



October 14, 2016

VIA E-FILING

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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 Secretary Chiavetta,

Attached, please find the *Joint Exceptions of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) and the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN et al.)*, which was e-filed with the Commission this afternoon.

Copies are being served pursuant to the attached Certificate of Service.

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

Respectfully,

A handwritten signature in blue ink that reads "Elizabeth Marx".

Elizabeth Marx
Counsel for CAUSE-PA

CC: ALJ Fordham & Parties per attached COS
Office of Special Assistants (OCA), ra-OSA@pa.gov

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

CERTIFICATE OF SERVICE

I hereby certify that on this day, October 14, 2016, I have served copies of the *Joint Exceptions of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) and the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN et al.)* 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

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
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
kkulak@morganlewis.com
bmcglinn@morganlewis.com
Counsel for PECO Energy

Aron J. Beatty, Esq.
Candis A. Tunilo, Esq.
Office of Consumer Advocate
555 Walnut Street
5th floor, Forum Place
Harrisburg, PA 17101-1923
abeatty@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
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
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
abakare@mwn.com
ahylander@mwn.com
Counsel for PAIEUG

Robert W. Ballenger, Esq.
Josie B.H. Pickens, Esq.
Community Legal Services, Inc.
1424 Chestnut Street
Philadelphia, PA 19102
ttran@clsphila.org
rballenger@clsphila.org
jpickens@clsphila.org

Charles E. Thomas III, Esq.
Thomas, Niesen & Thomas, LLC
212 Locust Street, Suite 600
Harrisburg, PA 17101
cet3@tntlawfirm.com
Counsel for Noble Americas Energy

Deanne M. O'Dell, Esq.
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
P.O. Box 1248
Harrisburg, PA 17101
dodell@eckertseamans.com
Counsel for RESA & Direct Energy



Elizabeth R. Marx, PA ID: 309014
Counsel for CAUSE-PA
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
Tel.: 717-236-9486, Ext. 202
Fax: 717-233-4088
emarxpulp@palegalaid.net

October 14, 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 : DOCKET NO. P-2016-2534980
THROUGH MAY 31, 2019 :

JOINT EXCEPTIONS OF

**THE COALITION FOR AFFORDABLE UTILITY SERVICES AND
ENERGY EFFICIENCY IN PENNSYLVANIA (CAUSE-PA)**

AND

**THE TENANT UNION REPRESENTATIVE NETWORK AND THE ACTION
ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA (TURN ET AL.)**

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

COMMUNITY LEGAL SERVICES, INC.

Counsel for TURN et al.

Robert W. Ballenger, Esq., PA ID: 93434
Josie B.H. Pickins, Esq., PA ID: 309422
1424 Chestnut Street
Philadelphia, PA 19102-2505
Tel.: 215-981-3700

October 14, 2016

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I. INTRODUCTION

The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), together with the Tenant Union Representative Network and the Action Alliance of Senior Citizens of Greater Philadelphia (TURN et al), herein referred to as the Joint Parties, file the following Joint Exceptions to the Recommended Decision issued by Administrative Law Judge Cynthia Williams Fordham (ALJ Fordham) in the above captioned proceeding.

The Joint Parties' Exceptions are as follows:

- **Joint Parties' Exception 1:**
ALJ Fordham erred in her Recommended Decision by declining to rule on CAUSE-PA's CAP-SOP proposal, which was squarely before her as part of PECO's DSP IV plan proceeding, and recommending that the matter be referred to the closed DSP III docket, where parties are foreclosed from presenting current record evidence on CAP shopping for full consideration.
- **Joint Parties' Exception 2:**
ALJ Fordham erred in her Recommended Decision when she failed to approve CAUSE-PA's proposal to implement a modified, CAP-specific Standard Offer Program (CAP-SOP), as the parties developed substantial and un rebutted record evidence that the CAP-SOP proposal is necessary and appropriate to balance the interests of CAP customers in gaining access to the competitive market while protecting the financial stability of the CAP program and the economically vulnerable customers enrolled therein, as required by the Choice Act and the Public Utility Code.

