

**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	:	

**PETITION FOR RECONSIDERATION
AND/OR CLARIFICATION
BY THE COALITION FOR AFFORDABLE UTILITY
SERVICES AND ENERGY EFFICIENCY IN
PENNSYLVANIA**

**OF THE OPINION AND ORDER
ENTERED AUGUST 16, 2012**

PENNSYLVANIA UTILITY LAW PROJECT

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The Coalition For Affordable Utility Services and Energy Efficiency In Pennsylvania (“CAUSE-PA”) through their attorneys at the Pennsylvania Utility Law Project, hereby submits this Petition pursuant to Public Utility Commission Regulations at 52 Pa. Code §§ 5.41 and 5.572, and request timely reconsideration and/or clarification of the Commission’s August 16, 2012 Opinion and Order in the captioned proceeding.

I. Introduction

1. On November 17, 2011, Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”) and West Penn Power Company (“West Penn”) (collectively, “the Companies”) filed a Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of Their Default Service Programs (“Joint Petition”) with the Pennsylvania Public Utility Commission (“Commission”). The Joint Petition sought Commission approval of the Companies’ programs to supply electricity to default service customers for the period from June 1, 2013, through May 31, 2015.

2. On December 19, 2011, CAUSE-PA filed a Petition to Intervene and an Answer to the Companies’ Petition raising concerns about the Companies’ proposed implementation of its proposed retail market enhancement. Various other parties also filed petitions to intervene and/or an answer to the Companies Joint Petition prior to the December 19, 2011 deadline.¹

3. CAUSE-PA filed the direct, rebuttal, and surrebuttal testimony of its witness, Carol J. Biedrzycki.

¹ Petitions to Intervene were filed by the following: Office of Small Business Advocate (“OSBA”), Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc., Exelon Generation Co., PECO, ARIPPA, FirstEnergy Solutions Corp., Washington Gas Energy Service, Direct Energy Services, Retail Energy Supply Association, Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, West Penn Industrial Intervenors, Dominion Retail, and the York County Solid Waste Authority. The Office of Consumer Advocate (“OCA”) filed a notice of appearance and public statement on December 19, 2011, announcing its intent to intervene to protect the interests of the Companies’ residential customers.

4. After hearings were held on April 11-12, 2012, the parties filed Main Briefs on May 3, 2012, and Reply Briefs on May 16, 2012.

5. The presiding officer, Administrative Law Judge (“ALJ”) Elizabeth H. Barnes wrote a Recommended Decision (“RD”) which was issued by the Commission on June 15, 2012.

6. On August 16, 2012 the Public Utility Commission (“Commission”) entered an Opinion and Order in the above captioned proceeding.

7. CAUSE- PA files this Petition and Requests Reconsideration and/or Clarification of the Commission’s August 16, 2012 Opinion and Order.

II. Legal Requirements for Granting Reconsideration Under 52 Pa. Code §5.592.

8. In *Philip Duick et al. v. Pennsylvania Gas and Water Company*, Docket No. C-R0597001 (Order entered December 17, 1982), 1982 Pa. PUC LEXIS 4, 56 Pa. PUC 553 (1982), the Commission explained the basis for rescinding or amending a prior order:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. . . . What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Duick, 1982 Pa. PUC LEXIS 4, at *11-*13.

9. In *Pennsylvania Public Utility Commission v. Jackson Sewer Corporation*, 2001 Pa. PUC LEXIS 44, the Commission also stated:

Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.

Jackson Sewer, 2001 Pa. PUC LEXIS 44, at *6.

10. This Petition satisfies *Duick* and *Jackson Sewer*, in that the Petition raises issues

“which appear to have been overlooked or not addressed by the Commission” and “alleges errors of law.”

III. Requests for Reconsideration and/or Clarification

11. It is submitted that the Commission has, without adequate substantial evidence, due process, and contrary to law, reversed its prior policy regarding the terms and conditions of the Opt-in Auction as proposed by the Companies, as well as reversed its position regarding the participation of CAP Customers in the Retail Market Enhancements without fully considering the harm caused to CAP customers by the changes made by the Commission to the Opt-in Auction product.

