



August 25, 2016

**VIA E-FILING & FIRST CLASS MAIL**

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

**Re: Petition of PECO Energy Company for Approval of a Default Service Program for the Period of June 1, 2017 through May 31, 2019, Docket P-2016-2534980**

Dear Judge Fordham,

Enclosed please find the Reply Brief of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), which was filed with the Commission today. Copies are being served pursuant to the attached Certificate of Service. I will also send a Microsoft Word version to Your Honor by email.

Please do not hesitate to contact me with questions or concerns.

Respectfully,

Patrick M. Cicero  
***Counsel for CAUSE-PA***

CC: ALJ Fordham & Parties per attached COS  
Secretary Rosemary Chiavetta

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Petition of PECO Energy Company for Approval of a Default  
Service Program for the Period of June 1, 2017 through May 31,  
2019**

Docket No. P-2016-2534980

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, August 25, 2016, I have served copies of the **Reply Brief of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)** upon all of the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**VIA EMAIL AND FIRST CLASS MAIL**

The Honorable Cynthia Williams Fordham  
Administrative Law Judge  
Pennsylvania Public Utility Commission  
801 Market Street, Suite 4063  
Philadelphia, PA 19107  
[cfordham@pa.gov](mailto:cfordham@pa.gov)

W. Craig Williams, Esquire  
Romulo L. Diaz, Jr., Esquire  
Exelon Business Services Company  
2301 Market Street, S23-1  
Philadelphia, PA 19101-8699  
[craig.williams@exeloncorp.com](mailto:craig.williams@exeloncorp.com)  
[romulo.diaz@exeloncorp.com](mailto:romulo.diaz@exeloncorp.com)  
*Counsel for PECO Energy*

Thomas P. Gadsden, Esquire  
Kenneth M. Kulak, Esquire  
Brooke E. McGlinn, Esquire  
Morgan, Lewis & Bockius  
1701 Market Street  
Philadelphia, PA 19103  
[tgadsden@morganlewis.com](mailto:tgadsden@morganlewis.com)  
[kkulak@morganlewis.com](mailto:kkulak@morganlewis.com)  
[bmcglinn@morganlewis.com](mailto:bmcglinn@morganlewis.com)  
*Counsel for PECO Energy*

Aron J. Beatty, Esq.  
Candis A. Tunilo, Esq.  
Office of Consumer Advocate  
555 Walnut Street  
5<sup>th</sup> floor, Forum Place  
Harrisburg, PA 17101-1923  
[abeatty@paoca.org](mailto:abeatty@paoca.org)  
[ctunilo@paoca.org](mailto:ctunilo@paoca.org)  
*Counsel for the OCA*

Elizabeth Rose Triscari, Esquire  
Assistant Small Business Advocate  
Office of Small Business Advocate  
300 North Second Street, Suite 202  
Harrisburg, Pennsylvania 1710  
[etriscari@pa.gov](mailto:etriscari@pa.gov)  
*Counsel for the OSBA*

Phillip C. Kirchner, Esquire  
Bureau of Investigation & Enforcement  
Pennsylvania Public Utility Commission  
PO Box 3265  
Harrisburg PA 17105-3265  
[phikirchne@pa.gov](mailto:phikirchne@pa.gov)  
*Counsel for I&E*

Charis Mincavage, Esq.  
Adeolu A Bakare, Esq.  
Alessandra L. Hylander, Esq.  
McNees Wallace & Nurick LLC  
100 Pine Street  
P.O. Box 1166  
Harrisburg, Pennsylvania 17108  
[cmincavage@mwn.com](mailto:cmincavage@mwn.com)  
[abakare@mwn.com](mailto:abakare@mwn.com)  
[ahylander@mwn.com](mailto:ahylander@mwn.com)  
*Counsel for PAIEUG*

Thu B. Tran, Esq  
Robert W. Ballenger, Esq.  
Josie B.H. Pickens, Esq.  
Community Legal Services, Inc.  
1424 Chestnut Street  
Philadelphia, PA 19102  
[ttran@clsphila.org](mailto:ttran@clsphila.org)  
[rballenger@clsphila.org](mailto:rballenger@clsphila.org)  
[jpickens@clsphila.org](mailto:jpickens@clsphila.org)

Charles E. Thomas III, Esq.  
Thomas, Niesen & Thomas, LLC  
212 Locust Street, Suite 600  
Harrisburg, PA 17101  
[cet3@tntlawfirm.com](mailto:cet3@tntlawfirm.com)  
*Counsel for Noble Americas Energy*

Deanne M. O'Dell, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
[dodell@eckertseamans.com](mailto:dodell@eckertseamans.com)  
*Counsel for RESA & Direct Energy*



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Patrick M. Cicero

Pennsylvania Utility Law Project  
118 Locust Street  
Harrisburg, PA 17101  
Tel.: 717-236-9486, Ext. 202  
Fax: 717-233-4088  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)

August 25 2016

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITION OF PECO ENERGY :  
COMPANY FOR APPROVAL OF ITS :  
DEFAULT SERVICE PROGRAM FOR : DOCKET NO. P-2016-2534980  
THE PERIOD FROM JUNE 1, 2017 :  
THROUGH MAY 31, 2019 :

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**REPLY BRIEF OF THE COALITION FOR  
AFFORDABLE UTILITY SERVICES AND ENERGY  
EFFICIENCY IN PENNSYLVANIA**

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**PENNSYLVANIA UTILITY LAW PROJECT**  
*Counsel for CAUSE-PA*

Patrick M. Cicero, Esq., PA ID: 89039  
Elizabeth R. Marx, Esq., PA ID: 309014  
Joline Price, Esq., PA ID: 315405  
118 Locust Street  
Harrisburg, PA 17101  
Tel.: 717-236-9486  
Fax: 717-233-4088  
[pulp@palegalaid.net](mailto:pulp@palegalaid.net)

August 25, 2016

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## **I. INTRODUCTION**

### **A. BACKGROUND**

The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”), through its counsel at the Pennsylvania Utility Law Project, files this Reply Brief in response to the Main Briefs of the Retail Energy Supply Association (RESA), PECO Energy Company (PECO), and the Bureau of Investigation and Enforcement (I&E). As explained throughout, RESA’s argument is not rooted in law or fact. Rather, it is premised on factually disproven and legally unsound generalizations about how the competitive energy market will react to the introduction of reasonable CAP restrictions designed to protect economically vulnerable customers from proven harm and ensure that the costs of the CAP program are not unnecessarily increased. Furthermore, the “wait and see” approach advocated by RESA, PECO and I&E is insufficient because it will fail to protect CAP customers who shop for electric supply and non-CAP residential ratepayers within PECO’s service territory from the certain, substantial, and well-documented negative effects of paying more than the price to compare (PTC).