The Joint Parties respectfully submit that, based on these critical errors of law and fact, the Commission should reject the recommendation of ALJ Fordham and approve CAUSE-PA's CAP-SOP proposal for inclusion in PECO's DSP IV. In the alternative, and at the very least, due process requires that the Commission reopen PECO's DSP III docket (permitting parties in DSP IV, such as TURN et al., to intervene therein), and certify the record from DSP IV to be considered in the reopened DSP III proceeding for full consideration of parties' positions, as well as the current applicable facts and data.

II. BACKGROUND

The entanglement of PECO's DSP II, III, and IV proceedings is at the heart of the Joint Parties' first Exception in this proceeding. Careful attention must be paid to the procedural and substantive progression of all three proceedings to ensure that the parties' procedural and substantive due process rights are protected.

PECO's DSP II

On January 13, 2012, PECO filed a petition for approval of its Default Service Program for the period of June 1, 2013, to May 31, 2015 (DSP II). After a full on-the-record proceeding, the Commission issued an Opinion and Order on October 12, 2012, approving PECO's DSP II plan, in part, and directing PECO to develop a shopping plan that would allow its CAP customers to purchase generation supply from electric generation suppliers (EGSs).¹

On May 1, 2013, PECO filed a CAP Shopping Plan in compliance with the Commission's October 12, 2012 Opinion and Order in the DSP II proceeding.² On February 24, 2013, the Commission rejected PECO's DSP II CAP Shopping Plan, which included a price ceiling for EGSs serving vulnerable CAP customers. It also rejected OCA's proposed restriction on early termination and cancellation fees for CAP customers. The Commission cited its then-perceived lack of authority pursuant to the Choice Act to impose price restrictions on EGSs, and – in the alternative – the possibility that such restrictions would restrict competition.³

The Joint Parties appealed the Commission's decision to reject PECO's DSP II CAP Shopping plan to the Commonwealth Court. The OCA separately appealed the Commission's

¹ Petition of PECO Energy Company for Approval of its Default Service Plan, Opinion and Order, Docket No. P-2012-2283641 (October 12, 2012).

² Petition of PECO Energy Company for Approval of its Default Service Plan, Opinion and Order, Docket No. P-2012-2283641 (February 24, 2013).

³ Id. at 14-15.

decision. On appeal, the Commonwealth Court held that the Commission erred as a matter of law, and in fact has both the statutory authority to impose price restrictions as well as the corresponding duty and obligation to ensure that Universal Service programs (like PECO's CAP) are appropriately available to economically vulnerable customers, cost effective for the ratepayers who finance the program, and affordable for CAP participants.⁴ Notwithstanding its determination that the Commission erred as a matter of law, the Commonwealth Court did not reverse the Commission's rejection of price restrictions, finding that the Commission's decision to reject the price restrictions was reasonable based on the DSP II record before it at the time. The Commonwealth Court reversed the PUC's rejection of protections against termination/cancellation fees, finding that no substantial evidence supported the PUC's decision.⁵

On April 5, 2016, approximately one month *after* the start of the instant DSP IV proceeding, the Supreme Court of Pennsylvania denied the Commission's Petition for Allocatur regarding PECO's DSP II CAP Shopping plan.⁶

On May 11, 2016, the Commission issued a Secretarial Letter at PECO's DSP II docket requiring PECO to "file a rule revision to its CAP Shopping Plan in its current DSP III consistent with the Commonwealth Court's Order."⁷

On July 19, 2016, PECO filed a letter at the DSP II docket in response to the Commission's Secretarial Letter, explaining that it planned to file a rule revision to the DSP III docket by September 1, 2016.⁸

⁴ Coalition for Affordable Util. Servs. & Energy Efficiency in Pa, et al. v. Pa. Pub. Util. Comm'n, 120 A.3d 1087 (Pa. Commw. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016) (hereinafter CAUSE-PA et al.).

⁵ Id.

⁶ Id.

