



December 12, 2016

**VIA E-FILE**

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

**Re: Petition of PECO Energy Company for Approval of its Default Service Plan, Docket P-2012-2283641**

Dear Secretary Chiavetta,

Attached, please find the **Joint Reply Comments 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 were e-filed with the Commission this afternoon.

Copies of the attached comments are being served on active parties to this and the other effected dockets (M-2012-2290911; P-2014-2409362; M-2015-2507139; and P-2016-2534980), as evidenced by the attached Certificate of Service.

Finally, please note that a Microsoft WORD version of the Joint Comments is also being provided electronically to James A. Mullins, Louise Fink Smith, and Joseph Magee, as required in the Commission's November 18, 2016 Secretarial Letter.

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

Respectfully,

A handwritten signature in blue ink, appearing to read "Elizabeth Marx", is written above a horizontal line.

Elizabeth Marx  
***Counsel for CAUSE-PA***

CC: James A. Mullins, Esq., Louise Fink Smith, Esq., and Joseph Magee

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITION OF PECO ENERGY :  
COMPANY FOR APPROVAL OF ITS :  
DEFAULT SERVICE PLAN : DOCKET NO. P-2012-2283641  
:

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, December 12, 2016, have served copies of the *Joint Reply Comments 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).

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Respectfully Submitted,



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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITION OF PECO ENERGY :  
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**JOINT REPLY COMMENTS 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.)**

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**December 12, 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 Action Alliance of Senior Citizens of Greater Philadelphia (TURN et al), herein referred to as the Joint Parties, file the following Reply Comments. The Joint Parties' Reply Comments respond to the initial comments of the Retail Energy Supply Association (RESA) and the Final Order of the Commission issued December 8, 2016, in PECO's Default Service Plan IV proceeding at Docket No. P-2016-2534980.

In response to RESA's Comments, the Joint Parties assert that RESA's requests for modifications to PECO's CAP Shopping Plan are inappropriate. In relevant part, its suggestion regarding PECO's use of EDI codes to identify CAP customers – in lieu of having EGSs affirm its intent to serve CAP customers – would undermine PECO's ability to fulfill its obligation to ensure that universal service programs are operated in a cost-effective manner. And, its suggestion that a CAP identifier be included on the Eligible Customer List (ECL) raises significant privacy concerns which, without price and other protections for vulnerable households, would likely lead to abusive red line marketing tactics. Finally, RESA alludes to its persistent claims regarding the purported benefit of so called "value-added" products.<sup>1</sup> RESA provides no support for its conclusory assertions, continues to present no evidence that CAP customers would desire non-energy products, fails to quantify the "value" they supposedly add, and fails to explain how the existence of such products could justify millions of dollars in additional ratepayer costs and increased CAP unaffordability.<sup>2</sup> As explained more thoroughly

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<sup>1</sup> See RESA Cmts at 2.

<sup>2</sup> Because RESA does not elaborate in its Comments on these unsupported claims, the Joint Parties do not address them further herein, but rely instead upon the record, including the Joint Parties briefs, in DSP IV. See CAUSE-PA

below, RESA's recommendations should be denied and its unsupported assertions regarding the competitive market should be ignored.

The Joint Parties' Reply Comments also respond to the Commission's Final Order in PECO's DSP IV proceeding, which was issued on December 8, 2016 – 6 days after the Joint Parties issued their initial Comments and a mere 3 days before these Reply Comments were due. The Commission's Final Order is particularly relevant, as it deferred a decision on CAP shopping to this proceeding and, in response to Joint Parties' exceptions, committed to incorporating the DSP IV record regarding CAP shopping into this proceeding.<sup>3</sup> The Commission clearly and unequivocally stated that it would “consider[] the positions of all interested parties, including all parties to [PECO's DSP IV] proceeding” and committed to

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MB (DSP IV) at 35-36; TURN et al. MB (DSP IV) at 24. The Main Briefs of CAUSE-PA and TURN *et al.*, which were filed in DSP IV, are attached to the Initial Comments of the Joint Parties at Attachments A-1 and B-1.

