

COMMONWEALTH OF PENNSYLVANIA



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August 11, 2016

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

Re: Petition of PECO Energy Company
For Approval of its Default Service Program for the
Period from June 1, 2017 through May 31, 2019
Docket No. P-2016-2534980

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Initial Brief in the above-referenced proceeding.

Copies have been served per the attached Certificate of Service.

Respectfully submitted,

A handwritten signature in cursive script that reads "Christy M. Appleby".

Christy M. Appleby
Assistant Consumer Advocate
PA Attorney I.D. # 85824

Attachment

cc: Honorable Cynthia Williams Fordham, ALJ
Certificate of Service

224808

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company :
For Approval of its Default Service :
Program for the Period Service Plan : Docket No. P-2016-2534980
For the Period from June 1, 2017 Through :
May 31, 2019 :

INITIAL BRIEF
OF THE OFFICE OF CONSUMER ADVOCATE

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DATED: August 11, 2016

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I. INTRODUCTION

On March 17, 2016, PECO Energy Company (PECO or Company) filed a Petition with the Pennsylvania Public Utility Commission (Commission) requesting approval of its Default Service Program and Procurement Plan (DSP IV) for the period of June 1, 2017 through May 31, 2019.¹ The Petition was assigned to the Office of Administrative Law Judge and was further assigned to Administrative Law Judge (ALJ) Cynthia Williams Fordham for investigation and scheduling of hearings. On April 13, 2016, the Office of Consumer Advocate (OCA) filed its Answer, Notice of Intervention and Public Statement in this proceeding. On March 28, 2016, the Commission's Bureau of Investigation & Enforcement (I&E) filed a Notice of Appearance. On April 4, 2016, the Office of Small Business Advocate filed its Notice of Intervention and Answer. Petitions to Intervene were also filed by the following: Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA); Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN *et al.*); Philadelphia Area Industrial Energy Users Group (PAIEUG); Direct Energy Services LLC (Direct); Noble Americas Energy Solutions LLC (Noble); and the Retail Energy Supply Association (RESA).

The OCA submitted the Direct Testimony of Dr. Serhan Ogur² and Barbara Alexander³ on June 3, 2016. RESA and CAUSE-PA also submitted Direct Testimony. On June 24, 2016,

¹ The OCA notes that Joint Petition for Partial Settlement would extend this date through May 31, 2021, for a four year term. Joint Petition for Partial Settlement at ¶ 12.

² Dr. Serhan Ogur is a Senior Analyst with Exeter Associates, Inc.. Dr. Ogur received a B.A. degree in Economics from Bogazici University (Istanbul, Turkey) in 1996 and a Ph.D. in Economics from Northwestern University in 2007. Dr. Ogur has 15 years of experience in the energy industry specializing in organized wholesale and retail electricity markets. He was previously employed as an Economic Analyst at the Illinois Commerce Commission; a Senior Economist at PJM Interconnection LLC; and a Senior System Operator at Fellon-McCord & Associates. Dr. Ogur's qualifications are detailed in OCA St. 1 at 1-2, App. A.

³ Ms. Alexander is a Consumer Affairs Consultant who works on consumer protection and customer service issues associated with utility regulation. Ms. Alexander is an attorney and a graduate of the University of Michigan (1968) and the University of Maine Law School (1976). Prior to opening her consulting practice in 1996, she spent

the OCA submitted the Rebuttal Testimony of Ms. Alexander, and PECO and RESA also submitted Rebuttal Testimony. The OCA submitted the Surrebuttal Testimony of Dr. Serhan Ogur and Ms. Alexander on July 9, 2016, and RESA, CAUSE-PA, and TURN *et al.* also submitted Surrebuttal Testimony.

Through the course of the proceedings, the parties were able to reach Settlement on multiple issues, including the term length, product mix, and Standard Offer Product (SOP). On July 28, 2016, the Company filed the Joint Petition for Partial Settlement.⁴ Attachment C to the Settlement is the OCA's Statement in Support which enumerates its reasons for supporting the Partial Settlement. See, Joint Petition for Partial Settlement at Attach. C. Noble objected to the Settlement regarding the issue of the treatment of FERC-jurisdictional wholesale charges at the retail level, identified under the heading of Recovery of Certain PJM Charges in the Partial Settlement.⁵ The parties also were not able reach agreement with regard to issues surrounding customer shopping for PECO customers receiving assistance through the Company's Customer Assistance Program (CAP).

Under PECO's current CAP program, CAP customers are not able to shop for electric generation supply. A CAP Shopping Plan would establish the rules to allow customers in CAP to participate in the retail electric choice market. PECO's CAP program is designed to provide an affordable (i.e. discounted) monthly bill to the CAP customer to better enable the customer to

nearly ten years as the Director of the Consumer Assistance Division of the Maine Public Utilities Commission. Her current consulting practice is directed to consumer protection, customer service, and low-income issues associated with both regulated and retail competition markets. Ms. Alexander's qualifications are detailed in OCA St. 2 at 1-3, Exh. BA-1.

⁴ PECO, I&E, OSBA, OCA, PAIEUG, and RESA have signed the Settlement. Direct, CAUSE-PA, and TURN *et al.* filed letters which indicated that they do not oppose the Settlement.

⁵ On July 28, 2016, Noble filed a letter in opposition to the Joint Petition for Partial Settlement. Specifically, Noble states that it "opposes the Partial Settlement with respect to its treatment of FERC-jurisdictional wholesale market charges at the retail level." Noble Letter at 1. In its letter, Noble indicated that it will be filing formal written objections to the Partial Settlement on August 11, 2016.

make the monthly bill payment. See 52 Pa. Code § 69.265(2)(i)(A). The difference between the full residential customer bill and the discounted bill provided to CAP customers is collected from all non-CAP residential ratepayers. In Direct Testimony, CAUSE-PA witness Harry Geller identifies potential harms to CAP customers who are participating in the retail electric choice market and non-CAP residential ratepayers who pay the costs of the program. Mr. Geller also cites to the impacts on affordability and program costs that have been experienced with the FirstEnergy Companies’⁶ and PPL Electric’s (PPL) CAP Shopping programs. CAUSE-PA St. 1 at 27-29.