⁷ Petition of PECO Energy Company for Approval of its Default Service Plan, Secretarial Letter, Docket P-2012-2283641 (May 11, 2016).

⁸ Petition of PECO Energy Company for Approval of its Default Service Plan, PECO Letter, Docket P-2012-2283641 (July 19, 2016).

On September 1, 2016, PECO filed a second letter at the DSP II docket, which explained that PECO was in the midst of implementing its new CAP Program, the Fixed Credit Option (CAP-FCO), and requested to postpone implementation of its CAP Shopping rule revision until April 14, 2017 – just six weeks before PECO’s DSP III Plan expires and its DSP IV begins.

PECO’s DSP III

PECO’s DSP II expired on May 31, 2015, and PECO’s DSP III – which was fully litigated *without consideration of any aspects of CAP shopping, due to the then-pending appeal in DSP II and the existing stay to the implementation of CAP shopping* – went into effect on June 1, 2015, and remains effective through May 31, 2017.⁹ CAUSE-PA was a party to the DSP III proceeding, *but TURN et al. was not.*¹⁰

As noted above, the Commission issued a Secretarial Letter at PECO’s DSP II docket, requiring PECO to file a CAP Shopping rule revision at its DSP III docket. However, PECO requested to postpone implementation of any CAP Shopping rule revisions until April 14, 2017 – just over a month before DSP IV is set to begin.

⁹ Petition of PECO Energy Company for Approval of its Default Service Program for the Period From June 1, 2015 through May 31, 2017, Opinion and Order, Docket No. P-2014-2409362 (Dec. 4, 2014).

¹⁰ TURN et al. explained in its Main Brief why it did not intervene in DSP III, and why consideration of CAP Shopping in DSP III, to which they were not a party, presents significant Due Process concerns:

As the Commission is no doubt aware, TURN *et al.* were joint petitioners in the PECO CAP Shopping Case, arguing that case before the Commonwealth Court, and ultimately obtaining clear guidance from the Commonwealth Court that corrected the PUC’s misunderstanding and misapplication of the Choice Act in PECO’s DSP II proceeding. However, because of the pendency of that litigation in Commonwealth Court, TURN et al. did not intervene in PECO’s DSP III, because the issues of CAP shopping could not be addressed in DSP III while the Commonwealth Court’s supersedeas was in effect and that litigation was ongoing. Accordingly, proceeding in PECO’s DSP III with the consideration of CAP Shopping proposals presents a significant likelihood of impairment of TURN *et al.*’s due process rights.

TURN et al. MB at 15-16.

PECO's DSP IV

The instant proceeding was initiated on March 17, 2016, when PECO filed a petition for approval of its Default Service Program for the period of June 1, 2017 through May 31, 2019 (DSP IV). PECO's DSP IV set forth the terms and conditions under which it will procure default service supply to provide default service to non-shopping customers, as required by the Choice Act and the Commission's regulations.¹¹

It is significant to note, again, that the Petition for Allocatur to the Supreme Court in the DSP II CAP Shopping Plan was denied on April 5, 2016. (See above)

On April 12, 2016, Administrative Law Judge Cynthia Williams Fordham issued a Prehearing Order establishing a Prehearing Conference for April 22, 2016.

On April 19, 2016 – approximately one month before the Secretarial Letter was filed in DSP II – CAUSE-PA filed a Petition to Intervene, in which it specifically identified its intention to address the issue of CAP customer shopping in this proceeding:

Any proposals PECO or other parties may present in the context of this proceeding to allow CAP customers to shop for generation supply. CAUSE-PA has concerns about any CAP shopping plan that allows CAP customers to pay more than the Default Service price for electric generation supply. Evidence in service territories where CAP customers shop for generation supply shows that CAP customers, as well as the residential ratepayers who pay for the CAP program, are significantly harmed by this practice and are paying millions of dollars per year without any added benefit to CAP customers or the CAP program as a whole.

(CAUSE-PA Pet. Intervene at ¶ 11.b).

