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May 16, 2012

By e-mail & U.S. Mail
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Honorable Elizabeth H. Barnes
Administrative Law Judge
P.O. Box. 3265
Harrisburg, PA 17105-3265

Re:

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-2011-2273650 P-2011-2273668 P-2011-2273669 P-2011-2273670

Dear Judge Barnes:

Enclosed please find the Reply Brief of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) submitted in the captioned proceeding.

Should you have any questions or concerns please do not hesitate to contact me.

Respectfully submitted,

Patrick M. Cicero, Esquire
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Counsel for CAUSE-PA

CC: Certifícate of Service
PUC Secretary

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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-2011-2273650 P-2011-2273668 P-2011-2273669 P-2011-2273670

Certificate of Service

I hereby certify that I have this day served copies of the Reply Brief of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) upon the ALJ and the following parties as set forth below in accordance with the requirements of 52 Pa. Code § 1.54 and 52 Pa. Code § 5.412(f):

VIA E-MAIL & FIRST-CLASS MAIL

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DATE: May 16, 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JOINT PETITION OF METROPOLITAN	:		
EDISON COMPANY, PENNSYLVANIA	:	**Docket Nos.**	**P-2011-2273650**
ELECTRIC COMPANY, PENNSYLVANIA	:		**P-2011-2273668**
POWER COMPANY AND WEST PENN	:		**P-2011-2273669**
POWER COMPANY FOR APPROVAL OF	:		**P-2011-2273670**
THEIR DEFAULT SERVICE PROGRAMS	:		

REPLY BRIEF OF THE COALITION FOR AFFORDABLE UTILITY SERVICES AND ENERGY EFFICIENCY IN PENNSYLVANIA

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May 16, 2012

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I. Introduction

The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), through its counsel at the Pennsylvania Utility Law Project, files this Reply Brief in support of its positions and in response to the positions advanced by the Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), Pennsylvania Power Company ("Penn Power") and West Penn Power Company's ("West Penn") (collectively the "Companies"); Dominion Retail, Inc. ("Dominion"), the Retail Energy Supply Association, Inc. ("RESA"), and the FirstEnergy Solutions Corporation ("FES").

The evidence in the captioned proceeding demonstrates that the Companies' low-income customers, particularly those enrolled in the Companies' Customer Assistance Program ("CAP"), are economically vulnerable, merit distinct treatment, and require significant protection from the uncertainties of the retail electric market in order to adequately shield them from potential harm. None of the proposals put forward by parties who promote CAP customer participation in the Companies' proposed retail market enhancements provide sufficient or compelling evidence demonstrating that CAP customers can participate in the retail electric market without being subjected to harm. Furthermore, none of the parties opposed to the recommendations made by CAUSE-PA have come forward with adequate protections that would shield these economically vulnerable customers from harm.

Accordingly, for the reasons set out more fully below, CAUSE-PA requests that the Commission adopt the following recommended protections which were spelled out at length in CAUSE-PA's Main Brief and in the testimony submitted by its witness Carol J. Biedrzycki:

- CAP customers should be excluded from participation in the Retail Opt-in Auction and Customer Referral Programs;

- The Companies should be directed to modify their tariffs and universal service plans to require CAP customers to remain on default service;
- The Companies should be directed to develop a transition plan to transition its CAP customers who are currently shopping back to default service in a manner that does not economically harm CAP customers;
- The Companies should be directed to work with the Office of Consumer Advocate and low-income advocates to develop a communication plan for CAP customers to explain these changes;
- The Opt-In Aggregation Program and Customer Referral Program should be approved only if the Companies' proposal is amended to assure that at the conclusion of the auction/referral contract period that confirmed low-income customers who (1) have received a LIHEAP grant within the past year; or (2) are on a payment agreement (Commission-ordered or Company-provided) are offered a fixed rate 12-month contract at a price at or below the then existing default service PTC or returned to default service.
- All of the retail market enhancements should be paid for by participating EGSs;
- Calls concerning high bill complaints, bill disputes, and bill inquiries should not be part of the customer referral program; and,
- The Companies' Market Adjustment Clause should be rejected.