The stated purpose of the Electricity Generation Customer Choice and Competition Act (Choice Act) is to “create direct access to retail customers to the competitive market for the generation of electricity.” Thus, the non-commodity products mentioned by RESA are not within the purview of the Choice Act, and RESA's concern about CAP customer' 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. There is no intent or specification within the Act that encompasses access to debit cards, toasters, loyalty rewards, or any other attributes that could be included in an EGS price 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. RESA's insistence that these non-commodity products must remain available finds no support in law and, to the extent 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. In the absence of specificity as to how CAP customers and the ratepayers who finance CAP will benefit from the 'value' added by these products, and in the absence of a clear showing that the 'value' outweighs the harm associated with paying rates higher than the PTC, any argument to this end should be rejected.

CAUSE-PA MB (DSP IV) at 36 (quoting CAUSE-PA et al., 120 A.3d at 1103; citing 66 Pa. C.S. §§ 2802(10), (12)).

<sup>3</sup> Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2017 through May 31, 2021, Final Order, Docket No. P-2016-2534980, at 61-63 (Dec. 8, 2016) (hereinafter PECO DSP IV Final Order).

“incorporate the record” developed in DSP IV into the instant proceeding.<sup>4</sup> However, as explained below, the Joint Parties respectfully assert that, to the extent the Commission’s intention is to rely solely upon judicial and official notice, such process would be insufficient, creating additional substantive and procedural defects. Specifically, there have been no findings of fact by the Administrative Law Judge (ALJ) or the Commission on the issue of CAP shopping, and it is unclear how or whether the Commission weighed any of the evidence in the context of the DSP IV proceeding. The Joint Parties assert that the entire CAP shopping record from DSP IV, as well as the record from DSP II, must be considered as a whole. This may have been the Commission’s intent in stating it would “incorporate” the record of DSP IV into this proceeding, but Joint Parties submit that it is not clear from the Commission’s order. Thus, the Joint Parties recommend that the Commission officially certify the record from DSP IV to the instant record, and refer both the DSP II and the DSP IV records back to ALJ Fordham – who presided over both proceedings – for a Recommended Decision on the merits of the CAP Shopping issue. This clarification in procedural approach would ensure that the record in the instant proceeding is complete and that a decision is based on sworn evidence.

The Joint Parties stand on the arguments made in their initial Comments at this docket and, in turn, the positions that each of the Joint Parties took with regard to CAP shopping in PECO’s DSP IV. The Commission’s Final Order in DSP IV does not change the fact that the Commission must decide this issue based on the record evidence, not merely the unverified comments of the parties. As explained at length in our initial Comments, and as presented for the record in DSP IV, overwhelming evidence of long-term harm persists across the state as a result

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<sup>4</sup> Id.

of unrestricted pricing for CAP shopping customers.<sup>5</sup> Without swift and decisive action on the part of the Commission, PECO's residential customers will be subject to the same preventable financial and social harms associated with unrestricted CAP shopping across the state. Thus, in addition to prohibiting *ancillary non-energy fees*, including termination and cancellation fees,<sup>6</sup> it is critical that the Commission impose reasonable price restrictions on CAP shopping.

As explained in our initial Comments, a full and complete record, consisting of sworn testimony, briefs and reply briefs, was developed in DSP IV. The Commission's decision in DSP IV granted the Exceptions of the Joint Parties "to the extent their Exceptions request that we incorporate the record developed in this proceeding into the DSP II proceeding at Docket No. P-

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<sup>5</sup> The documented harms on record in PECO's DSP IV proceeding are in no way unique to Pennsylvania or to specific regions therein. Indeed, on the same day that the initial Comments were filed with the Commission in this proceeding, the New York Public Service Commission initiated an intensive investigation of competitive retail supply, and in so doing issued a scathing condemnation of suppliers' persistent abuses and failure to evolve into a sophisticated market:

After considerable experience with the offering of retail service to mass market customers by ESCOs [EGSs], the Commission has determined that the retail markets serving mass-market customers are not providing sufficient competition or innovation to properly serve consumers. Despite efforts to realign the retail market, **customer abuses and overcharging persist**, and there has been little innovation, particularly in the provision of energy efficiency and energy management services. Commodity price differentiation has not worked, and the market for differentiated services is immature or non-existent. **If ESCOs were truly living up to the promise of their function as innovators, it is expected that there would be much greater variety and transparency in the market for goods and services that supply real consumer energy value, insistence from serious participants on rules that govern against consumer fraud, maturity beyond door-to-door selling, and a consumer base with a much greater degree of satisfaction.** While a well designed market could offer these consumer opportunities, it simply does not exist today. Accordingly, the Commission continues to examine measures that must be taken to ensure that these customers receive valuable services and pay just and reasonable rates for commodity and other services.

See Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, NY PSC Docket Nos. 15-M-0127, 12-M-0476, and 98-M-1343 (Dec. 2, 2016) (emphasis added).

<sup>6</sup> The Commission may be aware that, as publically shown on papowerswitch.com, some suppliers have begun offering products with an "enrollment fee." Public Power, LLC, for example, offers a product within PPL's service territory with a \$.0299per kWh price for three months (after which the rate is variable, of course) and an enrollment fee of \$99. Once the enrollment fee is factored in, an average household using 700 kWh per month pay more than the price to compare for the entire length of the 3-month fixed term. Given marketers' persistent insistence on finding "innovative" ways to obscure the true cost of the energy it offers to customers, **PECO should be required to prohibit all ancillary, non-energy fees that suppliers may charge in the future, including but not limited to cancellation, termination, and enrollment fees.**

2012-2283641.”<sup>7</sup> As such, the Commission must reach a decision on CAP shopping on the basis of the record in DSP IV, as well as the DSP II record, to determine what restrictions are appropriate. As the more recent, and more robust, DSP IV record makes clear, the only reasonable alternative on the record that adequately addresses the Commission’s dual role of ensuring that universal service programs remain available and affordable for CAP customers and other ratepayers while at the same time allowing access to the competitive retail market is the CAP-SOP that was presented in DSP IV.<sup>8</sup> The CAP-SOP is supported by the Joint Parties and the Office of Consumer Advocate in PECO’s DSP IV. A virtually identical CAP-SOP framework was recently approved in PPL Electric’s DSP plan proceeding to stem the well-documented and long-term harm to ratepayers and CAP customers in Northeast and Central Pennsylvania.<sup>9</sup>

## II. BACKGROUND

The Joint Parties incorporate herein by reference the background sections contained in our Initial Comments. In addition, the Joint Parties note that initial Comments were filed on December 2, 2016. Shortly thereafter, on December 8, 2016, a Final Order was issued in PECO’s DSP IV proceeding. In relevant part, the Commission held:

Although we decline, at this time, to address the CAP shopping issue and the proposals set forth herein, we wish to make clear that we have every intention of fully considering the positions of all interested parties, including all parties to this proceeding, regarding PECO’s 2016 CAP Rule Change Filing and the ability of PECO’s CAP customers to shop for competitive generation supply. As set forth in the *May 2016 Secretarial Letter* and the *November 2016 Secretarial Letter*,

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<sup>7</sup> PECO DSP IV Final Order, at 62.

<sup>8</sup> PECO, in the original DSP II proceeding, supported price restrictions for CAP customers, including that CAP customers electing to shop with an EGS should not be charged no more than the price to compare. See Coalition for Affordable Util. Servs. & Energy Efficiency in Pa. (CAUSE-PA) et al. v. Pa. PUC, 120 A.3d 1087, at 1092 (Pa. Commw. Ct. 2015) (hereinafter CAUSE-PA et al.). Joint Parties and the Office of Consumer Advocate continue to support these protections, through the specific platform of the CAP-SOP. See OCA Cmts. at 6.

<sup>9</sup> See CAUSE-PA MB (DSP IV) at 27-30; TURN et al. MB (DSP IV) at 20-26.

PECO's 2016 CAP Rule Change Filing is subject to public comment. CAUSE/TURN and all other interested stakeholders will be free to present their positions on PECO's CAP shopping plan through the submission of comments to the 2016 CAP Rule Change Filing at Docket No. P-2012-2283641. In addition, we will take official notice of the documents constituting the record in this proceeding when we consider PECO's 2016 CAP Rule Change Filing in the proceeding at Docket No. P-2012-2283641, pursuant to 52 Pa. Code § 5.406 relating to public documents, 52 Pa. Code § 5.407 relating to records of other proceedings, and 52 Pa. Code § 5.408 relating to official and judicial notice of fact. We find that this process will address the due process concerns of CAUSE/TURN.

