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August 25, 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 Reply 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 Reply 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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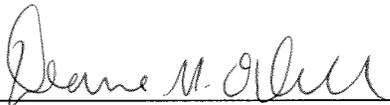
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Dated: August 25, 2016

**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 :

**REPLY BRIEF OF
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I. INTRODUCTION

The issue reserved for litigation in this proceeding is whether the Pennsylvania Public Utility Commission (“Commission”) should further 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%.

RESA urges rejection of the proposal offered by the Proponents of CAP Shopping Restrictions¹ and supports PECO’s position to evaluate PECO’s CAP Shopping Plan after it has been implemented. In its Main Brief, RESA anticipated and fully addressed many of the arguments in opposition to its preferred approach and incorporates those arguments herein. The purpose of this Reply Brief is to respond to a few of the issues raised in the Main Briefs by the Proponents of CAP Shopping Restrictions.

First, the Proponents of CAP Shopping Restrictions have failed to satisfy the burden of proof clearly established by the Commonwealth Court in its evaluation of CAP shopping restrictions. Contrary to the view of TURN et al. and CAUSE-PA that RESA had the burden to engage in a negotiation of CAP shopping restrictions, the Commonwealth Court has clearly established that the burden is on the proponents of CAP shopping restrictions to demonstrate that there are substantial reasons why there are no reasonable alternatives to the proposed restriction.² The Proponents of CAP Shopping Restrictions rely on incomplete data from other utilities in the

¹ The “Proponents of CAP Shopping Restrictions” include the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (collectively, “TURN et al.”) and the Office of Consumer Advocate (“OCA”).

² TURN et al. Main Brief at 32; CAUSE-PA Main Brief at 37.

Commonwealth to support their proposed restrictions on competition because no data for PECO exists.³ Reliance on data from other utilities is inappropriate, especially as the issue of PECO CAP shopping has already been fully litigated.

Second, the record provides no support for revisiting the Commonwealth Court’s denial of EGS price caps for PECO CAP customers.⁴ The General Assembly directed that all customers have the right to freely shop and the Commonwealth Court made clear that proposals to restrict this right must be given careful consideration. RESA submits that the Proponents of CAP Shopping Restrictions have failed to meet that burden and have offered nothing new here to support a departure from the Commonwealth Court’s recent decision on PECO CAP shopping restrictions.⁵

Finally, to address RESA’s concern that it would be unfair for EGSs to pay a referral fee for CAP SOP customers, as it would not have available the customer acquisition benefits of the current SOP, TURN et al. and OCA suggest that it might be possible for EGSs to avoid the referral fee for CAP SOP customers. RESA offers that this suggestion does not resolve its concern regarding the price ceiling aspect of the proposal. As explained below, their suggestion may result in increased costs to all residential and small commercial default service customers and all EGSs, even those that are not participating in the SOP due to the unique cost recovery mechanism PECO uses for its SOP.

³ CAUSE-PA St. No. 1 at 27.

⁴ RESA Main Brief at 14-17.

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

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. REPLY TO MAIN BRIEFS

A. **The Proponents of CAP Shopping Restrictions Have Not Satisfied Their Burden of Proof**

The Commonwealth Court, in evaluating PECO CAP Shopping Restrictions, clearly set forth the legal analysis that is to be applied when interpreting the Electricity Generation Customer Choice and Competition Act (“Competition Act”)⁶ and how it is to be interpreted when there are potentially conflicting objectives (i.e. right to shop and maintaining affordability of electricity).⁷ That legal analysis recognizes that, while the “overarching goal” of the Competition Act is competition, the Commission does have the authority to “bend” competition to further other important aspects of the Competition Act.⁸ Such “bending” of competition, however, may only occur upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.⁹

Notwithstanding this clear guidance, the Proponents of CAP Shopping attempt to evade their burden of proof in two ways. First, they fault RESA for not providing its own proposal to restrict CAP shopping. As discussed below in Section 1, RESA has no burden to propose restrictions on CAP shopping. Second, they focus on data from other service territories to support their claimed need for the restrictions. However, as discussed below in Section 2, the

⁶ 66 Pa. C.S. §§ 2801-2812.

⁷ *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

⁸ *Commonwealth Court CAP Shopping Decision* at 1101, 1104, 1106, 1107-1108; RESA Initial Brief at 14-15.

