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July 26, 2013

*Via regular and electronic mail*

Hon. Cynthia Williams Fordham  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
801 Market Street, Suite 4063  
Philadelphia, PA 19107

**RE: Petition of PECO Energy Company for Approval of its Default Service Plan  
Docket No. P-2012-2283641**

Dear Judge Fordham:

Enclosed please find a copy of the Main Brief of Direct Energy Services, LLC in the referenced proceeding.

Direct Energy's Main Brief was filed electronically with the Commission's Secretary on this date and served upon the parties as evidenced by the attached Certificate of Service.

Sincerely,



Edward G. Lanza  
Counsel for Direct Energy

Enclosure

cc: Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for :  
Approval of Its Default Service Program : Docket No. P-2012-2283641

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**MAIN BRIEF  
OF DIRECT ENERGY SERVICES, LLC**

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Date: July 26, 2013

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## **I. INTRODUCTION AND PROCEDURAL HISTORY**

### **A. Introduction**

The Pennsylvania Public Utility Commission (“Commission”) should amend or reject the proposed customer assistance plan (“CAP”) shopping program (“CAP Shopping Plan”) proposed by PECO Energy Company (“PECO”) in this proceeding. Absent significant changes, PECO will have a flawed CAP Shopping Plan with little or no electric generation supplier (“EGS”) participation, no benefits for low income customers, with non-participating suppliers picking up the costs. The worst possible result would be for PECO to spend \$4.6 million (regardless of how it is paid for) on a CAP Shopping Plan that few or no EGSs will participate in and which, thus, would bring no benefits at all to CAP customers. The Commission should therefore either: (1) modify PECO’s CAP Shopping Plan so that CAP customers will have the same rights and opportunities in the market as other customers, with cost recovery through a non-bypassable charge, or (2) order PECO and other parties back to the collaborative process to come up with a plan that works to supplant the unworkable CAP Shopping Plan proposed by PECO.

### **B. Procedural History**

On October 12, 2012, the Commission issued its Final Opinion and Order in the PECO Default Service Plan (“DSP”) Proceeding.<sup>1</sup> In its *October 2012 Order*, the Commission directed that the benefits of the competitive market be made available to CAP customers as follows:

The Commission is committed to ensuring that all customers, including CAP customers, are eligible to participate in the competitive retail electricity market.

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<sup>1</sup> *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641 (Opinion and Order issued October 12, 2012) (hereinafter, “*October 2012 Order*”).

Accordingly, while we are supportive of RESA's position on this issue, especially with regard to the portability of CAP credits, we acknowledge that PECO currently does not allow its CAP customers to shop, and that there are a number of issues that must be addressed in order to change this policy...

Rather than delay the inclusion of CAP customers within PECO's RME Programs, we shall direct PECO to develop a plan that will allow its CAP customers to purchase their generation supply from EGSs by January 1, 2014. Toward this end, we shall direct OCMO to work with PECO to: (1) ensure that, to the extent possible, the Opt-In and Standard Offer Programs are available to CAP customers; and (2) provide a path that allows both CAP credits and LIHEAP funds to be used by customers that choose an EGS to supply their generation service. Beyond allowing CAP customers to participate in PECO's DSP II RME Programs, this will ensure that all customers have the ability to avail themselves of the full benefits of retail electric competition. This is consistent with the proposal released on September 27, 2012, related to the Investigation of PA's Retail Electric Market at Docket No. I-2011-2237952.<sup>2</sup>

In accordance with the *October 2012 Order* (and other various Orders as well as Secretarial Letters in PECO's Three Year Plan Proceeding, DSP II case, and the Commission's 2013 Universal Service Order), PECO filed its proposed CAP Shopping Plan on May 1, 2013.<sup>3</sup> See Petition at 3-4.