Consistent with the above discussion, we shall adopt the ALJ's recommendation on this issue and deny the Exceptions of the OCA. We shall also grant, in part, the Exceptions of CAUSE/TURN, to the extent their Exceptions request that we incorporate the record developed in this proceeding into the DSP II proceeding at Docket No. P-2012-2283641, and permit TURN *et al.* to participate in that proceeding. In all other respects, the Exceptions of CAUSE/TURN on this issue shall be denied.<sup>10</sup>

### III. REPLY COMMENTS

**a. RESA's recommendations for a "more open flow process" would strip PECO – and the Commission - of the ability to monitor Universal Service costs, and would facilitate the economic redlining of energy markets.**

RESA recommends, in short, that PECO should eliminate its notice requirements for EGSs wishing to serve CAP customers, remove itself from any position of oversight over implementation of CAP shopping protections, and modify its CAP Shopping Plan to: (1) "provide, via EDI, an 'Accept' code which includes a 'CAP' identifier in response to an EGS enrollment request"<sup>11</sup> and (2) "include a flag on its Eligible Customer List ("ECL") for CAP participants." RESA cites to no evidence on the record in DSP II or DSP IV in support of these recommendations.

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<sup>10</sup> PECO DSP IV Final Order at 62. As set forth below, the Commission should certify the record of DSP IV into this DSP II proceeding and refer these records to ALJ Fordham for a Recommended Decision. Joint Parties contend that the Commission's intention to incorporate the record of DSP IV for consideration in this proceeding compels this course of action; the Commission's expressed desire to take official notice pursuant to regulations at 52 Pa. Code § 5.406, 5.407 and 5.408 cannot effectuate this intent and presents additional substantive and procedural ramifications which the Commission should avoid.

<sup>11</sup> RESA Cmts. at 3, 6-7.

RESA's recommendations, standing alone and without necessary price protections, would distance PECO from critical information about and oversight of its universal service program, and would frustrate future efforts by the Commission – or aggrieved ratepayers or CAP customers – to obtain data about and assess the impact of CAP shopping on universal service costs and CAP customer rates. Furthermore, such a result is in direct contravention of the Commonwealth Court's decision, which explicitly recognizes that the Commission is charged with a continuing obligation under the Choice Act to continually assess the impact of CAP shopping on the cost of the CAP program and, in turn, on CAP customers and residential ratepayers.<sup>12</sup>

Joint Parties note that other regulatory bodies have recently observed that if electricity generation suppliers were living up to their promise of innovation, then there would be “much greater variety and transparency in the market for goods and services that supply real consumer energy value [and] insistence from serious [market] participants on rules that govern against consumer fraud.”<sup>13</sup> With its recommendations here, RESA demonstrates that it desires secrecy in the market for its members' products and pledges no allegiance to protect the integrity of the market by ensuring that reasonable rules are in place to protect consumers from financial harm. This is unacceptable and should be rejected by the Commission.

- i. It is reasonable to use a CAP-specific EDI code to communicate CAP enrollment status to an EGS, provided the code does not replace other critical EGS notice requirements in PECO's proposed plan that allow for universal service program oversight.

RESA argues that – rather than impose notice requirements on EGSs (discussed below) – an EDI code should be used to indicate when a supplier has enrolled a CAP customer. RESA

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<sup>12</sup> CAUSE-PA et al., 120 A.3d at 1108 (“the PUC's obligations under the Choice Act with respect to low-income Pennsylvanians are of a continuing nature.”).

<sup>13</sup> See Notice of Evidentiary and Collaborative Tracks and Deadline for Initial Testimony and Exhibits, NY PSC Docket Nos. 15-M-0127, 12-M-0476, and 98-M-1343 (Dec. 2, 2016)

explains that this EDI communication would allow the EGS to either proceed with the enrollment or cancel it.<sup>14</sup> The Joint Parties are not opposed to use of the EDI notification system in this manner. Indeed, an EDI transaction with a CAP identifier could indicate to an EGS that it cannot charge an ancillary (termination, cancellation, or enrollment) fee -- just as it could indicate to an EGS that it cannot charge a customer more than the price to compare.

