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December 29, 2016

Via Electronic Filing

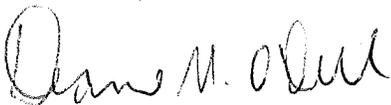
Rosemary Chiavetta, Secretary
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of PECO Energy Company for Approval of its Default Service Program for the
Period from June 1, 2017 through May 31, 2019, Docket No. P-2016-2534980

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Answer of the Retail Energy Supply Association ("RESA") to Petitions for Reconsideration of Commission's December 8, 2016 Order with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Cynthia Fordham w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Answer to Petitions for Reconsideration of Commission's December 8, 2016 Order 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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Dated: December 29, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for :
Approval of a Default Service Program and :
Procurement Plan for the Period June 1, 2017 : Docket No. P-2016-2534980
through May 31, 2021 :
:

**ANSWER OF
RETAIL ENERGY SUPPLY ASSOCIATION TO
PETITIONS FOR RECONSIDERATION OF
COMMISSION'S DECEMBER 8, 2016 ORDER**

I. INTRODUCTION

On December 8, 2016, the Commission issued its Opinion and Order (“Final Order”) in this proceeding which adjudicated the default service plan filed by PECO Energy Company (“PECO”) on March 17, 2016. As part of that Final Order, the Commission reasonably concluded (consistent with the recommendation of the Administrative Law Judge, “ALJ”) that it would defer the issue of shopping for PECO’s customer assistance program (“CAP”) participants to the currently open proceeding at docket number P-2012-2283641 (“CAP Shopping Proceeding”).¹ Importantly the Commission stated three times that it intends to “fully address” the matter and “the positions of all interested parties” in that open CAP Shopping Proceeding.² Further, to ensure full review of the matter and to address procedural concerns raised by some parties, the Commission specifically stated that it would incorporate the record developed in this proceeding into the pending CAP Shopping proceeding.³ Thus, pursuant to the Final Order, the

¹ *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Secretarial Letter dated November 18, 2016 (“*November 2016 Secretarial Letter*”). The comment period closed on December 12, 2016.

² Final Order at 61-62 (emphasis added).

³ Final Order at 62-63.

Commission has made clear that it will fully address how PECO's CAP participants will be able to avail themselves of the competitive market in the future and that it will take into consideration the record developed in this proceeding as related to the issue. This result is logical, reasonable and legally sound.

Notwithstanding this, 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") and the Office of Consumer Advocate ("OCA") seek reconsideration of the Commission's Final Order with respect to this issue. CAUSE-PA/TURN and OCA claim that reconsideration is appropriate based on procedural issues and request that the Commission: (1) reconsider its decision to defer addressing CAP shopping issues to the CAP Shopping Proceeding; or, alternatively, (2) consolidate this proceeding with the CAP Shopping Proceeding and refer the matter to ALJ Fordham with the direction to issue a recommended decision that includes findings of fact and conclusions of law.

The Retail Energy Supply Association ("RESA")⁴ opposes granting reconsideration. As discussed further below in Section II.1, the Final Order leaves no doubt that the Commission understood, considered and rightly considered the procedural concerns of these parties and nothing new is raised in the petitions for reconsideration. Referring this matter to the ALJ for further proceedings serves no legitimate purpose and appears to be rooted in either delaying

⁴ 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.

resolution of this matter (the Commission first directed that PECO CAP participants be permitted to shop effective January 1, 2014 but this has been successfully delayed through the appeal process) or a belief that ALJ Fordham will issue a recommended decision favorable to the viewpoint of the advocates.⁵ Neither of these reasons is a valid basis upon which to disrupt the legally sound and reasonable Final Order.

Additionally, CAUSE-PA/TURN advocate that reconsideration is appropriate on the basis that the Final Order is inconsistent with the Commonwealth Court's mandates. However, as explained more fully in Section II.2 below, the Commonwealth Court made explicitly 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 after which the impact of shopping on PECO's universal service program would be assessed.⁶ Nothing in the Commonwealth Court order requires (as CAUSE-PA/TURN advocate) the Commission to assess the shopping experience of CAP participants in other utility service territories to determine what restrictions should be placed on PECO's CAP participants. Therefore, the claim that the Final Order is inconsistent with Commonwealth Court directives has no merit.