For the reasons contained herein – as well as the arguments contained in the Main Briefs of CAUSE-PA, the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN et al.), and the Office of Consumer Advocate (OCA) – the positions advanced by RESA in its Main Brief should be rejected, and CAUSE-PA’s proposal to implement a standard offer program designed specifically for CAP customers (CAP-SOP)<sup>1</sup> should be adopted to ensure that CAP costs are reasonably controlled and that low income customers and residential ratepayers are protected from the certain and substantial harm that will occur with the

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<sup>1</sup> A summary of the CAP-SOP is set forth in CAUSE-PA’s Main Brief at page 11.

implementation of any CAP shopping proposal that does not limit CAP customers to choosing contracts at or below PECO's price to compare.

## **B. PROCEDURAL HISTORY**

CAUSE-PA incorporates by reference the procedural history set forth in its Main Brief. Main Briefs were filed on August 11, 2016, to address the sole issue reserved for litigation in this proceeding: Whether adoption of CAUSE-PA's CAP-SOP proposal is reasonable in light of the significant and certain harm which will be incurred by CAP customers and the residential ratepayers who finance the CAP program. Main Briefs were filed by CAUSE-PA, TURN et al., the OCA, PECO, I&E, and RESA.

## **II. STATEMENT OF THE CASE**

CAUSE-PA incorporates by reference its Statement of the Case set forth in its Main Brief.

## **III. LEGAL STANDARDS AND BURDEN OF PROOF**

Throughout its brief, RESA distorts the legal standard the Commission must use to determine whether restrictions on CAP shopping are necessary. Specifically, RESA concludes that CAUSE-PA, TURN et al., and the OCA "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."<sup>2</sup> RESA further asserts that, even if the proponent of a proposal meets the burdens of production and persuasion, the Choice Act allows the Commission to "rely on substantial evidence to reject the proposed restriction."<sup>3</sup> RESA's assertions regarding the applicable legal standard distort the law and twist the standard into one which is expedient for its purposes, but is not in accord with applicable precedent.

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<sup>2</sup> RESA MB at 6. Although CAUSE-PA in no way concedes the correctness of RESA's fallacious legal standard, as explained in detail below, CAUSE-PA has nevertheless met the standard posited by RESA by putting forth a substantial, undisputed evidence that every other proposal would continue to impose certain and substantial harm to low income CAP customers, residential ratepayers, or both.

<sup>3</sup> RESA MB at 6.

First, in reaching its decision that the Commission has the legal authority to approve rules that limit competition to protect competing interests and priorities (here, the interest in protecting ratepayers from unnecessary costs and preserving universal access to utility service), the Commonwealth Court, in Coalition for Affordable Util. Servs. & Energy Efficiency in Pa. (CAUSE-PA) et al. v. Pa. PUC, 120 A.3d 1087, 1103-04 (Pa. Commw. Ct. 2015), focused on the Commission's authority to act on a petition, and set forth standards applicable to that authority as well as the standard for review on appeal. The Court did not change the burden of proof or impose a new substantive legal standard. The Commonwealth Court stated:

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, etc.<sup>4</sup>

This is the standard that the Commission must use in assessing the evidence presented in this case, and it is the standard that the Commonwealth Court will use in assessing the Commission's ruling on any appellate review. It is not a new substantive legal standard for the parties presenting evidence to the Commission. That standard remains as it always was: Any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence,<sup>5</sup> meaning evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>6</sup> Thus, proponents of restrictions on CAP shopping must come forward

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<sup>4</sup> Coalition for Affordable Util. Servs. & Energy Efficiency in Pa. (CAUSE-PA) et al. v. Pa. PUC, 120 A.3d 1087, 1103-04 (Pa. Commw. Ct. 2015) (quoting PP&L Indus. Customer Alliance v. Pa. PUC, 780 A.2d 773 (Pa. Commw. Ct. 2001)).

<sup>5</sup> Met-Ed Indus. Users Group v. Pa. PUC, 960 A.2d 189, 193, n.2 (Pa. Commw. Ct. 2008) (citing 2 Pa. C.S. § 704).

<sup>6</sup> Borough of E. McKeesport v. Special/Temporary Civil Service Comm'n, 942 A.2d 274, 281 (Pa. Commw. Ct. 2008).

with substantial evidence from which the Commission can determine whether CAP restrictions are necessary,<sup>7</sup> which they have.

It is instructive that RESA made a similar argument in PPL Electric Utilities' (PPL) recent default service program proceeding, which was rejected by Administrative Law Judge Susan Colwell. In that proceeding, RESA opposed restrictions that were jointly supported by CAUSE-PA, the OCA, PPL, and I&E (collectively, in that proceeding, known as "Joint Parties"), and are substantially similar to those proposed by CAUSE-PA and supported by OCA and TURN et al. in this proceeding. In rejecting RESA's statement of the legal standard, ALJ Colwell stated:

**It is not feasible to require that the Joint Parties present an exhaustive list of all possible alternatives and discuss each one critically.** They have shown that they weighed the alternatives and active promoting the Joint Litigation Position as the best plan. **It is legally sufficient to show that alternatives have been evaluated and rejected in favor of the plan ultimately promoted, and to counter the alternatives raised by the party or parties opposing the choice.** RESA did not present a reasonable alternative to be considered until briefing, and even then, relies upon the record and original plan proposed by [PPL].<sup>8</sup>

The same is true here: "It is legally sufficient to show that alternatives have been evaluated and rejected in favor of the plan ultimately promoted, and to counter the alternatives raised by the party or parties opposing the choice."<sup>9</sup> As argued more fully below, CAUSE-PA, TURN et al. and the OCA have collectively countered the only alternative that has been proposed – PECO's approach of filing an unrestricted CAP shopping plan with an educational component – as insufficient and unreasonable in light of the overwhelming evidence of harm that will occur under this approach. In PPL, ALJ Colwell succinctly and accurately characterized this as the "cross your

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<sup>7</sup> CAUSE-PA et al., 120 A.3d at 1106-07 ("As the proponents of the rule restrictions in this case, [Joint Parties] ha[ve] the burden of proof and ultimately the burden to persuade the PUC to enact the proposed restrictions on competition.").