Nonetheless, as explained more thoroughly below in subpart a.iii, RESA's recommendation to rely solely on the EDI notice for implementation of CAP shopping is insufficient – on its own – to ensure compliance with general price restrictions or the prohibition on termination, cancellation, and other ancillary non-energy fees. Indeed, it would do nothing to protect against suppliers that do not know about or choose to ignore restrictions on CAP shopping. Likewise, such a move would prevent PECO from effectively overseeing the costs of CAP and, in turn, would foreclose the Commission from analyzing the impact of CAP shopping on residential and CAP customers. EDCs – and the Commission – must retain proper oversight and control over CAP shopping to ensure that universal service programs remain accessible and deliver affordable bills to vulnerable Pennsylvanians in a cost-effective manner, as required by the Choice Act.<sup>15</sup> Compliance with reasonable CAP shopping rules cannot be left to unregulated suppliers to implement protections based on receipt of an EDI code without sufficient notice and oversight by PECO and the Commission.

- ii. RESA's recommendation that PECO include CAP enrollment status on the Eligible Customer List opens the door to abusive marketing practices.

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<sup>14</sup> RESA Cmts. at 7.

<sup>15</sup> See CAUSE-PA et al., 120 A.3d at 1101, 03, 08; 66 Pa. C.S. § 2804(9).

RESA argues that its recommendation to include a CAP identifier on the Eligible Customer List (ECL) “would be beneficial because it could permit EGSs to learn of a potential customer’s CAP status prior to marketing and/or undertaking the enrollment process.”<sup>16</sup> But inclusion of a CAP indicator on the ECL is not only procedurally defective, it opens the door to exacerbated marketing abuses and the potential for energy market redlining.

First, the type of personal information disclosed to suppliers and marketers on the ECL was subject to lengthy and protracted litigation over several years.<sup>17</sup> Dozens of interested stakeholders from across the state, with an array of varied interests participated in the ECL proceeding. But the vast majority of the parties to the ECL proceeding are not parties to these proceedings and could not reasonably know or anticipate that the Commission would entertain proposals to expand the list of personal information subject to broad disclosure to hundreds of suppliers in this unrelated proceeding. Indeed, given the history of the ECL litigation, it would be wholly inappropriate for the Commission to now modify the ECL components in this PECO-specific proceeding.

Not only is inclusion of a CAP identifier on the ECL procedurally inappropriate to raise in this context, it is also substantively unpalatable without necessary price protections, and opens the door to marketing abuses and energy market redlining. Indeed, poor communities are often already the target of unscrupulous door-to-door marketing campaigns.<sup>18</sup> If allowed to learn of a customer’s household income *in advance of* making offers, the ECL would facilitate redlining –

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<sup>16</sup> RESA Cmts. at 3, 7-8.

<sup>17</sup> See Interim Guidelines for Eligible Customer Lists, Docket No. M-2010-2183412.

<sup>18</sup> Certainly, the Commission is aware of economically vulnerable customers who have been subjected to high-pressure, misleading door-to-door sales tactics. Such stories are not uncommon. See, e.g., Kerith Gabriel, Energy Scammed: Don’t Get Shocked by Door-to-Door Sales Reps, Phila. Weekly (Nov. 30, 2016), [http://www.philadelphiaweekly.com/arts/energy-scammed-don-t-get-shocked-by-door-to-door/article\\_e1adf78a-b721-11e6-8db0-4b9f2f94e022.html](http://www.philadelphiaweekly.com/arts/energy-scammed-don-t-get-shocked-by-door-to-door/article_e1adf78a-b721-11e6-8db0-4b9f2f94e022.html).

wherein marketers could handedly target exploitative teaser offers to low income populations. Indeed, inclusion of a CAP identifier on the ECL places PECO customers at risk by giving marketers a roadmap to households that may be more easily exploited by teaser rates, gift card offers, and other non-energy gimmicks and for whom the risk of such tactics is unbearable.<sup>19</sup>

- iii. Suppliers must be required to inform PECO of their intent to serve or stop serving CAP customers to ensure that PECO can monitor CAP program costs and, in turn, that the Commission can fulfill its universal service obligations under the Choice Act.

