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December 12, 2016

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find Comments of the Retail Energy Supply Association ("RESA") Regarding PECO Customer Assistance Program Shopping Plan, Proposed Rule Revision Dated September 1, 2016 with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

A handwritten signature in cursive script that reads "Deanne M. O'Dell".

Deanne M. O'Dell

DMO/lww
Enclosure

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CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Reply Comments upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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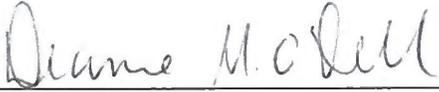
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Dated: December 12, 2016



Deanne M. O'Dell, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**REPLY COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION
REGARDING PECO CUSTOMER ASSISTANCE PROGRAM SHOPPING PLAN,
PROPOSED RULE REVISION DATED SEPTEMBER 1, 2016**

I. INTRODUCTION

On September 1, 2016, PECO Energy Company (“PECO”) filed its Customer Assistance Program Shopping Plan (“CAP Shopping Plan”). As permitted by the Commission’s November 18, 2016 Secretarial Letter, initial comments were filed by 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”) (collectively, “CAUSE-PA/TURN”), the Office of Consumer Advocate (“OCA”) and the Retail Energy Supply Association (“RESA”).¹ As detailed more fully in its initial comments, RESA supports the goals of PECO’s CAP Shopping Plan to permit its current CAP participants to shop and only restricting the ability of electric generation suppliers (“EGSs”) to assess early

¹ The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

cancellation/termination fees on CAP participants electing to cancel EGS contracts. PECO's CAP Shopping Plan is consistent with the Commonwealth Court's direction in this matter.²

In contrast, CAUSE-PA/TURN and OCA (collectively, "Advocates") focused their initial comments on advocating against implementation of PECO's CAP Shopping Plan unless EGSs are also prohibited from charging CAP participants prices above the PTC. In support of this position, the Advocates point to the passage of time since the Commission first directed (in 2012) that PECO permit its CAP participants to shop effective January 1, 2014.³ Due to the efforts of the Advocates, the ability of CAP participants to shop has been delayed with final resolution of the appellate proceedings occurring in April 2016 when the Pennsylvania Supreme Court denied review of the *Commonwealth Court CAP Shopping Decision*. In this proceeding, the Advocates rely on this passage of time as further support for their uncompromising position that the Commission should require EGSs to cap their prices to CAP participants as a precondition to opening up shopping for PECO's CAP participants.

² *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1106-1107 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016) ("*Commonwealth Court CAP Shopping Decision*"). Though not objecting to the goals of PECO's CAP Shopping Plan, RESA's initial comments focused on operational suggestions intended to better utilize existing protocols to more efficiently implement shopping for CAP participants and continues to believe these operational adjustments will improve process flows for the benefit of a more positive shopping experience for CAP participants.

³ The directive was first made during PECO's DSP II proceeding. *Petition of PECO Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641, Opinion and Order entered October 12, 2012 at 131. The Advocates also argue that the terms by which CAP customers should be able to shop should be addressed in PECO's most recent (DSP IV) default service proceeding. In its Opinion and Order entered on December 8, 2016, however, the Commission made clear that it will "fully address the matter" in this pending proceeding and also took "official notice of the documents constituting the record" in the DSP IV proceeding. *Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2017 through May 31, 2010*, Docket No. P-2016-2534980, Opinion and Order entered December 8, 2016 at 62. As such, these arguments of the Advocates are now moot.

As discussed more fully below, the Commonwealth Court’s decision is crystal clear – the Commission must move forward to implement PECO’s CAP Shopping Plan (ideally with RESA’s operational suggestions) which includes a restriction on the assessment of early cancellation/termination fees and then analyze the effect of the plan in the context of PECO’s next universal service plan. Nothing has happened between the time of the Commonwealth Court’s decision and today to justify reversing and/or re-litigating the path the Commonwealth Court has set to enable PECO’s CAP participants to avail themselves of the benefit of the competitive market. Thus, RESA urges the Commission to reject the position of the Advocates and finalize the mechanics of transitioning PECO CAP customers to a world in which they may freely exercise their right to shop for a competitive EGS product while also ensuring that EGSs do not charge early cancellation/termination fees to CAP participants who do elect to shop. Such outcome is fully consistent with the directives of the Commonwealth Court and creates opportunities for PECO’s CAP participants to avail themselves of competitive products that meet their specific needs and desires (just as every other PECO customer can do today).

II. REPLY COMMENTS

Since 2012 when the Commission first directed that PECO’s CAP participants be permitted to shop, the Advocates have continued to press in all the major utility default service proceedings their position that EGS prices should be capped. In doing so, they have acquired data from both PPL Electric Utilities (“PPL”) and the FirstEnergy Companies narrowly focused on comparing the EGS prices those utilities’ shopping CAP participants have paid in relation to the utilities’ price-to-compare (“PTC”). It is this – other utilities’ – data that the Advocates argue here support their position that the Commission must impose EGS price caps here. These arguments, however, are seriously flawed and must be rejected.