The Commission has the authority to ensure affordability for CAP customers participating in the retail market. Under the Public Utility Code, in particular the Electric Generation Customer Choice and Competition Act (Customer Choice Act), the Commission has the clear authority, as well as a duty, to maintain affordable, cost-effective universal service programs and may exercise that authority to implement shopping rules for the universal service programs. 66 Pa. C.S. §§ 2802(9), (10), (14), (17), 2803, 2804 (8)-(9), and 501 (a), (c). The Commonwealth Court recently affirmed this authority in PECO’s CAP Shopping appeal. CAUSE-PA, et al. v. Pa. PUC, 120 A. 3d 1087 (Pa. Cmwlth. Ct. July 14, 2015), *cert denied* 2016 Pa. LEXIS 723 (Pa. April 5, 2016)(PECO CAP Shopping). In PECO CAP Shopping, the Commonwealth Court stated that the Customer Choice Act “does not demand absolute and unbridled competition.” PECO CAP Shopping at 1101. The Commonwealth Court stated that “under certain circumstances, unbridled competition may have to give way to other important concerns.” PECO CAP Shopping at 1103. The Commonwealth Court has established that the Commission has the authority to require EGSs voluntarily participating in the CAP Shopping Plan to adhere to conditions of the CAP Shopping program so long as those conditions

⁶ The FirstEnergy Companies include Metropolitan Edison Company (Met-Ed); Pennsylvania Electric Company (Penelec); Pennsylvania Power Company (Penn Power); and West Penn Power Company (West Penn).

are designed to meet the statutory standards of maintaining affordability, cost effectiveness and justness and reasonableness of the rates of the non-CAP customers who pay the costs of the programs.⁷

In this proceeding, PECO did not present a CAP Shopping Plan. PECO witness McCawley stated that the Company planned to introduce a CAP Shopping Plan with no price restrictions and no cancellation fees on or around August 2016. PECO St. 2-R at 13-15. CAUSE-PA witness Geller, however, proposed a CAP Shopping Plan to commence with DSP IV on or about June 1, 2017. CAUSE-PA witness Geller recommended the following CAP Shopping principles:

1. CAP shopping participants should be prohibited from entering into a contract with an EGS in which they will pay, at any time, rates greater than the price to compare.
2. CAP shopping participants should be prohibited from entering into a contract with an EGS that includes early cancellation or termination fees.

CAUSE-PA St. 1 at 31. The OCA supports the fundamental principles identified in Mr. Geller's proposal. See, OCA St. 2-R at 5-7.

In order to achieve these CAP Shopping principles, Mr. Geller proposed a CAP-SOP to provide that: (1) the CAP customer would be allowed to enroll with a supplier only if they enrolled through a CAP-SOP; (2) the CAP customer would be enrolled in an SOP similar to the existing residential customer Standard Offer Program, which would provide 7% off the PTC at

⁷ After affirming the Commission's authority to implement CAP shopping program rules, the Commonwealth Court remanded the issue to the Commission with the specific direction to implement a CAP Shopping Plan with program rules that did not include cancellation or termination fees. PECO CAP Shopping at 1103-1104. On July 19, 2016, the Commission issued a Secretarial Letter in the original docket for the Commonwealth Court appeal, PECO's DSP II proceeding. Petition of PECO Energy Company for Approval of its Default Service Plan, Docket No. P-2012-2283641, Secretarial Letter (May 11, 2016) (Secretarial Letter). In that letter, the Commission directed PECO to file a proposed rule revision to its CAP Shopping Plan in its current DSP III filing consistent with the Commonwealth Court's Order. Secretarial Letter at 2. The Commission also affirmed its legal authority to implement CAP shopping program rules. The Secretarial Letter did not address the on-going DSP IV proceeding.

the time of enrollment; (3) if the PTC decreased by more than 7% off the enrollment PTC, the participating EGS would either re-enroll the customer at a new 7% discount or return the customer to default service;⁸ and (4) at the end of the 12 month term, the EGS could either re-enroll the customer at a new 7% off the effective PTC or return the customer to default service. CAUSE-PA St. 1 at 31-33. The OCA supports CAUSE-PA's proposed CAP-SOP Shopping Plan and recommends that a stakeholder group be developed in order to address the details of implementation of the CAP Shopping Plan prior to the commencement of DSP IV.

The OCA submits that the primary objective of PECO's CAP Shopping Plan must be to ensure that CAP shopping customers do not suffer higher bills and that other ratepayers are not required to pay higher costs for any program that allows CAP customers to select an EGS. See, OCA St. 2-R at 5. The OCA submits that these core principles should be adopted by the Commission, and that a stakeholder group be developed in order to address the details of implementation of the CAP Shopping Plan prior to the program's implementation. OCA St. 2-R at 7.

⁸ As explained in the Direct Testimony of Mr. Geller, the EGS would only have to adjust the enrollment if the PTC drop was more than 7%. CAUSE-PA St. 1 at 32, fn. 56.

II. STATEMENT OF THE CASE

On March 17, 2016, PECO filed a Petition requesting approval of its DSP IV for the period of June 1, 2017 through May 31, 2019. The filing addressed numerous issues including default service, the product mix, and the Standard Offer Program (SOP), among other issues. The parties to this case raised issues regarding these matters in Direct, Rebuttal and Surrebuttal Testimonies. The parties to this case include PECO, I&E, OCA, OSBA, Noble, Direct, CAUSE-PA, TURN *et al.*, PAIEUG, and RESA. After extensive negotiations, a Partial Settlement was reached on all issues but CAP Shopping and Noble's issue regarding the treatment of FERC-jurisdictional wholesale market charges at the retail level.

III. QUESTIONS INVOLVED

1. Does the Customer Choice Act permit the Commission to approve CAP program rules for CAP customer shopping?

Suggested Answer: Yes.

2. Should CAP Shopping be implemented to begin with the DSP IV provided important consumer protections are approved?

Suggested Answer: Yes.

