



December 19, 2016

VIA E-FILING & FIRST CLASS MAIL

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 Petition for Reconsideration and/or Clarification 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

**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, December 19, 2016, I have served copies of the *Joint Petition for Reconsideration and/or Clarification 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

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITION OF PECO ENERGY COMPANY :
FOR APPROVAL OF ITS DEFAULT : Docket No. P-2016-2534980
SERVICE PROGRAM :

**JOINT PETITION FOR RECONSIDERATION AND/OR
CLARIFICATION OF
THE OPINION AND ORDER
ENTERED DECEMBER 8, 2016**

BY THE

**COALITION FOR AFFORDABLE UTILITY SERVICES
AND ENERGY EFFICIENCY IN PENNSYLVANIA**

AND

**TENANT UNION REPRESENTATIVE NETWORK;
ACTION ALLIANCE OF SENIOR CITIZENS OF
GREATER PHILADELPHIA**

PENNSYLVANIA UTILITY LAW PROJECT

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Date: December 19, 2016

I. INTRODUCTION

The Coalition For Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”) through its attorneys at the Pennsylvania Utility Law Project, and the Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (“TURN *et al.*”), through their attorneys at Community Legal Services, Inc. (collectively “CAUSE/TURN”), hereby submit this Joint Petition pursuant to Pennsylvania Public Utility Commission (“Commission”) Regulations at 52 Pa. Code §§ 5.41 and 5.572, and request timely reconsideration and clarification of the Commission’s December 8, 2016 Opinion and Order (“Order”).¹

First, the Petitioners request that the Commission clarify and/or reconsider its Final Order with respect to its intended process for incorporating the record of this proceeding (DSP IV) into the record in PECO’s prior default service plan proceeding (DSP II).² The Commission’s Final Order in DSP IV lacks clarity, in that it suggests the Commission will proceed on two conflicting paths: (1) incorporating the pertinent DSP IV record in its entirety, and (2) taking judicial and official notice of as-yet-unspecified selected portions of the DSP IV record. As described below, there are procedural issues associated with taking judicial/official notice, because the Commission has not made any findings of fact or conclusions of law with relation to the record in DSP IV. Furthermore, it is unclear what process the Commission will establish to ensure full review of the DSP IV record in the context of the DSP II proceeding. This lack of clarity with regard to the Commission’s intended process for fully considering the DSP IV record, and its failure (as of yet)

¹ CAUSE/TURN note that their request for reconsideration and/or clarification is limited to CAP shopping issues. CAUSE/TURN does not seek reconsideration of the other issues contained within PECO’s DSP IV Plan.

² Petition of PECO Energy Company for Approval of its Default Service Program, Opinion and Order, Docket No. P-2012-2283641 (Oct. 12, 2012; Feb. 24, 2013) (hereinafter DSP II)

to consider the weight of the evidence and make findings of fact and conclusions of law, necessitates that the Commission consider the instant Petition for Reconsideration and/or Clarification on the merits and, thus, retain jurisdiction over the issue of CAP shopping so that a full, clear, and complete record can be compiled for review.

Second, the Petitioners request that the Commission reconsider its determination to defer its decision with regard to CAP shopping rules for PECO customers to DSP II, a closed docket which established PECO's default service rules for a period that ended on May 31, 2015. The Commission's refusal to conduct an evidentiary review and issue findings of fact and conclusions of law in DSP IV is at odds with the Commonwealth Court's affirmative mandates in Coalition for Affordable Utility Services and Energy Efficiency in Pa. et al. v. Pa. PUC (CAUSE-PA et al.).³ CAUSE/TURN submit that the Commission should reverse its determination, and should undertake consideration of CAP shopping rules in DSP IV. Indeed, as CAUSE/TURN have consistently argued, consideration of CAP shopping in DSP IV is necessitated by the factual evidence of harm from CAP shopping in Pennsylvania that has occurred across the state since the issue was first considered by the Commission in DSP II. The evidence in this proceeding has, without contradiction, shown that CAP customers and ratepayers will be harmed if CAP shopping is not subject to appropriate pricing controls. Turning back to DSP II to make a determination on CAP shopping overlooks the Commonwealth Court's explicit guidance that the impact of CAP shopping be regularly reviewed and reconsidered by the Commission.