Thus, for these reasons and as explained more fully below, neither petition for reconsideration meets the applicable legal standard for reconsideration and both should be denied. The Final Order leaves no doubt that the Commission understood, considered and rightly rejected the advocacy of these parties on these points and there is no legitimate reason upon which to reconsider the Commission's sound decision.

⁵ As CAUSE-PA/TURN stated in their exceptions, "[b]y ALJ Fordham's own account the Joint Parties and OCA raised 'valid points' about CAP Shopping in the context of PECO's DSP IV." CAUSE-PA/TURN Exceptions at 10.

⁶ *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*").

II. THE PETITIONS FOR RECONSIDERATION MUST BE DENIED

The threshold question for the Commission in deciding whether or not to grant reconsideration is whether the requesting party presents new and novel arguments, not previously heard, or considerations which appear to have been overlooked by the Commission. Importantly, parties are not permitted, by a second motion to review and reconsider, to raise the same questions which were specifically decided against them.⁷ The petitions of CAUSE-PA/TURN and OCA do not meet these standards and must be rejected.

1. Procedural Issues Raised By OCA, CAUSE-PA/TURN Do Not Support Granting Reconsideration

The advocates all point to procedural issues as support for granting reconsideration. OCA argues that the Commission overlooked alleged limitations of the CAP Shopping Proceeding resulting from the fact that PECO submitted tariff revisions at that docket to implement CAP Shopping and the Commission did not “state how it intends to take notice of the DSP IV record and documents, or what procedure it intends to utilize to consider those positions.”⁸ OCA appears to argue that the Commission has somehow limited its ability to fully review the CAP shopping issue because a tariff filing is pending in the CAP Shopping Proceeding. This reasoning is flawed and does not constitute an issue “overlooked” by the Commission to justify reconsideration.

PECO was first directed pursuant to a Secretarial Letter dated May 11, 2016 to file a rule revision to its CAP Shopping Plan and other information including a proposed timeline, effective date and plan to collect data upon which to evaluate CAP shopping. Additionally, the

⁷ *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553 (1982).

⁸ OCA Petition for Reconsideration at 5.

Commission specifically stated that PECO's filing would be subject to public comment and final review and approval by the Commission.⁹ Thus, the CAP Shopping Proceeding is more expansive than a traditional tariff filing which is usually approved via Secretarial Letter and without any public comment. Moreover, the Commission was well aware of the nature of the CAP Shopping Proceeding at the time of the Final Order which was entered on December 8, 2016. By that time, the Commission had already issued two Secretarial Letters at the CAP Shopping Proceeding docket. Therefore, it is not reasonable to believe that the Commission was unaware of the nature of the CAP Shopping Proceeding at the time of the Final Order.

Moreover, even if the CAP Shopping Proceeding were somehow limited consistent with OCA's view (which it is not), the Commission's Final Order makes clear that it will fully address the CAP shopping issue. Thus, the Final Order makes clear the Commission's intent to take into consideration all the positions of interested parties and to incorporate the record developed in this proceeding into that decision-making process. There is simply no basis upon which to validly claim that the Commission overlooked the nature of the CAP Shopping Proceeding to support reconsideration of the Final Order. Thus, OCA's petition for reconsideration must be rejected.

Like OCA, CAUSE-PA/TURN raise procedural issues claiming that the Sections 5.406, 5.407 and 5.408 of the Commission's procedural rules are insufficient to enable the Commission to consider the record developed in this proceeding as it decides this issue in the CAP Shopping Proceeding.¹⁰ Though dressed up as an analysis of the Commission's procedural rules, these arguments simply rehash concerns that were raised during the exception phase and which the

⁹ *Petition of PECO Energy Company for Approval of its Default Service Plan*, Docket No. P-2012-2283641, Secretarial Letter dated May 11, 2016 at 2 ("*May 2016 Secretarial Letter*").

¹⁰ CAUSE-PA/TURN Petition for Reconsideration at 5-8.