<sup>8</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 No. P-2016-2526627, Initial Decision, at 47-48 (August 17, 2016) (hereinafter "PPL CAP Shopping ID").

<sup>9</sup> Id.

fingers and hope they will listen”<sup>10</sup> approach and correctly concluded that it was “simply insufficient.”<sup>11</sup> The record in this proceeding compels the same conclusion.

Further, RESA is incorrect in claiming that “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.”<sup>12</sup> This is a distortion of the appellate standard. While the Commonwealth Court in CAUSE-PA et al. affirmed the Commission’s decision to not impose price restrictions, it did so *based on the record then before it*. In essence, the Court found – without reweighing the evidence or substituting its judgment for that of the PUC – that the parties in the case before it did not fulfill their burden of persuasion to convince the Commission that CAP restrictions were necessary such that competition had to bend. The Court did not find, as RESA asserts, that the parties met their burden of proof, and that the Commission could nonetheless reject the proposal based on substantial evidence.<sup>13</sup> RESA’s attempts to recast the legal standard are improper and should be disregarded.

Furthermore, RESA treats the legal standard as if it were a one-sided affair, it is not. The burden of proof is actually composed of two different burdens: the burden of production and the burden of persuasion.<sup>14</sup> While the burden of persuasion stays with the party that has the ultimate burden of proof, the burden of production can and does shift. ALJ Colwell succinctly summarized this in her recent Initial Decision in the PPL DSP case:

The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a trial. If the party (initially, this will usually be the complainant, applicant, or petitioner, as the case may be) with the

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<sup>10</sup> PPL CAP Shopping ID at 61.

<sup>11</sup> Id.

<sup>12</sup> RESA MB at 6.

<sup>13</sup> RESA MB at 11.

<sup>14</sup> Hurley v. Hurley, 754 A.2d 1283 (Pa. Super. 2000).

burden of production fails to introduce sufficient evidence the opposing party is entitled to receive a favorable ruling. That is, the opposing party would be entitled to a compulsory nonsuit, a directed verdict, or a judgment notwithstanding the verdict. Once the party with the initial burden of production introduces sufficient evidence to make out a prima facie case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to his position. **The burden of production goes to the legal sufficiency of a party's case.**<sup>15</sup>

In this proceeding, RESA has come forward with no evidence which would meet its burden of production. While it points obliquely to a filing that PECO has indicated that it will make by September 1, 2016, as a possible solution, RESA has suggested nothing tangible to address the certain and substantial harm caused by unrestricted CAP Shopping, and its “just say no” approach is insufficient to meet its burden of producing evidence. As explained at length below, the record is clear: the harm to CAP customers and other ratepayers is certain and substantial, and no alternatives to CAUSE-PA’s proposal reasonably exist to remedy that harm. As such, the CAP-SOP proposal set out by CAUSE-PA and endorsed by the OCA and TURN et al. should be approved.

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<sup>15</sup> PPL CAP Shopping ID at 53.

#### **IV. SUMMARY OF ARGUMENT**

RESA has produced no evidence in this proceeding that can be credibly relied on to overcome the need for adequate protections of PECO's CAP customers and has not met the burden of producing evidence that overcomes the substantial evidence introduced by CAUSE-PA, the OCA, and TURN et al. showing that PECO's CAP customers are economically vulnerable and in need of protections to ensure that when they choose an electric generation supplier they do so at a rate that does not exceed the price to compare. For its part, RESA merely argues that the previous CAP shopping decisions by the Commission somehow compel the Commission to discount the evidence and CAUSE-PA's CAP SOP proposal in this case. This is categorically untrue. The decisions of the Commission and the Commonwealth Court in PECO's previous DSP II proceeding were based on evidence entered into the record of that proceeding. None of the record evidence presented in this proceeding was available at that time. It can hardly be the case that all of the CAP shopping issues were fully vetted in that proceeding. The Commission recognized this very fact in its May 11, 2016 Secretarial Letter at PPL's DSP II docket, which invited further inquiry into these matters in this or other proceedings.<sup>16</sup>

RESA also inexplicably asserts that the evidence of widespread harm to CAP participants shopping for electric supply in other service territories is not sufficient to support CAUSE-PA's CAP-SOP proposal in this case. RESA offers no support for this conclusion, nor can it. No party has presented any evidence to indicate why or how the experience of CAP customers within PECO's service territory would be any different than the experience of PPL or First Energy CAP customers. There is no indication that the marketing techniques, offers, contract terms, and EGSs will vary significantly from those service territories to PECO's. The economic demographics of

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<sup>16</sup> Petition of PECO Energy Company for Approval of its Default Service Plan, Sec. Ltr., Docket No. P-2012-2283641 (May 11, 2016) (hereinafter May 11 2016 Secretarial Letter).

the CAP customer population of PPL and First Energy are determined by statewide CAP Policy Guidelines regarding eligibility and are, thus, not different than those for the CAP customer population within PECO's service territory. CAP customers across the state are all payment troubled, desperately poor, and require payment assistance that is subsidized in part by other ratepayers. As such, the experiences of CAP customers within other electric service territories is directly relevant to determining appropriate safeguards for PECO's CAP customers.