On April 22, 2016, ALJ Fordham presided over the Prehearing Conference, and granted CAUSE-PA's Petition to Intervene. At no time did any party object to the inclusion of CAP Shopping in this proceeding, nor did ALJ Fordham narrow the issues in the proceeding to exclude CAP Shopping.

¹¹ 52 Pa. Code §§ 54.181-54.189; 52 Pa. Code §§ 69.1801-69.1817.

On May 11, 2016, the Commission made its first critical intersection between DSP II, III, and IV when it issued a Secretarial Letter at the DSP II docket ordering PECO to file a rule revision in its DSP III to allow for CAP Shopping. The Commission did not mention the pending DSP IV, and therefore did not preclude CAP shopping issues from being addressed in DSP IV, nor did it identify any issues which could arise from inserting the issue of CAP Shopping into DSP III after DSP IV proceedings had begun.

Two days later, on May 13, 2016, TURN *et al.* filed its Petition to Intervene in DSP IV. In light of the Supreme Court's denial of Allocator, and the May 11, 2016 Secretarial Letter, ALJ Fordham determined that TURN *et al.* had shown good cause to intervene after the April 19, 2016 deadline, and granted TURN *et al.*'s intervention in DSP IV.

On June 3, 2016, CAUSE-PA, the OCA, the OSBA, and RESA submitted direct testimony. CAUSE-PA submitted CAUSE-PA Statement 1, the Direct Testimony of Harry Geller, which included a proposal for a CAP shopping platform (CAP-SOP) designed to allow CAP customers access to the competitive market while protecting CAP customers and other residential ratepayers from the clear and demonstrated negative financial impacts of unrestricted electric shopping. (RD at 36-37; CAUSE-PA MB at 11). The OCA, OSBA, and RESA also submitted Direct Testimony on June 3, 2016.

On June 24, 2016, PECO, the OCA, and RESA submitted rebuttal testimony. The OCA supported CAUSE-PA's CAP-SOP proposal,

On July 8, 2016, CAUSE-PA, the OCA, TURN *et al.*, and RESA submitted surrebuttal testimony. TURN Statement 1-SR, Surrebuttal Testimony of Philip A. Bertocci, supported CAUSE-PA's CAP-SOP proposal and submitted, among other things, that:

PECO's CAP shopping proposal should not be subject to approval in its DSP III, when the evidence showing the need for program protections is properly before the Commission in this DSP IV. PECO's CAP shopping plan should not be implemented on the basis of the DSP III record, when this DSP IV record demonstrates the harm that will befall low income CAP customers entering the competitive market without adequate price protections and termination/cancellation fee prohibitions.

(TURN St. 1-SR at 5-6).

A hearing was held on July 14, 2016, at which all of the parties' testimony and respective exhibits and attachments were entered into the record by stipulation or verification.¹² No party conducted cross-examination of any witnesses at the hearing and no party raised any objection to the testimony of CAUSE-PA or TURN et al. ALJ Fordham did not take any action, *sua sponte*, to indicate that consideration of CAP Shopping was beyond the scope of PECO's DSP IV.

On September 23, 2016, ALJ Fordham issued a Recommended Decision. Parties were served with the Recommended Decision on October 4, 2016. With respect to CAP Shopping in DSP IV, the Recommended Decision held:

Although CAUSE-PA, the OCA and TURN et al. make valid points about CAP Shopping, PECO did not submit a CAP Shopping Plan in this proceeding. Based on the Secretarial Letter, PECO is filing its plan in another proceeding. It is important that PECO be allowed to present its plan before a ruling is made. Furthermore, if the undersigned ruled on the proposal submitted in this proceeding, it might conflict with a ruling in the other proceeding. The undersigned recommends that PECO's proposal to file its plan in other proceeding be approved. Consequently, the undersigned will not address the CAP Shopping issue in this proceeding.

(RD at 57-58).

¹² The default service program and procurement issues that were the genesis of this proceeding, as well as various other competitive market issues, have been settled by various parties and are the subject of a Joint Petition for Partial Settlement that was filed on July 28, 2016. The Joint Parties have not joined in the Partial Settlement, but did not object to the proposed settlement of those issues..