Commission specifically addressed in its Final Order.¹¹ Notwithstanding this fact, none of CAUSE-PA/TURN's arguments regarding the procedural rules are particularly persuasive as the Final Order is clear that the Commission intends to incorporate the record of this proceeding into the CAP Shopping Proceeding.¹² There is no dispute about the contents of the record of this proceeding nor can the Commission's intent to incorporate those parts of the record dealing with CAP shopping into the CAP Shopping Proceeding be seriously questioned.

Rather, the core of CAUSE-PA/TURN's advocacy appears to be focused on the fact that there has been no recommended decision from the ALJ regarding the specifics of the CAP shopping restrictions favored by some of the advocates. According to CAUSE-PA/TURN, "there are no findings of fact or conclusions of law with which to guide the Commission's consideration of the evidence from the record" and "[t]he lack of explicit factual findings may lead the Commission to assign insufficient weight to the evidence presented on the record."¹³

The Commission, however, is the ultimate trier of fact and the ultimate decision maker regarding the weight to assign evidence in a proceeding. There is no specific requirement that the Commission must receive a recommended decision from an ALJ as a precursor to deciding a matter before it. On the contrary, there are many examples where the Commission does not require a recommendation from an ALJ to make a final determination. For example, the Commission makes the final determination regarding requests for interlocutory review which may or may not include the ALJ certifying relevant parts of the record but does not require the ALJ to issue a recommended decision.¹⁴ The Commission has also exercised its discretion in

¹¹ Final Order at 62-63.

¹² Final Order at 62.

¹³ CAUSE-PA/TURN Petition for Reconsideration at 6-7.

¹⁴ 52 Pa. Code §§ 5.302(c) and 5.305(b).

various cases to direct an ALJ to certify the record – without a recommendation from the ALJ – so that the Commission can make the final decision.¹⁵ Thus, there is no support for the CAUSE-PA/TURN view that the Commission must have a recommendation from an ALJ regarding the record in this proceeding before it can move forward to permit PECO’s CAP participants to shop.

Relatedly, the Commission has relied on the opportunity to provide comments to satisfy due process requirements in numerous proceedings.¹⁶ In fact, this process is routinely employed in the Commission’s review of the universal service plans of the utilities. Through that well-established process, the Commission reviews the universal service plan submitted by the utility, issues a tentative order seeking comments and then makes a decision based on the comments received.¹⁷ The Commission generally does not subject the universal service plans to the ALJ process and, therefore, does not have any recommendations from an ALJ before it when making its final determinations. Thus, there is nothing unusual or improper with the Commission’s determination in the Final Order to incorporate the record of this proceeding into the CAP Shopping Proceeding and, combined with the comments received in the CAP Shopping Proceeding, make a final determination.

For all these reasons, RESA submits that there is no reasonable basis upon which to grant reconsideration as the Commission’s Final Order is legally sound and consistent with long-

¹⁵ See, e.g., *Joint Petition of Verizon Pennsylvania LLC And Verizon North LLC for Competitive Classification of all Retail Services in Certain Geographic Areas and for a Waiver of Regulations for Competitive Services*, Docket Nos. P-2014-2446303 and P-2014-2446304, Opinion and Order entered March 4, 2015 at 10 (The Petition was assigned to OALJ which was directed to certify the record to the full Commission after the submission of main and reply briefs).

¹⁶ See, e.g., *Petition of Philadelphia Gas Works for Approval of Demand-Side Management Plan*, Docket No. P-2014-2459362, Order entered November 1, 2016 at 29-32.

¹⁷ See, e.g., *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 Order entered April 4, 2013 at 1.

standing Commission practice. Moreover, there is no legitimate legal purpose to be served here by sending this matter back to the ALJ for issuance of a recommended decision which would only result in further delaying the ability of PECO's CAP participants to shop.¹⁸ The path for PECO's CAP participants to exercise their right to shop has been clearly forged by the Commonwealth Court and the Final Order is wholly consistent with this direction. There is no reason to delay moving forward as the Commission has directed but, to do so, the Commission must deny the petitions for reconsideration filed by CAUSE-PA/TURN and OCA.