In a more recent pronouncement regarding CAP shopping, the Commission reiterated its position that low-income electric customers in CAP programs should have the opportunity of taking advantage of shopping for electric supply.<sup>4</sup> In its retail market investigation ("RMI") End State Final Order, the Commission stated that one of the basic intents of the Competition Act – to "permit retail customers to obtain direct access to a competitive generation market" – was

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<sup>2</sup> *October 2012 Order* at 131.

<sup>3</sup> See Petition at 3-4 for a summary of the full procedural history of this case.

<sup>4</sup> *Investigation of Pennsylvania's Retail Electric Market: End State of Default Service*, Docket No. I-2011-2237952 (Order Issued Feb. 15, 2013) (hereinafter, "*RMI End State Final Order*").

intended to include all customers.<sup>5</sup> The Commission went on to say that CAP customers have the capability to make shopping decisions and should be allowed to do so. According to the Commission, CAP customers can, in addition to their CAP benefit, also receive the additional benefit of possible energy costs savings. The Commission cautioned that care must be taken to educate CAP customers so that they understand how their CAP benefit interacts with shopping, and that EDCs should provide such information along with the information they routinely provide to CAP customers when explaining their CAP benefits.<sup>6</sup>

Finally, the Commission acknowledged in its *RMI End State Final Order* the concerns expressed by some parties about the complexities involved with the participation of CAP customers in the competitive market and the possible impact on these programs. However, the Commission decided that measuring and determining the benefits of shopping requires more than just comparing a supplier price to the default price at one point in time. The Commission stated that none of these complexities or concerns is insurmountable.<sup>7</sup>

## **C. Legal Standards**

### **1. Burden of Proof**

Section 332(a) of the Public Utility Code (“Code”) provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.<sup>8</sup> It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and

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<sup>5</sup> 66 Pa. C.S. § 2802(3).

<sup>6</sup> *RMI End State Final Order* at 61.

<sup>7</sup> *Id.* at 61-62.

<sup>8</sup> 66 Pa. C.S. § 332(a).

legally credible.”<sup>9</sup> A preponderance of the evidence means evidence which is more convincing, by even the smallest amount, than that presented by the other party.<sup>10</sup> Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence.<sup>11</sup> More information is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.<sup>12</sup>

PECO has the ultimate burden of proof in the proceeding and the burden of going forward with evidence showing that its CAP Shopping Plan is lawful and reasonable.

## **2. Standards Applicable to PECO’s CAP Shopping Plan**

The Competition Act mandates that customers have direct access to a competitive retail generation market.<sup>13</sup> This is based on the legislative finding that “competitive market forces are more effective than economic regulation in controlling the costs of generating electricity.”<sup>14</sup> Thus, a fundamental policy underlying the statute is that competition is more effective than economic regulation in controlling the costs of generating electricity.<sup>15</sup>

This particular proceeding is governed by the Commission’s *October 2012 Order* directing PECO to implement a program that provides CAP customers with an opportunity to

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<sup>9</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

<sup>10</sup> *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

<sup>11</sup> *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth. 1993).

<sup>12</sup> *Norfolk and Western Ry. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep’t. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

<sup>13</sup> 66 Pa. C.S. § 2802(3).

<sup>14</sup> 66 Pa. C.S. § 2802(5). See *Green Mountain Energy Company, et al. v. Pa. PUC*, 812 A.2d 740, 742 (Pa. Cmwlth. 2002).

<sup>15</sup> 66 Pa. C.S. § 2802(5).

take advantage of the competitive market for energy supply.<sup>16</sup> Pursuant to the Commission’s directive, PECO’s CAP shopping plan must be measured by whether the plan ensures shopping is made available to CAP customers, and that they provide a path that allows both CAP credits and LIHEAP funds to be used by customers that choose an EGS to supply their generation service. PECO’s plans must ensure that all customers, including CAP customers, have the ability to avail themselves of the full benefits of retail electric competition.

