

COMMONWEALTH OF PENNSYLVANIA



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December 12, 2016

Rosemary Chiavetta, Secretary
PA Public Utility Commission
Commonwealth Keystone Bldg.
400 North Street
Harrisburg, PA 17120

RE: Petition of PECO Energy Company for Approval of
Its Default Service Program
(Customer Assistance Program Shopping Plan)
Docket No. P-2012-2283641

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Reply Comments in the above-referenced proceeding.

Copies have been served upon all parties of record as shown on the attached Certificate of Service.

Sincerely,

A handwritten signature in cursive script that reads "Christy M. Appleby".

Christy M. Appleby
Assistant Consumer Advocate
PA Attorney I.D. # 85824

Enclosures

cc: Hon. Cynthia Williams Fordham, ALJ
Joseph Magee, Bureau of Consumer Services (jmagee@pa.gov, Email Only)
James Mullins, Law Bureau (jmullins@pa.gov, Email Only)
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Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PECO Energy Company :
For Approval of its : Docket No. P-2012-2283641
Default Service Plan :

REPLY COMMENTS
OF THE
OFFICE OF CONSUMER ADVOCATE

The Office of Consumer Advocate (OCA) files these Reply Comments pursuant to the Pennsylvania Public Utility Commission's (Commission's) directive in the November 18, 2016 Secretarial Letter under Docket No. P-2012-2283641 (2016 PECO CAP Rule Change Filing) and in response to the Commission's December 8, 2016 Order in Docket No. P-2016-2534980 (PECO DSP IV).

I. INTRODUCTION

On December 8, 2016, the Commission issued its Order regarding PECO's DSP IV plan at Docket No. P-2016-2534980. Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2017 through May 31, 2021, Docket No. P-2016-2534980, Order (December 8, 2016) (PECO DSP IV Order). In the PECO DSP IV proceeding, a record was developed regarding the impact of unrestricted CAP customer shopping where such unrestricted shopping was allowed in the period between the DSP II and the DSP IV proceeding. In its December 8 Order in the DSP IV proceeding, the Commission declined to address the CAP Shopping Plan issue that had been fully briefed in that case. Instead, the Commission determined:

Because PECO's 2016 CAP Rule Change Filing is still pending before this Commission, we do not believe it appropriate for us to decide issues relating to the ability of PECO's CAP customers to shop in this DSP IV proceeding, particularly as we are awaiting the receipt of comments from the parties in the DSP II proceeding. Rather, we intend to fully address the matter of CAP shopping in PECO's service territory in the context of the remanded proceeding under PECO's DSP II docket, wherein we will consider PECO's 2016 CAP Rule Change Filing.

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, PECO's 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. § 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.

PECO DSP IV Order at 62.

While the PECO DSP IV Order references consideration of the record and the parties' positions on this issue in the DSP IV docket, the procedure for this consideration and the finding of the necessary facts remains unclear. To ensure that all parties' due process rights are fully respected, the OCA respectfully requests the following:

- Consolidate PECO DSP II at Docket No. P-2012-2283641 and Docket No. P-2016-2534980.
- Refer the consolidated dockets to ALJ Cynthia Williams Fordham for a determination on the merits and the issuance of a Recommended Decision.
- Allow Exceptions and Reply Exceptions to the Recommended Decision.
- Decide the matter in the consolidated dockets.

It is important to note that ALJ Fordham was the presiding officer in DSP II and in DSP IV. ALJ Fordham has heard the evidence and reviewed the legal briefs in both dockets. In DSP IV, ALJ Fordham's decision was based on the procedural status of the case. By consolidating the dockets and requesting a decision on the merits, the ALJ can now make findings of fact and a determination on the merits. The parties will then have the opportunity to file Exceptions and Reply Exceptions to a decision on the merits, an opportunity that was not fully presented by the prior procedural determination.

Also, on December 2, 2016, the OCA and Retail Energy Supply Association (RESA) filed Comments in DSP II. The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) and Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (TURN *et al.*) also filed Joint Comments. The OCA will also respond in these Comments to RESA's December 2, 2016 Comments. With respect to RESA's proposals made in its Comments, the OCA respectfully requests:

- The CAP customer designation should not be added to the Eligible Customer List (ECL) information. The ECL should not be changed to be updated more frequently than every month.
- To the extent that a customer is no longer a CAP customer during the pendency of the EGS contract, the EGS contract should not change.
- To the extent that the Company becomes aware of violations of its tariff, PECO should address violations of its tariff, including issues related to EGS practices regarding the CAP Shopping Plan.