Finally, RESA, PECO, and I&E suggest that the parties should wait to see what PECO may file by September 1, 2016, file comments to that proceeding, and allow PECO to conduct its educational campaign. They argue that the Commission should only act to prevent avoidable harm and implement price protections *after* PECO's CAP customers actually experience the harm associated with higher, unaffordable EGS rates. This is unacceptable, as it fails to fulfill the Commission's obligation to ensure that universal service programs are appropriately available, adequately funded, and cost effective. There is no compelling reason to wait for harm that the Commission knows will occur before protecting customers from experiencing that harm. To do so would be an abdication of the Commission's responsibilities. For all of the reasons stated more fully below, the wait and see approach is grossly inadequate and is not a reasonable alternative to the CAP-SOP proposal presented by CAUSE-PA and endorsed by the OCA and TURN et al.

## V. ARGUMENT

### A. **THE COMMISSION SHOULD REJECT RESA'S POSITIONS BECAUSE THEY ARE UNSUPPORTED, SPECULATIVE, AND ERRONEOUS**

#### 1. **The previous CAP shopping decisions by the Commission were based on a different record and the evidence in this proceeding demonstrates the need for CAP shopping restrictions.**

From the very outset, RESA's Main Brief sets forth half-truths and incomplete facts of decisions made by the Commission based on an entirely different record. RESA asserts that the

previous CAP shopping decisions in PECO's service territory somehow dictate a result in this case because "implementation of shopping for CAP customers has already been fully vetted and reasonable alternative restrictions have already been determined through other litigated and appellate proceedings."<sup>17</sup> RESA further notes, after reviewing the history of CAP shopping decisions in PECO's service territory through and including the Commonwealth Court's decision, that "[t]he [p]roponents of CAP Shopping Restrictions raise no new issues in this proceeding to warrant further delay."<sup>18</sup> Both statements are simply untrue.

When PECO filed its DSP II CAP shopping plan, it initially proposed to allow CAP customers to shop for competitive electric supply from an EGS and retain CAP benefits only if the EGS guaranteed a rate that would be no greater than PECO's price to compare. In that proceeding, the OCA proposed that PECO's CAP shopping program also permit CAP customers to exit EGS contracts with no termination/cancellation fees. The Commission rejected both proposals, stating that these program features amounted to price restrictions that it did not have statutory authority to approve.<sup>19</sup> The Commission also determined, based on the evidence before it at the time of its DSP II consideration, that even if it did have authority to approve price limitations and fee restrictions for shopping CAP participants, it believed such limitations and restrictions would impede development of the competitive market, and that only a "robust competitive market coupled with effective customer education will result in the least-cost option" for CAP participants.<sup>20</sup> CAUSE-PA, TURN et al., and the OCA appealed the decision to the Commonwealth Court.

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<sup>17</sup> RESA MB at 10.

<sup>18</sup> RESA MB at 11.

<sup>19</sup> Petition of PECO Energy Company for Approval of its Default Service Plan, Opinion and Order, at 14, 16-17, Docket No. P-2012-2283641 (Jan. 24, 2014) (hereinafter January 2014 Opinion and Order).

<sup>20</sup> Petition of PECO Energy Company for Approval of its Default Service Plan, Opinion and Order, at 11, Docket No. P-2012-2283641 (March 12, 2014) (hereinafter March 2014 Opinion and Order).

By opinion and order dated July 14, 2015,<sup>21</sup> the Commonwealth Court reversed the Commission's determination concerning its legal authority, and clarified that both utilities and the Commission have the legal ability to set different rules for CAP customers. Specifically, the Court stated that the Electricity Generation Customer Choice and Competition Act<sup>22</sup> ("Choice Act") "does not demand absolute and unbridled competition,"<sup>23</sup> and found that "under certain circumstances, unbridled competition may have to give way to other important concerns,"<sup>24</sup> and specifically found that under circumstances like those that exist here, the Commission has the authority to limit CAP customers to paying no more than the price to compare and eliminate early termination or cancellation fees. The Commonwealth Court determined that the Commission erred as a matter of law regarding its determination that it did not have the legal authority needed to impose price restrictions on the terms and conditions surrounding CAP customer's access to EGS products while enrolled in CAP. However, the Commonwealth Court deferred to the Commission's determination regarding the evidence presented in the DSP II proceeding. Specifically, the Court found that the Commission had substantial evidence for its determination to reject the price ceiling requested by PECO, but that there was not substantial evidence for the Commission's determination to reject the OCA's proposal to prohibit early termination and cancellation fees.<sup>25</sup> RESA asserts that this decision means that the issue has been fully vetted. This is not the case.

First, the issues previously decided by the Commission and the Commonwealth Court in PECO's DSP proceeding were based on evidence entered into the record of that proceeding, a

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<sup>21</sup> CAUSE-PA et al., 120 A.3d 1087.

<sup>22</sup> See 66 Pa. C.S. §§ 2802(10), (17); 2804(9).

<sup>23</sup> CAUSE-PA et al., 120 A.3d at 1101.

<sup>24</sup> CAUSE-PA et al., 120 A.3d at 1103.

<sup>25</sup> CAUSE-PA et al., 120 A.3d at 1107-08.

record that closed on July 11, 2013. None of the record evidence presented in this proceeding was available then, so it is not the case – as RESA asserts - that all of the CAP shopping issues were fully vetted in that proceeding. The Commission recognized this very fact in its May 11, 2016 Secretarial Letter at PPL’s DSP II docket, which invited further inquiry into these matters in this or other proceedings. The letter stated, in pertinent part:

The Commission’s final approval of the rule revision ordered by the Court in this matter does not prejudice any Party’s ability to raise the termination/cancellation issue, and to provide evidence regarding its impacts on the retail electric shopping market, in a future proceeding.<sup>26</sup>

Furthermore, the Commission clearly recognized that the Commonwealth Court’s decision was “predicated on its review of the record evidence before the Commission during PECO’s DSP II proceeding.”<sup>27</sup> Thus, any and all new evidence that was not available to be entered into the DSP II proceeding must be considered, particularly in light of the clarified legal standard. Contrary to RESA’s assertion that there was no new issues in this proceeding, the record in this proceeding demonstrates that there are substantial adverse impacts to allowing CAP customers to shop at prices higher than the price to compare.