## **II. ARGUMENT**

### **A. Summary of PECO’s Proposed CAP Customer Shopping Plan**

PECO proposes a CAP Shopping Plan in which EGSs can voluntarily participate to provide CAP customers service but only at a rate that is at or below the PECO price to compare (“PTC”).<sup>17</sup> Under PECO’s proposal, unlike the Standard Offer Program (“SOP”), an EGS price to a CAP customer must remain at or below the effective PTC at all times.<sup>18</sup> PECO acknowledges this restriction on service to CAP customers is more stringent than that of the SOP, which only requires a twelve month fixed price product that is seven (7) percent below the PTC in effect at the time that the standard offer is made.<sup>19</sup> PECO states that its program does not “significantly” restrict the forms of rates, discounts, or other promotions by EGSs and that EGSs may make offers including fixed or variable pricing, “green” products with a renewable energy component, incentives such as initial period discounts, and signing bonuses, including gift cards,

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<sup>16</sup> *October 2012 Order* at 131.

<sup>17</sup> Petition at 8.

<sup>18</sup> PECO St. 2 at 4 (McCawley Direct Testimony).

<sup>19</sup> PECO St. 2 at 9 (McCawley Direct Testimony).

but then admits that such offers may only be made so long as the overall rate charged to a CAP customer for generation service does not exceed the PTC.<sup>20</sup>

PECO also proposes that a participating EGS must publish its CAP rates on PAPowerSwitch.com and in a customer mailing (upon a customer's request via EGS call centers).<sup>21</sup> An EGS would also electronically submit a notice of intent to participate as a CAP supplier at least five (5) business days before publishing CAP rates.<sup>22</sup> Further, a participating EGS must enroll, without limitation, any CAP customer who requests service and a participating EGS must also provide periodic confidential reports to the Commission and PECO on the number of CAP customers served and the rates charged to those customers.<sup>23</sup> Finally, a participating EGS must use PECO's consolidated billing for CAP customers.<sup>24</sup>

PECO estimates it will cost approximately \$4.6 million to implement its CAP Plan. The costs fall into three (3) categories – (1) customer education initiatives (approximately \$300,000); (2) training and information technology (“IT”) changes to PECO's billing and customer information system to facilitate CAP shopping and to appropriately calculate the CAP discount (approximately \$3.8 million); and (3) business readiness, including training and business process modifications (approximately \$500,000).<sup>25</sup> PECO proposes to recover the customer education monies (approximately \$300,000) through the current Customer Education Charge.<sup>26</sup> However,

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<sup>20</sup> PECO St. 1 at 10 (Crowe Direct Testimony).

<sup>21</sup> Petition at 8.

<sup>22</sup> Petition at 9.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Petition at 11.

<sup>26</sup> *Id.*

half of the remaining approximately \$4.3 million would be recovered from residential customers on a non-bypassable basis through the Universal Service Fund Charge (“USFC”) and the other half would be recovered from EGSs (in addition to the SOP costs) through a 0.3% purchase of receivables (“POR”) discount rate.<sup>27</sup> The 0.3% POR discount rate represents a 0.1% increase from 0.2% to 0.3% to recover both SOP and CAP Plan costs.<sup>28</sup> PECO expects to recover its implementation costs in one (1) year.<sup>29</sup>

**B. The Commission Should Reject PECO’s Price Cap Provision as Illegal and as Bad Public Policy And Allow CAP Customers to Shop Just Like Non-CAP Customers**

**1. PECO’s Proposed Price Cap Should Be Rejected Because It Is Illegal**

The Commission should reject PECO’s price cap proposal inasmuch as it is illegal. The Competition Act does not give the Commission authority to regulate the prices charged by EGSs.<sup>30</sup> “Prices for competitive generation service offered by EGSs are not regulated [by the Commission] and are instead set by the EGS.”<sup>31</sup> Direct Energy does not object to maintaining current protections for CAP customers (e.g, application of CAP credits or LIHEAP monies to their total bills) or complying with the Commission’s existing rules and regulations regarding universal service, but a hard cap on prices is illegal and should be rejected.