As explained throughout, the Joint Parties assert that ALJ Fordham erred by not issuing a decision on the issue of CAP Shopping in DSP IV and by failing to approve CAUSE-PA's CAP-SOP, which was supported by substantial and un rebutted record evidence.

III. EXCEPTIONS

- A. **Joint Parties' Exception 1: ALJ Fordham erred in her Recommended Decision by declining to rule on CAUSE-PA's CAP-SOP proposal, which was squarely before her as part of PECO's DSP IV plan proceeding, and recommending that the matter be referred to the closed DSP III docket, where parties are foreclosed from presenting current record evidence on CAP shopping for full consideration.**

The procedural progression of the CAP Shopping issue, which was laid out in detail in the background section above, is critical to understanding the seriousness of the error ALJ Fordham made in refusing to decide the CAP Shopping issues in this proceeding. ALJ Fordham did not just set aside the issue for another litigated proceeding in which parties would have the opportunity to fairly present their case, subject to the rules of evidence, including hearsay and cross-examination, with regard to the appropriate structure of CAP Shopping *in PECO's DSP IV*. She extricated the entire issue of DSP IV CAP Shopping from the currently litigated proceeding – where parties expended a considerable amount of time and resources to present *current* data and evidence for the record and brief the issue for the Commission's decision. She then recommended – though did not ensure – that the issue of DSP IV CAP Shopping be referred to a closed docket for PECO's soon-to-expire DSP III – where it appears the Commission may limit party¹³ participation to unverified comments that are not subject to cross examination. As the

¹³ It remains unclear whether TURN *et al.* would even be permitted to participate in the DSP III process, as they were not a party to that proceeding. As TURN *et al.* explained in its Main Brief:

Although TURN *et al.* would, and if necessary will, submit comments in response to PECO's 'proposed rule revision,' the Commission's proposal, set forth in the Secretarial Letter, nonetheless presents a due process quandary. For example, would TURN *et al.* have standing to appeal the Commission's decision on CAP Shopping in PECO's DSP III solely on the basis of its submission of comments and without being a party/intervenor? Having directed PECO to submit a proposed

Joint Parties have consistently asserted, this course of action would truncate the procedural due process necessary with regard to this critically important issue. (See TURN et al. MB at 16; CAUSE-PA MB at 21-25; see also TURN *et al.* St. 1-R at 16 (“Because of the statutorily recognized importance of low income protections, confirmed by the Commonwealth Court, proposals that would diminish those protections must be fully vetted in an on the record proceeding.”)).

The CAP Shopping filing which PECO is required to make at the DSP III docket originated in PECO’s DSP II. It was litigated in 2013, and then became the subject of lengthy appeals. However, at no time was the issue of DSP II CAP Shopping subject to further evidentiary proceedings.

Utilities are required to submit Default Service Program Plans every 2-3 years, unless otherwise ordered by the Commission.¹⁴ This periodic review of a utility’s default service programs ensures that the utility’s plans account for and respond to a current and more relevant state of market realities, facts, and law. The data available conclusively shows the financial impact of unrestricted CAP Shopping on CAP and non-CAP customers alike has drastically worsened since 2013, when PECO’s DSP II CAP Shopping Plan was first reviewed by the Commission. As discussed below in Exception 2, the unrebutted data presented on the record in *this* proceeding demonstrates that substantial financial harm is occurring in every service territory which allows CAP customers to shop without restriction – to the tune of several million

rule revision, is the Commission obligated to reopen the record in DSP III, in order to allow the parties, and any new intervenors such as TURN et al., to develop evidence for or against proposed rule revisions? Although these specific issues may not be presently before the Commission, they should nonetheless inform its decision concerning the necessity of addressing CAP shopping issues in this DSP IV proceeding.

TURN et al. MB at 16, n.16.