12. The August 16, 2012 Opinion and Order arbitrarily reversed the Commission’s prior direction contained within the Final Order issued March 2, 2012 in the *Investigation of Pennsylvania’s Retail Market: Intermediate Work Plan* at Docket No. I-2011-2237952 (“IWP Final Order”), wherein it was expressly stated that a) CAP customers should be excluded from the Standard Offer Customer Referral Program; b) that consideration of how CAP customers could be incorporated into the competitive marketplace without suffering harm was referred to the RMI’s Universal Service subgroup; c) that the Company develop a Retail Opt –In Auction and, d) that the issue of whether or not CAP customer’s could participate in the Retail Opt –In Auction without harm was an issue to be determined within this proceeding by the ALJ.

13. In addition, the Commission, without substantial basis on the record, arbitrarily disregarded the ALJ’s determination made after the development of a full record, hearing and briefing that CAP customers would suffer harm and that they should be excluded from participating in the Companies’ proposed market enhancements.

14. On March 2, 2012, the Commission issued its Final Order in *Investigation of Pennsylvania's Retail Market: Intermediate Work Plan* at Docket No. I-2011-2237952 ("IWP Final Order"). The IWP Final Order sets forth the Commission's recommendations concerning a series of proposed retail market enhancements; most relevant to the issues CAUSE-PA has addressed in this proceeding are the Commission's recommendations concerning the Opt-in Auction/Aggregation program and its recommendations concerning the Customer Referral Program. Specifically, the Commission's IWP Final Order stated, among other things, the following concerning any EDC's proposed customer referral program:

The standard offer will target/market residential default service customers; however, residential shopping customers will not be excluded if they specifically request to participate. **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.**²

15. Concerning the retail opt-in auction/aggregation programs proposed by EDCs in their default service proceedings, the Commission stated generally that the Retail Opt-in Auction should be made available to residential customers. However, regarding the conditions required to enable participation of low-income CAP customers, the Commission specifically 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. The Commission notes that a Universal Service subgroup has been formed under the auspices of the Investigation and it is expected that those subgroup participants will discuss the issues surrounding CAP customer shopping at length and provide recommendations for future RMI initiatives, such as the long-term work plan anticipated to be released in the spring of 2012. However, the Commission believes it cannot make a determination, at this time, regarding the eligibility of

² IWP Final Order at 31-32 (emphasis added).

such customers to participate in the Retail Opt-in Auctions. 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.**³

16. In response to the Commission's IWP Final Order, the Companies sent a letter to ALJ Barnes and the parties dated March 9, 2012 in which it indicated that it would respond to the Commission's IWP Final Order recommendations in its rebuttal testimony filed on March 16, 2012.

17. On March 16, 2012, the Companies, along with other parties including the Retail Energy Supply Association ("RESA") filed rebuttal testimony in response to the direct testimony filed by the all parties.

18. Specifically relevant to the issues of concern raised in this Petition for Reconsideration and Clarification, the Companies filed rebuttal testimony by Charles V. Fullem,⁴ in which Mr. Fullem explained the changes Companies proposed in response to the Commission's IWP Final Order:

(a) the Companies significantly revised their Customer Referral Program to offer a fixed 7% off the EDC PTC at the time of customer enrollment with a service term of 12 months, and

(b) they also revised their Opt-in Auction proposal to offer a product that has a twelve-month term rather than a twenty-four month term and a fixed price at least 5% less than each EDC's PTC at the time of the auction as opposed to a guaranteed percent

³ IWP Final Order at 43 (emphasis added).

⁴ Met-Ed/Penelec/Penn Power/West Penn Statement No. 7-R ("Companies' Statement. No. 7-R").

off.⁵

19. On April 4, 2012, CAUSE-PA filed its written Surrebuttal Testimony.⁶ In her Surrebuttal, Ms. Biedrzycki modified her conclusions based on the Commission's IWP Final Order and the rebuttal testimony filed by the Companies.

