



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE  
REFER TO OUR FILE

August 4, 2016

Secretary Rosemary Chiavetta  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re:

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

Dear Secretary Chiavetta:

Enclosed please find the Bureau of Investigation and Enforcement's (I&E) **Main Brief** in this proceeding.

Copies are being served on all active parties of record as evidenced in the attached Certificate of Service. If you have any questions, please contact me at (717) 783-6151.

Sincerely,

Phillip C. Kirchner  
Prosecutor  
Bureau of Investigation and Enforcement  
PA Attorney I.D. #313870

PCK/sea  
Enclosure

cc: ALJ Cynthia W. Fordham  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Petition of PECO Energy Company</b>	<b>:</b>	
<b>for Approval of a Default Service</b>	<b>:</b>	
<b>Program for the Period June 1, 2017</b>	<b>:</b>	<b>Docket No. P-2016-2534980</b>
<b>through May 31, 2019</b>	<b>:</b>	

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**MAIN BRIEF  
OF THE  
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: August 4, 2016

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## I. INTRODUCTION

### A. The Retail Choice Act

The Electricity Generation Customer Choice and Competition Act (“Choice Act”) took effect on January 1, 1997. The Choice Act, which added Chapter 28 to the Public Utility Code, modified the code such that electricity generation would no longer be regulated as a public utility.<sup>1</sup> Instead, electric utilities were required to unbundle their rates and services and to provide open access over their transmission and distribution systems to permit competitive suppliers to generate and sell electricity directly to consumers in this Commonwealth.<sup>2</sup> In essence, Chapter 28 opened a retail electric market in which customers could purchase electricity from competing electric generation suppliers (“EGSs”). The Choice Act was prefaced, in part, with a declaration that that competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.<sup>3</sup>

Beyond that, the Choice Act also addressed the importance of access to electric service and the need for customer protection in the competitive market. Specifically, the Choice Act concluded that electric service is “essential to the health and well-being of residents, to public safety and to orderly economic development” and that all customers should be able to obtain service on reasonable terms and conditions.<sup>4</sup> The Choice Act also spoke specifically of the needs of low income customers, mandating that “[t]he

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<sup>1</sup> 66 Pa.C.S.A. § 2802(14).

<sup>2</sup> Id.

<sup>3</sup> 66 Pa.C.S.A. § 2802(5).

<sup>4</sup> 66 Pa. C.S. § 2802(9).

Commonwealth must, at a minimum, continue the protections, policies and services that now assist customers who are low-income to afford electric service.<sup>5</sup> To ensure the protection of low income customers, the Choice Act mandated that the Commission ensure that universal service and energy conservation policies, activities and services are appropriately funded and available in each EDC's territory.<sup>6</sup> The Choice Act defines Universal service and energy conservation as:

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 programs, application of renewable resources and consumer education.<sup>7</sup>

## **B. Universal Service Programs**

To comply with the mandates of the Act, the Commission established regulations which required electric distribution companies ("EDCs") to develop uniform reporting requirements for universal service and energy conservation.<sup>8</sup> As part of the regulations, the Commission indicated that it would determine whether EDCs met the goals of the universal service programs, which it identified as: (1) protecting consumers' health and safety by helping low-income customers maintain electric service; (2) providing for affordable electric service by making available payment assistance to low-income

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<sup>5</sup> 66 Pa. C.S. § 2802(10).

<sup>6</sup> 66 Pa. C.S. §2804(9).

<sup>7</sup> 66 Pa.C.S.A. § 2803 (emphasis added).

<sup>8</sup> 52 Pa. Code § 54.71-§54.78.

customers; (3) assisting low-income customers conserve energy and reduce residential utility bills; and (4) establishing universal service and energy conservation programs are operated in a cost-effective and efficient manner.<sup>9</sup>

A key universal service program, the Customer Assistance Program (“CAP”) is defined as:

An alternative collection method that provides payment assistance to low-income, payment troubled utility customers. CAP participants agree to make regular monthly payments that may be for an amount that is less than the current bill in exchange for continued provision of electric utility services.<sup>10</sup>

Customers may be eligible for participation in a utility’s CAP if their status as a ratepayer or new application is verified, their household income is verified to be at or below 150% of the Federal poverty income (“FPL”) guidelines, and they qualify as a low income, payment troubled customer.<sup>11</sup> Low income, payment troubled status means that CAP customers must meet at least one of the following four criteria: (1) a household whose housing and utility costs exceed 45% of the household's total income; (2) a household who has \$100 or less disposable income after subtracting all household expenses from all household income; (3) a household who has an arrearage as defined by the utility; or a household who has received a termination notice or who has defaulted on one payment arrangement.