2. Affirming The Final Order Is Consistent With The Directives Of The Commonwealth Court

CAUSE-PA/TURN argue that reconsideration is appropriate because the Commission overlooked how addressing CAP shopping issues in the CAP Shopping Proceeding circumvents the direction of the Commonwealth Court that the Commission periodically re-assess the impact of CAP shopping on residential ratepayers and CAP customers.¹⁹ Pursuant to this flawed argument, the record developed in this proceeding will not be taken into consideration during the CAP Shopping Proceeding and, therefore, the Commission will not be relying on the data gathered from PPL and FirstEnergy where CAP participants have been able to shop (there is no PECO specific data) to make its determination on imposing price restrictions on EGS offers to CAP participants.²⁰

This analysis, however, contorts the clear directive of the Commonwealth Court because it inappropriately expands the review and evaluate direction of the Commonwealth Court beyond

¹⁸ OCA also supports, as an alternate request for relief, consolidating both proceedings and referring them back to ALJ Fordham for a decision on the merits. OCA Petition for Reconsideration at 6.

¹⁹ CAUSE-PA/TURN Petition for Reconsideration at 5.

²⁰ CAUSE-PA/TURN Petition for Reconsideration at 10.

PECO. By its clear text, the Commonwealth Court directed: (1) that PECO's CAP participants to be able to avail themselves of shopping with only a prohibition on the imposition of early cancellation/termination fees;²¹ and then, (2) the impact of this shopping on PECO's universal service plan would be reviewed as part of PECO's universal service plan review process.²² More specifically, the Commonwealth Court stated:

. . . 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.²³

Nothing in this language either explicitly or implicitly directs the Commission to analyze the shopping experience of CAP participants in other utility service territories to determine what restrictions should be placed on PECO's CAP participants (as CAUSE-PA/TURN advocate here). Rather, the Commonwealth Court understood there was no PECO specific data to assess the impact of shopping on PECO's universal service programs (because CAP participants had not been able to shop). The Commonwealth Court was also not persuaded that data from PPL supported concerns about the impact of CAP shopping on PECO's universal service program.²⁴ Therefore, directing that PECO's CAP participants be able to shop with only a limitation on the assessment of early termination/cancellation fees and then evaluating the impact of that decision

²¹ CAUSE-PA/TURN continue to claim that data from PPL and FirstEnergy provided in this record presents new information that would compel a different result than that reached by the Commonwealth Court regarding placing price restrictions on EGS offers to CAP participants. CAUSE-PA/TURN Petition at 8, fnote 17. However, as explained more fully in RESA's briefs, the Commonwealth Court rejected price restrictions based on the substantial evidence that the proposed restrictions would adversely affect available choices for CAP participants. RESA Main Brief at 16-19. Evidence presented in this proceeding in response to the proposals of the proponents of CAP shopping restrictions continues to support the conclusion that restrictions on EGS pricing will adversely affect available choices for CAP participants. RESA St. No. 1-R at 15-17 (RESA expert testified how the proposals in this proceeding are even more problematic for EGSs than those before the Commonwealth Court).

²² *Commonwealth Court CAP Shopping Decision* at 1106-1107.

²³ *Commonwealth Court CAP Shopping Decision* at 1108 (emphasis added).

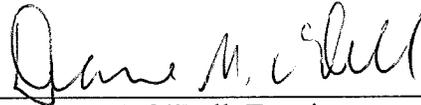
²⁴ *Commonwealth Court CAP Shopping Decision* at 1105-1106.

during the subsequent review of PECO's universal service program makes perfect sense. Thus, contrary to the claims of CAUSE-PA/TURN, rather than "failing to effectuate the Commonwealth Court's mandates" affirming the decision of the Final Order and comprehensively addressing CAP shopping issues in the CAP Shopping Proceeding with the benefit of the record in this proceeding is wholly consistent with the Commonwealth Court's directives.

III. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission reject the petitions for reconsideration of OCA and CAUSE-PA/TURN and affirm the Final Order as written.

Respectfully submitted,



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