First, the Commonwealth Court made absolutely clear that it expected PECO's CAP participants to be able to avail themselves of shopping with only a prohibition on the imposition of early cancellation/termination fees. The Commonwealth Court specifically rejected the view that EGS prices must be capped. In reaching this decision, the Commonwealth Court understood there was no PECO specific data to assess the impact of shopping for CAP participants but, nonetheless, still concluded that CAP customers should be permitted to shop with only a restriction on the assessment of early termination/cancellation fees. Addressing concerns about how shopping might impact the universal service program, the Commonwealth Court directed as follows:

. . . we anticipate that when PECO files its next Universal Service Plan, it will include in its filing an analysis of its CAP Shopping Plan, including how that plan has affected the availability and affordability of electricity supply for CAP participants and the cost-effectiveness of the CAP.⁴

Nothing has changed here. There still is no PECO specific data about the impact of shopping on PECO's CAP participants (because they have never been permitted to shop). As such, moving forward to implement PECO's CAP Shopping Plan and analyzing the effect of the plan in the context of PECO's next universal service plan is completely consistent with the clear directives and intent of the Commonwealth Court.⁵ What the Advocates support would not achieve the

⁴ *Commonwealth Court CAP Shopping Decision* at 1108.

⁵ Also noteworthy is that during the pendency of appellate review of the Commission's actions to permit PECO's CAP participants to shop, the structure of PECO's CAP program has been changed via a settlement involving PECO and the Advocates which was approved with modifications by the Commission. *PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4*, Docket No. M-2012-2290911, Final Order entered August 11, 2016. In supporting that settlement, the Advocates recognized that the redesign will ensure that CAP customer benefits are portable. *PECO Energy Company Universal Service and Energy Conservation Plan for 2013-2015 Submitted in Compliance with 52 Pa. Code §§ 54.74 and 62.4*, Docket No. M-2012-2290911, OCA Statement in Support at 4 (filed March 20, 2015), CAUSE-PA Statement in

same result but would rather result in a reversal of the Commonwealth Court's clear direction: (1) to not require caps on EGS pricing; (2) to open up shopping to CAP participants prohibiting only EGS early termination/cancellation fees; and, (3) to analyze the consequence of CAP shopping in the next universal service plan proceeding.

Second, the Advocates fail to consider that PECO's CAP Shopping Plan is different from the approaches taken for PPL and the FirstEnergy Companies. A significant obvious difference is that EGSs would be prohibited from assessing early cancellation/termination fees to PECO CAP participants. Such prohibitions do not exist in the PPL or FirstEnergy service territories. Another less obvious difference is that PECO will be required to give EGSs notice that a potential customer is a CAP participant.⁶ No such notice is provided in PPL or FirstEnergy service territories so EGSs serving customers in those areas do not know the CAP participation status of any potential or current customer. This is a significant difference because notice of CAP status will give the EGSs more flexibility with regard to CAP participants. EGSs may elect to offer specific products and services to CAP participants that better address the consumers' individual needs and preferences. Developing such products today for PPL or FirstEnergy CAP participants is not possible because EGSs in those service territories do not know when their potential or existing customers participate in CAP. With the knowledge of a potential customer's CAP status, an EGS may also elect not to provide service to that customer. Such a decision on the part of the EGS would lead to the same result supported by the Advocates – that

Support at 5 (filed April 22, 2015). Consistent with the Commonwealth Court's recognition, the impact of shopping on each utilities' CAP program is unique and the effects of shopping for CAP participants needs to be analyzed in the context of each utilities' specific CAP program.

⁶ While RESA recommends streamlining PECO's proposed EGS notice of entry/exit process, the concept of providing EGSs notice of CAP participation status is the same under either approach.

CAP participants pay no more than the PTC. The difference, though, is that such result would be a market determined outcome rather than a regulatory prohibition on the right to shop.

Third, as advocated by RESA more fully during the PECO DSP IV proceeding, the Advocates have not satisfied the legal burden clearly laid out by the Commonwealth Court before restrictions on the right of CAP customers to shop can be implemented.⁷ This legal burden specifically requires that – because the “overarching goal of the Choice Act is competition” – restrictions on the right of all customers to freely shop can only be considered upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.⁸ Here the Commonwealth Court specifically approved a “reasonable alternative” to restricting competition and that is one where EGSs are prohibited from assessing early cancellation/termination fees with the Commission assessing the impact during PECO’s next universal service plan review. Because there is already a court approved reasonable alternative to the overly restrictive approach continued to be favored by the Advocates (i.e. capping EGS prices), the Advocates have not met their clear legal burden to support imposing EGS price caps as a precondition to opening up shopping for PECO’s CAP participants.