II. The First Energy Companies' Position

In their Main Brief, the Companies advance three arguments in opposition Ms. Biedrzycki's recommendation that CAP customers be precluded from the Companies' proposed retail market enhancements, and that the Companies be required to implement a plan to transition

CAP participants who are shopping back to default service. First, the Companies suggest that that nothing in the Commission's *Intermediate Work Plain Final Order* supports Ms. Biedrzycki's proposal that CAP customers remain on default service, and that Ms. Biedrzycki misunderstands the competitive markets and the concept of "least cost to customers" embodied in § 2807(e)(3.4).[1] Second, the Companies contend that they have structured their CAP benefits in such a way as to ensure that they are portable, and therefore these benefits cannot be lost through CAP customer shopping.[2] Finally, the Companies contend that since their proposed retail market enhancements provide for one-year fixed prices that will be below the Price to Compare CAP customers will benefit through their participation in the these programs.[3] Each of these arguments fails upon closer examination.

A. The Commission's Intermediate Work Plan Final Order supports the recommendations made by CAUSE-PA witness Ms. Biedrzycki.

It is apparent from the arguments advanced in their Main Brief that the Companies have paid little to no attention to the concern and restraint urged by the Commission when dealing with the issue of CAP customer shopping. In fact, the Companies incredibly state that "there is no basis for Ms. Biedrzycki's proposal to bar CAP customers from shopping[,]" and that "[n]othing in the *Intermediate Work Plan Final Order* suggests that the Commission believes such an outcome is appropriate or desirable."[4] Quite to the contrary, the Commission took great care in its Final Order in the *Investigation of Pennsylvania's Retail Market: Intermediate Work Plan* at Docket No. I-2011-2237952 ("IWP Final Order"), to carve out exceptions for low-income customers.

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[1] Companies' Main Brief at 134.
[2] Companies' Main Brief at 135.
[3] Companies' Main Brief at 136.
[4] Companies' Main Brief at 134.

First, in discussing the Customer Referral Program, the Commission unequivocally stated the following:

> **At this time, CAP customers should be excluded from the Standard Offer Customer Referral Program and have deferred the details of addressing the provision of universal service within default service to the [Retail Market Investigation's] Universal Service subgroup.**[5]

Second, regarding the opt-in auction/aggregation programs the Commission indicated the need for specific protections to be addressed and present in each Default Service Plan:

> The Commission recognizes the input provided thus far regarding the inclusion of CAP customers in the Retail Opt-in Auctions and has reviewed and discussed all information provided by the parties at great length. Because CAP customer participation in electric competition currently varies from EDC to EDC, the Commission finds it difficult to make a statewide pronouncement regarding these customers' inclusion or exclusion in the auctions at this time. . . . As such, the Commission believes the ability of CAP customer participation should be determined within each EDC's default service proceeding, through which the EDCs are presenting proposed Retail Opt-in Auction models. **We also note that we do see significant merit and agree with the comments provided by [numerous parties] that CAP customers should not be subject to harm, i.e., loss of benefits, if they are deemed eligible to participate in the auctions.**[6]

Thus, contrary to the contention of the Companies, there is clear direction and ample support in the Commission's IWP Final Order for precluding CAP customers from participating in the either the Retail Opt-in Auction or Customer Referral Programs if the proposed model will subject them to harm.