¹⁴ See 52 Pa. Code § 54.185(d)-(e).

dollars each and every year. (CAUSE-PA MB at 28-29). Likewise, PECO's CAP structure during DSP IV will also be radically different from its CAP structure during DSP II. (CAUSE-PA MB at 15-18, 22-23). As explained by CAUSE-PA in its Main Brief, "DSP IV is the first opportunity in which the Commission will have the opportunity to review the relationship of the new FCO with PECO's DSP IV design." (CAUSE-PA MB at 22).

Refusing to rule on the issue of CAP Shopping in DSP IV, as recommended by ALJ Fordham in her Recommended Decision, would deprive the Joint Parties of the ability to pursue a rule or order, to present evidence, and to obtain a decision based on current facts and circumstances. In short, refusing to rule on the merits of CAP Shopping in DSP IV would deprive the Joint Parties of due process – changing the rules of the game after the game is played. By ALJ Fordham's own account, the Joint Parties and OCA raised "valid points" about CAP Shopping in the context of PECO's DSP IV. (RD at 56). And the Joint Parties assert that those valid points must be considered by the Commission in *this* proceeding, where a record has been fully developed, the parties have thoroughly engaged in an on-the-record proceeding, and the decision was properly presented to the Commission for a decision.

1. *PECO – along with the other parties to this proceeding - had ample time and opportunity to present a CAP Shopping plan in DSP IV.*

ALJ Fordham opined in her RD that it was proper to forego ruling on CAUSE-PA's CAP-SOP proposal as part of PECO's DSP IV because "it is important that PECO be allowed to present its plan before a ruling is made." (RD at 57-58). PECO had ample time to present a CAP Shopping plan for its DSP IV in its initial Petition and Plan filing, in its rebuttal testimony, in its surrebuttal testimony, or in its rejoinder testimony. But PECO chose not to do so, instead relying on its argument that the Parties should not be afforded a decision on CAP Shopping in DSP IV,

and should instead be confined to whatever decision is made in the future in the closed docket DSP III proceeding.

ALJ Fordham's refusal to consider CAUSE-PA's properly presented proposal – especially in light of her explicit acknowledgement that “CAUSE-PA, the OCA, and TURN et al. make valid points about CAP Shopping”, (RD at 57), constitutes a critical error. The applicable standards of review clearly contemplate that non-utility parties are entitled to raise proposals in litigated proceedings.¹⁵ There is no legal basis for the PUC to conclude that, in the context of a PECO's DSP IV proceeding, and without any objection or other articulated basis, a proponent of a rule or order may simply be disregarded. To the contrary, the Joint Parties are entitled to a ruling on the merits of the CAP shopping proposals and consideration of the evidence, which has been a recognized and unchallenged aspect of this DSP IV proceeding since CAUSE-PA intervened on April 19, prior to the Commission's May 11 Secretarial Letter.

The simple fact of the matter is that CAP shopping program proposals were properly raised in this proceeding without objection. That the proposals were raised by parties other than PECO matters only for the burden of proof, but not for the propriety of the arguments' placement in this proceeding. It is a manifest error for ALJ Fordham to punt these issues to a forum where, by all indications, the evidentiary record will remain closed, participation will be limited to the submission of unverified, unsworn comments, and stakeholders who were not a party to DSP III may be denied intervention. At a minimum, if the Commission is going to consider CAP

¹⁵ See 66 Pa. C.S. § 332(a).

Shopping in PECO's DSP III, the record of this proceeding must be transferred and considered on the record therein, and the parties to this proceeding must be permitted to intervene.¹⁶

2. *A ruling on CAP Shopping for DSP IV will not improperly interfere with a compliance decision on CAP Shopping for DSP III.*