II. BACKGROUND

CAUSE/TURN incorporate by reference the Background section contained in the Joint Exceptions of CAUSE-PA and TURN *et al.*, which were filed with the Commission on October

³ Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) et al. v. Pa. PUC, 120 A.3d 1087 (Pa. Commw. Ct. 2015).

14, 2016. The Background section of the Joint Exceptions provides a detailed explanation of the procedural progression of PECO's DSP II, III, and IV proceedings. In addition to the Joint Exceptions filed by CAUSE/TURN, Exceptions were also filed by the OCA on the same day. Reply Exceptions were filed by PECO and RESA on October 21, 2016.

On December 8, 2016, the Commission issued a Final Order, which granted in part and denied in part the Joint Exceptions of CAUSE-PA and TURN *et al.*⁴ In relevant part, the Final Order granted the Joint Exceptions "to the extent their Exceptions request that we incorporate the record developed in this [DSP IV] proceeding into the DSP II proceeding at Docket No. P-2012-2283641."⁵ All other Exceptions were denied.

With respect to the issue of CAP shopping, and the Commission's decision to defer the issue to a comment proceeding in DSP II, the Final Order (DSP IV) explained:

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 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.⁶

The Commission's decision did not make any findings of fact or conclusions of law with

⁴ Final Order at 65, ¶ 3.

⁵ Final Order at 62-63.

⁶ Final Order at 62.

respect to the issue of CAP shopping, nor did it apply substantive legal precedent.

Also important to the procedural progression in this case is the fact that – while a Final Order was pending in the instant proceeding – the Commission issued a Secretarial Letter on November 18, 2016, at PECO’s DSP II docket, which allowed interested stakeholders to submit comments and reply comments on the CAP shopping rule revision that PECO filed with the Commission by letter dated September 1, 2016.⁷ CAUSE/TURN submitted Joint Comments at the DSP II docket on December 2, 2016. Comments were also submitted by OCA and RESA. On December 12, 2016, CAUSE/TURN submitted Joint Reply Comments, and OCA, RESA, and PECO submitted Reply Comments.

III. LEGAL STANDARD

In Duick et al. v. Pennsylvania Gas and Water Company,⁸ the Commission explained the basis for rescinding or amending a prior order:

A petition for reconsideration, under the provisions of 66 Pa. C.S. § 703(g), may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code section to rescind or amend a prior order in whole or in part. . . . What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.⁹

This Petition satisfies *Duick*, in that it raises issues “which appear to have been overlooked or not addressed by the Commission,” specifically:

- The Commission issued ambiguous instruction in its Final Order with regard to the process it will employ in DSP II to review the DSP IV record evidence, make findings

⁷ Petition of PECO Energy Company for Approval of its Default Service Program, Opinion and Order, Docket No. P-2012-2283641 (Oct. 12, 2012; Feb. 24, 2013) (hereinafter DSP II).

⁸ Duick et al. v. Pa. Gas & Water Co., 56 Pa. P.U.C. 553 (1982).

⁹ Id. at 559.

of fact and conclusions of law, and weigh the various positions of the parties to reach a final determination on CAP shopping.

- The Commission inappropriately deferred its determination on PECO’s CAP shopping rules to PECO’s DSP II proceeding, without consideration of the record evidence before it, overlooking the Commonwealth Court’s instruction that the Commission periodically re-assess the impact of CAP shopping on residential ratepayers and CAP customers.

IV. REQUEST FOR RECONSIDERATION AND/OR CLARIFICATION

a. The Commission’s Final Order lacks sufficient clarity and/or issues conflicting guidance regarding its intended process to incorporate the record from DSP IV into DSP II.