In their brief, the Companies have denigrated Ms. Biedrzycki' s testimony which highlights the importance of rate stability for vulnerable low-income households and the ability of default service to better provide that stability. The goal, articulated by Ms. Biedrzycki throughout her testimony, was for default service to produce stable prices that are projected to be

[5] IWP Final Order at 31 (emphasis added).
[6] IWP Final Order at 43 (emphasis added).

least cost over the timeframe of the default service plan.[7] Ms. Biedrycki's admitted lack of awareness of the specifics of how the price to compare is calculated in Pennsylvania[8] in no way detracts from her assertion that the default service model, which better addresses "rate stability" than market forces operating on their own, is preferable for low-income customers. Ample support for that view may be found in the framework endorsed by the Commission in its Final Rulemaking Order adopting the default service regulations:

> [T]he "least cost over time" standard should not be confused with the notion that default prices will always equal the lowest cost price for power at any particular point in time. In implementing default service standards, Act 129 requires that the Commission be concerned about **rate stability** as well as other considerations such as ensuring a "prudent mix" of supply and ensuring safe and reliable service. *See* 66 Pa. C.S. §§ 2807(e)(3.2), (3.4) and (7). In our view, a default service plan that meets the "least cost over time" standard in Act 129 should not have, as its singular focus, achieving the absolute lowest cost over the default service plan time frame but, rather, a cost for power that is both adequate and reliable and also economical relative to other options.[9]

Undoubtedly, when constructing a default service supply portfolio designed to produce least cost to customers over time, no one has a crystal ball which would allow a perfect mix of products guaranteed to produce the lowest price at any given time. However, this is neither the goal articulated by the Commission nor by Ms. Biedrzycki. Instead, the goal is for default service to produce stable prices that are projected to be least cost over the timeframe of the default service plan. This is in contrast to the procurement strategy of retail suppliers who design their own mix of contracts based on their own judgments about customer preferences. When left with these two choices, Ms. Biedrzycki asserts that the Act 129 default procurement requirements are significantly

[7] CAUSE-PA Statement No. 1-SR at 11.
[8] The Companies suggest, without elaboration that Ms. Biedrzycki's testimony should be disregarded because she could not elaborate on the concept of "least cost to customers" and that she had was not are of the specifics of how the price to compare is calculated in Pennsylvania. Companies' Main Brief at 134.
[9] *Implementation of Act 129 of October 15, 2008; Default Service and Retail Electric Markets Final Rulemaking Order*, Docket No. L-2009-2095624 at 11-12 (emphasis added).

more compatible with the goals of the CAP program than procurement practices based upon the market judgments of EGSs which are not subject to regulatory oversight.

B. The portability of CAP benefits is immaterial in this proceeding because the evidence demonstrates that CAP customers cannot participate in the retail markets without being harmed.

Throughout the Retail Market Investigation, the Commission has articulated a concern that CAP participants not be harmed through their participation in the Retail Opt-in Auction and that they be excluded from the Customer Referral Program.[10] The Companies and the suppliers have interpreted the Commission's statement that CAP customers "should not be subject to harm, i.e., loss of benefits,"[11] in an excessively narrow and unsupportable manner. In their view, so long as CAP customers retain the ability to be in CAP – i.e., their CAP benefits are portable – when they participate in the retail markets then ipso facto CAP customers have not been harmed.[12] This is not the standard established by the Commission.

In its IWP Final Order, the Commission did not say that those EDCs who currently allow CAP customers to shop should allow them to participate in the Opt-in Auction and allow their benefits to be portable. The Commission could have taken this approach. It did not. The Commission was clearly looking at something more than the mere portability of benefits: It was concerned that, if portable, CAP customers not be subject to harm. The Companies' simplistically narrow view that the Commission was only concerned with portability of CAP benefits should be rejected as inconsistent with the more nuanced view by the Commission. The Commission's view requires a fact intensive, company specific analysis as to whether CAP participants would be harmed through their participation in the proposed retail market

[10] IWP Final Order at 43.
[11] Ibid.
[12] See Companies' Main Brief at 136; Dominion's Main Brief at 28; RESA's Main Brief at 88; FES' Main Brief at 58.

enhancements. This requires a look at both the structure of the proposed retail market enhancements and the Companies' CAP program to determine whether together they work to the benefit or the potential detriment of CAP customers. The essential question to consider is: Would the participation of CAP participants in either of the proposed retail market enhancements "subject [CAP participants] to harm, i.e., loss of benefits."[13] It is clear from the facts of this case that the answer to that question is yes. There is no way to adequately ensure that CAP customers will not lose benefits through their participation in the competitive markets,[14] and thus, consistent with the guidance provided by the Commission they should be excluded from participating in the competitive enhancements. The arguments and evidence supporting this position were advanced in Ms. Biedrzycki's testimony and CAUSE-PA's Main Brief, but warrant repeating in summary format.

