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August 11, 2016

Via Electronic Filing

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

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:

Enclosed for electronic filing please find the Main Brief of the Retail Energy Supply Association ("RESA") with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Cynthia Fordham w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Main Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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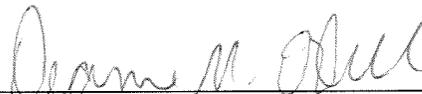
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Deanne M. O'Dell, Esq.

Dated: August 11, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MAIN BRIEF OF
RETAIL ENERGY SUPPLY ASSOCIATION**

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I. INTRODUCTION

The issue reserved for litigation in this default service proceeding for PECO Energy Company (“PECO”) is whether the Commission should delay the ability of customers participating in PECO’s customer assistance program (“CAP”) to shop for competitive generation supply from an electric generation supplier (“EGS”) and, once they are permitted to shop, require EGSs to provide service at a price that is always initially 7% lower than PECO’s price-to-compare (“PTC”) and required to be further lowered if PECO’s PTC drops another 7%.

PECO did not propose to address CAP shopping issue in this proceeding as it is being addressed in the context of a prior default service proceeding.¹ The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”), however, proposed that PECO not allow CAP customers to shop until the effective date of this proceeding (June 1, 2017) and then only under specific restrictions that would require EGSs to always provide below-PTC pricing to CAP customers.² The Office of Consumer Advocate (“OCA”) and the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (collectively, “TURN et al.”) support CAUSE-PA’s proposals. CAUSE-PA, OCA and TURN et al. are collectively referred to herein as the “Proponents of CAP Shopping Restrictions.”

Based on recent interpretations by the Commonwealth Court of the Electricity Generation Customer Choice and Competition Act (“Competition Act”)³ and the record developed in this

¹ *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641, Secretarial Letter dated May 11, 2016 (“*DSP II CAP Shopping Secretarial Letter*”).

² CAUSE-PA St. No. 1 at 31-32.

³ *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm’n*, 120 A.3d 1087, 1106-1107 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016) (“*Commonwealth Court CAP Shopping Decision*”); 66 Pa. C.S. §§2801-2812.

proceeding, the Retail Energy Supply Association⁴ does not support the proposal to delay providing the benefits of shopping to CAP customers or to severely restrict this right. The law is clear that the “overarching goal” of the Competition Act is competition and, while the Commission may “bend” competition to further other important aspects of the Competition Act, it can: (1) only do so upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition; and, (2) may rely on substantial evidence showing why proposed restrictions on competition should be rejected.⁵ This evidence can include a showing that the proposed restrictions may adversely affect available choices for CAP customers.⁶

PECO is addressing CAP shopping issues in the context of another proceeding and there has been no showing why that alternative is unreasonable. Moreover, the record in this proceeding makes clear that the proposed restrictions on CAP shopping supported by CAUSE-PA would adversely affect available choices for CAP customers by including program restrictions that would result in no EGSs participating. This is because the CAP-SOP would require the EGS to pay a \$30 referral fee for each customer, agree to only provide below-PTC priced electricity and prohibit the EGS (or any other EGS) from marketing other products to the CAP customer. EGSs are not likely to view such structure as favorable and would not agree to

⁴ The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

⁵ *Commonwealth Court CAP Shopping Decision* at 1107-1108.

⁶ *Commonwealth Court CAP Shopping Decision* at 1107-1108.

provide service under these conditions. The practical result would be to remove any opportunity for CAP customers to shop.

For these reasons, and as explained in more detail below, RESA recommends rejection of the restrictions on the ability of CAP customers to shop proposed by the Proponents of CAP Shopping Restrictions.

II. STATEMENT OF THE CASE

On March 17, 2016, PECO filed a petition, along with supporting direct testimony proposing to establish the terms and conditions under which it will procure default service supplies, satisfy requirements imposed by the Alternative Energy Portfolio Standards Act⁷ and recover all associated costs on a full and current basis for the period from June 1, 2017 through May 31, 2019. Notice of appearances and interventions were filed by the Commission's Bureau of Investigation & Enforcement (“BI&E”), OCA and the Office of Small Business Advocate (“OSBA”). Pursuant Prehearing Order #2 dated May 27, 2016, a litigation schedule was established and the following petitions to intervene of the following parties were granted: TURN, et al, the Philadelphia Area Industrial Energy Users Group (“PAIEUG”), Noble Americas Energy Solutions LLC (“NAES”), CAUSE-PA, Direct Energy Services, LLC (“Direct Energy”) and the Retail Energy Supply Association (“RESA”).

Direct, surrebuttal and rejoinder testimony of all parties other than the Company was served on or before July 14, 2016 and was admitted into the record on that date. The following testimony of Matthew White was admitted on behalf of RESA: (1) RESA St. No. 1; (2) RESA St. No. 1-R which includes Exhibit MW-1; and (3) RESA St. No. 1-SR.

⁷ 73 P. S. §§ 1648.1 - 1648.8 and related provisions of 66 Pa. C. S §§ 2813-2814.

At the July 14, 2016 hearing, the parties informed the ALJ that an agreement had been reached on all issues except for the right of customers participating in PECO's low-income customer assistance program ("CAP") to freely shop for competitive supply from an electric generation supplier ("EGS"). As such, this issue has been reserved for litigation.

