

**BEFORE  
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of the Boroughs of Camp Hill,	:	
Carlisle, Hatboro, Lansdowne, Media,	:	
Narberth, State College and Swarthmore	:	P-2024-3049623
for a Declaratory Order Regarding the	:	
Implementation of Community Choice	:	
Aggregation	:	

**INITIAL DECISION**

Before  
Mary D. Long  
Administrative Law Judge

**INTRODUCTION**

A group of boroughs filed a petition for declaratory judgment seeking an order that would approve a proposed opt-out municipal aggregation program. This decision dismisses the petition and denies the associated motion for partial judgment on the pleadings. The boroughs failed to demonstrate that either judgment on the pleadings or declaratory judgment in their favor was appropriate.

**HISTORY OF THE PROCEEDINGS**

On June 20, 2024, the Boroughs of Carlisle, Hatboro, Lansdowne, Media, Narberth, State College and Swarthmore (the Boroughs) petitioned the Public Utility Commission asking the Commission to issue a declaratory order “to remove uncertainty concerning the lawfulness under Pennsylvania law and Commission precedent of the

establishment by each Borough of a Community Choice Aggregation (CCA) program.” (Petition). Notice of the Petition was published in the July 6, 2024, *Pennsylvania Bulletin*.<sup>1</sup> The notice stated that protests and petitions to intervene must be filed by August 5, 2024.

Protests, answers and/or petitions to intervene were filed by the following parties on August 5, 2024: Office of Consumer Advocate (OCA), Office of Small Business Advocate (OSBA), Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), Citizens’ Electric Company of Lewisburg (Citizens), Wellsboro Electric Company (Wellsboro), Duquesne Light Company (DLC), FirstEnergy Pennsylvania Electric Company (FirstEnergy), PECO Energy Company (PECO), PPL Electric Utilities Corporation (PPL), NRG Energy Inc. (NRG), and Retail Energy Supply Association (RESA).<sup>2</sup>

On September 3, 2024, the Boroughs amended their Petition to add Camp Hill Borough as a petitioner and proposed modifications to the original June 20, 2024, Petition.

The Petition was assigned to me, and I scheduled a prehearing conference for September 13, 2024. The prehearing conference was convened as scheduled. Following a discussion with the parties, I issued an interim order which, among other things, directed the Boroughs to file a consolidated amended Petition which integrated the modifications proposed in the September 3, 2024, amendment. That order also scheduled a further prehearing conference for October 29, 2024.

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<sup>1</sup> 54 Pa.B. 3859 (July 6, 2024).

<sup>2</sup> Letters or comments in support of the proposal in the petition were also filed by several legislators, municipalities, local officials and business entities.

The Boroughs filed a consolidated amended Petition on September 20, 2024, as directed. Notice of the amended Petition and October 29, 2024, Prehearing Conference was published in the October 5, 2024 *Pennsylvania Bulletin*.<sup>3</sup> OCA, CAUSE-PA, Citizens, Wellsboro, PECO, PPL, NRG and RESA filed answers or comments to the amended petition on October 18, 2024. No additional entities filed answers or petitions to intervene.

The September 13, 2024, Interim Order directed the parties to submit proposals for a litigation plan by noon on October 8, 2024. OCA, PPL, Citizens and Wellsboro served timely letters noting that the parties had been unable to reach a consensus on a litigation plan for the Petition. OCA and PPL advocated their approaches for discovery and dispositive motions. The Boroughs emailed an untimely letter proposing to file a motion for judgment on the pleadings.

The October 29, 2024, Prehearing Conference convened as scheduled. Counsel for the parties appeared. After noting that only two parties had presented proposals for discovery and dispositive motions, I directed the Boroughs to file a memorandum that shows cause why the Petition for Declaratory Order should not be dismissed. I directed the Boroughs to specifically explain why the Commission should exercise its discretion to entertain declaratory judgment and why the municipal aggregation proposal is not better addressed by rulemaking or legislation. The Boroughs were to address how declaratory judgment removes “uncertainty” regarding the application of the Commission’s existing statutory mandate and regulations and does not abuse the due process rights of municipalities, utilities, energy suppliers and other stakeholders who are not parties to this proceeding. The Boroughs’ memorandum was due on November 26, 2024; responses were due on December 23, 2024. I also granted

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<sup>3</sup> 54 Pa.B. 6349 (Oct. 5, 2024).

the Boroughs leave to file a motion for judgment on the pleadings on the same schedule. I memorialized my instructions in a Rule to Show Cause served on October 30, 2024.