3. Will CAP Shopping without any programmatic rules harm both CAP customers and non-CAP customers?

Suggested Answer: Yes.

IV. LEGAL STANDARDS

A. Burden of Proof

The Public Utility Code provides in relevant part:

(a) Burden of proof.—Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this or other relevant statute, the proponent of a rule or order has the burden of proof.

66 Pa. C.S. § 332(a). As petitioner for a Commission Order in this matter, PECO has the burden of proof.⁹ In addition to the burden of proof, the petitioner must provide substantial evidence in the record as support for its case before the Commission.¹⁰ The Pennsylvania Supreme Court has also provided that even where a party has established a prima facie case, the litigant must establish that:

The elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.

Burleson v. Pa. PUC, 501 Pa. 433, 436 (1983) (Burleson).

“The term ‘burden of proof’ is comprised of two distinct burdens, the burden of production and the burden of persuasion.” Hurley v. Hurley, 754 A.2d 1283, 1285 (Pa. Super. 2000). The burden of production dictates which party has the duty to introduce enough evidence to support a cause of action. Id. at 1286. The burden of persuasion determines which party has the duty to convince the finder-of-fact that a fact has been established. Id. “The burden of persuasion never leaves the party on whom it is originally cast.” Id. See also, Pa. PUC v. Equitable Gas Co., 57 Pa. PUC 471 (1983).

⁹ In Se-Ling Hosiery, Inc. v. Margulies, 364 Pa. 45 (1950), the Pennsylvania Supreme Court held that the term “burden of proof” means a duty to establish a fact by a preponderance of the evidence.

¹⁰ 2 Pa. C.S. § 704. The term “substantial evidence has been defined by the Pennsylvania Supreme Court, Superior Court, and Commonwealth Court as such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. PUC, 489 Pa. 109 (1980); Erie Resistor Corp. Unemployment Comp. Bd. of Review, 194 Pa. Super. Ct. 278 (1961); and Murphy v. Comm. Dept. of Public Welfare, White Haven Center, 85 Commw. 23 (1984).

“It is well-established that the evidence adduced by a utility to meet this burden must be substantial.” Lower Frederick Twp. v. Pa. PUC, 409 Pa. PUC 505, 507 (1980). The Supreme Court of Pennsylvania has stated that even where a party establishes a prima facie case by producing enough evidence to support a cause of action, the party does not satisfy its burden of persuasion unless the elements of that cause of action are proven with substantial evidence. Burleson at 436. Thus, the petitioner has the affirmative burden to produce enough evidence to establish the justness and reasonableness of every component of its request, and in order to persuade the finder-of-fact, there must be substantial evidence that each component of its request is in fact just and reasonable. See e.g., Sharon Steel Corp. v. Pa. PUC, 468 A. 2d, 862 (1978); Johnstown v. Pa. PUC, 133 A. 2d 246, 250 (Pa. Super. 1957).

In conclusion, the OCA submits that PECO must affirmatively demonstrate the reasonableness of its claims and that its claims are in the public interest. As discussed in more detail below, the OCA submits that the Company has not shown that allowing CAP Shopping in DSP IV without adequate protections is reasonable.

B. Legal Standards Applicable to CAP Shopping

The Public Utility Code provides the Commission with full authority over public utilities and every other person or corporation subject to the Public Utility Code to carry out the provisions of the Public Utility Code. 66 Pa. C.S. § 501(a) and (c). CAP customer programs are governed by the requirements of the Customer Choice Act and the Commission’s CAP Policy Statement. 66 Pa. C.S. §§ 2802(9), (10), (14), (17), 2803, 2804 (8)- (9); 52 Pa. Code § 69.261, et seq. Under the Public Utility Code, the Commission has the clear legal authority, as well as a duty, to maintain affordable, cost-effective universal service programs and may exercise that authority to implement CAP shopping rules for the universal service programs. 66 Pa. C.S. §§ 2802(9), (10), (14), (17), 2803, 2804 (8)- (9), and 501 (a), (c); CAUSE-PA, et al. v. Pa. PUC,

120 A.3d 1087 (Pa. Cmwlth. Ct. July 14, 2015), *cert denied* 2016 Pa. LEXIS 723 (Pa. April 5, 2016) (PECO CAP Shopping). The Customer Choice Act “does not demand absolute and unbridled competition.” PECO CAP Shopping at 1101. “Under certain circumstances, unbridled competition may have to give way to other important concerns.” PECO CAP Shopping at 1103. The OCA addresses the application of the legal standards applicable to CAP customer shopping in Section VI(A) below.

V. SUMMARY OF ARGUMENT

The OCA submits that a CAP Shopping Plan must be implemented for DSP IV that meets the requirements of the Customer Choice Act. The Commission is empowered and required by the Public Utility Code to take the steps necessary to maintain affordable service for low-income CAP customers in the retail choice environment. The Commission not only has the authority, but also the obligation, to provide the necessary protections for low-income customers in accord with the Customer Choice Act and to ensure that the rates paid by non-CAP residential customers to support the program are just and reasonable. Without CAP Shopping program rule protections, CAP customer shopping has the potential to impact the overall affordability and cost-effectiveness of PECO's CAP program.

The OCA, CAUSE-PA, and TURN *et al.* recommend that a CAP Shopping Plan should commence with the DSP IV proceeding on or about June 1, 2017. OCA St. 2-R at 3-4; CAUSE-PA St. 1 at 14; TURN *et al.* St. 1-SR at 11. CAUSE-PA witness Geller recommended the following CAP Shopping principles:

1. CAP shopping participants should be prohibited from entering into a contract with an EGS in which they will pay, at any time, rates greater than the price to compare.
2. CAP shopping participants should be prohibited from entering into a contract with an EGS that includes early cancellation or termination fees.

CAUSE-PA St. 1 at 31. The OCA supports the adoption of the principles identified in Mr. Geller's proposal.