NAES filed a Letter of Opposition on July 28, 2016, conveying that it opposes the "treatment of FERC-jurisdictional wholesale market charges at the retail level."⁸ NAES plans to file its written objections to the Partial Settlement on August 11, 2016. The other parties will have an opportunity to respond to NAES' opposition by August 25, 2016. Those dates coincide with the revised briefing schedule issued in Prehearing Order #3 on July 21, 2016.

Regarding the issue of CAP shopping, PECO did not make any specific proposals. In direct testimony, CAUSE-PA proposed that PECO not allow CAP customers to shop until the effective date of this proceeding (June 1, 2017) and then only under specific restrictions that would require EGSs to limit the prices that could be offered to CAP customers.⁹ More specifically, CAUSE-PA proposed that PECO CAP customers should only be permitted to shop through a modified CAP SOP which would require participating EGSs to serve CAP customers at a 7% discount off the PTC at the time of enrollment and if the PTC drops below more than 7% at any time during the customer's enrollment, the EGS must either re-enroll the customer in a new CAP SOP enrollment at 7% off the then applicable PTC or return the customer to default service. CAUSE-PA also proposed that the CAP SOP require EGSs at the end of the 12-month SOP contract to: (1) re-enroll a CAP customer in a new contract the same 7% off the then-applicable PTC pricing terms; or (2) return the customer to default service if they stop serving

⁸ NAES Letter of Opposition (dated July 28, 2016).

⁹ CAUSE-PA St. No. 1 at 12-13, 30-33.

CAP customers.¹⁰ In rebuttal testimony, OCA supported CAUSE-PA's proposal that no changes to CAP customer shopping should be made until June 1, 2017.¹¹ OCA also viewed CAUSE-PA's proposed restrictions on CAP shopping as "an acceptable interim approach."¹² In contrast, both PECO and RESA opposed CAUSE-PA's proposal in their rebuttal testimony.¹³

In surrebuttal testimony, the parties maintained their positions on this issue. In addition, surrebuttal testimony was filed by TURN et al. in support of the positions of CAUSE-PA and OCA and in opposition to the positions of PECO and RESA.¹⁴

RESA is filing this main brief pursuant to the revised briefing schedule issued in Prehearing Order #3 on July 21, 2016 and urges rejection of the proposals of the Proponents of CAP Shopping Restrictions.

III. LEGAL STANDARDS AND BURDEN OF PROOF

A. BURDEN OF PROOF

Section 332(a) of the Public Utility Code provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.¹⁵ It is well-established 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 legally credible."¹⁶ The burden of proof is comprised of two distinct burdens: the burden of

¹⁰ CAUSE-PA St. No. 1 at 31-32.

¹¹ OCA St. No. 2-R at 4.

¹² OCA St. No. 2-R at 5.

¹³ PECO St. No. 2-R at 11-15; RESA St. No. 1-R at 14-18.

¹⁴ TURN et al. St. No. 1-SR at 4.

¹⁵ 66 Pa.C.S. §332(a).

¹⁶ *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990).

production and the burden of persuasion. The burden of production tells the adjudicator which party must come forward with evidence to support a particular proposition.¹⁷ The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established, and it never leaves the party on whom it is originally cast.¹⁸ In this case, CAUSE-PA, OCA and TURN et al. are proposing to both forestall and place onerous new restrictions on the ability of CAP customers to shop. Therefore, they have the burden of proof and ultimately the burden to persuade the Commission that there are no reasonable alternatives to their proposed restrictions on competition and the Commission may rely on substantial evidence to reject the proposed restrictions.¹⁹

B. STANDARDS APPLICABLE TO DEFAULT SERVICE AND THE ABILITY OF LOW-INCOME CUSTOMERS PARTICIPATING IN A CUSTOMER ASSISTANCE PROGRAM TO SHOP

The Competition Act addresses the requirements that PECO, as the default service provider, must meet.²⁰ The Competition Act does not require a specific rate design methodology for non-shopping customers in the post transition period. Instead, it requires that the default service provider acquire electric energy through a “prudent mix”²¹ of resources that must be designed: (i) to provide adequate and reliable service; (ii) to provide the least cost to customers

¹⁷ See *In re Loudenslager’s Estate*, 240 A.2d 477, 482 (1968).

¹⁸ *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa. Commw. Ct. 1993).

¹⁹ *Commonwealth Court CAP Shopping Decision* at 1106-1107.

²⁰ See 66 Pa. C.S. § 2807(e).

²¹ 66 Pa. C.S. § 2807(e)(3.2); “In interpreting the term ‘prudent mix,’ the PUC must exercise some balance and discretion under the circumstances of the case in order for the ‘mix’ in question to be ‘prudent’.” *Popowsky v. Pennsylvania Pub. Util. Comm’n*, 71 A.3d 1112, 1117 (Pa. Commw. Ct. 2013) (Petition for Allowance of Appeal Denied December 31, 2013, Docket No. 641 MAL 2013).

over time; and, (iii) to achieve these results through competitive processes which includes auctions, requests for proposals and/or bilateral agreements.²²

The “overarching goal of the Choice Act is competition through deregulation of the energy supply industry, leading to reduced electricity costs for consumers.”²³ To achieve this, the Competition Act requires the Commission to “allow customers to choose among electric generation suppliers in a competitive generation market through direct access.”²⁴ The Competition Act recognizes that greater competition in the electricity generation market benefits all classes of customers, including those of low income.²⁵ In addition, the Competition Act requires the Commission to ensure that universal service plans are appropriately funded, available, and cost-effective.²⁶

The Commission has the authority to “bend” competition to further other important aspects of the Competition Act but, can only do so upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.²⁷ Then, even if restrictions on competition are deemed the only way to address the concern, the Commission may rely on substantial evidence showing why such restrictions should be rejected.²⁸ This evidence can include a showing that the restrictions would adversely affect available choices for CAP participants.²⁹

²² 66 Pa. C.S. § 2807(e)(3.1).