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<sup>27</sup> *Id.*

<sup>28</sup> Petition at 11, FN 8; PECO St. 3 at 8 (Cohn Direct Testimony); PECO St. 2 at 11 (McCawley Direct Testimony).

<sup>29</sup> Petition at 12.

<sup>30</sup> 66 Pa. C.S. § 2802.

<sup>31</sup> *See, Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961, 2013 Pa. PUC LEXIS 321, (Order Issued May 23, 2013) at fn. 3.

2. **PECO's Proposed Price Cap Should Be Rejected Because It Is Bad Public Policy**

The Commission made it clear in its *October 2012 Order* as well as its *RMI End State Final Order* that it is Pennsylvania's public policy that all customers, including CAP customers, should have the ability to avail themselves of the full benefits of retail electric competition.<sup>32</sup> PECO's CAP Shopping Plan is bad public policy for several reasons and should be modified to come in line with Pennsylvania public policy or rejected outright until PECO brings forward a Cap Shopping Plan that is legal and in step with Pennsylvania's public policy.

First, any price cap requirements would undermine the free market public policy objectives contained in 66 Pa. C.S. § 2802 as well as 66 Pa. C.S. § 2805. The artificial price interference proposed by PECO in its CAP Shopping Plan frustrates the public policy goals articulated by the General Assembly and implemented by the Commission. Simply put, if price caps are illegal then they must also be contrary to Pennsylvania's public policy goals. Here, the public policy is clear: Pennsylvania policy strongly favors market forces in setting prices for generation services, and an artificially capped price is anathema to this policy.

Second, any condition that requires a price always remains at or below the PTC thwarts Pennsylvania public policy by creating a significant price risk for EGSs which inevitably creates barriers to their participation in any CAP program served by the competitive marketplace.<sup>33</sup> The CAP Shopping Plan injects into the market for CAP customers a significant degree of risk<sup>34</sup> that

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<sup>32</sup> Direct Energy St. 1 at 6-7 (Kallaher Direct Testimony).

<sup>33</sup> Direct Energy St. 1 at 4-5 (Kallaher Direct Testimony).

<sup>34</sup> See PECO Hearing Exhibit 13 where Direct Energy explained this risk as follows: 'The risk related to variable priced contracts exists under PECO's price cap proposal because it places price parameters on service to those customers that are not directly related to current market conditions. The price-to-compare changes based on the prices of the wholesale supply contracts procured by PECO to meet its default service obligation plus (under the

makes those customers undesirable<sup>35</sup> from a business perspective, meaning that few, if any, EGSs would be interested in addressing the substantial number of customers in the market who qualify for CAP benefits. This unlawful and unnecessary business risk denies CAP customers the full benefits of competition by removing from the marketplace a robust selection of EGSs and different products from which to choose, leaving little or no real choice to CAP customers.

Further, the logistics of providing service to customers in the proposed CAP Shopping Plan further demonstrates why the CAP Shopping Plan strays from Pennsylvania's public policy goals.<sup>36</sup> As a practical matter, under the price cap provision, an EGS could only offer variable priced products as the price would possibly need to shift every three (3) months as PECO's PTC changes.<sup>37</sup> The full complement of products available to non-CAP customers will not be available to CAP customers. A supplier could not guarantee a fixed price beyond the next default service price change. Even if an EGS fully hedged its position for a group of CAP

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current approach) the impact of reconciling the over- or under-recovery of default service revenue from the previous pricing period. These factors may bear little direct relationship to current-month wholesale prices, which variable-priced products typically track. Either factor – prices of underlying default service wholesale contracts or the impact of reconciliations – could cause the default service price for a given month to be below the market-derived price for a variable product, meaning that under the PECO proposal an EGS serving customers on a variable-priced product might be forced to serve those customers at a loss.”