20. Ms. Biedrzycki concluded that in light of the changes proposed by the Companies in the rebuttal testimony of Mr. Fullem, CAP customers should remain on default service and should be excluded from participating in any of the Companies proposed retail market enhancements.⁷

21. Ms. Biedrzycki also recommended that, given the complexity of the issues involved, the Companies initiate a process to prohibit CAP customers from choosing a retail EGS at any time.⁸

22. On the basis of this record and the proposals in front of her at the time, the presiding officer, Administrative Law Judge ("ALJ") Elizabeth H. Barnes wrote a Recommended Decision ("RD") which was issued by the Commission on June 15, 2012 in which she agreed with CAUSE-PA

23. In the R.D., the ALJ concluded that the Companies' CAP customers would be harmed through participation in the Companies' proposed retail market enhancements. ALJ Barnes stated:

I am persuaded to agree with CAUSE-PA that the combination of the Companies' CAP structures combined with a lack of guaranteed affordable payments for CAP customers participating in the retail market indicates that CAP customers should be precluded from participation in the Opt-in Auction and Customer Referral Program at this time.⁹

⁵ Companies' Statement No. 7-R at 3-4.

⁶ CAUSE-PA Statement No. 1-SR.

⁷ CAUSE-PA Statement No. 1-SR at 10

⁸ CAUSE-PA Statement No. 1-SR at 13.

⁹ R.D. at 121.

24. However, the Commission, in its August 16 Opinion and Order, abandoned the auction model and imposed instead an Opt-In Aggregation Model without any discussion on the record of the effect that this aggregation model, as distinct from the auction model, would have upon low-income CAP customers or the potential harm to these customers of that model.

25. The Commission's aggregation model replaces a 12-month fixed price product guaranteed to be at least 5% less than the PTC at the time of the auction with a product that is guaranteed to be less than the PTC for only 4 months and then, while fixed price, will be a fixed price that is administratively determined by the supplying EGS.¹⁰

26. There was ample evidence in the record that CAP customers would be harmed though their participation in the Opt-in Auction product proposed by the Companies, although the Commission chose to ignore this evidence and found that CAP customers could participate in the auction.

27. Regardless of the Commission's decision on the record regarding CAP customer participation in the **auction program proposed by the Companies**, there is no basis in the record for the Commission to have made a determination of the effect upon CAP customers based on the **aggregation program devised by the Commission**.

28. No party submitted evidence on an aggregation program or its effect because the issues were not raised until the Commission issued its Opinion and Order on August 16, 2012.

29. CAUSE-PA submits that the elimination of the Opt-in Auction model and its replacement by the Commission with a different (aggregation) model that was not previously proposed, analyzed, or subject to review, testimony, and briefing is an error of law and is not based on substantial evidence.

¹⁰ August 16, 2012 Opinion and Order at 117-118.

30. The Commission also erred in its failure to analyze or determine whether potential increases in costs to non-CAP low-income customers as a result of participation in the market enhancements, particularly the ROI Aggregation Program violates the Electricity Generation Customer Choice and Competition Act (“Choice Act”).

31. Pursuant to the Electricity Generation Customer Choice and Competition Act (“Choice Act”), an essential statutory obligation of the Public Utility Commission (“Commission”) is to “continue the protections, policies and services that now assist customers who are low-income to afford electric service”¹¹ in the competitive environment.

32. This polestar legal principle in the midst of the myriad issues presented in this case was not addressed in the context of the ROI aggregation program and was lost in the August 16 Opinion and Order.

33. The Commission also erred in its failure to adequately address the issue of harm to CAP customers through their participation in the market enhancement programs.

34. The Choice Act recognizes that, although direct access by retail customers to the competitive generation market was needed to enable competition, it was to be tempered by the Commission’s continued role in ensuring affordability of electric service to the Commonwealth’s most economically vulnerable citizens.

35. The Commission’s determination that CAP benefits will continue to be portable inadequately addresses the issue of potential economic harm to CAP customers – a standard announced by the Commission in its *IWP Final Order*.