²³ *Commonwealth Court CAP Shopping Decision* at 1101 (emphasis added); 66 Pa.C.S. § 2802(13).

²⁴ 66 Pa.C.S. § 2804(2); See also *Popowsky*, 71 A.3d at 1116.

²⁵ 66 Pa. C.S. § 2802(7); *Commonwealth Court CAP Shopping Decision* at 1106.

²⁶ 66 Pa. C.S. § 2804(9).

²⁷ *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

²⁸ *Commonwealth Court CAP Shopping Decision* at 1107-1108.

²⁹ *Commonwealth Court CAP Shopping Decision* at 1107-1108.

The Commission has long supported the ability of customers participating in a customer assistance program to shop without restriction. The Commission first directed PECO to permit CAP customers to shop in October 2012 with an effective date of January 1, 2014.³⁰ Consistent with this directive, PECO filed a petition seeking approval of its CAP Shopping Plan on May 1, 2013.³¹ After another fully litigated proceeding focused only on the CAP Shopping Plan, the Commission approved PECO's CAP Shopping Plan but rejected: (1) PECO's proposal to restrict the prices of EGSs; and, (2) OCA's proposal to prohibit EGSs from imposing cancellation or termination fees.³² PECO was directed to implement the CAP Shopping Plan to permit its CAP customers to shop no later than April 15, 2014.³³ On March 28, 2014, the Commonwealth Court granted a stay of the Commission's directives that PECO implement its CAP Shopping Plan.³⁴

Subsequently, the Commonwealth Court issued an opinion and order which: (1) affirmed the Commission's rejection of a rule that would impose a price ceiling on EGSs that wish to participate in the PECO CAP Shopping Plan; and, (2) reversed the Commission's rejection of a rule that would prohibit CAP participants from entering into any contract with an EGS that imposes early cancellation/termination fees.³⁵ In response to a Secretarial Letter dated May 11, 2016 and consistent with the testimony of PECO Witness McCawley, PECO provided notice of its intent to file the proposed rule revision to its PECO CAP Plan consistent with the directives of

³⁰ *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641, Opinion and Order entered October 12, 2012 at 131 (“*PECO DSP II Order*”).

³¹ *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Opinion and Order entered January 24, 2014 at 6 (“*PECO CAP Shopping Plan Order*”).

³² *PECO CAP Shopping Plan Order* at 14-16.

³³ *PECO CAP Shopping Plan Order* at Ordering ¶¶ 7-8.

³⁴ *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, No. 445 CD 2014 (Order entered March 28, 2014).

³⁵ *Commonwealth Court CAP Shopping Decision* at 1108-1109.

the Commonwealth Court by September 1, 2016.³⁶ PECO anticipates that it will recommend implementation of its CAP Shopping Plan during the first quarter of 2017 which is within the operational period of its default service III plan.

IV. PARTIES PROPOSING TO ADDRESS CAP SHOPPING HAVE FAILED TO MEET THEIR BURDEN OF PROOF

Currently, PECO's CAP customers are not able to avail themselves of the competitive market. The future terms under which these customers will be able to shop for a competitive supplier have been fully vetted in two Commission litigated processes that have been reviewed and adjudicated by the Commonwealth Court. As a result of these proceedings, PECO is required to permit CAP customers to shop and the only restriction that PECO may impose on this is a prohibition on EGSs providing service to CAP customers from offering an early termination/cancellation fee.³⁷ Other proposed restrictions on the price that EGSs may offer CAP customers have been specifically denied by the Commission and upheld on review by the Commonwealth Court. Despite this, the Proponents of CAP Shopping Restrictions recommend both: (1) further delaying the ability of CAP customers to shop; and, (2) even more onerous restrictions on the ability of EGSs wishing to serve CAP customers than those rejected by the Commission and the Commonwealth Court. Both of these proposals must be rejected.

³⁶ *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Letter of PECO Energy Company dated July 19, 2016 in response to May 11, 2016 Secretarial Letter, PECO St. No. 2-R at 13.

³⁷ *Commonwealth Court CAP Shopping Decision* at 1108-1109.

A. THERE ARE REASONABLE ALTERNATIVES TO THE PROPOSED RESTRICTION ON COMPETITION

The law is clear that the “overarching goal” of the Competition Act is competition and, while the Commission may “bend” competition to further other important aspects of the Competition Act, it can only do so upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition. The Proponents of CAP Shopping Restrictions have not met their burden of proving that there are no reasonable alternatives to their proposed restrictions on the ability of CAP customers to shop because implementation of shopping for CAP customers has already been fully vetted and reasonable alternative restrictions have already determined through other litigated and appellate proceedings. No evidence presented in this case shows why implementing CAP shopping consistent with these prior decisions is not a reasonable alternative to what is proposed here by the Proponents of CAP Shopping Restrictions.