The Boroughs filed a Memorandum to Show Cause and Motion for Partial Judgment on the Pleadings on November 26, 2024. OCA, OSBA, CAUSE-PA, Citizens, Wellsboro, DLC, PECO, PPL and NRG filed responses on December 23, 2024.

The Boroughs want the Commission to:

Issue a declaratory order to remove uncertainty concerning the lawfulness under Pennsylvania law and Commission precedent of the establishment by each Borough of a Community Choice Aggregation (“CCA”) program as described in more detail below (the “CCA Program” or the “Program”). CCA permits municipalities to act as an aggregator for the electric power demand of their residents and procure power on their behalf to achieve favorable pricing, better consumer protection, and other community goals.<sup>[4]</sup>

As set forth in some detail in their Petition, the Boroughs wish to adopt an “opt-out” aggregation program. Broadly, the Boroughs wish to design a program to acquire electricity supply on behalf of their citizens with the assistance and support of a program administrator. Citizens would be automatically enrolled in the program, unless they notified the Borough that they did not wish to participate. According to the Boroughs, the purpose of the program is to achieve renewable energy goals in response to the challenge posed by climate change.

The Intervenors oppose the Boroughs proposal on a variety of grounds, including, but not limited to, the unknown impact on default service obligations, customer protections, and potential undesirable impacts on low-income citizens. Parties

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<sup>4</sup> Amended Petition ¶ 1.

representing electricity suppliers argue that they already provide renewable energy products that are available to retail customers. The Intervenor all note the design of the program as an “opt-out” program, violates the anti-slamming provisions of the Public Utility Code.

## DISCUSSION

The Boroughs’ stated goal for the proposed aggregation program is commendable and important. However, for the reasons set forth below, the Boroughs’ Motion for Judgment on the Pleadings is denied and Petition for Declaratory Judgment is dismissed. The Boroughs have failed to sustain their burden of proving that they are entitled to judgment as a matter of law or that granting their petition is appropriate.

### **Motion for Partial Judgment on the Pleadings**

The Commission’s Rules of Practice and Procedure at 52 Pa. Code § 5.102 govern motions for judgment on the pleadings. The Commission will grant a motion for judgment on the pleadings only if the pleadings show there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law.<sup>5</sup>

Commission preliminary motion practice is similar to Pennsylvania civil practice.<sup>6</sup> When ruling on a motion for judgment on the pleadings the Commission must view all of the opposing party's allegations as true, and only those facts that the opposing party has specifically admitted may be considered against the opposing party.<sup>7</sup> Following

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<sup>5</sup> 52 Pa.Code § 5.102(d)(1).

<sup>6</sup> *Equitable Small Transp. Interveners v. Equitable Gas Co.*, Docket No. C-00935435 (Opinion and Order entered July 18, 1994).

<sup>7</sup> *Johnson v. Wetzel*, 271 A.3d 547 (Pa. Cmwlth. 2021); *Bolus v. Fisher*, 785 A.2d 174, 176, n.4 (Pa. Cmwlth. 2001); *see also Trib Total Media, Inc. v. Highlands Sch. Dist.*, 3 A.3d 695, 698 n.2 (Pa. Cmwlth. 2010).

the practice in civil courts, in reviewing a motion for judgment on the pleadings, “[w]e may consider only the pleadings themselves and any documents properly attached thereto.”<sup>8</sup>

Further, motions for judgment on the pleadings may be granted only when there is no genuine issue of fact, and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing the lack of a genuine issue of material fact.<sup>9</sup> The Commission “need not accept as true conclusions of law, unwarranted inferences from fact, argumentative allegations, or expressions of opinion.”<sup>10</sup>

The Boroughs did not file a separate motion for partial judgment on the pleadings but instead filed a combined “Memorandum to Show Cause and Motion for Partial Judgment on the Pleadings.” This document includes 76 numbered paragraphs along with headings that travel back and forth between averments from the original petition. The Memorandum includes the Boroughs’ assessment of issues raised by some of the opposing parties in their answers, and paragraphs that generally describe assertions that the Boroughs view as issues to which they are entitled to relief.