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<sup>9</sup> 52 Pa. Code § 54.73.

<sup>10</sup> 52 Pa.Code § 54.72.

<sup>11</sup> 52 Pa.Code § 69.265(4).

Aside from qualification guidelines, the Commission has also demarcated credit limits and control features for CAPs. As an example, absent limited exceptions, the annual maximum CAP credits for non-heating electric customers should not exceed five-hundred and sixty dollars (\$560) and should not exceed one thousand four hundred dollars (\$1,400) for heating electric customers.<sup>12</sup> Additionally, CAP participants are not permitted to subscribe to non-basic services that would cause an increase in monthly billing and would not contribute to bill reduction. Furthermore, CAP credits should not be used to pay for non-basic services.<sup>13</sup>

### **C. The Role of the Bureau of Investigation & Enforcement**

Act 129 of 2008<sup>14</sup>, authorized the Commission to establish bureaus, offices and positions to, *inter alia*, take appropriate enforcement actions that are necessary to ensure compliance with the Public Utility Code and Commission regulations and orders.<sup>15</sup> In accordance with Act 129, the Commission established the Bureau of Investigation and Enforcement (“I&E”) to serve as the prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Public Utility Code.<sup>16</sup> The above-captioned docket warrants I&E’s participation because its outcome has ratemaking implications and because key components of the Public Utility Code and the Commission’s regulations are at issue.

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<sup>12</sup> 52 Pa.Code § 69.265(3)(v)(B-C).

<sup>13</sup> 52 Pa.Code § 69.265(3)(ii).

<sup>14</sup> 66 Pa.C.S. § 308.2.

<sup>15</sup> 66 Pa.C.S. § 308.2(a)(11).

<sup>16</sup> 66 Pa.C.S. §§ 101 *et seq.*, and Commission regulations, 52 Pa. Code §§ 1.1 *et seq.* See *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

## II. STATEMENT OF THE CASE

On March 17, 2016, PECO Energy Company, Inc. (“PECO”, “Company” or “Petitioner”) filed a petition with the Pennsylvania Public Utility Commission (“Commission”) requesting that the Commission approve its fourth Default Service Program (“DSP IV”). PECO noted that this petition was filed in accordance with its responsibilities as the default service provider for its certificated service territory for the period from June 1, 2017 through May 31, 2019, following the expiration of its current default service program (“DSP III”). Beyond PECO and I&E, the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”), Direct Energy Services, LLC (“Direct Energy”), Noble Americas Energy Solutions, LLC. (“Noble”), the Philadelphia Area Industrial Energy Users Group (“PAIEUG”), and the Retail Energy Supply Association (“RESA”) have been actively participating in this proceeding (collectively “the parties”). Throughout the course of this docket, the parties have engaged in substantial discovery, discussions and negotiations resulting in an agreement on most issues in this case. This settlement was memorialized and supported through a Joint Petition for Partial Settlement that was filed on July 28, 2016 that was joined or not opposed by all but one party. That being noted, a settlement has not been reached regarding PECO’s proposed CAP shopping program. Accordingly, I&E now timely submits this brief on that issue.

### III. QUESTIONS INVOLVED

A. Does the Commission Have the Authority to Limit CAP Shopping?

Suggested Answer: Yes.

B. Has direct evidence been produced of increased shopping costs incurred through its CAP program and the resulting harm imposed upon ratepayers yet?

Suggested Answer: No.

C. Should the Public Utility Commission address CAP shopping issues on a uniform, statewide basis?

Suggested Answer: Yes.

### IV. LEGAL STANDARDS AND BURDEN OF PROOF

Pursuant to the Public Utility Code, the proponent of a rule or order bears the burden of proof.<sup>17</sup> In a case such as this one, pending before an administrative tribunal, Courts have held that a “litigant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”<sup>18</sup> In order to meet their burden of proof, the litigants must “present evidence more convincing, by even the smallest amount, than that presented by any opposing party.”<sup>19</sup>

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<sup>17</sup> 66 Pa. C.S. § 332(a).