II. COMMENTS

A. Reply to the Commission's December 8, 2016 PECO DSP IV Order

In its December 8, 2016 PECO DSP IV Order at Docket No. P-2016-2534980, the Commission adopted ALJ Fordham's recommendation to address the issue of a CAP Shopping

Plan within the remand from the PECO DSP II proceeding at Docket No. P-2012-2283641. PECO DSP IV Order at 61. The Commission stated that “we intend to fully address the matter when we consider PECO’s 2016 CAP Rule Change Filing.” PECO DSP IV Order at 61.¹

In order to address the procedural due process concerns identified by CAUSE-PA/TURN, the Commission decided to take official notice of the documents constituting the record of the DSP IV proceeding at Docket No. P-2016-2534980. PECO DSP IV Order at 62, citing 52 Pa. Code §§ 5.406, 5.407, 5.408. While the Commission states that it intends to take notice of the DSP IV record and documents, it is not clear how the Commission intends to proceed thereafter. It is important to note that in DSP IV, the ALJ did not render a decision on the merits as she decided the case on a procedural ground. The OCA respectfully submits that the Commission’s consideration of this issue may benefit from a Recommended Decision on the merits from the ALJ who served as the trier of fact. ALJ Fordham was also the ALJ in the DSP II proceeding and is familiar with that record.

To respect due process, the OCA respectfully requests that the Commission consolidate the two proceedings and refer the matter back to ALJ Fordham for a decision on the merits. 52 Pa. Code § 5.81. ALJ Fordham has heard all of the evidence presented in the testimony and at the hearings of both proceedings, reviewed the record, and the briefs filed in both proceedings. The issue of CAP shopping protections is now ripe for her to establish findings of fact and to

¹ In its December 2, 2016 Comments in this proceeding, the OCA proposed that the issue of CAP customer shopping should be addressed in the currently pending DSP IV proceeding at Docket No. P-2016-2534980, and not in either the DSP II or DSP III dockets. The OCA proposed that the Commission should take no action on the proposed rule revision presented in PECO’s September 1, 2016 filing, as a full and updated evidentiary record has been developed in the DSP IV for service effective June 1, 2017. In the alternative, the OCA proposed that a CAP Shopping Plan should be developed that contains appropriate price protections, in addition to the prohibition on early cancellation and termination fees, to address the undisputed harms to CAP customer affordability and cost-effectiveness due to unrestricted CAP customer shopping.

make a determination on the merits. After issuance of a Recommended Decision, the parties will then have a full opportunity to file Exceptions and Reply Exceptions on the merits.

A common question of law and fact regarding the need for CAP Shopping protections has been raised in both the PECO DSP II proceeding at Docket No. P-2012-2283641 and the DSP IV proceeding at Docket No. P-2016-2534980. The OCA submits that the Commission should formally consolidate the DSP II proceeding at Docket No P-2012-2283641 and the DSP IV proceeding at Docket No. P-2016-2534980 pursuant to Section 5.81 of the Commission's regulations. Section 5.81 provides:

(a) The Commission or presiding officer, with or without motion, may order proceedings involving a common question of law or fact to be consolidated. The Commission or presiding officer may make orders concerning the conduct of the proceeding as may avoid unnecessary costs or delay.

52 Pa. Code § 5.81.

In the event that the Commission declines to consolidate the two proceedings, the OCA respectfully requests that the Commission clarify that the record of which it is taking notice includes all document in DSP IV, including Briefs, Exceptions and Reply Exceptions. If the Commission is to consider DSP IV, it should ensure that the full record is included for review, including all legal argument.

The OCA submits that this remand proceeding, and the underlying factual evidence presented in PECO's DSP II and DSP IV cases, should now be reviewed in the context of the Commission's legal authority to mitigate the harms of unrestricted CAP Shopping. See, CAUSE-PA et al. v. Pa. PUC, 120 A.3d 1087, Order at 1105-1106 (Pa. Cmwlth. Ct. July 14, 2015), cert denied 2016 Pa. LEXIS 723 (Pa. April 5, 2016) (PECO CAP Shopping); PECO DSP IV, OCA I.B. and OCA R.B.; Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period

June 1, 2017 through May 31, 2012, Docket No. P-2016-2526627, Order at 54-55 (October 27, 2016) (PPL DSP IV Order). As the OCA discussed in its Comments, a CAP Shopping Plan must be developed that contains appropriate price protections to address the undisputed harms to CAP customer affordability and cost-effectiveness caused by unrestricted CAP customer shopping. See, OCA Comments 8-10. Between the DSP II and the DSP IV dockets, program rules and procedures have been developed on the record to provide this necessary protection. It is now time to afford this protection to PECO's customers.