⁹ *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

Proponents of CAP Shopping Restrictions have not provided any PECO specific evidence and have failed to offer any evidence to upend the Commonwealth Court’s decision to reject price caps. Because the Proponents of CAP Shopping Restrictions have failed to satisfy their burden of proof, their proposals must be rejected.

1. RESA Is Not Legally Required to Propose CAP Shopping Restrictions

TURN et al. and CAUSE-PA argue that RESA has an obligation to propose its own restrictions on CAP shopping in this proceeding.¹⁰ However, RESA did not propose to restrict the right of CAP customers to shop and, therefore, has no obligation to offer specific restrictions or modify restrictions offered by other parties. RESA did offer its expert witness testimony about the restrictions supported by the Proponents of CAP Shopping Restrictions and explained why those restrictions will likely result in no shopping opportunities for CAP customers.¹¹ TURN et al. and CAUSE-PA assert that the testimony presented by RESA Witness White which demonstrates why few EGSs would be willing to participate in the CAP-SOP is “without merit” and should “carry no weight.”¹² Their view, however, does not negate the validity of Mr. White’s experience as an industry expert who works for an EGS and is authorized to present testimony for RESA members, which include many EGSs operating in Pennsylvania. Mr. White’s testimony contains substantial evidence supporting his view that the CAP-SOP will not succeed because EGSs will choose not to participate.

RESA’s decision to not engage in a tweaking of the initially proposed restrictions does not (because it cannot) alter the burden the Proponents of CAP Customer Restrictions must

¹⁰ TURN et al. Main Brief at 32; CAUSE-PA Main Brief at 37.

¹¹ RESA Main Brief at 18.

¹² CAUSE-PA Main Brief at 36; TURN et al. Main Brief at 29.

satisfy. As clearly required by the Commonwealth Court, the Proponents of CAP Shopping Restrictions had the burden to demonstrate that there are no reasonable alternatives to the proposed restriction on competition and they failed to do so. 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.¹³ It establishes no requirement for other parties to engage in a negotiation of the type of restrictions to place on CAP shopping just because a party proposes its own restrictions.

For these reasons, the Proponents of CAP Shopping Restrictions have failed to meet their legal burden and the proposed restrictions on shopping as detailed in their proposal must be rejected.

2. The Proponents of CAP Shopping Restrictions Have Provided No PECO Specific Evidence to Support Their Position

Notwithstanding the Commonwealth Court’s guidance, CAUSE-PA, OCA and TURN et al. assert their own legal threshold that should be applied to the litigated issue. The Proponents of CAP Shopping Restrictions fail to acknowledge (and consider) the appropriate “weight” that is to be given to the right of 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)¹⁴ and the need to balance this with other “important” (not overarching and not central) concerns,¹⁵ CAUSE-PA essentially argues that affordability must give way to competition.¹⁶ OCA argues that any conditions on the right of CAP customers

¹³ *Commonwealth Court CAP Shopping Decision* at 1104.

¹⁴ *Commonwealth Court CAP Shopping Decision* at 1100-1101.

¹⁵ *Commonwealth Court CAP Shopping Decision* at 1103, 1106.

¹⁶ CAUSE-PA Main Brief at 30-31, 33-34.

to shop may be imposed provided “those conditions are designed to meet the statutory standards of maintaining affordability, cost effectiveness....”¹⁷ TURN et al. incorrectly claims that conditions may be placed on CAP shopping so long as the conditions provide “substantial reasons why competition needs to bend,” and ignores the Commonwealth Court’s directive that there be “substantial reasons why there is no reasonable alternative so competition needs to bend.”¹⁸ In their Main Briefs, TURN et al. and CAUSE-PA claim that the proposed restrictions are the only reasonable alternative¹⁹ which is irreconcilable with the fact that implementation of shopping for PECO CAP customers has already been fully vetted and reasonable alternative restrictions have already been determined through proceedings at the Commission and at the Commonwealth Court.²⁰

The Proponents of CAP Shopping Restrictions’ primary focal point to justify their proposal is data submitted from other service territories where CAP customers are permitted to shop. This data, however, does not satisfy the legal burden of the Proponents of CAP Shopping Restrictions. Even if the information related to the experiences of other 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.

As explained in RESA’s Main Brief, there is no evidence in the record about how PECO’s customers have been harmed by allowing CAP customers to exercise their right to

¹⁷ OCA Main Brief at 3-4.

¹⁸ TURN et al. Main Brief at 31-32.

¹⁹ TURN et al. Main Brief at 32, fn. 22; CAUSE-PA Main Brief at 37.