The essential problem with CAP customer shopping as the CAP program is structured by Met-Ed/Penelec/Penn Power is that CAP customers bear the initial brunt of all cost increases if they were to choose a competitive product that has higher prices than what they could obtain on default service.[15] Furthermore, the methods the Companies use to calculate their CAP benefits produces a "lag" which does not help the customer pay his or her current bill each month because the monthly CAP benefit is a product of the prior year's energy bill.[16]

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[13] IWP Final Order at 43.

[14] One means of ensuring that CAP customers are not harmed would be to convert all of the Companies' CAP programs to straight percentage of income programs such as in West Penn Power. Ms. Biedrzycki mentions this in her surrebuttal testimony but ultimately rejects it because of the potentially negative consequences to other ratepayers who pay for the CAP program. See CAUSE-PA Statement No. 1-SR at 10-11.

[15] CAUSE-PA Main Brief at 38.

[16] Again, as pointed out throughout the testimony and CAUSE-PA's Main Brief, this is not true of West Penn Power which has a straight percentage of income program. Thus, CAP participants pay the same amount regardless of the cost of the commodity. Under this structure, it is the other residential customers who pay for the CAP program who lose in the retail market when a CAP participant chooses a product that costs more than default service. This also is not a desirable result.

For a customer exiting either the Opt-in Auction Program or the Customer Referral Program, their prior year's bill will likely be lower than it had been before. As a result, the customers' **then-current monthly CAP benefit will be reduced** because it would be based on this lower annual bill. At this point, upon the expiration of the competition promotion programs customers are left on their own to obtain contracts from EGSs or return to default service. Those customers who enter into contracts with costs above what they had been paying under the program – even if they return to default service – will end up receiving an insufficient subsidy based on their prior year's energy costs and will see a monthly increase in their bills.[17] Thus, CAP participants will suffer a reduction of benefits.

The Companies contend – somewhat inexplicably – that CAP customers would not lose their benefits. The Companies have conflated the concept of CAP portability with loss of CAP benefits. These are not the same. To be sure, CAP households would continue to be enrolled in CAP and have not lost the ability to participate in the program. However, if simply maintaining enrollment status while shopping was all the Commission meant, it would have merely said that it would leave it to the EDCs to determine whether or not CAP benefits were to be portable. Instead, the Commission's standard is whether CAP customers will be harmed through their participation in these programs. Portability of benefits is not the sine qua non of whether customers are protected from harm. The Companies' have made their benefits portable; they have not structured their CAP program in such a way as to insulate CAP customers from harm via a loss of benefits. In fact, as was discussed in detail in Ms. Biedrzycki's testimony and CAUSE-PA's Main Brief, the Companies' CAP structure perpetuates the loss of benefits by creating a CAP subsidy that bears no relationship to the household's current energy costs.[18]

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[17] CAUSE-PA Main Brief at 41.
[18] See CAUSE-PA Statement No. 1-SR at 6-9; CAUSE-PA Main Brief at 40-41.

Neither the Companies nor the other parties promoting the participation of CAP customers in these programs has come forward with any evidence contradicting the fact that CAP participants would potentially lose benefits through their participation in the retail markets. As such, their positions should be rejected.

C. A fixed price product that is a percent off the price to compare at the beginning of the retail market enhancements provides inadequate protection to payment-troubled, low-income CAP customers.