As noted above, the Commission’s Final Order granted the Joint Exceptions of CAUSE-PA and TURN *et al.* “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.”¹⁰ In the same section of the Commission’s Final Order, the Commission stated that it would:

[T]ake 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.¹¹

The rules for official notice cited by the Commission are insufficient to effectuate the Commission’s Order to “incorporate the record” from DSP IV into the record of DSP II. Specifically, to take official notice, the record from both DSP II and DSP IV must be certified *with particularity* and the evidence weighed and evaluated by a trier of fact. Taking official notice is inadequate in itself because the evidence submitted in DSP IV has not been weighed,

¹⁰ Final Order at 62-63 (emphasis added).

¹¹ *Id.* at 62.

and the persuasiveness of the briefs submitted in DSP IV has not been measured. Indeed, there are no findings of fact or conclusions of law with which to guide the Commission's consideration of the evidence from the record in DSP IV.

The procedural shortcomings of the Commission's Final Order are discussed in the Joint Comments of CAUSE/TURN, which were filed on December 2, 2016 to the docket for PECO's DSP II proceeding.¹² There, CAUSE/TURN note that Section 5.406, public documents, is insufficient to incorporate the record because it only pertains to specific reports, decisions, or opinions on file with the Commission or issued by an agency, committee, or commission which are offered in evidence.¹³ Section 5.408, official and judicial notice of fact, is similarly insufficient, as it only allows for judicial or official notice of facts. But in DSP IV, neither the ALJ nor the Commission made any findings of fact on the issue of CAP shopping. Instead, both referred the issue to the proceeding at PECO's DSP II docket without making any findings of fact, weighing the evidence, or making determinations about credibility, weight, or substance of the evidence. As explained in the Joint Reply Comments of CAUSE/TURN at the DSP II docket on December 12, 2016,

[W]ere 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 IV). Furthermore, the Commission would be obligated by Section 5.408 to give notice of each material fact for reargument and/or rebriefing on the same evidence which has already been thoroughly briefed in DSP IV.¹⁴

Indeed, taking judicial/official notice may in fact create a less expeditious review than the Commission intended in the Final Order.

Finally, while Section 5.407, records in other proceedings, is perhaps the closest

¹² Petition of PECO Energy Co. for Approval of Its Default Service Plan (DSP II), Docket P-2012-2283641.

¹³ See DSP II, Joint Reply Cmts. of CAUSE-PA & TURN *et al.* at 13-14; see also 52 Pa. Code § 5.406.

¹⁴ See DSP II, Joint Reply Cmts. of CAUSE-PA & TURN *et al.* at 14; see also 52 Pa. Code § 5.408.

procedural rule cited by the Commission in its Final Order that would allow the Commission to bring in the full record from DSP IV into DSP II.¹⁵ But that rule only contemplates that parties (as opposed to the Commission) may introduce a record from one proceeding into evidence in another litigated proceeding – and its explicit instruction that the portions of the record to be incorporated be identified “with particularity.”¹⁶ Nonetheless, assuming that the Commission can, *sua sponte*, incorporate the record from DSP IV to DSP II, the rule still seems to contemplate that there should be a record proceeding in which to accomplish that incorporation, and explicitly requires that the Commission state, with particularity, the portions of the record it seeks to incorporate. The Commission did not do so in its Final Order.

In addition to the uncertainty about the procedural mechanism the Commission will use to incorporate the record into DSP II, it is also unclear what evidence the Commission will consider in making its final determination in DSP II. As pointed out above, there are no findings of fact from DSP IV with respect to CAP shopping. The lack of explicit factual findings may lead the Commission to assign insufficient weight to the evidence presented on the record in DSP IV. It is likewise unclear whether the Commission intends to consider unsworn comments of interested parties (filed in DSP II during the pendency of the Final Order in this proceeding) in tandem with its review of sworn record testimony from DSP IV.