The Boroughs appear to argue that they are entitled to judgment on the pleadings in their favor on the following issues:

1. The Proposed CCA Program does not harm and has the potential to improve competition;

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<sup>8</sup> *Bolus*, 785 A.2d at 176, n.4.

<sup>9</sup> *Hughes v. Council 13, Am. Fed. of State, Cnty. & Mun. Emps., AFL-CIO*, 629 A.2d 194, 195 (Pa. Cmwlth. 1993).

<sup>10</sup> *Diess v. Pa. Dep’t of Transp.*, 935 A.2d 895, 903 (Pa. Cmwlth. 2007) (quotation omitted).

2. Findings on the CCA Program Pricing are not necessary or appropriate in this proceeding;
3. The Boroughs have a duty “to act affirmatively to protect the environment” and the Constitution protects their ability to do so. The Commission must interpret its statutory jurisdiction in a manner consistent with the Boroughs’ ability to act;
4. The Program makes a modest imposition on customers who desire default service and are asked to actively choose it;
5. The Boroughs may implement the proposed CCA Program subject to certain further proceedings relating to standard offer procurement, customer communications and data transfer.<sup>[11]</sup>

The Boroughs’ motion does not clearly set out the undisputed facts from their initial pleading and the opposing answers to that pleading, that support judgment in their favor. Instead, the Boroughs contend the Commission may grant judgment in their favor by taking “official notice” of facts. The Boroughs also assert that the Commission should only consider the facts that the Boroughs contend the Commission should officially notice and disregard opposing facts asserted by the other parties in their Answers to the Petition. The Boroughs do not set forth specific facts that they believe the Commission should notice but cite and summarize a variety of state and federal reports<sup>12</sup> and ask the Commission to take “notice of these findings.”<sup>13</sup>

The Boroughs fail to appreciate the standard for granting judgment on the pleadings in their favor. First, only the *pleadings* can be considered. Facts beyond the

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11 Memorandum ¶¶ 54-59.

12 Memorandum ¶¶ 47-50.

13 Memorandum ¶ 46.

pleadings – including officially or judicially noticed facts – cannot be considered.<sup>14</sup> Second, the Boroughs have the burden of specifically demonstrating which facts are not in dispute. It is not the burden of the opposing parties to *prove* the facts alleged in their answers to the petition; in a motion for judgment on the pleadings those facts are presumed to be true.

With the exception of the Boroughs’ claim regarding the consequence of the Environmental Rights Amendment (ERA),<sup>15</sup> the issues that the Boroughs contend are appropriate for judgment on the pleadings are by their very nature fact intensive. The facts that would support the conclusions that the Boroughs seek are strenuously disputed by parties opposing the motion. Therefore, the Boroughs’ motion on issues regarding potential harm to competition, the imposition on customers, and necessity of further procedures on some of the details of the proposal is denied.

The Boroughs’ claim that the ERA mandates judgment in their favor is essentially a legal argument. However, this claim must fail also.

As noted above, the stated intent behind the Boroughs’ municipal aggregation proposal – improving air quality by purchasing energy from renewable sources – is laudable. Indeed, several of the opposing parties agree that climate change poses a challenge and that an impulse to address the challenge is a good thing.<sup>16</sup>

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<sup>14</sup> Nor is it the Commission’s burden to suss out the specific “facts” in the reports that the Boroughs believe are obvious and notorious to an expert in the agency’s field and those facts contained in reports and records in the agency’s files, in addition to those facts which are obvious and notorious to the average person.

<sup>15</sup> Pa. Const. art. 1, § 27.