36. For the Commission to set the stage by telling the parties that CAP customers can participate in the market enhancement programs only if they can do so and not be subjected to harm and then to *totally ignore this standard* in reaching its conclusion about the evidence in the

¹¹ 66 Pa. C.S. § 2802 (10).

record is arbitrary and without basis.

37. CAUSE-PA as a party to this proceeding litigated this case based on the guidance provided by the Commission in its *IWP Final Order*. Its evidence was tailored to that standard, but the end result by the Commission was an abrogation of the “no harm” standard without affording *any party* the opportunity to present new and additional evidence.

38. This abrogation of the “no harm” standard is best evidenced in the Commission’s discussion in its Opinion and Order of the reasons why it will permit CAP customers to participate in the retail market enhancements, wherein it stated that it was convinced by three arguments made by the Companies:

We are persuaded by the Companies’ arguments that: (1) CAP customers are already permitted to shop under the terms of the Companies’ existing retail tariffs; (2) under their Commission-approved Universal Service Programs, CAP funding is entirely “portable” and CAP benefits cannot be diminished if a customer switches to an EGS; and (3) the Companies’ proposed Market Enhancement Programs assure that the customer will receive a price lower than the PTC at the time of enrollment or referral.

...

While we recognize that this decision deviates from our conclusion within our recent *IWPF Order* at 31, we find that the Companies have provided sufficient justification within this proceeding to alter that approach within their service territories.¹²

39. While admittedly, these arguments were advanced by the Companies to justify the inclusion of CAP customers in **the Companies’** proposed retail market enhancements, none of them addressed the Commission’s “no harm” standard.

40. This abrupt change in direction by the Commission without notice and an opportunity to present argument constitutes error and fails completely to address the issue of actual harm to low-income customers.

41. The first argument, “CAP customers are already permitted to shop under the

¹² IWPF at 143

terms of the Companies' existing retail tariffs" is asserted without any analysis of the effect on these customers as a result of shopping, particularly in light of the newly announced aggregation program.

42. The second basis relied upon to reverse the ALJ's decision is that "under their Commission-approved Universal Service Programs, CAP funding is entirely "portable" and CAP benefits cannot be diminished if a customer switches to an EGS" is made without any substantial evidence within the record and is clearly contradictory to the evidence.

43. As pointed out by CAUSE-PA when briefing this issue, 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. Instead, the evidence in this proceeding demonstrated that 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.¹³

44. Neither the Companies nor the other parties promoting the participation of CAP customers in these programs came forward with any evidence contradicting the fact that CAP participants would potentially lose benefits through their participation in the retail markets, yet the Commission adopted the Companies' position.

45. The third leg used as the basis for reversing the ALJ was:"the Companies' proposed Market Enhancement Programs assure that the customer will receive a price lower than the PTC *at the time of enrollment or referral.*" (*Emphasis added.*)

46. The reliance by the Commission upon a single temporal moment, rather than analyzing and determining the effect upon a low income CAP or non-CAP customer overtime is error. The Choice Act's conferral of responsibility upon the Commission to protect the interests

¹³ See CAUSE-PA Statement No. 1-SR at 6-9; CAUSE-PA Main Brief at 40-41.

of low-income customers in the competitive market place was not intended to be only at the moment of entry into that arena but on a continuing basis.

WHEREFORE, CAUSE-PA respectfully requests that the Commission:

a. Reverse its decision that directs that CAP customers be included in the newly announced opt-in aggregation program and customer referral program because this decision was an error in that it is not supported by substantial evidence in the record; or, in the alternative,

b. Remand this matter back to the ALJ for the introduction of additional evidence on the impact and effect of the Commission's newly promulgated opt-in aggregation program on the affordability of CAP customers bills and, in particular, for a determination as to whether CAP customers would be harmed by their participation in this newly announced program; or, in the alternative,

c. Provide an explanation, rationale and reasoning for its reversal of its position regarding the appropriate standard to be used in determining whether to include CAP customers in the retail market enhancements so that parties can have a proper basis for determining whether to file an appeal.

Respectfully submitted,

PENNSYLVANIA UTILITY LAW PROJECT

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