1. The ability of CAP customers to shop has already been fully vetted and the reasonable restrictions already determined through other litigated and appellate proceedings

The Commission first directed PECO to permit CAP customers to shop in October 2012 with an effective date of January 1, 2014.³⁸ Following a subsequent Commission proceeding³⁹ and a stay of the Commission’s directives that PECO implement its CAP Shopping Plan,⁴⁰ the Commonwealth Court issued an opinion and order which: (1) affirmed the Commission’s rejection of a rule that would impose a price ceiling on EGSs that wish to participate in the PECO CAP Shopping Plan; and, (2) reversed the Commission’s rejection of a rule that would

³⁸ *PECO DSP II Order* at 131.

³⁹ *PECO CAP Shopping Plan Order* at 14-16.

⁴⁰ *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm’n*, No. 445 CD. 2014 (Order entered March 28, 2014).

prohibit CAP participants from entering into any contract with an EGS that imposes early cancellation/termination fees.⁴¹ In response to a Secretarial Letter dated May 11, 2016 and consistent with the testimony of PECO Witness McCawley, PECO provided notice of its intent to file the proposed rule revision to its PECO CAP Plan consistent with the directives of the Commonwealth Court by September 1, 2016.⁴² PECO anticipates that it will recommend implementation of its CAP Shopping Plan during the first quarter of 2017 which is within the operational period of its default service III plan.

Notwithstanding all this history, the Proponents of CAP Shopping Restrictions support delaying the ability of CAP customers to shop until June 1, 2017 at the earliest.⁴³ This proposal is unreasonable. The Commission first directed that PECO's CAP customers should have the ability to freely shop in 2012⁴⁴ and much time has been spent on developing the specifics of the PECO CAP Shopping Plan since then. The Proponents of CAP Shopping Restrictions raise no new issues in this proceeding to warrant further delay. Moreover, as PECO noted, once its CAP Shopping Plan is implemented it will compile information regarding the number of CAP customers shopping, the rates CAP customers pay for generation service, and the portion of the aggregate CAP credit amount paid for by residential customers.⁴⁵ Going forward this PECO-specific data may present useful information that can be analyzed in assessing the functioning of

⁴¹ *Commonwealth Court CAP Shopping Decision* at 1108-1109.

⁴² *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Letter of PECO Energy Company dated July 19, 2016 in response to May 11, 2016 Secretarial Letter. PECO St. No. 2-R at 13.

⁴³ CAUSE-PA St. No. 1 at 13-14; OCA St. No. 2-R at 4; TURN et al. St. No. 1-SR at 6.

⁴⁴ *PECO DSP II Order* at 131.

⁴⁵ PECO St. No. 2-R at 13.

CAP shopping.⁴⁶ However, it would be premature to continue to deny CAP customers access to the competitive market now when there is a well vetted path forward to provide these customers access to the benefits and innovations of the competitive market.⁴⁷

In consideration of all the issues here, PECO has presented a reasonable timeframe and a reasonable path forward to permitting CAP customers to avail themselves of the competitive market.⁴⁸ As the well-litigated CAP Shopping Plan presents a reasonable alternative to the more onerous restrictions being proposed here, the proposals of the Proponents of CAP Shopping Restrictions must be rejected.

2. **No evidence presented in this case shows why implementing CAP shopping consistent with prior decision is not a reasonable alternative to what is proposed here by the Proponents of CAP Shopping Restrictions**

The Proponents of CAP Shopping Restrictions attempt to distance the prior proceedings on the claim that new evidence exists now to justify the even more onerous restrictions on CAP shopping that they favor.⁴⁹ More specifically, they point to PECO's recent redesign of the structure of its CAP program and the experiences of customers in other service utilities who participate in those utilities' CAP programs while exercising their right to shop.⁵⁰ Neither of these claims, however, present compelling or substantial evidence to support reversing the prior determinations of the Commission which were upheld by the Commonwealth Court.

In support of their proposals, the Proponents of CAP Shopping Restrictions generally fail to acknowledge (and consider) the appropriate "weight" that is to be given to the right of

⁴⁶ PECO St. No. 2-R at 15.

⁴⁷ RESA St. No. 1-R at 14.

⁴⁸ RESA St. No. 1-R at 17.

⁴⁹ CAUSE-PA St. No. 1 at 9-10; OCA St. No. 2-R at 3; TURN et al. St. No. 1-SR at 8.

⁵⁰ CAUSE-PA St. No. 1 at 23-30; OCA St. No. 2-R at 3; TURN et al. St. No. 1-SR at 8.

shopping. Even though the Commonwealth Court acknowledged the significant importance of the right to shop (referring to it as an “overarching goal” and the “central objective” of the Competition Act)⁵¹ and the need to balance this with other “important” (not overarching and not central) concerns,⁵² CAUSE-PA essentially argues that affordability must give way to competition.⁵³ Similarly, TURN et al. refers to the “statutorily recognized importance of low income protections”⁵⁴ and OCA testifies that the “primary objective must be to ensure that CAP customers do not suffer higher bills.”⁵⁵ Outright ignoring or not acknowledging the required analysis on the impact of competition as required by the Commonwealth Court is legally flawed and must be rejected.