<sup>16</sup> *E.g.*, CAUSE-PA Answer to Memorandum to Show Cause at 1; PPL Answer to Memorandum to Show Cause at 15; Wellsboro Answer to Restated Petition at 13.

The Boroughs are correct that the Commission certainly has a duty in certain circumstances to consider environmental impacts when exercising its authority. However, simply invoking the ERA does not force the Commission to act in the Boroughs' favor, particularly when there is no statutory mandate to do so. The Commission may only exercise the jurisdiction that the General Assembly has delegated.<sup>17</sup> The ERA cannot expand the statutory powers of an administrative agency.<sup>18</sup> In short, while the Commission is obligated to consider the environmental impacts of certain decisions, particularly related to siting decisions, it may only do so within the confines of its authority:

Because it is the Commonwealth, not individual agencies or departments, that is the trustee of public natural resources under the ERA, and the Commonwealth is bound to perform a host of duties beyond implementation of the ERA, the ERA must be understood in the context of the structure of government and principles of separation of powers. In most instances, the balance between environmental and other societal concerns is primarily struck by the General Assembly, as the elected representatives of the people, through legislative action. While executive branch agencies and departments are, from time to time, put in the position of striking the balance themselves, they do so only after the General Assembly makes “basic policy choices” and imposes upon the agencies or departments “the duty to carry out the declared legislative policy in accordance with the general provisions of the statute.” The second provision of the ERA impels executive branch agencies and departments to act in support of conserving and maintaining public natural resources, but it cannot operate on its own to

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<sup>17</sup> *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny Cnty. Port Auth. v. Pa. Pub. Util. Comm'n.*, 237 A.2d 602 (Pa. 1967). See also *Dep't of Env'tl. Res. v. Butler Cnty. Mushroom Farm*, 454 A.2d 1 (Pa. 1982); *Pequea Twp. v. Dep't of Env't Prot.*, 716 A.2d 678 (Pa. Cmwlth. 1998).

<sup>18</sup> See *Commonwealth v. Monsanto Co.*, 269 A.3d 623 (Pa. Cmwlth. 2021); *Delaware River Keeper Network v. Pa. Dep't of Env't Prot.*, 247 A.3d 1188 (Pa. Cmwlth. 2021) (unpublished).

“expand the powers of a statutory agency.” Thus, courts assessing the duties imposed upon executive branch departments and agencies by the ERA must remain cognizant of the balance the General Assembly has already struck between environmental and societal concerns in an agency or department's enabling act.<sup>[19]</sup>

Climate change is a complex problem which requires a balancing of many societal, economic and environmental concerns. The responsibility for striking this balance lies with the General Assembly, not with any single administrative agency.<sup>20</sup> In the absence of statutory authority to approve opt-out municipal aggregation as a means to address climate change, the Pennsylvania Constitution does not by itself require the Commission to approve the Boroughs' petition. Notably, the General Assembly balanced the need to consider environmental concerns and energy in the Alternative Energy Portfolio Standards Act<sup>21</sup> and Act 129.<sup>22</sup> While the Boroughs may dispute that these statutes have achieved environmental goals to the degree that the Boroughs believe they should, as a matter of law, the ERA does not place an independent mandate on the Commission to act where the General Assembly has not. Therefore, the Boroughs' motion for partial judgment on the pleadings on this is denied as well.

### **Rule To Show Cause: Propriety of Declaratory Judgment**

The Public Utility Code authorizes the Commission to issue declaratory judgment:

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<sup>19</sup> *Funk v. Wolf*, 144 A.3d 228, 234 (Pa. Cmwlth. 2016), *affirmed*, 158 A.3d 642 (Pa. 2107) (citations omitted).

<sup>20</sup> *See Funk* at 250.

<sup>21</sup> 73 P.S. §§ 1648.1-1648.8.

<sup>22</sup> Act 129 of 2008, P.L. 1592 (October 15, 2008).