**2. Evidence of widespread harm to CAP customers in other utility service territories is relevant and persuasive evidence in support of CAUSE-PA’s proposal**

RESA is incorrect in its contention that the evidence of widespread harm to CAP participants shopping for electric supply in other service territories is not sufficient to support

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<sup>26</sup> May 11, 2016 Secretarial Letter at 2 n. 2. It is unclear why the Commission chose to limit its footnote to clarify the ability of parties to raise the termination and cancellation fee issue in future proceedings – like this one – and did not include the related and inextricably intertwined issue of whether other CAP shopping rules should be developed to ensure continued CAP customer affordability for those customers who select EGS-supplied generation service, clearly the Commission could not prohibit such an inquiry as it would seem to violate due process rights to allow parties to address one set of issues while disallowing parties to raise another critically important, material, and relevant issue – ensuring CAP customer affordability within the competitive market – which is articulated in the Choice Act and the recent Commonwealth Court decision.

<sup>27</sup> May 11, 2016 Secretarial Letter at 2 n. 4.

CAUSE-PA's CAP-SOP proposal. RESA offers no support for its conclusion that the experience of customers in 5 of the 7 large EDC service territories is irrelevant to what PECO CAP customers can expect to encounter. Indeed, evidence of harm in 5 of 7 large electric distribution companies is wholly relevant in this case. As set forth in CAUSE-PA's Main Brief:

There is no indication that the marketing techniques, offers, contract terms, and EGSs will vary significantly from those service territories to PECO's. The economic demographics of the CAP customer population of PPL and First Energy are determined by statewide CAP Policy Guidelines regarding eligibility and are, thus, not different than those for the CAP customer population within PECO's service territory. EDC CAP customers across the state are all payment troubled, desperately poor, and require payment assistance that is subsidized in part by other ratepayers. While there are significantly more CAP customers within PECO's service territory than other service territories, these customers face the same challenges as all poor households across the state: how to pay for essential goods and services with little to no income. The only significant difference is that because of PECO's larger CAP enrollment more of its low-income customers will be subject to harm if permitted to engage in unrestricted shopping.<sup>28</sup>

In the context of determining whether competition needs to bend to ensure that PECO's universal service programs are adequately funded and available to assist low-income customers to afford electricity, it is perfectly appropriate for the Commission to consider the data from the PPL and First Energy service territories, particularly when this data shows a length of time and depth of data that paints an indisputably clear picture of a long term pattern demonstrated over a period of years which has resulted in deep and quantifiable harm. None of this information has previously been before the Commission in making a judgment about PECO's CAP shopping parameters.

Perhaps RESA wants to pretend this evidence does not exist because it is so damaging to its rhetorical position. Whatever the motivation, the experience of CAP customers in other utility service territories amply demonstrates that a policy of allowing CAP customers to shop without

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<sup>28</sup> CAUSE-PA MB at 25-26.

limitation on the price or terms of service will worsen the affordability crisis for PECO's CAP customers.<sup>29</sup> This was summarized in CAUSE-PA's Main Brief:

A review of the data [in PPL's service territory] shows that low-income CAP customers have been significantly harmed by their participation in the competitive electric generation market. In its 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 high supplier prices for its CAP customers is to increase the "burn rate" of CAP credits.<sup>30</sup> In response, the Commission directed PPL to address the issue of CAP shopping in its upcoming DSP.<sup>31</sup> In preparation for its currently pending default service proceeding, PPL produced evidence which makes it clear that a significant number of PPL's CAP customers who are shopping pay more than the price to compare.<sup>32</sup> 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. This evidence corroborates the findings of harm shown in PPL's DSP II, but now spans a ***46 month period of time (nearly 4 years) and reveals millions of dollars in net harm over that time, factoring in both the savings earned and the costs incurred by all CAP shopping customers over the same period.***<sup>33</sup> This length of time and depth of data paints an indisputably clear picture of a long term pattern of deep and quantifiable harm.

...

**The net impact<sup>34</sup> of CAP customer shopping over the 46- month period from January 2012 through October 2015 is \$2,743,872 per year, which if extrapolated over that entire 46-month period results in more than \$10.5 million in additional costs for PPL's CAP customers and other ratepayers.**<sup>35</sup> That is, as a result of PPL's current practice of allowing CAP customers to select any EGS offer regardless of cost, residential ratepayers are paying \$2,743,872 more

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<sup>29</sup> See CAUSE-PA MB at 18-20 (summarizing the energy affordability challenges for PECO's CAP customers).

<sup>30</sup> See PPL Electric Utilities Corporation Universal Service and Energy Conservation Plan for 2014-2016 Submitted in Compliance with 52 Pa. Code § 54.74, Reply Comments of PPL Electric Utilities, Docket No. M-2013-2367021 at 11 (July 21, 2014).

<sup>31</sup> PPL Electric Utilities Corporation Universal Service and Energy Conservation Plan for 2014-2016 Submitted in Compliance with 52 Pa. Code § 54.74, Final Order, Docket No. M-2013-2367021, at 19 (Sept. 11, 2014).

<sup>32</sup> See CAUSE-PA St. 1, Attachment B (PPL Electric Utilities OnTrack (CAP) Program Shopping Collaborative #2, Friday Jan. 15, 2016).

<sup>33</sup> CAUSE-PA St. 1 at 29:1-11.

<sup>34</sup> As noted above, see supra note 3, net impact – as the term is used here - means all of the savings incurred by CAP customers shopping at rates *at or below* the price to compare, subtracted from all of the costs incurred by CAP customers shopping at rates *higher* than the price to compare. This shows the net harm to the CAP program as a whole, ***but does not monetize the particularized harm to individual CAP customers who pay more***. This latter harm, while not monetized, presents a significant and substantial risk of harm to low income households, and creates a ripple effect on other ratepayers in terms of increased termination costs and uncollectible expenses.

<sup>35</sup> See CAUSE-PA St. 1 at 29:1-11.

per year for the CAP program than they would have paid had all CAP customers simply paid the price to compare.