²⁰ RESA Main Brief at 10-12. OCA refers to the proposal as merely a “reasonable measure,” which RESA submits falls short of the legal standard. OCA Main Brief at 22.

shop.²¹ Data from other utilities is not instructive for PECO as the CAP programs of various utilities are unique as is the competitive market structure within each utilities' service territory. PECO's service territory is unique in that: (1) PECO CAP customers are not currently eligible to shop for their electric generation supply; and (2) the issue of PECO CAP shopping has already been fully litigated. Even if the data from other service territories were viewed as supporting restrictions on shopping (which it does not), the initial legal burden is not simply to prove harm to customers and then implement restrictions on shopping. Rather, the initial burden includes showing why there are no reasonable alternatives to restricting competition.²² Consequently, the data presented does not justify the restrictions proposed on PECO CAP customer shopping.

B. The Proponents of CAP Shopping Have Failed to Offer Evidence to Upend the Commonwealth Court's Decision to Reject Price Caps

The Proponents of CAP Shopping Restrictions raise no new issues in this proceeding that warrant revaluation of shopping restrictions for PECO's CAP customers. RESA supports PECO's position that the appropriate time to evaluate its CAP Shopping Plan is after it has been implemented.²³ Furthermore, it would be premature to deny PECO CAP customers the ability to shop for their electricity when there is a path forward to provide those customers access to the competitive market. The litigated CAP Shopping Plan presents a reasonable alternative to the restrictions to the proposals of the Proponents of CAP Shopping Restrictions. The Proponents of CAP Shopping Restrictions provide no legitimate basis to upend the Commonwealth Court's

²¹ RESA Main Brief at 14.

²² *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

²³ PECO Main Brief at 9.

decision that a price ceiling would be anti-competitive and limit the choices available to PECO CAP participants.²⁴

PECO's CAP program was recently redesigned and was evaluated during the same time period in which the Commission directed PECO to permit CAP customers to shop. In CAUSE-PA Witness Geller's words, this consideration "was an essential component of the lengthy CAP re-design mediation that took place over months in 2014-2015."²⁵ The redesign of PECO's CAP program does not support the current shopping restrictions proposed in this proceeding, as PECO CAP shopping has already been fully vetted. Significantly, all of the Proponents of CAP Shopping Restrictions participated in the redesign proceeding and were signatories to the Joint Petition for Settlement that was approved by the Commission.²⁶ The Proponents of CAP Shopping Restrictions should have addressed concerns regarding the design of PECO's CAP structure in that proceeding. Furthermore, PECO's recent redesign of its CAP program is in line with the Commission's view that CAP benefits should be made portable, ensuring that CAP customers may enjoy the benefits of the competitive market.²⁷ RESA reiterates its support for PECO's position that the appropriate time to consider design changes to PECO's CAP Shopping Plan is after it has been implemented.²⁸

Moreover, RESA the CAP shopping restrictions proposed in this proceeding are inappropriate as they are significantly more onerous than the price caps already rejected by the

²⁴ *Commonwealth Court CAP Shopping Decision* at 1107.

²⁵ CAUSE-PA St. No. 1-SR at 6-7; RESA Main Brief at 16.

²⁶ *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 (Order entered July 8, 2015).

²⁷ RESA Main Brief at 15.

²⁸ PECO Main Brief at 9.

Commonwealth Court for PECO CAP customers.²⁹ The Commonwealth Court ruled that the Commission relied on record evidence to support its conclusion that an EGS price ceiling for PECO CAP customers would be anti-competitive and that it would restrict shopping choices available to PECO's CAP customers.³⁰ Importantly, what is proposed here is significantly more onerous than what the Commonwealth Court considered. The proposal of the Proponents of CAP Shopping Restrictions is significantly worse than the proposal evaluated by the Commission and Commonwealth Court. The proposal before the Commonwealth Court would have required EGSs to only charge CAP customers a price for generation supply at or below the prevailing PTC. In contrast, the current proposal would require EGSs to offer a price 7% below the PTC. In addition, if the PTC drops more than 7% at any time during the customer's enrollment, the EGS would have to re-rate the customers to the new lower price or return the customer to default service.³¹ Requiring an EGS to provide service at a guaranteed 7% off the PTC will not result in EGSs being willing to offer that product for the reasons explained on the record by RESA's expert witness.³² As discussed above, nothing new has been provided on the record in this proceeding to justify imposing even more onerous restrictions on shopping than those already rejected by the Commission and the Commonwealth Court.