The commission, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.<sup>[23]</sup>

Like any other request, as the petitioner, the Boroughs bear the burden of convincing the Commission that it should exercise its discretion and grant declaratory judgment in the Boroughs' favor.<sup>24</sup>

The essential purpose of declaratory judgment is to resolve a controversy based on *existing* rights, status or legal relations.<sup>25</sup> That is, declaratory judgment is like “judicial searchlights, switched on at the behest of a litigant to illuminate an existing legal right, status or other relation.”<sup>26</sup> Declaratory judgment proceedings cannot be used to make new law.<sup>27</sup>

The October 30, 2024, Rule to Show Cause memorialized my instructions to the Boroughs to demonstrate why their Petition should not be dismissed as an inappropriate use of declaratory judgment. Specifically, I instructed the Boroughs to demonstrate why legislation or rulemaking was not a more appropriate mechanism to address municipal aggregation rather than by declaratory judgment, a judicial procedure.

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<sup>23</sup> 66 Pa.C.S. § 331(f).

<sup>24</sup> 66 Pa.C.S. § 332(a); *Petition of Librandi Machine Shop, Inc.*, Docket P-2018-3000047 (Opinion and Order entered Feb. 25, 2021) (*Petition of Librandi Machine*).

<sup>25</sup> *Independent Petroleum Producers v. Dep't of Env't Res.*, 525 A.2d 829 (Pa. Cmwlth. 1988), *affirmed*, 550 A.2d 195 (Pa. 1989), *cert. denied*, 489 U.S. 1096 (1989).

<sup>26</sup> *Doe v. Johns-Mansville Corp.*, 471 A.2d 1252, 1254 (Pa. Super. 1984) (*Johns-Manville*).

<sup>27</sup> *Atlantic Richfied Co. v. Cnty. of Montgomery*, 294 A.2d 1274 (Pa. Cmwlth. 2023) (*Atlantic Richfied*); *Johns-Manville*.

The Boroughs' response is dismissive: "The Boroughs might seek legislation, but nothing obligates them to."<sup>28</sup> The Boroughs go on to assert that their memorandum demonstrates that "the issues they raise are, in large part, capable of legal clarification either on the face of the law, or with the benefit of facts of which the Commission may take notice."<sup>29</sup>

OCA, CAUSE-PA, the EDCs<sup>30</sup> and EGS<sup>31</sup> representatives argue that the Petition should be dismissed.<sup>32</sup> Generally, they contend that the Boroughs' petition does not meet the standard for a declaratory order. The Boroughs' Petition raises many issues that impact, among other things, customers, default service providers, suppliers and the competitive market. As these issues are of a statewide nature, the Intervenors (except for OSBA) argue the Commission should decline to address the Petition by declaratory order.

### **Prior Commission Decisions**

The Boroughs' CCA is designed as an "opt out" program, which would require citizens to affirmatively decline to participate. However, the Public Utility Code expressly forbids EDCs or EGSs from switching a customer's supplier without direct consent. Therefore, as a general rule, neither EDCs nor EGSs are authorized to participate in opt-out municipal aggregation.

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<sup>28</sup> Memorandum ¶ 74.

<sup>29</sup> *Id.*

<sup>30</sup> The EDCs (electric distribution company) are Citizens/Wellsboro, DLC, PECO, and PPL. FirstEnergy did not respond to the motion for partial judgment on the pleadings or rule to show cause.

<sup>31</sup> EGS (electric generation supplier) parties are NRG and RESA. RESA did not respond to the motion for partial judgment on the pleadings or rule to show cause.

<sup>32</sup> OSBA takes the position that the Commission should set a schedule for discovery and litigation.

However, on two occasions, parties have requested the Commission to consider whether EDCs or EGSs may provide supply to retail customers on an “opt-out” basis. The first decision was *Pike County*,<sup>33</sup> where Direct Energy Services, LLC (Direct Energy) requested that the Commission approve a proposal to offer electric generation supply in the service territory of Pike County Light & Power (PCLP). Importantly, this petition was not a petition for declaratory judgment. Rather, it requested emergency approval to address an emergency situation, in the context of a Commission investigation.

The genesis of the Direct Energy petition was unusually high retail rates in the service territory of PCLP, resulting from an auction to establish Provider of Last Resort rates. The Commission, in February 2006, initiated an investigation into the competitive electric market in PCLP’s service territory. In March 2006, Direct Energy filed a Petition for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike Count Light & Power. Following a one-day hearing, the presiding administrative law judge certified the record to the Commission for decision.