The second and final rationale ALJ Fordham cites as support for her decision to forego a decision on DSP IV CAP Shopping is that “if the undersigned ruled on the proposals submitted in this proceeding, it might conflict with a ruling in the other proceeding [DSP III].” (RD at 57-58). This justification for inaction is without merit. By design, a ruling with respect to a prior Default Service Plan will not interfere with a ruling on a new Default Service Plan. Each successive plan proceeding is based on the facts and circumstances applicable at the time of the Plan's filing, and changes implemented in the DSP IV program in no way conflict with approved provisions in the DSP III program, which is effective for a different period. In other words, PECO's DSP II Plan was effective only for the DSP II Plan period (June 1, 2013, to May 31, 2015) and PECO's DSP III Plan will be effective only until May 31, 2017. To assert that the Order and Opinion in a successive, subsequently submitted Plan proceeding could not modify aspects of a previously issued Order in a prior Plan proceedings would result in a stagnant and unchanging Plan – undermining the purpose of periodic plan review. ALJ Fordham's assertion that it would be inappropriate for her decision in DSP IV to conflict with a decision in DSP III is, thus, without merit and should be rejected.

¹⁶ Deferring issues raised by parties in an on-the-record proceeding to a subsequent proceeding in which the Commission provides only a right to comment would violate the due process rights of the Joint Parties who raised the issues here. The fact that the Commission may prefer to deal with an issue later rather than now is irrelevant. The issue was presented, evidence was fully developed, no objections or other barriers to consideration of the issue were presented, and the parties fully briefed the issue. The Commission needs to rule on the issue based on the record before it and cannot defer a decision to some unknown time pursuant to some unknown and ad hoc process.

B. Joint Parties' Exception 2: ALJ Fordham erred in her Recommended Decision when she failed to approve CAUSE-PA's proposal to implement a modified, CAP-specific Standard Offer Program (CAP-SOP), as the parties developed substantial and un rebutted record evidence that the CAP-SOP proposal is necessary and appropriate to balance the interests of CAP customers in gaining access to the competitive market while protecting the financial stability of the CAP program and the economically vulnerable customers enrolled therein, as required by the Choice Act and the Public Utility Code.

ALJ Fordham's decision to forego a ruling on CAP Shopping is not only procedurally defective – raising the due process issues discussed above – it also ignores the substantial evidence presented in support of CAUSE-PA's CAP-SOP proposal to stem the certain and substantial harm that will occur to both CAP customers and non-CAP residential ratepayers alike if the Commission fails to require implementation of reasonable price protections in PECO's DSP IV. Rather than reiterate here the lengthy and nuanced arguments set forth in the Joint Parties' Main and Reply Briefs, the Joint Parties will briefly summarize those points here while incorporating the totality of those arguments by reference.

Pursuant to the Electricity Generation Customer Choice and Competition Act (Choice Act), the Commission has both the duty and obligation to ensure that Universal Services, including CAP, are appropriately funded to protect the affordability of electric service for low income customers.¹⁷ Within that duty, the Commission has the corresponding duty to ensure that Universal Services are provided in a cost-effective manner.¹⁸ The Commonwealth Court definitively held that in fulfilling these corresponding duties, the Commission has the legal authority to “bend competition” and impose rules which may restrict CAP customer shopping to protect CAP customers and residential ratepayers from financial harm.¹⁹

¹⁷ 66 Pa. C.S. §§ 2802(10), (17); 2803; 2804(9); see also 52 Pa. Code § 69.265.

¹⁸ Id.

¹⁹ CAUSE-PA et al., 120 A.3d at 1101, 1103-04.

When CAP customers shop without pricing restrictions, either the cost of the CAP program increases, the cost of utility service for CAP customers increases beyond Commission-established affordability levels, or both. (CAUSE-PA MB at 18; TURN MB at 19). This is not speculative. The record in this proceeding shows that harm is occurring to CAP customers and residential ratepayers in every service territory where CAP shopping is allowed. The CAP program in PPL's service territory has suffered a net²⁰ harm of \$2,743,872 every year for nearly four years (January 2012 through October 2015). (CAUSE-PA MB at 27-30; TURN MB at 20-23). When extrapolated over time, unrestricted CAP shopping in PPL's service territory has cost residential ratepayers a **net of \$10.5 million in additional program costs**. (Id.) Substantially similar data was produced in the First Energy Company Service territories. The reported data from that proceeding showed that as of November 2015, more than 77% of Met-Ed's CAP customers, more than 50% of Penelec's customers, and more than 65% of West Penn's CAP customers who are shopping are paying more than the price to compare. (CAUSE-PA MB at 29; TURN MB at 22-23). There is no record evidence that the harm will be any different in PECO's service territory than it is in the PPL and First Energy service territories. (CAUSE-PA MB at 30; TURN MB at 23-24).