In order to achieve these CAP Shopping principles, Mr. Geller proposed a CAP-SOP to provide that: (1) the CAP customer would be allowed to enroll with a supplier only if they enrolled through a CAP-SOP; (2) the CAP customer would be enrolled in an SOP similar to the existing residential customer Standard Offer Program, which would provide 7% off the PTC at the time of enrollment; (3) if the PTC decreased by more than 7% off the enrollment PTC, the

participating EGS would either re-enroll the customer at a new 7% discount or return the customer to default service;¹¹ and (4) at the end of the 12 month term, the EGS could either re-enroll the customer at a new 7% off the effective PTC or return the customer to default service. CAUSE-PA St. 1 at 31-33. The OCA supports CAUSE-PA's proposed CAP-SOP Shopping Plan and recommends that a stakeholder group be developed in order to address the details of implementation of the CAP Shopping Plan prior to the commencement of DSP IV.

¹¹ As explained in the Direct Testimony of Mr. Geller, the EGS would only have to adjust the enrollment if the PTC drop was more than 7%. CAUSE-PA St. 1 at 32, fn. 56.

VI. ARGUMENT

A. Legal Authority for CAP Shopping Restrictions.

The Commission may impose program rules for CAP customer shopping. Under the Public Utility Code, the Commission has the clear legal authority, as well as a duty, to maintain affordable, cost-effective universal service programs and may exercise that authority to implement shopping for the universal service programs. Universal service programs are defined in the Customer Choice Act as follows:

“Universal service and energy conservation.” Policies, protections and services that help low-income customers to maintain electric service. The term includes customer assistance programs, termination of service protection and policies and services that help low-income customers to reduce or manage energy consumption in a cost-effective manner, such as the low-income usage reduction program, application of renewable resources and consumer education.

66 Pa. C.S. § 2803. The Customer Choice Act specifically requires that universal service and energy conservation are to be maintained and supported as part of the restructuring of the electric industry. Specifically, Section 2802(10) provides:

The Commonwealth must, at a minimum, continue the policies, protections and services that now assist customers who are low-income to afford electric service.

66 Pa. C.S. § 2802(10). Section 2802(17) also requires the following:

There are certain public purpose costs, including programs for low-income assistance, energy conservation and others, which have been implemented and supported by public utilities’ bundled rates. The public purpose is to be promoted by continuing universal service and energy conservation policies, protections and services, and full recovery of such costs is to be permitted through a nonbypassable rate mechanism.

66 Pa. C.S. § 2802(17). These purposes are specifically recognized along with the essential nature of electric service and the need for electric service to be available on reasonable terms and conditions to all customers. The Act provides:

Electric service is essential to the health and wellbeing of residents, to public safety and to orderly economic development, and electric service should be available to all customers on reasonable terms and conditions.

66 Pa. C.S. § 2802(9).

In order to meet its universal service obligations, PECO operates a Customer Assistance Program (CAP) that provides bill payment assistance to qualified low-income residential customers with incomes at or below 150% of the Federal Poverty Level (FPL). CAUSE-PA St. 1 at 18-19. A customer enrolled in PECO's CAP program is not required to pay his or her total bill for energy service, as a discount is applied to the CAP customer's bill so that the customer only pays the affordable portion of the bill.¹²

The Customer Choice Act restructured the electric industry, and in so doing, the General Assembly established standards for the "oversight of the transition process and regulation of the restructured electric utility industry" to promote the purposes declared by the Act. 66 Pa. C.S. § 2804. Key among these standards is the requirement that universal service and energy conservation policies, activities and services be appropriately funded and available in each of electric distribution service territory and that the programs be operated in a cost-effective manner. 66 Pa. C.S. § 2804(9). The statute explicitly states in relevant part:

Programs under this paragraph shall be subject to the administrative oversight of the Commission which will ensure that the programs are operated in a cost-effective manner.

66 Pa. C.S. § 2804(9).

The Commonwealth Court affirmed the Commission's authority over CAP shopping program rules in the determination of PECO's DSP II proceeding. See, PECO CAP Shopping at 1104. In the PECO CAP Shopping case, PECO sought to implement a CAP shopping program in which EGSs who voluntarily participated would charge a price that was at or below the Price to Compare (PTC). PECO CAP Shopping at 1090. The Commission denied PECO's proposed CAP shopping plan because the Commission concluded that it lacked the authority to regulate

¹² The OCA notes that effective October 2016, PECO's CAP program design will change, but the fundamental goal of providing an affordable bill through a cost-effective program remains the same.

EGS rates. PECO CAP Shopping at 1092. While the Commonwealth Court did not reverse the Commission's determination regarding the price protections under PECO's CAP Shopping Plan, the Commonwealth Court did affirm the Commission's authority to implement CAP Shopping rules, including a price protection rule if the Commission found it necessary based on the evidence of record. PECO CAP Shopping at 1103-1104.

The Commonwealth Court specifically recognized the Commission's duty under the Act regarding both universal service and retail choice. The Commonwealth Court addressed these obligations as follows:

What is particularly noteworthy about the legal arguments of the PUC and Direct Energy is their focus on the PUC's lack of authority to regulate the rates EGSs charge to customers. We are persuaded, however, by Petitioners' contention that the absence of authority to regulate EGS rates alone does not compel the conclusion that the PUC lacks authority to adopt rules attendant to universal service programs that may have the effect of limiting competition and choice with respect to low-income customers.

PECO CAP Shopping at 1101. The Commonwealth Court concluded that:

[t]he PUC has the authority under Section 2804(9) of the Choice Act, in the interest of ensuring that universal service plans are adequately funded and cost effective, to impose, or in this case approve, CAP rules that would limit the terms of any offer from an EGS that a customer can accept and remain eligible for CAP benefits. The obligation to provide low-income programs falls on the public utility under the Choice Act, not the EGSs. Moreover, the Choice Act expressly requires the PUC to administer these programs in a manner that is cost effective for the CAP participants and the non-CAP participants, who share the financial consequences of the CAP participant's EGS choice.