<sup>18</sup> *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

<sup>19</sup> *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

## V. SUMMARY OF THE ARGUMENT

After carefully considering the evidence and pertinent case law in this matter, I&E respectfully maintains that while the Commission has the clear authority to limit CAP shopping, no direct evidence exists of harm suffered by PECO's customers yet since there has been no prior CAP shopping. While there is indirect evidence that the Commission may consider in deciding potential limits to CAP shopping in this matter, the Commission has previously required evidence "that demonstrates that the overall long-run electric rates for CAP shopping customers will be higher than if those customers are served under default service rates"<sup>20</sup> prior to implementing CAP shopping limitations such as those proposed by CAUSE-PA. Bearing that in mind, I&E would respectfully propound that the Commission initiate a statewide collaborative open to all interested stakeholders and/or initiate a new rulemaking proceeding to address CAP shopping issues. It is noted that this resolution was also advocated for in PP&L's DSP IV proceeding<sup>21</sup>.

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<sup>20</sup> Coal. for Affordable Util. Servs. & Energy Efficiency in Pennsylvania v. Pennsylvania Pub. Util. Comm'n, 120 A.3d 1087, 1093–94 (Pa. Commw. Ct. 2015), appeal denied, 136 A.3d 982 (Pa. 2016), and appeal denied, 136 A.3d 983 (Pa. 2016)

<sup>21</sup> Reference generally Docket P-2016-2526627, Petition of PPL Electric Utilities Corporation for approval of a Default Service Program and Procurement Plan for the Period June 1, 2017 through May 31, 2021.

## **VI. ARGUMENT**

### **A. The Commission has Authority to Impose Restrictions on CAP Shopping**

I&E relies on three sources to support its first and foremost position that the Public Utility Commission may and should impose shopping restrictions upon CAP customers when appropriate. Specifically these sources are the Choice Act, the Commission's own regulations governing Universal Service Programs and, perhaps most pertinently, legal precedent arisen from a recent Commonwealth Court decision in PECO's DSP II proceeding. I&E is confident arguing about the authority to limit CAP shopping being granted to the Commission through any of these sources individually but maintains that when these three sources are viewed in totality, they overwhelmingly support I&E's stance that the Commission may choose to implement limitations on PECO's CAP shopping proposal.

#### **1. The Choice Act**

With regards to low-income customers, The Choice Act explicitly stressed the need for protections and safeguards, mandating that "[t]he Commonwealth must, at a minimum, continue the protections, policies and services that now assist customers who are low-income to afford electric service."<sup>22</sup> This same piece of legislation further expounded that protections extended to low-income customers "shall be subject to the administrative oversight of the commission which will ensure that the programs are operated in a cost-effective manner."<sup>23</sup> Bearing this in mind, the plain language of the

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<sup>22</sup> 66 Pa. C.S. § 2802(10).

<sup>23</sup> 66 Pa. C.S. §2804(9)

Choice Act imposes both an active mandate upon the Commission to ensure that low-income customers are receiving electric service in a cost-conscious manner and the authority to enforce that mandate.

## **2. Universal Service Goals Identified in Commission Regulations**

The Commission's regulations acknowledge a proactive mandate to ensure that universal service and energy conservation policies, activities and service for residential electric customers are appropriately funded and available in each EDC territory<sup>24</sup>. The goals of universal service programs have been identified, *inter alia* as assisting low-income customers in reducing residential utility bills and establishing universal service and energy conservation programs that are operated in a cost-effective and efficient manner.<sup>25</sup> Limits on CAP shopping customers that prevent the selection of unduly high commodity pricing and unnecessary penalties is arguably one of the most direct and efficient ways for the Commission to fulfill its stated goal of lowering the utility bills of low-income ratepayers and also ensuring that the CAP program is run in a fiscally-efficient manner. Such protections would fulfill this goal by ensuring that CAP customers could not be lured into higher generation supply prices thereby increasing the amount that must be subsidized by other consumers.<sup>26</sup> Subsidization of unnecessarily high commodity prices by standard ratepayers would be a prime example of fiscal-inefficiencies in a CAP shopping program and in direct contravention to the stated objectives of Universal Service Programs.

