in a last minute attempt to sway the Commission, the ESC claims that the PUC should institute a statewide review of NITS issues. This claim fails on several counts, including the fact that: (1) it is not an exception to anything in the RD; (2) it was not presented as part of ESC's case in chief in its Main Brief; and (3) it is outside the scope of this proceeding. Accordingly, ESC's request must be rejected. *See* Reply Exception No. 3, *infra*.

II. REPLY EXCEPTIONS

A. Reply Exception No. 1. The Recommended Decision Correctly Finds That the Electric Supplier Coalition Did Not Meet Its Burden of Proof With Respect to a Change in the Status Quo for the Collection of NITS.

In the RD, the ALJ recommends that ESC's request to modify the status quo with respect to the collection of NITS costs be rejected because the ESC failed to meet the burden of proving such a change was appropriate. RD at 106-108. In its Exceptions, the Coalition claims that the RD must be rejected based upon a single paragraph discussing the provisions of the Competition Act. ESC Exc. No. 1. Further review of the RD finds that, while the ALJ agrees with several parties' positions on the Competition Act interpretation, the reasoning behind the ALJ's recommendation to maintain the status quo stems from the ESC's failure to meet its burden of proof in this proceeding.

In the RD, the ALJ correctly finds that the ESC failed to show that the NITS costs in PECO's service territory are so volatile they cannot be predicted. RD at 106. Moreover, the ALJ appropriately notes that ESC did not provide any evidence showing the volatility of PECO's NITS rates. *Id.* Further, the ALJ fittingly references current PUC precedent holding that the collection of NITS for shopping customers should remain with the customer's EGS. *Id.* at 107. In other words, the RD provides a strong and substantive basis for rejecting ESC's position.

For purposes of its Exceptions, however, ESC focuses mainly on one paragraph in the RD that agrees with PAIEUG's position regarding the possibility that rebundling of transmission and distribution services could result from the Coalition's proposal in contravention of the Competition Act. ESC Exc., p. 5. In response, the ESC spends several pages of its Exceptions arguing about this interpretation of the Competition Act. *Id.* Moreover, the ESC points to a PUC Order in which the Commission had previously addressed this issue. *Id.* at 4. In doing so, however, the Coalition fails to recognize that in this same PUC Order, the Commission

determined that the lack of volatility in NITS costs warranted retention of the status quo. *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-2013923913745, P-2013-2391278, Opinion and Order (July 24, 2014) ("FE DSP III Order"). In other words, the Order that ESC cites in its Exceptions actually supports the ALJ's findings in the RD, as the Coalition has failed to prove any volatility in NITS costs warranting a change in the status quo.

In the FE DSP III Order, the Commission does find that First Energy Solutions' (*i.e.*, an EGS similar to those members of the ESC) proposal to modify the NITS collection was not precluded by the Competition Act or PUC regulations. FE DSP III Order, p. 38. This finding, however, is irrelevant to the Commission's overarching determination that FES did not meet its burden of proof in that proceeding. *Id.* at 31. According to the PUC, FES did not present any evidence showing any volatility in NITS costs warranting a change in circumstances with respect to the PUC's previous decision to retain NITS cost collection for shopping customers with their EGSs. *Id.*

In the instant proceeding, the ALJ also correctly finds that ESC had failed to show that NITS costs in PECO's service territory are so volatile they cannot be predicted. RD at 106. Moreover, the ALJ determines that the ESC did not provide any evidence of volatility for PECO's NITS costs. *Id.* Further, the ALJ cites to previous PUC precedent upholding the status quo with respect to NITS collection. *Id.* at 107. Accordingly, even if the PUC were to determine that the Competition Act did not hinder ESC's proposal, that determination is irrelevant in light of PUC precedent and lack of evidence by the Coalition. For these reasons, ESC's Exception No. 1 should be denied by the PUC.

B. Reply Exception No. 2: The Recommended Decision Correctly Finds that the Evidence Presented Herein Proves that PECO's NITS Are Not Volatile.

In the RD, the ALJ correctly determines that the Coalition failed to provide any evidence showing that PECO's NITS costs are volatile. RD at 106. ESC attempts to argue that such evidence is not relevant because the PUC should instead focus on providing similar playing fields for both EGSs and EDCs. ESC Exc., p. 9-10. Contrary to the ESC's claims, EDCs and EGSs are not identical and should not be treated as such. Moreover, the mere fact that PECO has implemented formula rates does not automatically prove evidence of volatility in NITS rates. Because the ALJ correctly finds that no volatility exists with respect to NITS in PECO's service territory, ESC's Exceptions should be denied.

The main thrust of the Coalition's argument is that the RD does not interpret the evidence correctly because the ALJ fails to focus on creating a level playing field for EDCs and EGSs. ESC Exc., pp. 8-10. Unfortunately, the ESC fails to recognize that EDCs and EGSs are different and must be treated as such. Once that issue is resolved, review of the Coalition's Exceptions show that the ESC can provide no evidence that PECO's NITS are volatile.

As correctly noted by Calpine, another EGS in PECO's service territory, comparing retail electric market products and services to fully regulated default service is an apples to oranges comparison. Calpine Main Brief, p. 4. Default service is based on a uniform master supply agreement with no individually negotiated terms of service (*i.e.*, it is one size fits all). *Id.* Conversely, the Competition Act has provided EGSs with the freedom to choose the products and services they offer into the marketplace, as well as the freedom to build, establish, and promote innovate products and services to meet both individual customer needs and the EGS's own business and management decisions. *Id.* at 4-5.