Our conclusion finds support in the Choice Act's legislative declaration of policy, which both encourages deregulation to allow consumers the opportunity to purchase directly their supply from EGSs and emphasizes the need to continue to maintain programs that assist low-income customers to afford electric service. 66 Pa. C.S. § 2802(7), (9), (10), (14), (17). So long as it "provides substantial reasons why there is no reasonable alternative so competition needs to bend" to ensure adequately-funded cost-effective, and affordable programs to assist customers who are low-income to afford electric service...the PUC may impose CAP rules that would limit the terms of any offer from an EGS that a customer could accept and remain eligible for CAP benefits – e.g. EGS rate ceiling, prohibition against early termination/cancellation fees."

PECO CAP Shopping at 1103-1104.

The PECO CAP Shopping case established that the Commission has the authority to require EGS voluntarily participating in the CAP Shopping Plan to adhere to the conditions of the CAP Shopping program, provided those conditions are designed to meet the statutory standards of maintaining affordability and cost effectiveness for both CAP participants and non-CAP customers who pay the costs of the programs. As the Commonwealth Court stated in the PECO CAP Shopping case, nothing in the Customer Choice Act precludes the Commission from implementing program rules to protect low-income customers in a retail choice program that is voluntary for EGSs as well as customers. PECO CAP Shopping at 1103-1104.

The Commission is empowered and required by the Public Utility Code to take the steps necessary to maintain affordable service for low-income CAP customers in the retail choice environment. The Commission not only has the authority, but also the obligation, to provide the necessary protections for low-income customers in accord with the Customer Choice Act and to ensure that the rates paid by non-CAP residential customers to support the program are just and reasonable.

B. Whether CAP Shopping restrictions are needed.

1. Introduction.

The OCA submits that the evidence presented in this case demonstrates that there is a need to implement CAP shopping rules and to develop a specific shopping program for CAP customers to address their unique challenges. As discussed in Section A above, under the Customer Choice Act, affordability and cost-effectiveness of the CAP program must be maintained. 66 Pa. C.S. §§ 2802(10), 2804(9). CAP Shopping program rules are necessary in order to preserve affordability for CAP customers and the cost-effectiveness of the CAP program for all other non-CAP residential customers who pay the costs of the program.

Chairman Gladys M. Brown described this challenge and the need to preserve both CAP customer affordability and cost-effectiveness in her dissent in the case involving PECO's CAP Shopping Plan in the DSP II proceeding. See, Petition of PECO Energy Company for Approval of its Default Service Plan, Docket No. P-2012-2283641, Statement of Commissioner Gladys M. Brown (January 9, 2014). Chairman Brown stated:

I am supportive of availing CAP customers the opportunity to enroll with an electric generation supplier (EGS). As well, I believe affordability is of paramount concern for CAP customers...A potential result, under PECO's current CAP structure, of not placing a ceiling on the prices that EGSs can charge CAP customers is that the overall cost of PECO's CAP program will rise. Those increased costs will be borne by the residential class as a whole.

Id.

The Customer Choice Act recognized the need to protect essential electric service for CAP customers in the retail competitive environment, and in order to preserve that affordability, CAP Shopping Plan rules must be implemented. See, 66 Pa. C.S. §§ 2802(9), (10), 2804(9). The analysis presented by CAUSE-PA witness Geller demonstrates the need to provide additional protections for CAP customers in the retail choice environment, and that those additional protections are necessary to ensure that non-CAP residential ratepayers who pay the costs of the program are also protected. The OCA submits that affordability and cost-effectiveness of the CAP program must be protected.

2. Affordability for CAP customers and cost-effectiveness for non-CAP residential customers will be impacted without CAP shopping rules.

In his Direct Testimony, CAUSE-PA witness Geller described the impacts on CAP customer affordability and CAP program costs without effective CAP Shopping program rules. See, CAUSE-PA St. 1 at 18-19. CAP customers are not like other residential customers. CAP customers are enrolled in CAP because they otherwise have difficulty paying the full residential customer rate at PECO's Price to Compare. The CAP program provides CAP

customers with necessary essential protections to maintain electric service. CAUSE-PA St. 1 at 30.

CAUSE-PA witness Geller examined the impact of CAP customer shopping on CAP customer affordability in the five Pennsylvania service territories (PPL and the four FirstEnergy Companies (Met-Ed, Penelec, Penn Power, and West Penn Power)) that allow CAP Shopping without restrictions. Mr. Geller testified:

A review of the data shows that low-income customers have been significantly harmed by their participation in the competitive electric generation market. In PPL's most recent universal service plan proceeding, PPL Electric agreed that CAP customer shopping can affect customers' ability to remain in the program if they have selected a supplier with very high energy prices and that the primary impact of higher supplier prices for its CAP customers is to increase the "burn rate" of CAP credits. In response, the Commission directed PPL to address the issue of CAP shopping in its upcoming DSP. In preparation for its currently pending default service proceeding, PPL produced evidence that makes it clear that a significant number of PPL's CAP customers who are shopping paid more than the price to compare. For calendar year 2015, an average of 52% of PPL's customers shopped each month, and of those customers who were shopping, an average of 46% paid more than the price to compare.

The numbers are worse when disaggregated over the four year period from January 2012 through February 2016. In response to discovery, PPL produced a table that revealed some alarming statistics. Every month from January 2012 through February 2016, at least 42% of CAP customers paid more than the PTC, and in 6 of those months, 88-99% of CAP customers paid more than the PTC. In most months over this more than four-year period of time, between 45%-70% of CAP customers paid more than the price to compare. I have attached this chart to my testimony in Appendix D, as it shows the full scale of the harm. This information shows that the harm to CAP customers is not isolated to a single point in time, but rather is a consistent concern in the interaction of CAP customers and the competitive market.

CAUSE-PA St. 1 at 27-28, App. D.

CAP shopping customers not only paid more on average than the Price to Compare in PPL's service territory, but the CAP shopping customers paid *significantly* more than the Price to Compare. CAUSE-PA witness Geller testified:

The data also shows that those customers who paid more than the price to compare paid significantly more, as compared to the savings achieved by

customers who paid less than the price to compare. In the month in which CAP customers who shopped paid the highest percentage more than the price to compare, they paid on average 101% more per kWh. But in the month when CAP customers who shopped achieved the greatest savings, they paid only 14% less than the price to compare.