The intent of the Commonwealth Court is clearly expressed throughout its decision and makes clear that “bending” competition is something that can be done only upon a substantial showing that doing so is the only reasonable alternative.⁵⁶ By recasting this requirement to one where the primary focus is on affordability (and not maintaining the right to shop or at least not overly restricting it), the Proponents of CAP Shopping Restrictions launch into discussing the harm to customers they believe is supported by the data from other service territories where CAP customers are able to shop. In doing this, the Proponents of CAP Shopping Restrictions deflect ever discussing how they have met their burden of showing that no other reasonable alternatives exist to restricting competition. Even if the information related to the experiences of other

⁵¹ *Commonwealth Court CAP Shopping Decision* at 1100-1101.

⁵² *Commonwealth Court CAP Shopping Decision* at 1103, 1106.

⁵³ CAUSE-PA St. No. 1-SR at 7-8.

⁵⁴ TURN et al. St. No. 1-SR at 16.

⁵⁵ OCA St. No. 2-R at 5.

⁵⁶ *Commonwealth Court CAP Shopping Decision* at 1104.

utilities' CAP customers who can shop were persuasive (which it is not), it is not sufficient to meet the burden of showing that no other reasonable alternatives exist. To the contrary, in this case, the reasonable alternative not only exists but has been developed over many years of litigated proceedings and appellate review.

In addition, there is no evidence in this case about how PECO's customers have been harmed by allowing CAP customers to exercise their right to shop. This fact is not disputed. Rather, the Proponents of CAP Shopping Restrictions rely on data from other utilities where CAP customers are permitted to shop and, in doing so, only present a one-sided interpretation of those numbers.⁵⁷ Data from other utilities is not particularly instructive for PECO and PECO's new CAP program design is not scheduled to be implemented until October 2016. The CAP programs of various utilities are unique as is the competitive market structure within each utilities' service territory. In other words, there may be only two competitive offers in one service territory while another service territory has hundreds of available competitive offers. Therefore, attempting to draw conclusions from one utility's experiences to another utility is speculative and presents no meaningful basis to support the restrictions proposed in this proceeding.

Setting this aside, however, the data from these other utilities does not take into account a specific contract term with an EGS to show whether the CAP customer paid a higher price for the entire term of their contract with EGSs or the CAP customer – when he or she first chose the EGS – obtained some benefit or incentive for switching (such as a lower price, a gift card, or

⁵⁷ Most prominently, CAUSE-PA Witness Geller relies on data provided by PPL. CAUSE-PA St. No. 1 at 27-30. These statistics reflect that at least 58% of CAP customers paid at or less than the PTC every month from January 2012 through February 2016 in PPL's service territory. RESA St. No. 1-SR at 7.

energy audit).⁵⁸ Thus – as the Commission has recognized – the point of time used for the comparison is most certainly not reflective of the conditions experienced by the other utilities’ shopping CAP customers over their entire shopping experience.⁵⁹

Moreover, customers have always retained the ability to make new choices in response to changes in the market price. The same is true for the CAP customers who were shopping at the time of the comparison. The fact that CAP customers who were shopping did not respond to the price change by the point of time used for the comparison does not mean that nothing was done. Following that point in time, (a) could have received a lower price from their existing EGS, (b) could have switched to default service or to another EGS, (c) could have decided that other benefits or incentives being received by them outweighed the price being paid.⁶⁰ Simply put, the point of time comparison (even if reliance on data from other utilities were appropriate which it is not) does not justify restricting the ability of CAP customers to freely shop.

Finally, PECO’s recent redesign of its CAP program is consistent with the Commission’s view that CAP benefits should be made portable so that CAP customers may continue to enjoy the benefits of the competitive market.⁶¹ Importantly, the redesign of the CAP program took

⁵⁸ RESA St. No. 1-SR at 7.

⁵⁹ *Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. P-2012-2302074 at 163 (Opinion and Order entered January 24, 2013).

⁶⁰ RESA St. No. 1-SR at 7.

⁶¹ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of their Default Service Programs*, Docket No. P-2011-2273650, et. seq., Opinion and Order entered August 16, 2012, *reconsideration granted in part*, Opinion and Order entered September 27, 2012, and amended on October 11, 2012 at 22-24; *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641, Order at Ordering Par. 18 (October 12, 2012) and Motion of Commissioner Witmer on Issue 22 entered September 27, 2012; *PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4*, Docket No. M-2012-2290911, OCA Statement in Support at 4 (filed March 20, 2015), CAUSE-PA Statement in Support at 5 (filed April 22, 2015).

place during the same time the Commission had directed PECO to permit CAP customers to shop and, as CAUSE-PA Witness Geller testified, this consideration “was an essential component of the lengthy CAP re-design mediation that took place over months in 2014-2015.”⁶² Thus, despite the view to the contrary, the redesign of PECO’s CAP program does not provide support for reconsidering the decisions already made regarding CAP shopping. Rather, consistent with PECO’s view, the appropriate time to consider design changes to PECO’s CAP Shopping Plan is after it has been implemented.⁶³

For all these reasons, the Proponents of CAP Shopping Restrictions have failed to meet their burden and their proposals must be rejected.