RESA asserts that its recommendation to include CAP identifiers on the EDI code and ECL list should wholly replace PECO's proposal to require suppliers to provide advance notice of their intent to serve or stop serving CAP customers. RESA claims that PECO should have absolutely no role in tracking or confirming whether suppliers comply with the rules to be put in place for CAP shopping – arguing that the Commission should not “deputize PECO to scrutinize EGS contracts or be the arbitrator about whether or not an EGS serving a CAP participant complied with this requirement.”<sup>20</sup> Essentially, RESA argues for the “just trust us” approach. This course of action is insufficient to protect against unnecessary costs to CAP and non-CAP ratepayers, especially in light of the proliferation of complaints against suppliers for violations of a host of consumer protection and unfair trade practice laws.<sup>21</sup>

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<sup>19</sup> The Joint Parties submit that if there are restrictions on the types of offers in which CAP customers can enroll – specifically the CAP-SOP or another mechanism that limits CAP customers to products that are at or below the price to compare and eliminates cancellation, termination, enrollment or other fees – then the inclusion of CAP status on the ECL becomes less troublesome. Of course, depending on the type of protection the Commission imposes, inclusion on the ECL may be unnecessary. For example, if CAP customers can only enroll with a supplier through the CAP-SOP then they need not be marketed to in the first instance and could be excluded from the ECL altogether.

<sup>20</sup> RESA Cmts. at 8-12.

<sup>21</sup> See, e.g., Landau v. Viridian Energy Pa., LLC, 16 CV 2383 (E.D. Pa. Nov. 30, 2016) (mem. op.) (citing Kantor v. Hiko Energy, LLC, 100 F. Supp. 3d 421 (E.D. Pa. 2015); Basile v. Stream Energy Pa., LLC, 1:15 CV 01518 (M.D. Pa. Sept. 6, 2016); Mirkin v. Viridian Energy, Inc., 3:15-CV-1057 (SRU) (D. Conn. July 5, 2016); Daniyan v. Viridian Energy LLC, CIV.A. GLR-14-2715 (D. Md. June 30, 2015); Zahn v. N. Am. Power & Gas, LLC, No. 14 C 8370 (N.D. Ill. May 22, 2015)).

But it is not only inadvisable to place unregulated suppliers in charge of policing themselves, it would also create a clear violation of the Commission and PECO's joint responsibilities under the Choice Act to ensure that Universal Service programs remain cost-effective and affordable, as it would prevent PECO from accurately tracking EGS participation and would in turn strip the Commission of any real opportunity for oversight. For these reasons, CAUSE-PA's witness in DSP II, Mr. Mitchell Miller, recommended PECO – as the administrator of CAP - be required to monitor and enforce provisions of its CAP shopping plan, with the Commission maintaining ultimate monitoring and enforcement responsibilities.<sup>22</sup> Similarly, OCA's witness in DSP II, Mr. Roger Colton, contended that EGSs must supply PECO with sufficient data upon which PECO may assess the impact of its universal service plan.<sup>23</sup>

CAUSE-PA further addressed PECO's ongoing responsibilities to CAP in its Main Brief in the DSP II proceeding, noting that while the Commission has the "ultimate monitoring and enforcement responsibilities" over CAP, PECO is responsible "for administering its CAP and its CAP shopping Plan."<sup>24</sup> Ultimately, the Commonwealth Court agreed, explaining that the EDC – not the EGS – is in the best position to monitor compliance because it "remains in direct contact with the consumer on matters related to billing and customer service."<sup>25</sup> In turn, the Commonwealth Court noted:

The obligation to provide low-income programs falls on the public utility under the Choice Act, not the EGSs. Moreover, the Choice Act expressly requires the PUC to administer these programs in a manner that is cost-effective for both the CAP participants and the non-CAP participants who share the financial consequences of the CAP participants' EGS choice.<sup>26</sup>

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<sup>22</sup> DSP II CAUSE-PA CAP Shopping St. No 1-SR at 2:6-19.

<sup>23</sup> DSP II OCA ST. CAP-1R 10:10-13.

<sup>24</sup> DSP II CAUSE-PA MB at 9-10.