Simply because the members of the Coalition have decided that they do not want the freedom provided by the competitive marketplace does not mean that the ESC can now argue that EGSs should be treated identically to EDCs. Unfortunately, the ESC cannot pick and choose those provisions of a regulated EDC that they would prefer apply to EGSs while still retaining those portions of the competitive marketplace that benefit ESC members.

In this instance, and as referenced by the Coalition, the PUC has previously held that the collection of NITS costs should not be transferred to EGSs if such costs are not volatile. FE DSP III, p. 31. Moreover, the ALJ correctly determines that the ESC failed to meet its burden of proof in this instance, as "[n]one of the examples of NITS rates volatility brought forth by the Coalition in this proceeding pertain to PECO. Instead, they involve other transmission owners." RD at 106. In its Exceptions, the Coalition claims the ALJ "plainly misapprehended the effect of the only evidence in this proceeding related to PECO's NITS rates, which show a rate change of 18% in a single year." ESC Exc., p. 9. ESC's claim of this "only evidence" is especially ironic in light of the fact that it was provided by PAIEUG in response to ESC's failure to include PECO's NITS rates in any of the Coalition's evidence comparing NITS costs among transmission owners. *See Rebuttal Testimony of Jeffrey Pollock*, PAIEUG Statement No. 1, p. 7. Not surprisingly, the Coalition also fails to mention that the 18% change in PECO's NITS rates is actually a decrease. RD at 98. Viewed under this more appropriate lens, the ALJ is correct in finding that ESC failed to provide any evidence indicating volatility in PECO's NITS costs.

Contrary to the ESC's claims, the ALJ appropriately finds that ESC did not provide any evidence showing the volatility of NITS rates in PECO's service territory. Rather, the ESC only provided information regarding other transmission owner rates, which the PUC has already indicated as irrelevant for purposes of this issue. FE DSP III, p. 31. Moreover, the ALJ

correctly determines that the only evidence provided in this proceeding showed that PECO's NITS rates have decreased by 18% since implementation of formula transmission rates. Because the ESC did not meet its burden of proof in this proceeding, the PUC must reject the Coalition's Exceptions and accept the recommendations of the ALJ.

C. Reply Exception No. 3: Because ESC's Request for a Statewide Review Is Outside the Purview of This Proceeding, the Commission Must Reject This Request.

In a last minute attempt to salvage its argument, the ESC claims that the Commission should institute a statewide review of NITS issues in the retail market. Not surprisingly, the ESC does not include this claim as an Exception because it was not part of the ALJ's RD. Moreover, this issue was likely not addressed in the ALJ's RD because it was not part of ESC's case in chief. As a result, ESC's argument on this issue is beyond the scope of Exceptions. Accordingly, ESC's argument should be rejected, and this section of ESC's Exceptions should be stricken from the record.

The purpose of Exceptions is to respond to issues raised in the ALJ's RD. For purposes of the Coalition's Exceptions, the ESC inappropriately and unjustly attempts to include an argument beyond the scope of the ALJ's RD. The fact that this argument is beyond the scope of the RD is fully recognized by the fact that ESC does not label it as an "Exception." Instead, the ESC references testimony presented by its witness noting the status of a prior PUC investigation. ESC Exc., p. 12. As part of its testimony, ESC noted that it would welcome statewide review of this issue; however, ESC chose not to expound upon this reference in its Main Brief. Now, ESC unjustly and unreasonably attempts to have a "second bite at the apple" by raising this issue in its Exceptions.

Moreover, this argument seeks a statewide review as part of a specific EDC's DSP proceeding. Obviously, other entities not involved in this proceeding (*e.g.*, other EDCs) might

have a position on whether such an investigation is appropriate. ESC's attempt to argue for a statewide proceeding as part of an EDC-specific DSP proceeding is inappropriate and ill-conceived. If ESC truly believes a statewide investigation is warranted, ESC has the ability to file a Petition with the PUC requesting the same. Such a Petition would ensure appropriate due process, as all interested parties would have the ability to respond accordingly. ESC's proposal in this proceeding, however, removes that ability and attempts to circumvent appropriate due process requirements.

If ESC seeks a statewide investigation of this issue, the Coalition is free to file a Petition with the Commission requesting the same. To place this argument as part of its Exceptions, however, when ESC chose not to address this issue in its Main Brief is unjust and unreasonable. Accordingly, Section III of ESC's Exceptions must be stricken in their entirety and rejected in full by the PUC.

III. CONCLUSION

WHEREFORE, the Philadelphia Area Industrial Energy Users Group respectfully requests that the Pennsylvania Public Utility Commission adopt the Recommended Decision's recommendations with respect to maintaining the status quo for the collection of Network Integrated Transmission Service costs and reject the Exceptions filed by the Electric Supplier Coalition.

Respectfully submitted,

McNEES WALLACE & NURICK LLC

By 

Charis Mincavage (Pa. I.D. No. 82039)
Adeolu A. Bakare (Pa. I.D. No. 208541)
Jo-Anne S. Thompson (Pa. 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 Users
Group

Dated: November 3, 2020