B. THE PROPOSED RESTRICTIONS WOULD ADVERSELY AFFECT AVAILABLE CHOICES FOR CAP CUSTOMERS

Even if the Proponents of CAP Shopping Restrictions are deemed to have met their initial burden (which they did not for the reasons discussed in the previous section), the legal analysis required by the Commonwealth Court does not end there. Rather, in assessing the proposed restrictions on CAP shopping, the Commission may rely on substantial evidence showing why such restrictions should be rejected and this can include a showing that the restrictions would adversely affect available choices for CAP participants.⁶⁴

On this issue, the Commission – as affirmed by the Commonwealth Court – concluded that a price ceiling would be anti-competitive and limit the choices available to CAP participants.⁶⁵ What is proposed here, however, is significantly worse than the price ceiling

⁶² CAUSE-PA St. No. 1-SR at 6-7.

⁶³ PECO St. No. 2-R at 15.

⁶⁴ *Commonwealth Court CAP Shopping Decision* at 1107-1108.

⁶⁵ *Commonwealth Court CAP Shopping Decision* at 1107.

already rejected by the Commission. First, the proposal here would require EGSs to guarantee a steady supply of energy priced below the PTC. Initially, EGSs would have to price their generation supply at 7% off the PTC and, if the PTC drops more than 7% at any time during the customer's enrollment, the EGS would have to re-rate the customer to the new lower price or return the customer to default service.⁶⁶ This is in contrast to the prior proposal which would have only required EGSs to provide service at or below the PTC. While using the EDC's PTC as the sole metric for what constitutes an appropriate or reasonable price for generation supply in a competitive marketplace is inappropriate given the manner in which default service is structured and the PTC is ultimately priced,⁶⁷ requiring an EGS to provide service at a guaranteed 7% off the PTC is completely unworkable. Requiring EGSs to provide a steady supply of below PTC priced energy and requiring them to offer a discount to a future unknown price will result in EGSs not choosing to provide service to CAP customers.⁶⁸

Second, by limiting the ability of CAP customers to shop through a new component of the existing SOP, EGSs would be required to pay the \$30 SOP referral fee to serve CAP customers.⁶⁹ This additional cost to EGSs in the form of a referral fee was not contemplated in the prior proceedings and is a newly proposed feature which would further serve as a disincentive for EGSs to provide CAP customers service.⁷⁰ Thus, in addition to being required to offer below-PTC priced service to these customers, CAUSE-PA's proposal would require EGSs to also pay a \$30 fee for each of these customers (and additional \$30/customer referred

⁶⁶ CAUSE-PA St. No. 1 at 32.

⁶⁷ RESA St. No. 1-R at 15.

⁶⁸ RESA St. No. 1-R at 16.

⁶⁹ RESA St. No. 1-R at 16.

⁷⁰ RESA St. No. 1-R at 16.

fees for customers who had already been in the program and are re-enrolling). Restrictions on the pricing and structure of a product that EGSs can offer to a select group of customers would be difficult to implement and no EGS would be willing to serve customers under these conditions.⁷¹ Moreover, unlike the existing SOP, EGSs would not be permitted to offer a competitive (non-CAP SOP product) to the CAP customers at the end of the SOP contract term (or at any time) thereby degrading the value to the EGSs of the SOP which has been helpful in initially establishing a customer relationship between the EGS and the consumer.⁷²

The newly proposed features proffered by the Proponents of CAP Shopping Restrictions are more onerous than those considered previously. As set forth in the record, they are even more likely than the prior proposed restrictions to result in no EGSs providing service to CAP customers. Without EGS participation in the proposed CAP SOP and by only permitting CAP customers to shop through the CAP SOP, the result would be that CAP customers would not have any shopping opportunities. As RESA Witness White aptly described, the proposal “is really just a CAP shopping ban masquerading as a shopping proposal.”⁷³

The Proponents of CAP Shopping Restrictions do not seem at all troubled by such an outcome where CAP customers have no shopping options because no EGSs elect to provide offers under the anti-competitive and restrictive terms they propose. Both OCA and TURN et al. outright elect to ignore that this outcome is likely.⁷⁴ According to CAUSE-PA, even if no EGSs provide competitive options “this alone should not be dispositive.”⁷⁵ This, however, ignores the

⁷¹ RESA St. No. 1-R at 15.

⁷² RESA St. No. 1-R at 16-17.

⁷³ RESA St. No. 1-R at 17.

⁷⁴ TURN et al. St. No. 1-SR at 12; OCA St. No. 2-SR at 14.

⁷⁵ CAUSE-PA St. No. 1-SR at 10.

clear direction from the Commonwealth Court that the Competition Act’s “overarching goal” is competition and restrictions on shopping can only be implemented if there are no reasonable alternatives and the restrictions are not found to adversely affect available choices for CAP customers⁷⁶ Therefore, adopting a program that would eliminate the right of customers to shop when there are other alternatives such as proceeding to implement the PECO CAP Shopping Plan consistent with the directives of the Commission and the Commonwealth Court is not consistent with the law.