The Companies suggest that the harm caused by their CAP structure is somehow mitigated by the fact that their revised retail market enhancements provide "one-year fixed-prices that will be below the Price to Compare," and further, that "if a CAP customer determines that the price offered is reasonable at the time of enrollment, that price cannot become unreasonable over the life of the program because it is fixed for the term of the customer's participation."[19] The Companies miss the point. Of course, one-year fixed prices won't change. What does change, however, is (1) the bench mark by which the value of this fixed price is measured, i.e., the Price to Compare and, (2) the CAP subsidy provided to CAP customers at the conclusion of the program.

If, during the term of the auction, the price to compare adjusts downward significantly then CAP households – and everyone else for that matter – lose because they are paying more for electricity than they otherwise would have. For non-low income households this is an inconvenience, for the poor it matters significantly. CAP households can ill afford an increase in their monthly electricity costs, and even a month or two of higher prices can make the difference between falling behind and staying current.[20] The Companies summarily dismiss this argument as "obviously . . . not the case" that CAP participants would be harmed by paying higher prices

[19] Companies' Main Brief at 136.
[20] See e.g. CAUSE-PA Statement No. 1 at 6-9; 14-18.

because these customers would be getting the benefit of their bargain.[21] CAUSE-PA submits that this paradigm is unacceptable in the context of a regulated CAP program that is designed to assist households who are payment troubled remain current on their bill.

Even assuming that the prices are not higher during the term of the auction or referral period, CAP customers are punished at the end of that period when their rates are based not on a Commission mandated referral program or auction, but rather on whatever rates the EGS sees fit to offer. This result would be in direct contrast to the direction to the Commission, provided within the Electricity Generation Customer Choice and Competition Act ("Choice Act), requiring the continuity of protections, policies and services that assist low-income customers to afford electric service.[22]

The fact that these households may have received a benefit in one year only to have that benefit taken back in year two by virtue of reduced CAP benefits does nothing to help households which are barely functioning economically from month to month to be able to maintain electric service.[23]

III. The Suppliers' Position

Dominion Retail, RESA, and FES all assert that CAP customers should be permitted to participate in the retail market enhancements proposed by the Companies. Each of their arguments is a variation on the theme that the Commission should be empowering customer choice rather than restricting choice. While maintaining rhetorical appeal, these arguments fail to address the issue of harm, provide no proposals to provide protections in the face of potential harm, and fail under the weight of the evidence.

[21] Companies' Brief at 136.
[22] 66 Pa CS §2802 (10)
[23] Tr. of Proceedings at 333; CAUSE-PA Statement No. 1-SR at 19.

For instance, in its brief, Dominion Retail asserts that from a "pure policy perspective, there is no good reason to deprive low-income customers who may participate in an EDC's CAP program the opportunity to save money."[24] While this is undoubtedly true, it is inconsistent with the facts of this case. There is no evidence in this case suggesting that low-income CAP customers *will save* money through their participation in these programs. None of the programs guarantees a percent off the price to compare for the entire term of the program nor do they provide any protection to these customers at the expiration of the program such that they guaranteed to never pay more than the price to compare. The standard put forward by the Commission in assessing whether or not CAP customers should participate in these retail market enhancement programs is not whether they provide an opportunity to save money; but whether or not the opportunity that is provided is one that subjects the CAP customer to economic loss. There are ample policy reasons, cited by Ms. Biedrzycki, why CAP customers should remain on default service, not the least of which is that that the Companies' CAP structure harms CAP customers when price variations swing up and down as they are more prone to do in the competitive market where customers may get into variable rate contracts.[25] This concern for harm to CAP customers is the policy reason cited by the Commission in its IWP Final Order.[26]

Dominion also asserts:

> The only argument in favor of [a restriction on CAP customer participation in the retail market enhancements] is the paternalistic suggestion that "low-income customers are not capable to assessing competing offers and thus need to be kept on higher priced default service so they do not suffer the consequences of their poor choices." While some EDCs may have implementation issues that make it difficult, in the short term, for CAP customers to participate in every facet of the CHOICE market, First Energy does not.[27]

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[24] Dominion Retail Main Brief at 28.
[25] See CAUSE-PA Statement No. 1-SR at 8-10; 18.
[26] IWP Final Order at 43.
[27] Dominion Retail Main Brief at 28 (quotation marks and capitalization in original). It is unclear whom or what Dominion Retail is quoting in its brief as it does not provide a citation.