CAUSE-PA St. 1 at 28.

Another impact of this data is the increase to the costs of the CAP program. All non-CAP residential ratepayers must pay the costs of the universal service program. The amount that is paid by non-CAP residential ratepayers is referred to as the CAP Shortfall. The amount of the CAP Shortfall will increase when the customer is charged a price by an EGS that is higher than PECO's Price to Compare. Those increased costs will flow through to other ratepayers. As discussed in Mr. Geller's Direct Testimony, PPL's non-CAP residential customers have annually paid \$2.74 million more for the CAP program exclusively due to CAP Shopping. CAUSE-PA witness Geller testified regarding the costs to PPL's ratepayers:

[T]he net impact of CAP customer shopping over the 46-month period from January 2012 through October 2015 is \$2,743,872 per year. That is, as a result of CAP customer shopping without restriction, as is presently occurring in the PPL service territory, residential ratepayers are paying \$2,743,872 more per year for the CAP program than they would have paid if all CAP customers simply paid the PTC. None of this more than \$2.74 million promoted universal service goals under the Choice Act to assist low-income customers better meet their home energy needs. In fact, as previously discussed, these increased costs resulted in reducing affordability for CAP customers. Since program costs are intended to assist low-income customers afford and maintain essential utility service, they should not be increased by more than \$2.74 million per year for the purpose of paying generation rates which are higher than the default price.

CAUSE-PA St. 1 at 29 (emphasis in original and footnotes omitted).

The experiences of FirstEnergy Company customers have been consistent with the experiences of PPL's CAP shopping customers. Mr. Geller testified that as of November 2015, "more than 77% of Met-Ed's CAP customers, more than 50% of Penelec's CAP customers, and more than 65% of West Penn's CAP customers who are shopping are paying a price higher than the price to compare." CAUSE-PA St. 1 at 29.

The OCA submits that the similar experiences in all five of the service territories demonstrate the consistent harms experienced by both CAP shopping customers and non-CAP residential customers. The PPL and FirstEnergy Companies' experiences demonstrate a clear need for additional protections to be provided for PECO's CAP customers. The OCA submits that the objectives of cost-effectiveness and affordability cannot be achieved without necessary CAP Shopping program rule protections.

C. CAP Shopping Proposals

1. CAP Shopping Program Rules

a. CAUSE-PA's CAP-SOP is a reasonable CAP Shopping Plan.

CAUSE-PA, TURN *et al.*, and OCA support the implementation of CAP Shopping program rules to protect CAP customers and non-CAP residential customers from the impact of ineffective shopping decisions. The OCA supports both CAUSE-PA witness Geller's proposed fundamental CAP Shopping principles and the CAP-SOP program design.

CAUSE-PA witness Geller recommended the following CAP Shopping principles:

1. CAP shopping participants should be prohibited from entering into a contract with an EGS in which they will pay, at any time, rates greater than the price to compare.
2. CAP shopping participants should be prohibited from entering into a contract with an EGS that includes early cancellation or termination fees.

CAUSE-PA St. 1 at 31. OCA witness Alexander recommended that Mr. Geller's fundamental principles for the design of a CAP Shopping Plan be approved in this proceeding. Ms. Alexander testified:

It is my view, similar to Mr. Geller's, that the primary objective must be to ensure that CAP customers do not suffer higher bills and that other ratepayers are not required to pay higher costs for any program that allows a CAP customer to select an EGS. I also agree with Mr. Geller's proposal to eliminate early termination or cancellation fees for CAP customers served by an EGS. Assuming that a program can be developed that reflects this fundamental principle, there are obvious

implementation details and concerns that would need to be resolved to implement Mr. Geller's suggestion.

OCA St. 2-R at 5.

In order to achieve its CAP shopping principles, CAUSE-PA proposed a CAP-SOP that would provide CAP customers an opportunity to shop while helping to ensure affordability. As proposed, the CAP-SOP provides that: (1) CAP customer would be allowed to enroll with a supplier only if they enrolled through a CAP-SOP; (2) the CAP customer would be enrolled in an SOP similar to the existing residential customer Standard Offer Program, which would provide 7% off the PTC at the time of enrollment; (3) if the PTC decreased by more than 7% off the enrollment PTC, the participating EGS would either re-enroll the customer at a new 7% discount or return the customer to default service;¹³ and (4) at the end of the 12 month term, the EGS could either re-enroll the customer at a new 7% off the effective PTC or return the customer to default service. CAUSE-PA St. 1 at 31-33. The OCA submits that CAUSE-PA's CAP-SOP is a reasonable CAP Shopping Plan. The CAP-SOP is designed to preserve the affordability for CAP customers and to address the costs that are paid for by all other non-CAP residential customers.

RESA witness White opposed CAUSE-PA witness Geller's proposal to require CAP customers to shop only through the CAP-SOP option. RESA St. 1 at 14. Mr. White was concerned with the administrative difficulties of implementing the CAP-SOP program. Mr. White's arguments are not persuasive. The CAP-SOP proposal provides for the program to be completely voluntary for EGS participants. EGSs are free to elect to participate in both the traditional SOP program and the proposed CAP-SOP program. EGSs may opt in or out of both of the programs on a quarterly basis and must continue to serve the customers that they enroll for the full 12-month term.

¹³ As explained in the Direct Testimony of Mr. Geller, the EGS would only have to adjust the enrollment if the PTC drop was more than 7%. CAUSE-PA St. 1 at 32, fn. 56.

RESA witness White also argued that restricting CAP shopping to a CAP-SOP “is really just a CAP shopping ban masquerading as a shopping proposal.” RESA St. 1-R at 16. To the contrary, the CAP-SOP provides a means for CAP customers to participate in the competitive market through an EGS that will provide a discount on the PTC. CAUSE-PA’s proposal provides a guarantee of savings for CAP customers. However, if the PTC drops more than 7% any time during the CAP shopping customer’s enrollment, the EGS would have to re-enroll the customer in with a new 7% off the then applicable PTC or return the customer to default service. CAUSE-PA St. 1 at 32, fn. 56. Under CAUSE-PA’s proposal, if the EGS did not want to offer more than the initial 7% discount when the PTC changes, the EGS would simply return the CAP customer to default service. CAUSE-PA St. 1 at 33. The CAP customer would receive the benefits of the competitive retail choice market, and the EGSs would be able to return the CAP customers to default service if the PTC changes beyond 7% off the PTC at the time of enrollment. The CAP-SOP also provides protections to ensure that customers can end contracts, without penalty, if the customer so chooses.