Moreover, such a result would be extremely unfortunate because it would deny shopping CAP customers any opportunity to shop for any product including participation in the traditional SOP and leave CAP customers with only the default service rate. The end result would be to reverse the Commission’s decision – as affirmed on appeal – that PECO’s CAP customers should have access to the competitive market. Moreover, this result is completely unnecessary given that the PECO CAP Shopping Plan would mitigate some of the concerns expressed by CAUSE-PA regarding the price paid by CAP customers for electricity in the form of early termination/cancellation fees.⁷⁷ In sum, the substantial evidence in this record is clear that the restrictions proposed by the Proponents of CAP Shopping Restrictions will prohibit CAP customers from having competitive options and must be rejected.

V. CONCLUSION

The General Assembly has determined that the unrestricted ability of all customers to freely shop is an important right. And, while there may be reasons to restrict this right for

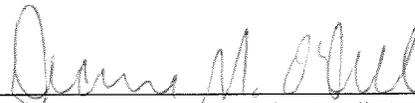
⁷⁶ *Commonwealth Court CAP Shopping Decision* at 1101.

⁷⁷ As PECO Witness McCawley noted, CAUSE-PA requests a prohibition against early termination or cancellation fees and this will be included in the PECO CAP Shopping Plan consistent with the directives of the Commonwealth Court. PECO St. No. 2-R at 15.

particular customers (such as those participating in a CAP program), imposing such restrictions can only be done based on substantial evidence showing that there are no reasonable alternatives. In this proceeding, reasonable restrictions that can be placed on the right of PECO's CAP customers to shop have already been developed and fully vetted through two Commission litigated proceedings and appellate review. No new evidence has been presented in this proceeding to explain why those restrictions are not reasonable.

Even if this threshold were deemed to be met (which it has not been), the law further permits proposed restrictions on shopping to be rejected if substantial evidence supports a showing that they will adversely affect available choices for CAP customers. The record in this proceeding is clear that if the proposed restrictions on CAP shopping – which are even more onerous than those already rejected by the Commission and the Commonwealth Court are adopted – there will be no shopping opportunities available for CAP customers. This further supports rejection of the proposed CAP shopping restrictions.

Respectfully submitted,



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VI. APPENDIX A – PROPOSED FINDINGS OF FACT

1. Currently, PECO's CAP customers are not able to avail themselves of the competitive market. PECO St. No. 2-R at 15. As such, no data regarding the actual experience of PECO CAP customers and shopping is unavailable. Once PECO's CAP Shopping Plan is implemented, PECO intends to compile this information. PECO St. No. 2-R at 13.
2. The Commission first directed PECO to permit CAP customers to shop in October 2012 with an effective date of January 1, 2014. *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641, Opinion and Order entered October 12, 2012 at 131 (“*PECO DSP II Order*”).
3. In a subsequent proceeding, the Commission approved PECO's CAP Shopping Plan but rejected: (1) PECO's proposal to restrict the prices of EGSs; and, (2) OCA's proposal to prohibit EGSs from imposing cancellation or termination fees. *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Opinion and Order entered January 24, 2014 at 14-16. The Commission directed PECO to implement the CAP Shopping Plan to permit its CAP customers to shop no later than April 15, 2014. *Id.* at Ordering ¶¶ 7-8.
4. On March 28, 2014, the Commonwealth Court granted a stay of the Commission's directives that PECO implement its CAP Shopping Plan. *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, No. 445 CD. 2014 (Order entered March 28, 2014).
5. Subsequently, the Commonwealth Court issued an opinion and order which: (1) affirmed the Commission's rejection of a rule that would impose a price ceiling on EGSs that wish to participate in the PECO CAP Shopping Plan; and, (2) reversed the Commission's rejection of a rule that would prohibit CAP participants from entering into any contract with an EGS that imposes early cancellation/termination fees. *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1106-1107 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016).
6. In response to a Secretarial Letter dated May 11, 2016, PECO provided notice of its intent to file the proposed rule revision to its PECO CAP Plan consistent with the directives of the Commonwealth Court by September 1, 2016. *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Letter of PECO Energy Company dated July 19, 2016 in response to May 11, 2016 Secretarial Letter.
7. PECO anticipates that it will recommend implementation of its CAP Shopping Plan during the first quarter of 2017 which is within the operational period of its default service III plan. *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Letter of PECO Energy Company dated July 19, 2016 in response to May 11, 2016 Secretarial Letter.
8. PECO did not propose to address CAP shopping issue in this proceeding as it is being addressed in the context of a prior default service proceeding. *Petition of PECO Energy*

Company for Approval of its Default Service Program II, Docket No. P-2012-2283641, Secretarial Letter dated May 11, 2016.