Given the substantial and un rebutted evidence of harm to ratepayers as a result of unrestricted CAP shopping, it is critical that the Commission approve CAUSE-PA's CAP-SOP proposal for inclusion in PECO's DSP IV plan. The CAP-SOP is designed to provide CAP customers access to the market based upon a currently existing SOP platform, while protecting the participating households and the non-CAP ratepayers who finance CAP from unreasonable

²⁰ Net impact 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.

and completely preventable risk of financial harm. (CAUSE-PA MB at 31-32; TURN MB at 26-27). The only other position on CAP shopping advanced in this proceeding - to sit by and wait for the harm to befall CAP customers and ratepayers who contribute to the cost of CAP - is simply untenable, as it would allow ratepayers and vulnerable CAP customers to incur substantial, unjustifiable, and wholly preventable costs. (CAUSE-PA MB at 33; TURN MB at 23). Indeed, the CAP-SOP is the only reasonable alternative advanced by the parties to this proceeding that fulfills the duties of the Commission to ensure the affordability of CAP rates and the cost-effectiveness of the CAP program. (Id.)

On the other hand, no other party to this proceeding has mounted a substantiated argument against the CAP-SOP which would outweigh the substantial harm that could result if the proposal were not adopted. RESA's speculative assertions that no suppliers will participate in the CAP-SOP – and that it would be too hard to implement – are belied by the complete lack of data to even suggest that suppliers are not interested in serving CAP customers under the terms of the proposed CAP-SOP. (CAUSE-PA MB at 36; TURN MB at 28-29). Similarly, RESA's assertion that certain undefined non-energy benefits received by CAP shoppers might outweigh the harm to CAP customers and ratepayers is also wholly unsupported by any record evidence. (CAUSE-PA MB at 35-36; TURN MB at 24). Coincidentally, any data which could support RESA's claim is within RESA's – and its members' – sole possession, as they are the entities selling these non-energy benefits, but they produced nothing in this proceeding to make their case. (Id.). Indeed, RESA's position on the value of undefined non-energy benefits lacks any support from, and is at odds with, the letter and intent of the Choice Act.²¹

²¹ “The purpose of the Choice Act is not to make “value-added” products available to customers. The purpose is “to create direct access by retail customers to the competitive market for the *generation of electricity*.” 66 Pa. C.S. § 2802(12) (emphasis added). Furthermore, the Choice Act specifically recognizes that deregulation was intended to be an effective means to control *cost*, not value added services. 66 Pa. C.S. § 2802(5).” TURN MB at 24.

When examining the record in this proceeding, there is ample evidence to support the necessity and the reasonableness of the CAP-SOP and, as such, the proposal has met the evidentiary burden applicable in this case and should be approved by the Commission for inclusion in PECO's DSP IV.

IV. CONCLUSION

For the foregoing reasons, the Joint Parties respectfully request that the Commission reject the Recommendations of ALJ Fordham and approve CAUSE-PA's CAP-SOP proposal, as it was supported by substantial and un rebutted evidence, thereby meeting the applicable evidentiary standard in this proceeding.

Respectfully Submitted,

PENNSYLVANIA UTILITY LAW PROJECT

Counsel for CAUSE-PA



Elizabeth R. Marx, Esq., PA ID 309014
Patrick M. Cicero, Esq., PA ID 89039
Joline Price, Esq., PA ID 315405
118 Locust Street
Harrisburg, PA 17101
Tel.: 717-236-9486

COMMUNITY LEGAL SERVICES

Counsel for TURN et al.



Robert W. Ballenger, Esq., PA ID 93434
Josie B.H. Pickins, Esq., PA ID 309422
1424 Chestnut Street
Philadelphia, PA 19102-2505
Tel.: 215-981-3700