There has been no suggestion from Ms. Biedrzycki that low-income households are incapable of making reasoned choices. However, even reasoned choices may have negative economic consequences. The Choice Act charges the Commission with assisting low-income customers to afford and maintain their electric service. While some may claim it is paternalistic, it is nevertheless the policy of the Commonwealth of Pennsylvania to create a structure to assist these customers. Not because CAP customers are unable to make rational choices, but because they simply lack sufficient economic resources to maintain electric service without Commission intervention.

In this proceeding, it is the design of the Companies' proposed retail enhancements as well as the design of the Companies' CAP programs that ensures that *if* CAP customers choose poorly either they and/or other customers, who pay for the CAP programs, will bear the financial burden of this choice. For CAP customers, this could readily be catastrophic given that they have no economic margin in their budget; and for other customers who pay for these programs, it would needlessly add to the costs of the program with no evident benefit to any entity other than the retail suppliers. This is not the purpose of the CAP program. Its purpose to assist low-income payment troubled customers pay for essential utility service; this is best done when the CAP program is married to a regulated product designed to promote rate stability.

Dominion Retail's final argument is essentially that since the Companies have designed a portable benefit and have overcome "implementation issues" that CAP customers should shop.[28] Again, the issue is not whether CAP benefits are portable; it is whether CAP customers can be harmed by their participation in the competitive market.

[28] Ibid.

Since the answer to this question, in the context and facts of this case is affirmative, CAP customers should not participate in these markets.

For its part, RESA suggests that since CAP customers will not lose benefits and they "would stand to receive a $50 bonus for participating" that CAP customers should be permitted to participate in the retail market enhancements.[29] FES suggests that all customers should be permitted to participate because CAP benefits are portable.[30] First, as to RESA's arguments, to be clear, under the Companies' proposal no customer will receive a $50 bonus for participating in the opt-in auction.[31] It is only if the Commission modifies the Companies' proposal to conform with RESA's position, would this be the case. Second, all of the evidence in the proceeding suggests that CAP customers will likely lose benefits by participating in the auction because of the manner in which the Companies – with the exception of West Penn Power – calculate their CAP payments. This has already been discussed in detail,[32] and does not need repeating here. Because of the very real potential for harm, CAP customers should be precluded from participating in the retail market enhancements proposed by the Companies, and the Companies should be required to develop a plan to transition those already shopping back to default service.

IV. Conclusion

The Commission articulated in its IWP Final Order that CAP customers should not participate in the Customer Referral Program and should only participate in the Opt-in Auction

[29] RESA Main Brief at 90-91.
[30] FES Main Brief at 58.
[31] See Companies' Statement No. 7-R at 32-34.
[32] See supra and CAUSE-PA Main Brief at 38-43 (citing testimony).

program if they could do so without being harmed.[33] Moreover, the Choice Act directs the Commission to continue protections, policies and services that assist low-income customers to afford electric service.[34] Here, none of the parties opposed to CAUSE-PA's position have provided evidence or compelling reasons why CAP customers should participate in the retail market enhancements or how these programs would insulate CAP customer from harm.

Low-income households have no budget elasticity. When faced with the prospect of higher electric costs – even paying only marginally more for only a short period of time – this additional cost is often the difference between remaining current on their bills or falling behind. This is an unacceptable risk for CAP customers, the Commission and for other residential customers. The best way to monitor and promote the success of the CAP program is to maintain the program within the safe harbor of the default service provider.

Respectfully submitted,

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May 16, 2012

[33] IWP Final Order at 43
[34] 66 Pa CS §2802 (10)