The Commission recognized that the “extraordinarily high price to compare” coupled with the lack of offers from licensed electric generation suppliers in the service territory, created a unique and compelling circumstance that required expeditious action by the Commission:

Upon our consideration of Direct Energy’s Petition and the responses thereto, we conclude that a Retail Aggregation Bidding Program, as further described below, is appropriate at this time in [PCLP]’s service territory. Our decision is

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<sup>33</sup> *Petition of Direct Energy Services, LLC for Emergency Order Approving a Retail Aggregation Bidding Program of Customers of Pike County Light & Power Company*, Docket P-00062205 (Final Opinion and Order entered Apr. 20, 2006) (*Pike County*).

based on the following factors: the unique circumstances resulting from the timing of this auction, the isolation of this service territory from the more robust MISO and PJM Regional Transmission Organizations (RTOs), the scarcity of competitive offers in the wholesale bid for default service, and the small size of [PCLP]’s service territory.<sup>[34]</sup>

Specifically, the Commission explained that although there was an “opt-out” element of the program for customers, the program as designed was not slamming within the meaning of the Public Utility Code:

[A]n opt-out program is not prohibited by Section 2807(d)(1) of the Public Utility Code, 66 Pa.C.S. § 2807(d)(1), which requires the Commission to establish regulations to ensure that an EGS does not change a customer's electricity supplier without direct oral confirmation or written evidence of the consent. This statutory provision and regulations promulgated thereunder are directed toward the prevention of un-authorized switching of retail customers, or “slamming.” The implementation of the retail aggregation program, under this Commission’s oversight and according to the terms and conditions of the Request For Proposals attached hereto, does not constitute slamming or violate the prohibitions of the statute. The type of program adopted here, when supported by the record, was upheld in *George v. Pa. Pub. Util. Comm’n*, 735 A.2d 1282 (Pa. Cmwlth. 1999), appeal denied, 563 Pa. 650, 758 A.2d 1202 (2000), and we approved a substantially similar program in *Petition for Approval of PECO-Market Share Threshold Bidding/Assignment Process*, Docket No. P-00021984 (Order entered May 1, 2003).<sup>[35]</sup>

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<sup>34</sup> *Pike County* at 5.

<sup>35</sup> *Pike County* at 13-14.

Finally, recognizing that the need for rate relief for PCLP customers would not persist indefinitely, the Commission limited the timeframe for the program.<sup>36</sup>

The Commission next considered a petition for opt-out municipal aggregation in the *Petition of the Retail Energy Supply Association for Investigation and Issuance of Declaratory Order Regarding the Propriety of the Implementation of Municipal Electric Aggregation Programs Absent Statutory Authority*.<sup>37</sup> The Commission consolidated RESA's petition with similar petitions filed by Dominion Retail and FirstEnergy Solutions Corporation (FES). The gist of the RESA and Dominion Retail petitions was that opt-out municipal aggregation was illegal in the absence of an act of the General Assembly and was inconsistent with Commission regulations and approved electric distribution company default service plans. FES, in contrast, sought an order from the Commission declaring that FES does not need any Commission approvals to participate in opt-out municipal aggregation programs designed by the City of Meadville, the Borough of Edinboro, City of Warren, and the City of Farrell.

The Commission did not address "every aspect of the myriad issues regarding municipal aggregation."<sup>38</sup> Instead, the Commission focused on the authority of EGSs and EDCs to participate in municipal aggregation programs.

In a Declaratory Order, the Commission held that absent emergency circumstances like those in *Pike County*, opt-out municipal aggregation violates Section 2807(d)(1) of the Public Utility Code:

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<sup>36</sup> *Id.* at 18.

<sup>37</sup> Docket P-2010-2207-62 (consolidated) (Declaratory Order entered Mar. 17, 2011) (*RESA Petition*).

<sup>38</sup> *RESA Petition* at 4.