The OCA submits that CAP Shopping will not negatively impact affordability for CAP customers, nor burden non-CAP residential customers that fund the program. The CAP-SOP proposal is a reasonable measure to allow CAP customers access to the competitive retail choice market, to preserve CAP customer affordability, and to address potential impacts on non-CAP residential customers who pay the costs of the program.

- b. A stakeholder group should be implemented to address CAP-SOP implementation details.

OCA witness Alexander recommended that a stakeholder group notice should be sent to all PECO’s CAP agencies, parties to this proceeding and all licensed EGSs in PECO’s service territory in order to discuss implementation details of the CAP-SOP. OCA St. 2-R at 7. The stakeholder group should discuss the implementation details during the late 2016- early 2017

time period, and to the extent that there is consensus, a CAP Shopping Plan should be implemented on or about June 1, 2017. To the extent that there is not consensus, the parties should be permitted to submit their respective proposals to the Commission for review, comments, and final determination. OCA St. 2-R at 7.

OCA witness Alexander identified a list of issues and program design features that should be addressed in a stakeholder group. See, OCA St. 2-R at 5-6. For example, Ms. Alexander identified that some of the stakeholder group issues may include: (1) EGS enrollment fees; (2) the criteria for EGS participation in the CAP-SOP; (3) identification of the triggers to return a CAP shopping customer to default service; and (4) the electronic data protocols that might be required for implementation of the program. OCA St. 2-R at 5-6.

Within the framework of the approved CAP-SOP design and the CAP Shopping principles, the OCA submits that the stakeholder group will allow all interested participants to discuss the operational details of the program prior to its implementation.

2. Implementation of CAP Shopping should not occur until at least June 1, 2017.

On May 11, 2016, the Commission issued a Secretarial Letter directing PECO to file a proposed rule revision to its CAP Shopping Plan in its DSP III proceeding to conform to the rules established in the DSP II proceeding as modified by the Commonwealth Court's PECO CAP Shopping decision. Petition of PECO Energy Company for Approval of its Default Service Plan (DSP II), Docket No. P-2012-2283641, Secretarial Letter at 1 (May 11, 2016)(Secretarial Letter), citing PECO CAP Shopping at 1104. CAUSE-PA witness Geller, however, proposed to address the CAP Shopping rules in this proceeding for DSP IV. Mr. Geller argued that inserting a CAP Shopping into a program (the DSP III Plan) that will expire in less than year and "without addressing it prospectively in this DSP proceeding, would make little sense." CAUSE-PA St. 1 at 11. In response in Rebuttal Testimony, PECO witness McCawley stated that the Company

intends to file a CAP Shopping Plan in August 2016 for implementation in the Company's DSP III proceeding.¹⁴ PECO St. 2-R at 13-15. RESA witness White also argued that the appropriate forum to address the issue is in the DSP III proceeding. RESA St. 1-R at 17. TURN *et al.* witness Bertocci supported the approach proposed by CAUSE-PA witness Geller. TURN *et al.* St. 1-SR at 16. Whether changes to the CAP Shopping Plan are made procedurally in the DSP III proceeding or the DSP IV proceeding, OCA witness Alexander recommends that a CAP Shopping Plan should not be implemented until June 1, 2017 due to the significant CAP design changes to go into effect in October 2016. OCA St. 2-SR at 14.

The Secretarial Letter affirmed the Commission's authority to address the rules for CAP customer shopping as stated in the Commonwealth Court's PECO CAP Shopping decision. Secretarial Letter at 1, citing PECO CAP Shopping at 1104. The Secretarial Letter stated that PECO should file a CAP Shopping Plan in its DSP III docket and that PECO's filing would be subject to public comment and final review by the Commission. Secretarial Letter at 1-2. Mr. Bertocci testified:

Accordingly, unlike Mr. White, I believe the Commonwealth Court order, and the Commission's Secretarial Letter must be read to permit the parties to examine PECO's CAP shopping program in this DSP IV proceeding. As noted above, the Commonwealth Court has specifically mandated that the review of CAP shopping be periodically undertaken – doing so is part of the “continuing nature” of the PUC's oversight, as required by the Choice Act. Moreover, the Commission's Secretarial Letter was entered on PECO's DSP II docket, P-2012-2283641. I am aware of no basis for the Commission's Secretarial Letter in PECO's 2012 DSP proceeding, or any other prior decision or determination, to somehow prejudice the positions of the parties regarding PECO's CAP shopping plan in this DSP IV proceeding, which commenced several years after the close of the record in PECO's DSP II.

TURN *et al.* St. 1-SR at 16. The OCA submits that the Secretarial Letter left open the opportunity for parties to address CAP Shopping for DSP IV and should not be interpreted restrictively to prohibit addressing the issue on a going-forward basis. Secretarial Letter at 2.

¹⁴ The Company's current DSP III proceeding will expire on May 31, 2016.

Whether considered as part of the DSP III docket or this proceeding, the OCA submits that the CAP Shopping Plan should not be implemented until June 1, 2017. Simultaneous with the CAP Shopping Plan issues, the Commission has also been examining the affordability of PECO's CAP customer program design. The CAP program has been redesigned in order to better target affordability to those customers with the greatest need. The CAP is currently structured as a tiered discount rate program, and effective October 2016, the program will become a Fixed Credit Option (FCO) program. See FCO program description at CAUSE-PA St. 19-23. Given the complexity of the proposed program design changes and the potential for customer confusion, the OCA, CAUSE-PA, and TURN *et al.* recommend that the CAP Shopping Plan should not be implemented until June 1, 2017. OCA St. 2-R at 3-4; CAUSE-PA St. 1 at 14; TURN *et al.* St. 1-SR at 11.