The OCA submits that a full and complete record, including the parties' legal arguments, exists between the PECO DSP II proceeding and the PECO DSP IV proceeding regarding the need for CAP shopping protections in a CAP Shopping Plan. The OCA respectfully requests that the Commission consolidate the dockets for the PECO DSP II proceeding at Docket No. P-2012-2283641 and the PECO DSP IV proceeding at Docket No. P-2016-2534980 and refer the matter back to ALJ Fordham for a decision regarding PECO's CAP Shopping Plan.

B. Reply to RESA Comments

1. Overview

In its Comments, RESA made specific recommendations regarding the operation of the CAP Shopping Plan. RESA Comments at 5-12.² The OCA responds to three of RESA's proposed operational changes. First, RESA proposes that the ECL information should be expanded to include a CAP customer designation. RESA Comments at 7-8. Second, RESA proposes to remove from the tariff language that provides that the EGS will honor the terms of

² The OCA does not address RESA's operational proposals regarding the exit and reentry process. RESA challenges the following requirements: (1) 30 days' notice of customers intent to stop serving CAP customers; (2) 90-day stay-out; and (3) requirement for affirmative consent to re-enroll CAP customers. RESA Comments at 8-10. RESA argues that the proposed rules are unnecessarily complex. RESA Comments at 8-10. The OCA notes that these rules were proposed by Direct Energy in the case below at Docket No. P-2012-2283641. See, January 21 Order.

the contract whether or not the customer remains enrolled in CAP. RESA Comments at 11. Finally, RESA proposes that PECO should not be permitted to “police” CAP Shopping Plan contracts. RESA Comments at 11-12.

As discussed below, the OCA does not agree with these three proposed operational changes to PECO’s tariff. The OCA submits that the ECL information should not be expanded to include a CAP designation, and the frequency of such ECL updates should not increase beyond what has been established statewide by the Commission in the ECL Order. Interim Guidelines for Eligible Customer Lists, Docket No. M-2010-2183412, PPL Electric Utilities Corporation Retail Markets, Docket No. M-2009-2104271, Petition of Duquesne Light Company for Approval of Default Service Plan for the Period January 1, 2011 through May 31, 2013, Docket No. P-2009-2135500, Order (November 15, 2011) (ECL Order). The OCA further submits that if a customer enrolls in the EGS contract as a CAP participant, the EGS should honor the terms of the contract whether or not the customer remains in CAP. Finally, the OCA submits that PECO is obligated to and must address any known violations of its tariff, including if an EGS charges a CAP customer a cancellation or termination fee.

2. The ECL information should not be expanded to include a CAP designation.

In its Comments, RESA proposes that PECO should include a designation of the customer’s CAP participation on the Eligible Customer List (ECL). RESA Comments at 8-9. RESA also proposes that the Company update its ECL more frequently than on a monthly basis if the information on the ECL would not reflect the customer’s current CAP status. RESA Comments at 8. The OCA submits that inclusion of a customer’s CAP participation is inappropriate and should not be addressed in the limited context of this proceeding. Moreover,

updates to the ECL on a more frequent basis than provided in the ECL Order would potentially increase the costs and administrative burden of the ECL.

The requirements for the Eligible Customer Lists were established on a statewide basis through the consolidated proceeding Interim Guidelines for Eligible Customer Lists, Docket No. M-2010-2183412, PPL Electric Utilities Corporation Retail Markets, Docket No. M-2009-2104271, Petition of Duquesne Light Company for Approval of Default Service Plan for the Period January 1, 2011 through May 31, 2013, Docket No. P-2009-2135500, Order (November 15, 2011) (ECL Order). In its ECL Order, the Commission specifically consolidated the Duquesne and PPL proceedings and stated “that our main concern has been that EDCs begin to operate as much as possible in a uniform manner throughout Pennsylvania in order to facilitate the retail market for electric generation service.” ECL Order at 5. The contents of the ECL were derived through an extensive litigation process which involved implications to the constitutional rights to privacy. The matter was appealed by the OCA and the Pennsylvania Coalition Against Domestic Violation to the Commonwealth Court. See, ECL Order procedural history at 1-6.