To resolve these procedural shortcomings in the Commission’s Final Order, CAUSE/TURN assert that the Commission should clarify and/or reconsider its Final Order, and provide a clear explanation of how it plans to adequately incorporate the record from DSP IV to the record in DSP II, and how it will weigh the facts and evidence before it. CAUSE/TURN assert that the best course of action would be to consolidate the dockets and certify the DSP II

¹⁵ See DSP II, Joint Reply Cmts. of CAUSE-PA & TURN *et al.* at 15-16; see also 52 Pa. Code § 5.407.

¹⁶ 52 Pa. Code § 5.407.

and DSP IV CAP shopping records to ALJ Fordham – who previously issued a Recommended Decision in both DSP II and DSP IV and, thus, is familiar with the record evidence presented thus far – to issue findings of fact and a Recommended Decision on the issue of CAP shopping.

b. The Commission inappropriately deferred its CAP shopping determination for resolution in the DSP II docket, contrary to the Commission’s ongoing duty to ensure the affordability and cost-effectiveness of universal service programming.

CAUSE/TURN request that the Commission reconsider its underlying decision to defer the issue of CAP shopping to the docket of an expired DSP II program. Referring consideration of this matter to a re-opened DSP II proceeding creates a conundrum, wherein the Commission is poised to rule on CAP shopping in an expired DSP II plan, to be effective in an ongoing DSP III plan period (but without any record thereon in the DSP III docket), after refusing to consider CAP shopping proposals submitted in the DSP IV proceeding for the four-year period of the DSP IV plan (June 1, 2017 – May 21, 2021). CAUSE/TURN contend that the Commission’s determination is unsupported by the Commonwealth Court’s decision in CAUSE-PA et al., and that a proper reading of the decision requires the Commission to make a determination in this proceeding – based on the most up-to-date record and the data and evidence documented and explained in the record here.¹⁷

The Commission appears to contend that the Commonwealth Court’s decision requires that

¹⁷ See CAUSE-PA et al., 120 A.3d at 1108-09. In DSP II, the Commission’s decision with respect to CAP shopping rules rested on its erroneous belief that it lacked the legal authority to impose rules that would protect CAP customers from EGS prices in excess of PECO’s price to compare. The Commission made an alternative finding that price protections could impact the competitive market, but this was not the crux of the Commission’s decision in the case. On appeal, the Commonwealth Court overturned the Commission – finding it did have the legal authority to impose reasonable rules to protect the affordability and cost-effectiveness of CAP, specifically concluding that the Commission could implement price protections against EGS charges in excess of PECO’s price to compare. At the same time, the Commonwealth Court deferred to the Commission on its alternative finding that – *based on the record before it at the time* – the evidence of harm did not outweigh the possible impact the restrictions might have on competition. However, on another issue, the ability of EGSs to impose early termination/cancellation fees on CAP customers, the Commonwealth Court remanded to the Commission, with the instruction that it approve a rule revision to PECO’s CAP shopping program prohibiting such charges.

consideration of PECO's CAP shopping rules be undertaken *solely in the DSP II docket*, and without regard to the right of parties to raise issues and create a full record in DSP IV – complete with timely data evidencing long-term harm to residential ratepayers and CAP customers, as well as a reasonable proposal presented therein to address that harm.¹⁸ In its Final Order, the Commission explains:

PECO submitted its 2016 CAP Rule Change Filing pursuant to our *May 2016 Secretarial Letter*, in which we directed PECO to submit a proposed rule revision to its CAP Shopping Plan. That directive was issued pursuant to the Commonwealth Court's Order in *CAUSE-PA*, which, *inter alia*, remanded to the Commission the CAP shopping issue that was addressed in the Company's DSP II proceeding, and instructed the Commission to approve a rule revision to the PECO CAP Shopping Plan that would prohibit CAP participants from entering into any contract with an EGS that imposes early cancellation/termination fees.¹⁹

The Final Order reflects the Commission's erroneous belief that it is required "pursuant to the Commonwealth Court's Order in *CAUSE-PA*," to undertake review of PECO's future CAP shopping program in a resurrected DSP II proceeding, notwithstanding the ongoing review of CAP shopping underway in DSP IV. As TURN *et al.*'s witness explained:

[T]he Commonwealth Court entered an order that mandated ***only one specific change*** to PECO's CAP shopping plan: that plan must prohibit CAP shopping under any contracts that impose early termination/cancellation fees. Otherwise, the Commonwealth Court affirmed the PUC's finding that the PUC's denial of price protections in PECO's CAP shopping plan was permissible on the basis of the information presented in the DSP II proceeding, Docket No. P-2012-2283641.²⁰

In all other respects, the Commission is obligated to ensure that PECO's CAP shopping plan satisfies the requirements of the Choice Act, as supported by substantial record evidence. Indeed, the Commonwealth Court, in requiring the Commission to fulfill duties of an "ongoing

¹⁸ CAUSE/TURN respectfully incorporate herein the arguments in their respective Briefs and Reply Briefs regarding the need to implement a CAP-SOP as the only reasonable alternative to protect PECO customers from higher prices charged by EGSs, which undermine the Choice Act's mandates, as recognized by the Commonwealth Court in *CAUSE-PA et al.* See CAUSE-PA MB at 15-37; TURN *et al.* MB at 27-33.

¹⁹ Final Order, at 61-62.

²⁰ TURN *et al.*, St-1SR at 7 (emphasis added).

nature” to protect CAP affordability and cost-effectiveness, specifically recognized that the Commission’s obligations would have to be discharged *in the future*.²¹ Accordingly, the Commission’s referral of CAP shopping issues to DSP II, to the exclusion of full consideration of those issues in DSP IV, fails to effectuate the Commonwealth Court’s mandates because it appears to infringe upon the ongoing nature of the Commission’s obligations. As TURN *et al.*’s witness stated:

[T]he Commonwealth Court has specifically mandated that the review of CAP shopping be periodically undertaken – doing so is part of the “continuing nature” of the PUC’s oversight, as required by the Choice Act. Moreover, the Commission’s Secretarial Letter was entered on PECO’s DSP II docket, P-2012-2283641. I am aware of no basis for the Commission’s Secretarial Letter in PECO’s 2012 DSP proceeding, or any other prior decision or determination, to somehow prejudice the positions of the parties regarding PECO’s CAP shopping plan in this DSP IV proceeding, which commenced several years after the close of the record in PECO’s DSP II.

There is substantial record evidence in this DSP IV proceeding which conclusively shows that 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 and appealed to the Commonwealth Court.²² To discharge its ongoing obligations to ensure affordability and cost-effectiveness of CAP, as required by the Choice Act and affirmed by the Commonwealth Court, CAUSE/TURN submit that the Commission should reach these issues on the merits in DSP IV. The Commonwealth Court’s remand does not require the Commission to refer CAP shopping issues for a future period, governed by the DSP IV plan, to the DSP II docket, as that remand specifically recognizes the Commission’s obligations must be discharged in the future.

²¹ CAUSE-PA *et al.*, 120 A.3d at 1108.

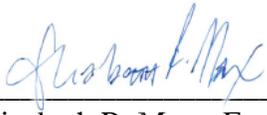
²² CAUSE-PA MB at 15-35, TURN *et al.* MB at 12-35.

V. CONCLUSION

WHEREFORE, CAUSE/TURN respectfully requests that the Commission reconsider and/or clarify its December 8, 2016 decision as requested above.

PENNSYLVANIA UTILITY LAW PROJECT

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Date: December 19, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PETITION OF PECO ENERGY :
COMPANY FOR APPROVAL OF ITS : Docket No. P-2016-2534980
DEFAULT SERVICE PROGRAM :

VERIFICATION

I, Elizabeth R. Marx, verify that the *Joint Petition for Reconsideration and/or Clarification of the Opinion and Order Entered December 8, 2016 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.)* was prepared by me or under my direct supervision, and is true and correct to the best of my knowledge, information and belief. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Counsel for CAUSE-PA



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Date: December 19, 2016