Substantially similar data was produced in the First Energy Company Service territories. The reported data from that proceeding appears to show 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.<sup>36</sup>

This experience is directly relevant to PECO's plan to permit its CAP customers to shop because PECO's CAP and non-CAP residential customers will face the same burdens, the same products, and the same unaffordability. As the record demonstrates, effective October 2016, PECO will switch its CAP design from a tiered CAP rate program to a Fixed Credit Option (FCO) program, which has produced a significantly different and complex new CAP structure, which will completely overhaul of the method PECO uses to calculate a CAP customer's bill.<sup>37</sup> While the FCO design is complicated, the most essential and relevant component to be considered with regard to the interaction of CAP and the competitive market in PECO's service territory is this: **PECO's FCO CAP design targets affordability – and the amount of CAP credits allotted to CAP customers – based on PECO's default service rate, regardless of whether the customer is shopping for electric generation supply service.**<sup>38</sup> If a customer is enrolled in PECO's FCO CAP, and purchases generation supply at a price that is higher than the price to compare for any period of time, she or he will not receive a credit that accounts for that higher price, and will receive less of a discount than is required for his or her bill to be affordable pursuant to Commission standards. In other words, the CAP customer will use their CAP credit to cover fewer kilowatt hours of electricity usage, thereby resulting in higher monthly bills which exceed the affordability standards set by the Commission. In turn, non-CAP residential customers who finance the CAP-

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<sup>36</sup> CAUSE-PA MB at 27-29 (emphasis in original).

<sup>37</sup> CAUSE-PA MB 15-18.

<sup>38</sup> See CAUSE-PA St. 1, at 22-23.

FCO will pay to supplement the profit margins of EGSs – rather than buying down the level of unaffordability for vulnerable electric consumers. Paying more than the price to compare will, thus, necessarily erode the effectiveness of PECO’s CAP in reaching Commission-established energy burden targets. This evidence was not in the record and was not available to the Commission in the DSP II Proceeding and, thus, must be considered here. RESA’s unsupported assertions to the contrary should be disregarded.

For its part, RESA incorrectly and inexplicably contends 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”<sup>39</sup> and that “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 the EGSs or the CAP customer – when he or she first chose the EGS – obtained some benefit or incentive for switching.”<sup>40</sup> This is not the case.

As to its first assertion, RESA badly misconstrues the data. In his direct testimony, Mr. Geller, on behalf of CAUSE-PA states that “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 shopping paid more than the PTC.”<sup>41</sup> Furthermore, Mr. Geller attached a chart at Appendix D to his direct testimony that made this point: At the **lowest point** from January 2012 through February 2016, 42% of CAP customers shopping within PPL’s service territory paid more than the PTC. Thus, RESA’s contention that somehow this was the average over this more than 40 month period is irrefutably false. A simple glance at Appendix D of CAUSE-PA’s Statement No. 1 plainly shows this.

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<sup>39</sup> RESA MB at 14, n. 57.

<sup>40</sup> RESA MB at 14-15.

<sup>41</sup> CAUSE-PA St. No. 1 at 27.

As to its second assertion – that the data does not take into consideration the contract terms or other benefits or incentives for switching – this is inaccurate as to the contract terms and irrelevant as to the incentives for switching. PPL’s data does reflect individual customer contracts because it calculated the cost to ratepayers by compiling the gains and losses of all CAP shopping customers over a period of time, thereby quantifying the consumer’s individual experience in each individual contract, and aggregating that impact over the population as a whole. This aggregation showed over a *46 month period of time (nearly 4 years) there was \$10.5 million in net harm over that time, factoring in both the savings earned and the costs incurred by all CAP shopping customers over the same period.*<sup>42</sup>

Moreover, RESA’s assertion that the data does not reflect other incentives and products – such as “a lower price, a gift card, or an energy audit” misses the point: paying more than the PTC at any time, and particularly for long periods of time, harms CAP customers and the ratepayers who finance CAP. This harm does not change when CAP customers receive other products, such as energy audits and gift cards. Furthermore, the stated purpose of the Choice Act is to “create direct access to retail customers to the competitive market for the generation of electricity.”<sup>43</sup> Thus, the non-commodity products mentioned by RESA **are not within the purview of the Choice Act,** and RESA’s concern about CAP customers’ access to these non-commodity products is misplaced. The Choice Act focuses on the generation of electricity, ensuring that the low-income programs remain adequately funded, and ensuring that these programs actually assist low-income households **afford electric service.**<sup>44</sup> There is no intent or specification within the Act that

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<sup>42</sup> See CAUSE-PA St. No 1 at 11 (showing a net shopping impact of \$228,656 monthly, which multiplied by 46 months is \$10,518,176).

<sup>43</sup> 66 Pa. C.S. § 2802(12) (emphasis added).

<sup>44</sup> 66 Pa C. S. § 2802(10).

encompasses access to debit cards, toasters, loyalty rewards, or any of the myriad of other products or services other than the cost of generation.

In fact, “the Choice Act expressly requires the [Commission] to administer these programs in a manner that is cost effective for both CAP participants and non-CAP participants, who share the financial consequences of the CAP participants’ EGS choice.”<sup>45</sup> RESA’s insistence that these non-commodity products must remain available finds no support in the law, and - to the extent that they may result in prices above the price to compare - will result in economic harm to CAP customers and the ratepayers who pay for CAP. RESA’s argument should be rejected. There is no evidence showing that CAP customers and the ratepayers who finance CAP will benefit from the “value” added by these products, and there is no evidence that the “value” outweighs the harm associated with paying rates higher than the PTC. There is no evidence demonstrating that any “value added” product has reduced the generation cost for CAP or non-CAP customers any argument to this end should be rejected. In the absence of any such evidence, RESA’s argument is hollow.

It is instructive that ALJ Colwell disposed of a similar argument by RESA that was made in PPL’s DSP:

RESA’s pointing out that the CAP customers *may have* enjoyed some benefit is not persuasive where the actual knowledge of these theoretical benefits is within the records of RESA’s own members and not within the records of any other part, including [PPL]. Pointing out what might have happened is not sufficient to counter the weight of the real data presented by [PPL], the veracity of which has not been challenged.<sup>46</sup>

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<sup>45</sup> CAUSE-PA et al., 120 A.3d at 1103.

<sup>46</sup> PPL CAP Shopping ID at 54 (emphasis added).

The same is true in this proceeding. RESA has come forward with no evidence to rebut the substantial evidence that CAP customers and the ratepayers who pay for CAP are harmed under any structure whereby CAP customers pay more than the PTC.