<sup>35</sup> See PECO Hearing Exhibit 14 where Direct Energy explained why CAP customers would be undesirable as follows: “Please see the response to PECO (Direct)-III-2, with respect to variable-price products. [which is contained in footnote 34 directly above] There are similar risks with respect to fixed-price products, namely the risk that the PTC will fall below the fixed price, perhaps to the point that the EGS would actually lose money in serving those customers. The risk of not actualizing expected returns or of even losing money in serving a group of customers would make serving those customers undesirable from a business perspective. Moreover, it might be impossible to offer certain kinds of products at all under the PECO proposal, most notably green products and time-differentiated products. Green products typically come with a premium, which some customers are willing to pay, that could put them above the default price in all months. Such a product would not be able to be offered under the PECO plan. Time-differentiated products (like Direct Energy's “Free Power Day” product) have prices that, by design, are higher during peak hours than during off-peak hours, in order to drive controllable consumption to off-peak hours. If the peak price could never be greater than the default service price, it is difficult to see how one could send the price signals the product is designed to send – namely that it costs more to produce power during some parts of the day or week than others – thus undermining the basis upon which such a product would be offered.”

<sup>36</sup> 66 Pa. C.S. § 2802(3), (5), (7) (amongst others).

<sup>37</sup> Direct Energy St. 1 at 5 (Kallaher Direct Testimony).

customers, a decrease in the default service price (which could be due to factors other than a decrease in wholesale prices) would destroy the value of whatever hedge the EGS had in place. It is also hard to imagine how an EGS would offer a green product, which might from the outset have a premium for its environmental attributes.<sup>38</sup> An EGS would also likely not be able to offer a time-differentiated product (like Direct Energy's Free Power Day), the price of which (for the other six days that are not free) would likely be higher than the default price, even though a customer on Direct Energy's Free Power Day is likely to save more on their total bill to which the CAP discount is applied than through the variable price pigeon hole that the CAP Shopping Plan mandates.<sup>39</sup> Also impossible would be products that offer enhancements as part of the service, such as free furnace tune-ups or free energy audits.

Finally, adopting the proposed CAP Shopping Plan would frustrate Pennsylvania's public policy goals by making it harder, not easier, for CAP customers to shop, period. Specifically, the CAP Shopping Plan structure would cause customer confusion inasmuch as the terms and conditions would likely be longer and more complex than an ordinary contract to account for the multitude of situations that may arise under the parameters of the proposed CAP Shopping Plan.<sup>40</sup> Customer contracts would need to contain special provisions for early termination depending on fluctuations in the PTC, whether an EGS would continue to supply a CAP customer if the PTC moves outside of a particular range, and how the contract would work if the customer exits the program.<sup>41</sup> Pennsylvania's public policy counsels that PECO and the

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Direct Energy St. 1 at 6 (Kallaher Direct Testimony).

<sup>41</sup> *Id.*

Commission should be looking for ways to encourage suppliers to shorten and simplify their terms and conditions, not lengthen and add in more complexity for customers to wade through before signing a contract with an EGS.<sup>42</sup>

PECO's proposal has as its underlying premise the notion that any price charged by an EGS that exceeds PECO's price to compare is somehow unreasonable, or that PECO's non-CAP customers should not be required to subsidize such a price. But PECO is wrong on both counts. The fact that an EGS's price might exceed the PTC in a particular quarter says nothing about the underlying reasonableness of the EGS price. As has been discussed, an EGS price might be greater than the PTC for any number of reasons – length of term, the sourcing of the power from a particularly desirable source (such as “wind” or Pennsylvania natural gas). Or it may be that the customer simply wants to deal with a particular EGS rather than purchase its generation from PECO.

The fact that an EGS price that is higher than the PTC in a particular quarter will impose an additional subsidy on remaining customers is also not a reason to adopt PECO's proposal. First, such a price difference can, and usually is fleeting. An EGS price that exceeds the PTC in one quarter can be below the PTC in the next, and so on. But more to the point, this fluctuating subsidy is a product of PECO's present CAP plan. If the Commission is concerned about this, the answer is NOT to impose competition-killing and illegal restrictions on the generation price that an EGS may offer to a CAP customer but to change PECO's CAP plan so that CAP customers receive both the risks and the benefits of the prices they select in the competitive market.