<sup>25</sup> CAUSE-PA et al., 120 A.3d at 1101.

<sup>26</sup> CAUSE-PA et al., 120 A.3d at 1103.

Accordingly, the Commonwealth Court has clearly recognized that the EDC has a service function to discharge in the context of CAP shopping because the EDC (here, PECO) must ensure that its CAP satisfies the mandates of the Choice Act. To fulfill this dual responsibility of the Commission and the EDC to ensure an adequately funded and cost-effective CAP, PECO must be empowered to: (1) monitor EGS compliance with the CAP shopping rules; and, (2) adequately report data and information about supplier compliance to the Commission. It is critical that PECO know – at the very least – which suppliers are serving CAP customers at any given point in time, and whether those suppliers are in compliance with the CAP shopping rules approved by the Commission. As such, RESA’s attempts to excise the reasonable notice requirements imposed by PECO are unreasonable and should be ignored.

- b. To fully preserve the procedural rights of the parties – and to ensure that the Commission’s ultimate decision is based on substantial record evidence -- the Commission should certify the record from DSP IV to this proceeding, and should refer the CAP shopping records from both DSP II and DSP IV to Administrative Law Judge Fordham to issue a Recommended Decision.**

The Commission issued its Final Order in PECO’s DSP IV on December 8, 2016 – six days after initial Comments were submitted in this DSP II proceeding and four days before the deadline for the instant comments. In the Final Order, the Commission deferred a decision on CAP shopping to this previously closed DSP II docket and noted its intent to incorporate the CAP shopping record of DSP IV into this proceeding.<sup>27</sup>

The Joint Parties respectfully assert that the Commission should clarify that it is not just taking official notice of the record, but that it is certifying the record from DSP IV into this DSP II proceeding. The Commission should refer this combined record on CAP Shopping from DSP

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<sup>27</sup> DSP IV Final Order at 62.

II and DSP IV to ALJ Fordham for a Recommended Decision. This clarified approach is necessary to ensure that the record in the instant proceeding is complete, that the Commission's decision is based on verified and sworn facts and evidence.

As noted above, the Commission's recent Final Order in PECO's DSP IV explicitly notes its intent to "take official notice of the documents constituting the record in [DSP IV] ..., pursuant to 52 Pa. Code § 5.406 relating to public documents, 52 Pa. Code § 5.407 relating to records of other proceedings, and 52 Pa. Code § 5.408 relating to official and judicial notice of fact" – which the Commission explained was to resolve parties' due process concerns.<sup>28</sup> It specifically grants, in part, the Exceptions of the Joint Parties in DSP IV, "to the extent their Exceptions request that we incorporate the record developed in this proceeding into the DSP II proceeding at Docket No. P-2012-2283641."<sup>29</sup>

More is required procedurally to effectuate the Commission's order to incorporate the DSP IV record into the DSP II proceeding. Specifically, the record from both DSP II and DSP IV must be certified *with particularity* and the evidence weighed and evaluated. Taking official notice is inadequate in itself because the evidence submitted in DSP IV has not been weighed, and the persuasiveness of the briefs submitted in DSP IV has not been measured.

First, section 5.406 – public documents – provides:

- (a) A report, decision, opinion or other document or part thereof, need not be produced or marked for identification, but may be offered in evidence as a public document by specifying the document or part thereof and where it may be found, if the document is one of the following:
  - (1) A report or other document on file with the Commission.
  - (2) An official report, decision, opinion, published scientific or economic statistical data or similar public document which is issued by a governmental

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<sup>28</sup> DSP IV Final Order at 62.

<sup>29</sup> DSP IV Final Order at 62.

department, agency, committee, commission or similar entity which is shown by the offeror to be reasonably available to the public.<sup>30</sup>

Nothing in this section would permit a full record from one proceeding to be transferred – in total – to another proceeding. While some documents from DSP IV may fall within the meaning of “public documents” described herein, testimony, exhibits, briefs, and other supporting documents contained in the DSP IV record simply do not fall within the scope of this limited provision.