OCA witness Alexander testified as follows:

At a minimum, there should not be any change to the CAP shopping policy until there has been a full implementation of the revised CAP rate design and arrears management program and a determination that the program has been properly implemented with evidence that customers understand and have adjusted to these program changes. It is my understanding that these program changes will occur in the 4th quarter of 2016. Therefore, at the earliest, I would not recommend any change to CAP customer shopping until June 1, 2017, the onset of PECO's DSP IV. I agree with Mr. Geller's proposal in this regard.

OCA St. 2-R at 3-4; see also, OCA St. 2-SR at 14.

The OCA agrees with CAUSE-PA's concerns about the potential for confusion and adverse impacts that would occur if there were to be a dramatic change in the current CAP customer shopping policy during the implementation of the change in the rate design for the CAP customer benefits. See, CAUSE-PA St. 1 at 14. OCA witness Alexander testified:

The Commission has approved a significant change to the PECO CAP customer rate design. The new CAP program design will change from a rate discount program to a fixed credit program. This change will affect all of PECO's 140,000 CAP customers. As with any change in rate design, particularly one of this substantial nature, there will be "winners" and "losers." Some CAP customers

will receive an increase to their current dollar benefits. Others will receive a reduction to their dollar benefits or no dollar benefits at all compared to the current discount program. Furthermore, PECO will initiate a new arrears management program design for CAP customers at this time and those benefits, where applicable, will also appear on the CAP customer's bill. These changes will require PECO to interact with its CAP customers and the agencies that interact with low income customers and qualify customers for and educate customers about this program. PECO will be issuing educational messages to its CAP customers and community agencies about the forthcoming changes. And, once these changes appear on CAP customer bills, PECO will also be informing customers about the specific impact of these changes on their bill payment requirements. Once the new benefits begin appearing on CAP customer bills, PECO will no doubt receive calls and communications from customers who will need significant education and explanation about these changes and their impact on the CAP customer bill payment requirements. It would be detrimental to CAP customers and the community agencies that interact with these customers to impose another set of educational messages and communications concerning customer choice and the same time.

OCA St. 2-R at 1-2.

OCA witness Alexander testified that the combination of these two changes to the CAP rate design and the addition of customer choice information, if implemented at or near the same, will likely lead to customer confusion and “contribute to the potential for adverse customer bills and affordability.” OCA St. 2-R at 3. Ms. Alexander testified:

This concern is even more important in light of the recent evidence in Pennsylvania that CAP customers on average pay more for generation supply service than the Price to Compare when served by an EGS, as well as the conclusion that these higher bills can adversely impact the affordability for essential electric service for CAP customers, and result in higher costs to the other residential ratepayers to fund these programs.

OCA St. 2-R at 3 (footnote omitted).

TURN *et al.* witness Bertocci also identified the logistical issues with the CAP design changes. CAP customers may experience differences in the level of benefits received and that may otherwise impact their CAP shopping decisions. Mr. Bertocci testified:

In addition to the direct financial harms to PECO CAP customers and other residential customers, Ms. Alexander is correct in recognizing that CAP shopping presents additional risks at this time, given the drastic changes to be implemented in PECO's CAP program. OCA St. 2-R at 3-4. Many CAP customers will have

to make adjustments to their monthly budgets with the implementation of PECO's new CAP program, because some will experience greater discounts, and some will experience reduced discounts. Until PECO's new CAP program is in operation, CAP customers will not have all of the information necessary to make an informed decision when evaluating EGS offers. This is particularly true for those CAP customers who will receive little to no CAP discount under PECO's new program and would need to carefully evaluate EGS offers to maximize bill affordability going forward.

TURN *et al.* St. 1-SR at 11.

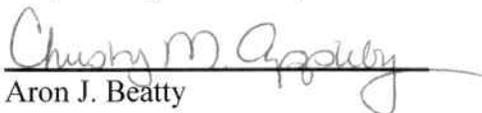
RESA witness White argued that if a CAP Shopping Plan is not implemented before the PPL DSP IV, CAP customers will miss opportunities to avail themselves of the benefits of the competitive market. RESA St. 1-SR at 6. Mr. White, however, fails to identify these benefits. As discussed in OCA witness Alexander's Rebuttal Testimony, the fundamental problem is that CAP customers will have a significant change to the design of the CAP program. OCA St. 2-R at 3. Until CAP customers have the opportunity to understand the changes to the CAP design on their monthly bill and to receive necessary education about shopping, CAP customers will not be able to make effective CAP shopping decisions.

The OCA submits that the CAP Shopping Plan should not be implemented until at the June 1, 2017 at the earliest. Implementation on June 1, 2017 will allow CAP customers to experience approximately three quarterly cycles of bill changes under the new CAP program design. A June 1, 2017 implementation will provide CAP customers with the ability to better understand the impact of the program design changes on their monthly bill and to make more effective CAP shopping decisions.

VII. CONCLUSION

For the reasons set forth above, the Office of Consumer Advocate respectfully requests that the fundamental framework of the CAP Shopping program, and the CAP-SOP, be approved as proposed by CAUSE-PA witness Geller. The OCA further submits that PECO should be required to establish a stakeholder process to develop protocols for the CAP-SOP for service beginning June 1, 2017. The OCA also respectfully requests that the CAP Shopping Plan be implemented no earlier than with the commencement of the DSP IV proceeding, on or about June 1, 2017.

Respectfully Submitted,



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224595.doc

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company :
For Approval of its Default Service :
Program for the Period Service Plan : Docket No. P-2016-2534980
For the Period from June 1, 2017 Through :
May 31, 2019 :

I hereby certify that I have this day served a true copy of the following documents, the Office of Consumer Advocate's Initial Brief, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 11th day of August 2016.

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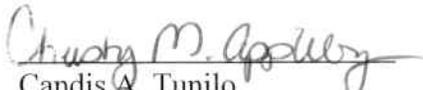
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