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<sup>42</sup> *Id.*

**3. The Commission should adopt Direct Energy's Alternative Proposal – Let CAP Customers Shop Just Like Non-CAP Customers**

Direct Energy's proposal is simple: treat CAP customers as one would treat other customers.<sup>43</sup> The Commission's Final Order on PECO's default service plan was clear on this point. Nothing in the Commission's *October 2012 Order* on PECO's DSP (nor in the Secretarial letter issued the same day) gives any indication that the Commission sought anything other than for CAP customers to be treated (as much as possible) as any other customers, rather than being segregated from other customers and subject to limitations that would make their options far less robust (or perhaps none) than those available for non-CAP customers.<sup>44</sup> PECO should be ordered to do what it appeared the Commission already ordered last October: adopt a program that allows CAP customers the opportunity to shop for electricity in a manner that "will ensure that all customers have the ability to avail themselves of the full benefits of retail electric competition."<sup>45</sup>

**C. Computer Upgrade and Business Process Implementation Costs Should Be Paid For Through A Non-Bypassable Charge Applicable to All Customer Classes And Not Through An Increase To The Purchase of Receivables ("POR") Discount Rate.**

The Commission should also reject PECO's proposed cost recovery scheme for its IT changes and business readiness preparations. Direct Energy has no objection to recovering the proposed \$300,000 for education initiatives through the customer education charge. However, the Commission should direct that the \$4.3 million in IT changes and business readiness

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<sup>43</sup> Direct Energy St. 1 at 6 (Kallaher Direct Testimony).

<sup>44</sup> Direct Energy St. 1 at 7 (Kallaher Direct Testimony).

<sup>45</sup> Direct Energy St. 1 at 7-8 (Kallaher Direct Testimony).

preparations should be recovered by all customers through a non-bypassable charge.<sup>46</sup> The expansion of shopping opportunities to CAP customers produces societal benefits that inure to all, not just EGSs. Permitting CAP customers to shop increases the number of customers in the competitive marketplace, thereby strengthening the market for all customers through greater enticement of new suppliers and their new products to the market.<sup>47</sup> All customers benefit from the varied products and services offered by an increasing participation of suppliers wanting to play in a vibrant and growing marketplace. This greater vibrancy of the market may also bring lower prices from EGS for all customers, as evidenced in this case by PECO's assumption that CAP customers will save ten (10) percent off of the PTC.<sup>48</sup> Finally, there is no evidence in the case that the universe of CAP customers is static. Customers who do not qualify now may well qualify in the future.<sup>49</sup> Because the CAP program is available to anyone who qualifies, and the group of customers who may at some point qualify is likely far broader than the group currently eligible for the program, it is best viewed as a societal safety net program that should be funded by all customers, any one of who could find himself or herself eligible for its benefits at some point.

Opening up competition to CAP customers is another market enhancement intended to move Pennsylvania closer to what the Commission may consider to be an optimal structure. Accordingly, this process can be viewed as a natural continuation of the transition to restructured

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<sup>46</sup> Direct Energy St. 1 at 10 (Kallaher Direct Testimony).

<sup>47</sup> *Id.*

<sup>48</sup> Petition at 11-12.