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<sup>24</sup> 52 Pa. Code § 54.71

<sup>25</sup> 52 Pa. Code § 54.73.

<sup>26</sup> OCA St. No. 2-SR. Pg 15 at 4-5.

### 3. The Commonwealth Court

The Commonwealth Court recently held that the Choice Act does not demand “absolute and unbridled competition,” and noted that the important goal of the Choice Act is reducing electric costs for consumers.<sup>27</sup> The Court held that the Commission does have the authority to limit the terms of CAP shopping offers available to CAP customers from an EGS. In its decision, the Commonwealth Court expounded:

[F]ollowing the reasoning of both the PUC [Commission] and this Court, as set forth in *PP & L Industrial*, we conclude that the 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 could accept and remain eligible for CAP benefits. The obligation to provide low-income programs falls on the public utility under the Choice Act, not on the EGSs. Moreover, the Choice Act expressly requires the PUC to administer these programs in a manner that is cost-effective for both the CAP participants and the non-CAP participants, who share the financial consequences of the CAP participants' EGS choice.<sup>28</sup>

Perhaps more pointedly, the Court unambiguously recognized that the Commission may impose a restriction on competition as long as it “provides substantial reasons why there is no reasonable alternative[.]”<sup>29</sup>

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<sup>27</sup> *Coal. for Affordable Util. Servs. & Energy Efficiency in Pennsylvania v. Pennsylvania Pub. Util. Comm'n*, 120 A.3d 1087, 1101 (Pa.Cmwlth. 2015), appeal denied, (Pa. Apr. 5, 2016), and appeal denied, (Pa. Apr. 5, 2016).

<sup>28</sup> *Id.* at 1103

<sup>29</sup> *Id.* at 1104

Given the foregoing sources, I&E respectfully maintains that the PUC has both the authority and a mandate to impose restrictions upon CAP shopping limits when appropriate.

**B. Has direct evidence been produced of increased shopping costs incurred through its CAP program and the resulting harm imposed upon ratepayers yet?**

PECO is unable to produce any evidence of increased costs or harms incurred by CAP shopping simply because there has been no CAP shopping in PECO's service territory. As PECO's witness John J. McCawley noted, "[i]n contrast to all other Pennsylvania EDCs, PECO's CAP customers are not eligible to purchase competitive generation supply from EGSs, and therefore there is no PECO-specific data to support a restriction on EGS prices."<sup>30</sup> This will change likely in or around the first quarter of 2017 due to a Secretarial Letter to PECO from the PUC ordering the implementation of the Commonwealth Court's Decision in PECO DSP II. Specifically, PECO CAP customers may shop for any generation supplier without pricing restrictions but may not enter contracts that impose early cancellation or termination fees.<sup>31</sup>

This presents a quandary given reasoning and justifications previously used by the Commission in PECO's DSP II proceeding to deny certain CAP shopping restrictions. As noted in the aforementioned Commonwealth Court opinion, the Commission would require "evidence that demonstrates that the overall long-run electric rates for CAP shopping customers will be higher than if those customers are served under default

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<sup>30</sup> PECO St. No. 2-R. Pg. 15 at 9-12.

<sup>31</sup> Id. at Pg. 13, lines 7-15.

service rates”<sup>32</sup> prior to implementing “anti-competitive”<sup>33</sup> CAP shopping restrictions such as those sought by certain parties in this proceeding. By using this reasoning as precedent, I&E concedes that the Commission would likely find an insufficient amount of evidence to place further restrictions on CAP shopping beyond what has been implemented as a result of PECO’s DSP II proceedings.

I&E does support PECO’s proposal to compile the relevant information regarding the number of CAP customers shopping, the rates these customers pay for generation service and the portion of the aggregate CAP credit amount paid for by residential customers.<sup>34</sup> This would allow for the direct evidence desired by the Commission to be analyzed and presented in future proceedings.