**3. RESA provides no credible evidence to support its position that CAP customers will be adversely affected by implementing the suggested CAP SOP.**

RESA contends that the CAP-SOP will result in the elimination of offers to CAP customers because it would “require EGSs to guarantee a steady supply of energy priced below the PTC,” and EGSs would be unwilling to do so while still paying a \$30 referral fee to enroll customers through the CAP-SOP.<sup>47</sup> These concerns are unfounded. First, RESA offered no credible evidence in their rebuttal testimony that indicated how many or if EGSs would actually leave the market. Mr. White said merely that he believes “few, if any EGSs, will choose to participate in the CAP SOP program.”<sup>48</sup> This is nothing more than speculation. Like RESA’s theoretical value added benefits argument addressed above, - any information which may support RESA’s claims is within the knowledge of the EGSs involved, yet no such quantifiable data or information was entered into the record of this proceeding.

Moreover, EGSs make business decisions all of the time for a host of reasons. Even today, under PECO’s current DSP, some suppliers choose not to enter PECO service territory. Even if a significant portion of EGSs did refuse to participate in the CAP-SOP – which is at best a speculative response to the CAP-SOP proposal – the CAP-SOP nonetheless contains a provision which would allow modifications to the program if EGS participation was insufficient.<sup>49</sup> Indeed, the goal of imposing reasonable restrictions for CAP shopping is to stem the certain and acute

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<sup>47</sup> RESA MB at 17

<sup>48</sup> RESA Statement No. 1-R at 16:19-20.

<sup>49</sup> PPL St. 1-RJ at 9.

harm that would be imposed on ratepayers and CAP customers alike. The Commonwealth Court has sanctioned this sort of reasonable restriction to remedy this sort of acute harm. As such, it is imperative that the Commission approve the CAP-SOP as a reasonable and necessary resolution to a significant and severe problem. To hold otherwise would be to abandon the Commission obligation under the Choice Act to ensure that universal service programs are appropriately available, adequately funded, and cost effective in each utility distribution territory.<sup>50</sup>

As to the issue of the \$30 referral fee, CAUSE-PA witness Geller acknowledged this reality in his surrebuttal testimony:

[A]s to RESA’s suggestion that it would be unfair to impose a \$30 SOP enrollment fee to suppliers agreeing to serve CAP customers with more restrictive terms, I agree that this concern may have merit. To that end, I endorse the suggestions of OCA witness Barbara Alexander who suggests that **PECO could simply transmit qualified and interested CAP customers to an EGS that is randomly selected from those willing to serve CAP customers under the CAP shopping criteria. This would avoid the third party enrollment fee altogether, thereby reducing any cost that might be required for EGSs to participate in such a program.** And, since PECO would have already conducted the initial screening, it would also alleviate any supplier concern as to whether the customer is or is not a CAP participant.<sup>51</sup>

The OCA crafted a solution to this concern raised by RESA and this solution has been endorsed by both CAUSE-PA and TURN et al.<sup>52</sup> As such, this is no longer an issue and is not an impediment to implementation of the CAP-SOP proposal.

**B. THE “WAIT AND SEE” APPROACH ADVOCATED BY RESA, PECO AND I&E TO ALLOW PECO TO IMPLEMENT A CAP SHOPPING PLAN WITHOUT PRICE PROTECTIONS IS NOT A REASONABLE ALTERNATIVE.**

For the first time, in its Main Brief, RESA asserts that it has identified a “reasonable alternative” to the proposal advanced by CAUSE-PA and supported by the OCA and TURN et

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<sup>50</sup> 66 Pa. C.S. § 2804 (9).

<sup>51</sup> CAUSE-PA St. No. 1-SR at 11:13-12:2 (emphasis added).

<sup>52</sup> See TURN et al. MB at 29-30.

al.<sup>53</sup> Specifically, RESA points to the shopping plan that PECO *intends to file* by September 1, 2016, as an alternative to the CAP-SOP. Although not explicitly suggesting that it is an alternative to the SOP, both I&E and PECO suggest that “the appropriate time for the Commission to consider any [price protections] is after data is available regarding the shopping experience of PECO’s CAP customers”<sup>54</sup> In essence, RESA, PECO, and I&E suggest that the parties should wait to see what PECO may file by September 1, 2016, file comments to that proceeding, and allow PECO to conduct its educational campaign. Only *after* PECO’s CAP customers actually experience the harm associated with higher, unaffordable EGS rates can the Commission implement price protections. This approach is grossly inadequate and is not a reasonable alternative to the CAP-SOP proposal.

First, this approach has already been tried and it does not work. With the exception of the banning of early termination and cancellation fees that will be a part of whatever CAP shopping plan filed by PECO<sup>55</sup>, the approach of unrestricted CAP shopping with education and tracking of harm has been tried in PPL and First Energy. In each case, the results were clear: significant number of CAP customers paid more than the price to compare and, on net, unrestricted CAP shopping cost CAP customers and the ratepayers who paid for CAP millions of dollars more than they otherwise would have paid. Doing the same thing over and over and expecting different results is not a reasonable alternative. The simple fact of the matter is that what RESA, PECO, and I&E propose has been tried and it failed. The parties considered all of these issues in various other iterations of PECO’s CAP shopping proceedings, and the proposal advanced by CAUSE-PA in this proceeding is the culmination of those prior positions, the product of which is to institute a

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<sup>53</sup> RESA MB at 10.

<sup>54</sup> PECO MB at 9. Both I&E and RESA assert essentially the same thing in their respective briefs. See I&E MB at 12; RESA MB at 14.

<sup>55</sup> This element was required by the Commonwealth Court on remand. See May 11, 2016 Secretarial Letter at 1.

framework that is administratively feasible, provides appropriate restrictions to CAP customers and the rate payers who pay for CAP, and permits CAP customers to shop for electricity in the competitive market place.