The information provided through the ECL is limited under the ECL Order to the customer’s name, address, telephone number and historic usage data and the specific categories of data that were reviewed and approved by the Commission. ECL Order at 11. Under Section 54.8 of the Commission’s regulations, a customer may restrict the release of the customer’s telephone number and historical usage data. 52 Pa. Code §54.8. PECO’s Electric Supplier Tariff specifically identifies the categories of information eligible to be released under the ECL, how customers may request to restrict the information, and the categories of information that may be restricted. See, Electric Generation Supplier Tariff, Supplement No. 8 to Tariff Electric Pa. P.U.C. No. 1S, Third Revised Page Nos. 17-18, Section 5.1.2-5.1.4 (Effective January 1,

2011). CAP participation is not one of the listed categories and should not be added as an operational request. PPL Electric Utilities Corporation (PPL) and the four FirstEnergy Companies (Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company) allow CAP customers to shop, and the ECL in those service territories does not contain a CAP customer designation. The OCA submits that no special designation regarding CAP customer participation should be provided on the ECL in the PECO service territory.

RESA also requests that the data be updated more frequently than monthly for CAP customers. RESA Comments at 7-8. The OCA does not agree that updates on a more frequent basis are needed. CAP customer enrollment can change for a multitude of reasons, but that is no different than any customer's status as switching/non-switching. Moreover, PECO currently has 140,000 CAP customers enrolled in the program. Tracking the daily or weekly status of each of these CAP participants would potentially be costly and administratively burdensome, with very little benefit to be provided to CAP customers as a result. If such an update is required, any costs of such an endeavor should not be borne by ratepayers.

For the reasons set forth above, the OCA submits that RESA's request to alter the information provided through the ECL should be denied.

2. If an EGS enrolls a customer who is a CAP participant, the EGS should maintain the terms of the contract through the duration of the contract even if the customer is no longer enrolled in CAP.

In its Comments, RESA identifies a concern with PECO's proposal to require that EGSs offering special pricing and/or programs for CAP customers "shall honor the terms of CAP shopping contracts until those contracts expire regardless of whether the customer remains on CAP for the duration of the contract." RESA Comments at 11. RESA argues that an EGS's

relationship with its customer is governed by the contract terms with the customer and the Commission's regulations. Id. The OCA submits that a CAP customer shopping presents a special contract circumstance, and PECO's proposed rule regarding the EGS contract should not be changed. If an EGS enrolls a customer who is CAP participant, the EGS should maintain the terms of the contract through the duration of the contract even if the customer is no longer enrolled in CAP.

The proposed rule was originally presented in the testimony of OCA witness Roger Colton. As discussed in the PECO DSP II proceeding, CAP customer enrollment is fluid, and the CAP customer enrollment, therefore, may not correlate directly with the EGS contract period. OCA St. No. 1-CAP at 12. In his Direct Testimony in the PECO DSP II proceeding, OCA witness Colton testified that:

a residential customer who is a CAP participant and who has been taking competitive supply through a competitive EGS presents a special contract situation to the EGS. The CAP participant is not merely taking competitive supply. The customer is participating in a particular program, of which shopping is one part. An EGS contract in the absence of CAP and its protections [EGS (no-CAP)], in other words, is a different contract than an EGS contract that incorporates the various CAP protections [EGS (CAP)].

This raises concern as to what happens when: (1) a customer with an existing EGS (no-CAP) contract enrolls in CAP, (2) a CAP customer with an EGS (CAP) contract leaves CAP, and (3) the EGS (CAP) contract expires. As I explain above, when a customer with an EGS contract enrolls in CAP, the customer should immediately be moved to an EGS (CAP) contract, and when a CAP participant leaves CAP before the expiration of his or her EGS (CAP) contract, the EGS (CAP) contract should continue until it expires.

OCA St. No. 1-CAP at 19-20. For this reason, Mr. Colton recommended that EGSs should maintain the CAP contract until the end of the EGS contract period. OCA St. 1-CAP at 12. PECO witness McCawley agreed and testified:

An EGS that submits a CAP Notice will be required to honor the terms of any contract it enters with a CAP customer, regardless of whether the EGS

subsequently receives notice, via an electronic data interchange transaction, that such customer leaves the CAP.