<sup>49</sup> OCA St. No. Cap-1 at 16 (Colton Direct Testimony).

markets that began in the late '90s.<sup>50</sup> All costs of initially opening retail markets in the late '90s were recovered from all electric customers (since there were few or no EGSs on which to impose the costs).<sup>51</sup> While Direct Energy agrees that EGSs will certainly benefit to some degree from PECO's proposal, part of the justification for this enhancement is the benefits it will bring to all customers.<sup>52</sup> Therefore, it is appropriate that the costs be borne by all customers, as were the costs of the original restructuring in the '90s.<sup>53</sup>

Additionally, costs related to implementation of the CAP plan should not be recovered through POR discounts.<sup>54</sup> In fact, Direct Energy views this method of cost recovery as possibly the worst option available. The POR program was not designed or intended to be a cost recovery mechanism for retail enhancement programs, and using the POR program this way violates fundamental principles of cost recovery, which is meant to follow cost causation.<sup>55</sup> The POR discount is meant to recover the costs of the purchase of receivables, which costs consist predominantly of EGSs' fair share of the EDC's uncollectible expense, plus certain administrative charges.<sup>56</sup> Cost recovery clearly follows cost causation in this arrangement.<sup>57</sup> The proposed expansion of retail access to allow CAP customers to participate has nothing whatsoever to do with an EGS's fair share of uncollectibles or the administrative costs of

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<sup>50</sup> Direct Energy St. 1 at 10 (Kallaher Direct Testimony).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Direct Energy St. 1 at 11 (Kallaher Direct Testimony).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Direct Energy St. 1 at 11 (Kallaher Direct Testimony).

<sup>57</sup> *Id.*

running the POR program.<sup>58</sup> Moreover, using the POR discount would be unfair to suppliers who participate in the POR program, but are either unwilling or unable to make offers to CAP customers.<sup>59</sup> Given the problems with PECO's proposed program, all or nearly all EGSs might choose not to make offers to CAP customers if the CAP Shopping Plan is adopted as proposed.<sup>60</sup> Recovering these costs through the POR discount would also mean that the burden would fall disproportionately on EGSs with a larger market share, even though an EGS's current market share might bear little resemblance to its desire or ability to serve the CAP market.<sup>61</sup>

Direct Energy believes that recovery of these costs through a non-bypassable charge is the only fair way for this program to be implemented.<sup>62</sup> All other options result in CAP customers being treated as second-class citizens, with few, if any, competitive options compared to non-CAP customers.<sup>63</sup>

**D. The Commission Should Amend PECO's Proposed Reporting Provisions To A More Reasonable Burden on EGSs.**

PECO proposes to require EGSs participating in the CAP shopping program to provide confidential reports to the Commission and to PECO for program evaluation. Such reports would be semi-annual reports detailing the number of customers served monthly over the six (6) month period with the following metrics for each customer served: (1) supplier name; (2) PECO customer account number; (3) the EGS CAP rate (per kWh); PECO Price-to-Compare for the

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Direct Energy St. 1 at 11-12 (Kallaher Direct Testimony).

<sup>62</sup> Direct Energy St. 1 at 12 (Kallaher Direct Testimony).

<sup>63</sup> *Id.*

months in which they serve the customer during the six-month reporting period; and (5) the start and end date for the CAP rate charged to the CAP customer during the 6 month reporting period.<sup>64</sup>

Direct Energy does not oppose this concept in theory. However, the Commission should ensure the reporting requirement burden is light enough such that the reporting obligation is strictly limited to confirming that an EGS is meeting the requirements of the program and nothing more.<sup>65</sup> The reporting provisions suggested by PECO go beyond that required to evaluate the program. These burdens will only serve to further dissuade suppliers from participating in an already flawed marketplace for CAP customers (assuming the CAP Shopping Plan is approved as proposed).

Instead, the Commission should only require an EGS to provide (on a monthly basis) the particular rate codes (with the price associated with the rate code) that it is serving EGS customers under and the total number of customers on each rate code.<sup>66</sup> This is a much less onerous burden for EGSs and provides the necessary information to conduct a comparable analysis (but with fewer steps and confusion) than PECO's proposed EGS reporting requirements.

Finally, as it relates to confidentiality, the Commission should declare that the reports are not discoverable in any Commission proceeding from any party who either provides or receives such reports.<sup>67</sup> Aggregated data from the Commission and PECO will be sufficient for other

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<sup>64</sup> See PECO St. No. 2-R, Exhibit JJM-2R (at 5.4.3.0.3)

<sup>65</sup> Direct Energy St. 1 at 8 (Kallaher Direct Testimony).