This is in contrast to RESA, I&E, and PECO's alternative to impose few restrictions now and wait and see what happens. ALJ Colwell succinctly summarized why this approach is insufficient in her recently issued decision in PPL's DSP:

Therefore, RESA's recommendation is to impose no restrictions on CAP shopping and to encourage CAP customers to use the SOP if they do shop. **This "cross your fingers and hope they will listen" approach is simply insufficient. It fails to protect the CAP shoppers from the negative effects of paying more than the PTC and reduces the ability of the individual customers to stay on CAP as long as possible. It reduces the overall ability of the CAP program to offer participation to as many customers as possible within the permitted expenditure as well as maximizes the burden on other residential ratepayers who fund CAP, some of whom are themselves low-income customers.** And, "CAP customers have had the opportunity to participate in the SOP throughout the period analyzed by PPL witness Wukitsch and the opportunity to choose other, higher-priced products. The PPL analysis demonstrates that this has not successfully managed the costs of the program."

However, RESA does raise legitimate concerns which should not go unaddressed. For example, while an introductory rate of 7% below the PTC at the time of enrollment with an EGS is an incentive to enter the competitive market that EGSs see as a legitimate introduction worth the cost and the \$28 enrollment fee, keeping the rate year after year while paying additional enrollment fees each year is a burden on the EGSs that they may not see as worthwhile. The requirement that CAP shoppers only shop using the SOP may have the unintended effect of preventing those low-income shoppers who are market-savvy from negotiating even more favorable rates.

At the same time, **the importance of the protections provided to all CAP customers clearly outweigh the importance of the EGSs' ability to make a profit serving those customers, at the expense of the other ratepayers.** While noting that RESA has not advocated an [sic] legitimate middle ground which recognizes that the continuation of electric service to low-income Pennsylvanians as vital to their health and welfare, surely it can see that a customer who cannot pay the electric bill and has service terminated will not be a paying customer to the EGS anymore. The overall interest, both the human interest and the economic interest,

is in favor of assisting the low-income customer to retain electric service in the most reasonable way possible.<sup>56</sup>

The proposal by RESA, PECO, and I&E is the same “wait and see” approach admonished by ALJ Colwell in PPL’s default service proceeding, and it is insufficient to effectively address the harm. As pointed out by TURN et al., “there is no need to gather more data re-confirming the incidence of harm to low-income customer in advance if implementing necessary price protections for PECO CAP customers choosing to shop for electricity supply.”<sup>57</sup> The case has already been made: CAP customers suffer by paying more than the PTC and “the importance of the protections provided to all CAP customers clearly outweigh the importance of the EGSs’ ability to make a profit serving those customers, at the expense of the other ratepayers.”<sup>58</sup>

As stated by Judge Leadbetter in granting the stay of PECO’s previous CAP shopping plan:

Petitioners have made a persuasive showing that at least a subset of CAP customers will suffer irreparable harm if the stay is denied. CAP customers are those whose household incomes are at or near the Federal Poverty Level. As Petitioners point out, these customers are exceedingly low income, economically vulnerable persons. If they are encouraged to shop for generation suppliers in the open market, some of these customers, may, by failing to read or perhaps to understand the “fine print,” select plans with low introductory rates which escalate dramatically after a fixed period, causing them to incur bills which they simply cannot afford.....those who end up with significantly increased rates could face disastrous economic consequences which could not likely be undone.....<sup>59</sup>

When the Pennsylvania General Assembly enacted the Choice Act in 1996, it was concerned about choice and affordability, not choice or affordability. Indeed, the ability of low-income households to continue to afford electricity in a competitive environment was a core concern of the Act’s drafters.<sup>60</sup> As a means of addressing these concerns, the General Assembly

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<sup>56</sup> PPL CAP Shopping ID at 61-62 (internal citations omitted) (emphasis added).

<sup>57</sup> TURN St. No. 1-SR at 8.

<sup>58</sup> PPL CAP Shopping ID at 61.

<sup>59</sup> Coalition for Affordable Util. Servs. & Energy Efficiency in Pa. (CAUSE-PA) et al. v. Pa. PUC, No 445 CD 2014, at 2-3 (March 28, 2014) (unpublished mem. op).

<sup>60</sup> See 66 Pa. C.S. §§ 2802 (10), (17); 2804 (9).

specifically tasked the Commission with the responsibility of ensuring that the programs intended to facilitate the affordability of electric service are appropriately funded and available in each electric distribution territory.<sup>61</sup> The universal service provisions of the Choice Act tie the affordability of electric service to a customer's ability to pay for that service,<sup>62</sup> and the statutory goals of universal service programs are to be achieved through the enactment, establishment and maintenance of policies, practices and services that help low-income customers maintain their electric service.<sup>63</sup> In this proceeding, the position of CAUSE-PA, the OCA, and TURN et al. is the only position advanced which meets all of these concerns.

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<sup>61</sup> 66 Pa. C.S. § 2804 (9).

<sup>62</sup> 52 Pa. Code. § 54.73.

<sup>63</sup> Id.

## VI. CONCLUSION

Based on the evidence in the record of this proceeding, it is apparent that unrestricted CAP shopping would produce devastating results for vulnerable PECO CAP households. Furthermore, the record “provides substantial reasons why there is no reasonable alternative” to eliminate the impending and inevitable harm that would befall CAP and non-CAP ratepayers. Thus, “‘competition needs to bend’ to ensure that adequately-funded, cost-effective, and affordable programs [exist] to assist customers who are of low-income to afford electric service.”<sup>64</sup> RESA’s arguments to the contrary are wholly unsupported and without merit. We should not “wait and see” the extent of the harm which is certain to result from unrestricted CAP shopping, especially given that the CAP-SOP provides a reasonable means of preventing such harm from occurring. As such, CAUSE-PA urges the Commission to adopt the CAP-SOP proposal in full, without modification.

Respectfully submitted,

**PENNSYLVANIA UTILITY LAW PROJECT**  
*Counsel for the Coalition for Affordable Utility  
Services and Energy Efficiency in Pennsylvania  
(CAUSE-PA)*



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Patrick M. Cicero, Esq., PA ID: 89039  
Elizabeth R. Marx, Esq., PA ID: 309014  
Joline Price, Esq., PA ID: 315405  
118 Locust Street  
Harrisburg, PA 17101  
Tel.: 717-236-9486  
Fax: 717-233-4088  
pulp@palegalaid.net

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<sup>64</sup> CAUSE-PA et al., 120 A.3d at 1104.