PECO St. 2-R at 11. RESA did not present Surrebuttal Testimony in the PECO DSP II proceeding in response. The Commission's Orders did not specifically address this issue, but PECO has maintained this proposed rule in this 2016 CAP Rule Change Filing.

CAP customer enrollment may change many times during the period of an EGS contract, depending upon a variety of circumstances. Those circumstances may include the customer's income eligibility for CAP, but they may also, for example, involve the CAP customer's failure to recertify, or to consent to LIURP weatherization treatments. The OCA submits, therefore, the CAP customer should be provided with a contract which addresses the needs presented by these circumstances. The OCA requests that PECO's proposed rule be maintained. If an EGS enrolls a customer who is CAP participant, the EGS should maintain the terms of the contract through the duration of the contract even if the customer is no longer enrolled in CAP.

3. PECO must timely address identified violations to its tariff.

RESA argues in its Comments that PECO proposes "to include the requirement in its tariff prohibiting EGSs from entering into any contract with CAP participants that imposes early cancellation/termination fees." RESA Comments at 11.³ RESA requests that "the Commission should make clear that including this in the tariff does 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." *Id.* While the OCA agrees that the Commission has the ultimate authority over violations of the CAP Shopping Plan, the OCA submits that PECO cannot ignore violations of its tariff. The OCA submits that PECO has an affirmative obligation under its

³ The OCA notes that RESA specifically states that "a prohibition on assessing early cancellation fees is not likely to deprive customers of the ability to avail themselves of these various products and services." RESA Comments at 2.

tariff to ensure that its tariff provisions are followed. When PECO becomes aware of such violations, it must take appropriate action.

The Commission specifically addressed this issue in its January 21 Order in the PECO DSP II proceeding. The Commission stated:

While we expect PECO to monitor compliance with the terms of its EGS Tariff, we concur with PECO and Direct Energy that there is no compelling evidence presented in this proceeding to warrant placing additional enforcement responsibilities of EGSs that are participating in the CAP program on PECO.

Petition of PECO Energy Company for Approval of its Default Service Plan, Docket No. P-2012-2283641, Order at 36 (January 21, 2014) (January 21 Order). Under the Commission's direction from the PECO DSP II Order, PECO does have an obligation to monitor compliance with its tariff. PECO, however, does not need to establish additional enforcement capabilities to monitor such violations.

EGSs will enroll in PECO's CAP Shopping Plan that is designed for CAP customers. That CAP Shopping Plan is included in PECO's tariff and specifically states that CAP customers may not be charged a cancellation or termination fee. The OCA submits, that to the extent that the CAP customer has a dispute with the EGS regarding the imposition of cancellation/termination fees, or the Company otherwise becomes aware of the imposition of such a cancellation/termination fee, PECO does have an affirmative obligation to ensure that its tariff is enforced.

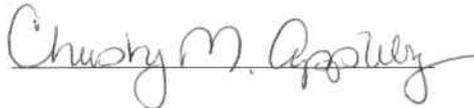
The OCA submits that a violation of PECO's tariff regarding the cancellation/termination fees should be treated as any other violation of PECO's tariff. To the extent that PECO becomes aware of a violation of the tariff, PECO would have the obligation to take action in the matter just like any other violation of the tariff. The customer, like the EGS, would still retain all rights to challenge such a determination before the Public Utility Commission. The OCA submits that

PECO's proposed rule regarding the ability to address violations of its tariff should be maintained.

III. CONCLUSION

The OCA appreciates the opportunity to provide its Comments and Reply Comments regarding PECO's CAP Shopping Plan. The OCA respectfully requests that the Commission adopt our recommendations herein.

Respectfully Submitted,



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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Re: Petition of PECO Energy Company for Approval of Its Default Service Program
(Customer Assistance Program Shopping Plan)
Docket No. P-2012-2283641

I hereby certify that I have this day served a true copy of the following document, the Office of Consumer Advocate's Reply Comments, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant), in the manner and upon the persons listed below:

Dated this 12th day of December 2016.

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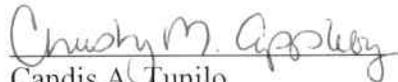
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