Fourth, even if the Commission were persuaded that the passage of time has somehow resulted in the Advocates meeting their initial legal threshold (which it has not), there has been no evidence in any of the dockets referenced by the Advocates to overcome the conclusion of the Commonwealth Court that restrictions on EGS pricing to CAP participants will adversely affect

⁷ See, e.g., *Petition of PECO Energy Company for Approval of its Default Service Program for the Period from June 1, 2017 through May 31, 2019*, Docket No. P-2016-2534980, Final Order entered December 8, 2016 (“*PECO DSP IV Proceeding*”), RESA Main Brief at 14; and RESA Reply Brief 6-7.

⁸ *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

available choices for CAP participants.⁹ Despite the passage of time and all of the laudable efforts of the Advocates to promote their preferred approach in many dockets, no evidence exists to reverse the determination of the Commonwealth Court that restrictions on EGS pricing will lead to no available EGS offers to CAP participants – a result which the Commonwealth Court agreed too severely impacts the right of CAP participants to shop and cannot be approved. While the Advocates attempt to shift focus to price comparisons between the PTC and EGS pricing in those service territories where CAP participants may shop, this data does not address the real world negative impact to CAP participants of restrictions on EGS pricing – namely EGSs are unlikely to provide offers to CAP participants if their pricing is restricted. Thus, approving price restrictions here as supported by the Advocates is not legally defensible.

Fifth, as RESA has explained in other default service proceedings wherein the Advocates rely on data comparing the PTC and EGS prices paid by CAP shopping customers, the data does not take into account a specific contract term with an EGS to show whether the CAP customer paid a higher price for the entire term of their contract with EGSs or the CAP customer – when he or she first chose the EGS – obtained some benefit or incentive for switching (such as a lower price, a gift card, or energy audit).¹⁰ Thus, the point of time used for the comparison is most certainly not reflective of the conditions experienced by the other utilities' shopping CAP customers over their entire shopping experience. Moreover, customers have always retained the ability to make new choices in response to changes in the market price. The same is true for the CAP customers who were shopping at the time of the comparison. The fact that CAP customers who were shopping did not respond to the price change by the point of time used for the

⁹ *Commonwealth Court CAP Shopping Decision* at 1107-1108.

¹⁰ *See, e.g., PECO DSP IV Proceeding*, RESA Main Brief at 15-16.

comparison does not mean that nothing was done. Following that point in time, the CAP shopping customer: (a) could have received a lower price from their existing EGS; (b) could have switched to default service or to another EGS; or, (c) could have decided that other benefits or incentives being received by them outweighed the price being paid.¹¹ Simply put, the point of time comparison (even if reliance on data from other utilities were appropriate which it is not) does not justify restricting the ability of CAP customers to freely shop.

Finally, data regarding the shopping experience of PPL's CAP participants was before the Commonwealth Court. Specifically, the PPL data before the Commonwealth Court showed that 73% of PPL's CAP shopping customers were paying more than the applicable PTC.¹² This data, however, was not enough to persuade the Commonwealth Court that EGS prices to CAP participants should be restricted. Also interesting to note is that the most current data assessing a 36-month period shows that an average of 55% of all PPL's CAP shopping customers paid an EGS price above the PTC.¹³ In other words, as time has passed and the data is gathered over longer period, the initial concerns expressed by the Advocates regarding the pricing impact to CAP customers of shopping looks different. This changing perception of the data is consistent with RESA's primary view that the point in time data that the Advocates so heavily rely on is not instructive for assessing the impact of shopping on CAP customers. As such, RESA urges the Commission to remain on course with the path as directed by the Commonwealth Court – permit PECO's CAP customers to shop restricting only the early cancellation/termination fees EGSs

¹¹ *Id.*

¹² *Commonwealth Court CAP Shopping Decision* at 1105-1106.

¹³ *Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2017 Through May 31, 2021*, Docket No. P-2016-2526627, Opinion and Order entered October 27, 2016 at 26 (reconsideration pending).

may assess and then comprehensively evaluate the impact of that decision during PECO's next universal service plan review.

III. CONCLUSION

RESA does not support the view of CAUSE-PA/TURN and OCA that the only situation under which the Commission should permit PECO's CAP participants to shop is one in which EGSs are restricted to offering EGS pricing at or below the PTC. This specific issue has been well litigated before the Commission and the appellate courts and the legal direction is clear – restrictions on EGS pricing for CAP participants is too restrictive to be legally sustainable. Also clear is the Commonwealth Court's understanding that CAP participants should have the right to shop without requiring restrictions on EGS pricing with the consequences of that decision to be evaluated during the context of PECO's universal service program. Thus, approving PECO's CAP Shopping Plan and permitting PECO's CAP customers to shop with only a restriction on the assessment of early cancellation/termination fees coupled with information being provided to EGSs about a potential customer's CAP status is the legally sustainable and most reasonable way to open up shopping to PECO's CAP participants who have never before been able to exercise their statutory shopping rights. By permitting these customers to exercise their statutory right, the Commission will be empowering them to make their own individual decisions about the energy needs that best suit their personal situation – just as the Competition Act intended for all customers.

Respectfully submitted,



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