<sup>66</sup> *Id.*

<sup>67</sup> Direct Energy St. 1 at 8 (Kallaher Direct Testimony).

parties to evaluate the proposed program and therefore make the individual EGS reports irrelevant to any party other than an entity enforcing the rules related to CAP customer shopping. Therefore, a determination now from the Commission that these reports are off limits would ease concern by EGSs about confidentiality of their information and remove a possible barrier to participation by EGSs.

**E. The Commission Should Ensure There Are Appropriate and Defined Parameters Around Entering and Exiting Service of CAP Customers by EGSs.**

PECO proposes a requirement that an EGS give PECO five (5) days notice before an EGS begins enrolling CAP customers. Direct Energy does not oppose this requirement as proposed by PECO. However, the Commission should ensure there are appropriate on-ramps and off-ramps for EGSs serving CAP customers. From the testimony (as originally suggested by Direct Energy in a discovery response)<sup>68</sup>, it appears there were no objections to the following parameters:

- An EGS who opts to cease serving CAP customers must give the Commission, PECO, and its customers at least 30 days' notice before terminating its participation in the CAP shopping program.
- An EGS who exits the CAP customer program must wait at least 90 days before re-entering the CAP customer program.
- An EGS who exits the CAP customer program cannot automatically re-enroll its previous CAP customers but must again obtain a CAP customer's affirmative consent to another contract before re-enrolling them.

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<sup>68</sup> PECO Hearing Exhibit 3

Direct Energy supports these parameters as reasonable on- and off-ramps for EGS participation in the CAP shopping program.

**F. The Commission Should Retain Quarterly Generation Service Adjustments (“GSA”) In Order to Further Its Commitment To A PTC That Is Market Reflective**

PECO proposes to file its quarterly residential adjustments to the PTC 75 days before their effective date instead of the current 45 days in advance.<sup>69</sup> PECO also proposes to reconcile its GSA for residential customers on a yearly basis instead of a quarterly basis.<sup>70</sup> PECO claims the 75 day advance notice for quarterly PTC adjustments will help provide ample notice of PTC changes to EGSs and the yearly GSA adjustment will facilitate an EGS’s ability to track and reduce (if necessary) their price charged to CAP customers.<sup>71</sup> PECO also claims the yearly adjustment will mitigate the risk of significant residential PTC fluctuations inasmuch as it will smooth out quarterly over- and under-recoveries and send clearer pricing signals to customers and EGSs.<sup>72</sup>

The Commission should reject PECO’s GSA true-up proposal. The proposal conflicts with the Commission’s final order in its Retail Markets Investigation, in which it recommended that future default service plans move to procurements of no less frequency than quarterly, even for residential customers.<sup>73</sup> The Commission should require PECO and interested stakeholders to explore other options for minimizing the fluctuations in the PTC that are unrelated to actual

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<sup>69</sup> PECO St. 3 at 9 (Cohn Direct Testimony).

<sup>70</sup> *Id.* at 9-10.

<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.*

<sup>73</sup> *RMI End State Final Order* at 42.

movements in the underlying prices of default service wholesale contracts.<sup>74</sup> Approval of PECO's proposed annual GSA reconciliation would be a step backwards from the Commission's commitment to keeping retail prices as reflective of current market prices as possible.<sup>75</sup>

### **III. CONCLUSION**

Direct Energy respectfully requests that the Commission issue an Order consistent with Direct Energy's positions and recommendations in this proceeding.

Respectfully submitted,



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Date: July 26, 2013

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<sup>74</sup> Direct Energy St. 1 at 13 (Kallaher Direct Testimony).

<sup>75</sup> *Id.*

## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of Direct Energy Services, LLC's Main Brief, upon the participants listed below in accordance with the requirements of § 1.54 (relating to service by a participant).

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