9. CAUSE-PA proposed that PECO not allow CAP customers to shop until the effective date of this proceeding (June 1, 2017) and then only under specific restrictions that would require EGSs to always provide below-PTC pricing to CAP customers. CAUSE-PA St. No. 1 at 31-32. More specifically, CAUSE-PA proposed that PECO CAP customers should only be permitted to shop through a modified CAP SOP which would require participating EGSs to serve CAP customers at a 7% discount off the PTC at the time of enrollment and if the PTC drops below more than 7% at any time during the customer's enrollment, the EGS must either re-enroll the customer in a new CAP SOP enrollment at 7% off the then applicable PTC or return the customer to default service. CAUSE-PA also proposed that the CAP SOP require EGSs at the end of the 12-month SOP contract to: (1) re-enroll a CAP customer in a new contract the same 7% off the then-applicable PTC pricing terms; or (2) return the customer to default service if they stop serving CAP customers. CAUSE-PA St. No. 1 at 31-32.
10. OCA and TURN et al. supported CAUSE-PA's proposed CAP shopping restrictions. OCA St. No. 2-R at 5; TURN et al. St. No. 1-SR at 6.
11. Both PECO and RESA opposed CAUSE-PA's proposal. PECO St. No. 2-R at 11-15; RESA St. No. 1-R at 14-18.
12. CAUSE-PA's recommendation that no CAP shopping program be implemented in PECO's territory until the beginning of DSP IV will deny CAP customers opportunities to apprise themselves of cost-saving and value added products available in the market, just like any other customer. RESA St. No. 1-R at 18.
13. The record is devoid of any PECO specific statistics. The statistics relied upon by CAUSE-PA primarily from the PPL service territory focus on a single point in time and do not take into account: (1) a specific contract term with an EGS to show whether the CAP customer paid a higher price for the entire term of their contract with EGSs; and (2) whether the CAP customer – when he or she first chose the EGS – obtained some benefit or incentive for switching to a supplier (such as a gift card, energy audit, or some other innovative product or service such as a smart thermostat). As a result, the point of time used for comparison is not reflective of the conditions CAP shopping customers have experienced over their entire shopping experience. Moreover, CAP shopping customers have the ability to switch to default service or another EGS or enroll with their existing supplier for another product. CAP shopping customers may have also decided that other benefits or incentives received outweigh the price being paid. Even the incomplete statistics Ms. Alexander relies on reflect that at least 58% of CAP customers paid at or less than the PTC every month from January 2012 through February 2016 in PPL's service territory. RESA St. No. 1-SR at 7.
14. Using the EDC's PTC as the sole metric for what constitutes an appropriate or reasonable price for generation supply in a competitive marketplace is inappropriate given the manner in which default service is structured and the PTC is ultimately priced. RESA St. No. 1-R at 15.

15. CAUSE-PA's proposal would significantly change the nature of the product an EGS would be expected to offer through the SOP. The proposal would establish a CAP SOP that guarantees CAP participants a steady supply of energy priced below the PTC. RESA St. No. 1-R at 16. The proposed CAP-SOP would require the EGS to pay a \$30 referral fee for each customer, agree to only provide below-PTC priced electricity and prohibit the EGS (or any other EGS) from marketing other products to the CAP customer. RESA St. No. 1-R at 16.
16. Restrictions on the pricing and structure of a product that EGSs can offer a select group of customers would be difficult to implement and would require significant changes to existing EDC and EGS protocols to develop new administrative protocols that do not exist. RESA St. No. 1-R at 15.
17. EGSs are not likely to provide service to CAP customers pursuant to the restrictions proposed by CAUSE-PA denying CAP customers any shopping opportunities. RESA St. No. 1-R at 16-17.

VII. APPENDIX B – PROPOSED CONCLUSIONS OF LAW

1. The Electricity Generation Customer Choice and Competition Act (“Competition Act”) addresses the requirements that PECO, as the default service provider, must meet. 66 Pa. C.S. § 2807(e).
2. The Competition Act requires the Commission to “allow customers to choose among electric generation suppliers in a competitive generation market through direct access.” 66 Pa.C.S. § 2804(2).
3. The Competition Act recognizes that greater competition in the electricity generation market benefits all classes of customers, including those of low income. 66 Pa. C.S. § 2802(7); *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm’n*, 120 A.3d 1087, 1106 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016).
4. The “overarching goal of the Choice Act is competition through deregulation of the energy supply industry, leading to reduced electricity costs for consumers.” *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm’n*, 120 A.3d 1087, 1101 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016). (emphasis added); 66 Pa.C.S. § 2802(13).
5. The Competition Act requires the Commission to ensure that universal service plans are appropriately funded, available, and cost-effective. 66 Pa. C.S. § 2804(9).
6. The Commission has the authority to “bend” competition to further other important aspects of the Competition Act but, can only do so upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition. *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm’n*, 120 A.3d 1087, 1104, 1106 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016).
7. The Commission may rely on substantial evidence showing why restrictions on competition should be rejected and this evidence can include a showing that the restrictions would adversely affect available choices for CAP participants. *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm’n*, 120 A.3d 1087, 1107-1108 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016).
8. The party seeking a rule or order from the Commission has the burden of proof in that proceeding. 66 Pa.C.S. §332(a).
9. The Proponents of CAP Shopping Restrictions bear the burden of proof in this proceeding.
10. The Proponents of CAP Shopping Restrictions have failed to prove that substantial reasons exist as to why there are no reasonable alternatives to the proposed restriction on competition.
11. The substantial evidence in this proceeding make clear that the proposed restrictions on the ability of CAP customers to shop must be rejected because these restrictions would adversely affect available choices for CAP participants.

VIII. APPENDIX C – PROPOSED ORDERING PARAGRAPHS

1. The proposal to restrict the ability of CAP customers to shop as set forth in CAUSE-PA's direct testimony is denied.