C. The Cost Structure of the Standard Offer Program Creates the Risk that If Not Enough EGSs Participate, Then Costs will Be Spread to Customers and All EGSs Through PECO's Purchase of Receivables Program

²⁹ *Commonwealth Court CAP Shopping Decision* at 1108-1109.

³⁰ *Commonwealth Court CAP Shopping Decision* at 1107.

³¹ CAUSE-PA St. No. 1 at 32.

³² RESA Main Brief at 17. EGSs would not choose to provide a steady supply of energy below the PTC and also be required to offer a discount to a future unknown PTC.

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.³³ 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 fees for customers who had already been in the program and are re-enrolling). As RESA explained in its Main Brief, this would further serve as a disincentive for EGSs to provide CAP customers service, especially as, 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 eliminating the customer acquisition benefits of the current SOP.³⁴ In its Main Brief, TURN et al. asserts that OCA's suggestion that "it might be possible for PECO to directly transmit a qualified CAP customer to an EGS that is randomly selected from those willing to serve these customers...thus avoiding the third party enrollment fee" eliminates RESA's concerns regarding the enrollment fee.³⁵ However, OCA's suggestion that it *might* be possible for EGSs to avoid the enrollment in the proposed CAP-SOP does not eliminate RESA's concerns regarding the price cap aspect of the proposal.

Moreover, TURN et al. and OCA's suggestion fails to consider that an elimination of the referral fee could result in requiring all customers and all EGSs (who participate in POR) absorbing greater costs because there are no EGSs participating in the program.³⁶ Since 2014,

³³ RESA St. No. 1-R at 16.

³⁴ RESA St. No. 1-R at 16-17; RESA Main Brief at 18.

³⁵ TURN et al. Main Brief at 30.

³⁶ OCA St. 1-R at 6; CAUSE-PA St. 1-SR at 11.

the SOP has been fully-funded through EGS referral fees. PECO has recommended that if administrative costs are incurred to implement the proposal of the Proponents of CAP Customer Restrictions, that the costs should be recovered in accordance with its existing cost recovery mechanism.³⁷ Currently, PECO recovers SOP costs through an EGS referral fee not to exceed \$30 per enrolled customer, with any remaining costs recovered in the following manner: (1) fifty percent from EGSs through a 0.2% Purchase of Receivables discount; and (2) fifty percent from residential and small commercial default service customers via the Generation Supply Adjustment (“GSA”).³⁸ If the proposal set forth by the Proponents of CAP Shopping Restrictions is approved and greater costs for the program are incurred than can be recognized through the EGS participation fee, then all customers and all EGSs using PECO’s Purchase of Receivables program would experience increased costs due to the CAP-SOP.

This potential result is more than just speculative. For the reasons discussed in RESA’s Main Brief,³⁹ EGSs are not likely to participate in the CAP-SOP. If EGSs do not participate then (in addition to not providing CAP customers with competitive options) the number of “payors” for the program decreases. With no EGSs to pay for the costs of the CAP-SOP, per existing cost recovery mechanisms, these costs will be passed on to all customers and all EGSs.⁴⁰

³⁷ PECO St. No. 5-R at 4.

³⁸ PECO St. No. 5-R at 3-4.

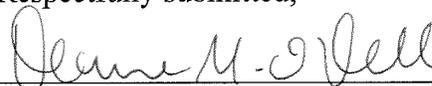
³⁹ RESA Main Brief at 17-19.

⁴⁰ TURN et al. argues that the existing success of the SOP means that the CAP-SOP will be successful. TURN et al. Main Brief at 29. Opinions regarding the success (or failure) of the current SOP have no bearing on whether or not the CAP-SOP would be successful as it would be a separate program. However, the additional programming required to create the CAP-SOP and the potential additional enrollments through the CAP-SOP would drive up the costs of the SOP that would have to be recovered through PECO’s existing cost recovery mechanism. Thus, implementing CAP-SOP would lead to increased costs and if no EGSs participate in the CAP-SOP, those costs would have to be absorbed by all customers and all EGSs who participate in the POR.

III. CONCLUSION

For the reasons set forth in this brief as well as RESA's Main Brief and as supported by the record in this proceeding, RESA recommends that the proposal of the Proponents of Capping Shopping Restrictions 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 be denied. The Proponents of CAP Shopping Restrictions have failed to meet their initial legal burden of showing that no reasonable alternatives exist and have failed to demonstrate why the Commission should reevaluate a fully-litigated issue.

Respectfully submitted,



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