Section 5.408 – official and judicial notice of fact – is likewise insufficient to allow the Commission to take notice of the full DSP IV record. Section 5.408 provides, in relevant part:

- (a) Official notice or judicial notice of facts may be taken by the Commission or the presiding officer.
- (b) When the decision of the Commission or presiding officer rests on official notice or judicial notice of a material fact not appearing in the evidence in the record, the parties will be so notified.
- (c) Upon notification that facts are about to be or have been noticed, a party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.<sup>31</sup>

Section 5.408 only contemplates judicial or official notice of facts. But in DSP IV, neither ALJ Fordham nor the Commission make any findings of fact on the issue of CAP shopping. Instead, both referred the issue back to this DSP II docket without weighing the evidence or making determinations about credibility, weight, or substance of the evidence. Thus, it is unclear which facts from DSP IV the Commission could properly judicially or officially notice.

Accordingly, were the Commission to take notice of facts from DSP IV, it would have to engage in some form of de facto fact-finding on the evidence submitted in DSP IV, which would directly conflict with its Final Order (declining to consider evidence on CAP shopping in DSP

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<sup>30</sup> 54 Pa. Code § 5.406.

<sup>31</sup> 52 Pa. Code § 5.408.

IV). Furthermore, the Commission would be obligated by Section 5.408 to give notice of *each* material fact upon which it may seek to rely, which would require the parties to be afforded opportunity for reargument and/or rebriefing on the same evidence which has already been thoroughly briefed in DSP IV. In sum, the use of official notice would appear to contribute to a less expeditious review than would be accomplished by certifying the DSP IV record into DSP II and then remanding to ALJ Fordham for full consideration.

Section 5.407 – records of other proceedings – is perhaps the closest procedural rule that would allow the Commission to bring the full record from DSP IV into DSP II:

(a) When a portion of the record in another proceeding before the Commission is offered in evidence and shown to be relevant and material to the instant proceeding, a true copy of the record shall be presented in the form of an exhibit, together with additional copies ... unless both of the following occur:

(1) The party offering the record agrees to supply, within a period of time specified by the Commission or the presiding officer, the copies at his own expense, if any, when so required.

(2) The portion is specified with particularity so as to be readily identified, and upon motion is admitted into evidence by reference to the records of the other proceedings.<sup>32</sup>

The rule appears to only contemplate that *parties* may introduce a record from one proceeding into another. However, it is logical to conclude that the Commission could act on its own to bring “a portion of the record in another proceeding” as contemplated by the rule -- provided it specifies the portions of the record it intends to certify “with particularity so as to be readily identified.” Up to this point, it remains unclear what portions of the record the Commission may consider to be relevant, as the Commission has not specified with particularity the contents of the record to which it intends to incorporate and, thus, consider in making its final determination.

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<sup>32</sup> 52 Pa. Code § 5.407.

To ensure that a decision is made based on the record evidence in DSP II and DSP IV – and not on unsworn statements contained in parties’ comments and reply comments – the Joint Parties submit that the Commission should certify the DSP II and DSP IV CAP shopping records to ALJ Fordham. ALJ Fordham presided over both DSP II and DSP IV proceedings, heard and reviewed voluminous testimony on the issue, and issued two Recommended Decisions on the topic. She is best positioned to expediently review the mature records and issue a Recommended Decision consistent with the sworn record evidence contained therein.<sup>33</sup>

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<sup>33</sup> At a minimum, whether the Commission decides to refer to an ALJ for findings of fact or simply makes its own findings, any decision about CAP shopping which comes out of this proceeding must result in a final order that consists of findings of fact and conclusions of law, and must be based on substantial record evidence - not hearsay, comments, and unverified opinions of the parties.

#### IV. CONCLUSION

For the reasons described herein, the Joint Parties urge the Commission to deny RESA's proposed changes consistent with the comments provided above, certify the record from DSP IV to this proceeding, and to refer both the DSP II and DSP IV records to ALJ Fordham with instructions for her to issue a Recommended Decision on CAP shopping based on the evidence before her from DSP II and DSP IV. As explained throughout the DSP II and DSP IV records – and in our initial Comments at this docket – any decision from ALJ Fordham (and ultimately the Commission) must include reasonable price restrictions to prevent untold financial harm on residential and CAP customers alike.

Respectfully Submitted,

**PENNSYLVANIA UTILITY LAW PROJECT**

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