Bearing in mind the foregoing constraints on implementing CAP shopping restrictions, I&E has advocated for CAP shopping restrictions similar to those sought by CAUSE-PA in other EDC’s DSP proceedings. In particular, I&E has advocated for price ceilings for CAP shopping programs in PPL Electric’s latest DSP docket<sup>35</sup> which, at the time of this brief had not reached a final resolution. In that case, I&E observed what it believed to be clear and persuasive evidence that CAP customers were exceeding CAP credits at a faster pace than they would if a price ceiling at the Price to Compare was

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<sup>32</sup> Coal. for Affordable Util. Servs. & Energy Efficiency in Pennsylvania v. Pennsylvania Pub. Util. Comm’n, 120 A.3d 1087, 1093–94 (Pa. Commw. Ct. 2015), appeal denied, 136 A.3d 982 (Pa. 2016), and appeal denied, 136 A.3d 983 (Pa. 2016)

<sup>33</sup> Coal. for Affordable Util. Servs. & Energy Efficiency in Pennsylvania v. Pennsylvania Pub. Util. Comm’n, 120 A.3d 1087, 1103-1104 (Pa. Commw. Ct. 2015), appeal denied, 136 A.3d 982 (Pa. 2016), and appeal denied, 136 A.3d 983 (Pa. 2016)

<sup>34</sup> PECO St. No. 2-R. Pg. 13 at 13-15.

<sup>35</sup> Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2017 through May 31, 2021, Docket P-2016-2526627. *PENDING FINAL RESOLUTION.*

implemented on CAP shopping prices. It also seemed apparent to I&E that this unrestricted shopping led to increased CAP costs, which are paid for by non-CAP residential consumers through its Universal Service Rider.

Due to the pending and somewhat contemporaneous nature of that proceeding, I&E will curtail its discussion of that docket at this point but notes specifically that restrictions such as those sought by CAUSE-PA in this proceeding can be well-founded and in the public interest.

**C. Should the Public Utility Commission address CAP shopping issues on a uniform, statewide basis?**

As noted above, PPL's latest DSP<sup>36</sup> case contained a very similar dispute over potential CAP shopping limitations. It does not require prescience to realize that this same issue will likely continue to reoccur across the Commonwealth as EDC's file their DSP plans for approval. In the interest of advancing prudent, efficient and cost-effective regulations and saving needless litigation, I&E maintains that the Commission would be wise to take charge and defeat this hydra-headed problem sooner rather than later.

To further compound the foregoing concern, the two current cases before the Commission with this issue are at different timelines in terms of the evidence gathering. PECO has gathered no data on harms suffered from uncontrolled CAP shopping since it has never had CAP shopping. PPL, on the other hand, has put forth substantial data to support its position that CAP shopping restrictions are merited. This distinction could

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<sup>36</sup> Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2017 through May 31, 2021, Docket P-2016-2526627. *PENDING FINAL RESOLUTION.*

easily result in drastically different results on the same issue across different service territories, which could result in disparate treatment and regulation of EDC's across the Commonwealth. This undesirable situation could be prevented by timely intervention from the Commission.

Given these concerns, I&E renews its request that was originally put forth in PPL's DSP proceeding. Specifically, I&E respectfully maintains that the Commission would be prudent to promptly initiate a statewide collaborative open to all interested stakeholders and/or initiate a new rulemaking proceeding to address CAP shopping issues to advance cost-efficient and effective rulemaking in furtherance of uniform and fair regulation of consumers throughout the Commonwealth.

## VII. CONCLUSION

For the reasons outlined in this Main Brief, the Commission's Bureau of Investigation and Enforcement represents that while the Commission has the clear and distinct authority to implement further restrictions upon CAP shopping, it may not have the desired level of evidence required to implement such restrictions. Therefore, the Bureau of Investigation and Enforcement respectfully requests that Administrative Law Judge Cynthia Fordham recommend, and the Commission subsequently approve, the previously submitted Joint Petition for Partial Settlement and adopt the foregoing reasoning for the disputed issue remaining.

Respectfully submitted,



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Dated: August 4, 2016

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**CERTIFICATE OF SERVICE**

I hereby certify that I am serving the foregoing **Main Brief** dated August 4, 2016, in the manner and upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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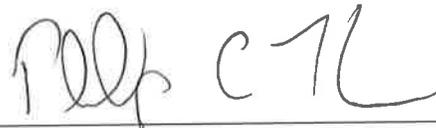
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