The FES/City of Meadville municipal aggregation program is an opt-out program, which means that residents must affirmatively choose to leave the program, otherwise they will participate in the program by default. Such a program violates section 2807(d)(1) of the Public Utility Code, 66 Pa.C.S. § 2807(d)(1), and related Commission regulations regarding the standards for changing a customer's electricity generation supplier found at 52 Pa Code §§ 57.171 – 57.179 which prohibit “slamming.” “Slamming” is a term that has developed to characterize the practice of changing a customer's electric generation supplier without their approval. The General Assembly explicitly prohibits “slamming”, as set forth in section 2807(d)(1) and (2) of the Public Utility Code, which provides:

(1) The commission shall establish regulations to ensure that an electric distribution company does not change a customer's electricity supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier.

(2) The commission shall establish regulations to require each electric distribution company, electricity supplier, marketer, aggregator and broker to provide adequate and accurate customer information to enable customers to make informed choices regarding the purchase of all electricity services offered by that provider. Information shall be provided to consumers in an understandable format that enables consumers to compare prices and services on a uniform basis.

66 Pa.C.S. § 2807(d)(1) and (2).

The Meadville Ordinance is inconsistent with the consumer protection rules applicable to switching electric generation suppliers which are controlled on a statewide basis by

Section 2807(d)(1) of the Public Utility Code and the related Commission regulations. The statute prohibits EDCs from switching a customer “without direct oral confirmation from the customer of record or written evidence of the customer’s consent to a change of supplier.” *Id.* Regardless of the City of Meadville’s authority to pass an ordinance authorizing municipal aggregation, an EDC or EGS cannot switch a customer who does not opt-out without Commission approval.<sup>[39]</sup>

The Commission then emphasized that the approval of opt-out aggregation in *Pike County* was “within an emergency context.” Specifically:

The situation in Pike County was unique, involving a small community that required rate relief after the relevant EDC conducted an auction to obtain default electric service supply at an inopportune moment in the electricity market, resulting in an increase in residential electric bills of approximately seventy-five percent (75%). In its Pike County decision, the Commission did not endorse opt-out programs as a general rule, rather the Commission approved such a program to deal with an emergency situation with appropriate consumer protections within the context of the situation. FES’s reading of Pike County as a general endorsement of opt-out programs is not correct.<sup>[40]</sup>

The Commission further held that since both EGSs and EDCs are subject to Commission oversight and regulation and in the absence of legislative authority or unique and emergency circumstances, “approval of an opt-out municipal aggregation program would be an improper and unnecessary abrogation of individual consumers’ rights concerning electricity choice.”<sup>41</sup>

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<sup>39</sup> *Id.* at 5-6.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.* at 10.

## Current Petition

As noted above, it is not the purpose of a declaratory order to create new law.<sup>42</sup> This standard is rooted in the notion that it is not a judicial function to usurp the role of the legislative function by creating new legal standards. Generally, where the Commission has granted declaratory judgment, it has done so by interpreting existing regulation and applying that interpretation to a set of unique factual circumstances.<sup>43</sup> In this case, I find the relief requested by the Boroughs far exceeds merely interpreting a statutory provision or regulation, but asks for Commission approval for a program that is in conflict with the Public Utility Code and not contemplated by the Commission's current statutory mandate. Therefore, the Boroughs' Petition is dismissed.

The Boroughs have not offered a compelling explanation why their Petition is distinct from the petitions in *RESA Petition*. Citing the Commission's *Pike County* decision, the Boroughs claim that responding to climate change is an emergent situation which calls for the Commission to approve the proposed opt-out municipal aggregation program.

As explained above, invoking the ERA does not require that the Commission grant declaratory relief. There is nothing unique about the Boroughs. Climate change is not a short-term problem, nor does the Boroughs' proposal involve a limited service territory. In *Pike County*, the service territory was faced with a relatively short-term failure of the competitive market. The situation called for an "out-of-the-box" solution to address a specific, defined problem. The Commission was clear that the solution was not meant to create a *de facto* regulatory scheme or substitute for legislation.

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<sup>42</sup> *Atlantic Richfield; Johns-Manville.*

<sup>43</sup> E.g., *Petition of Librandi Machine.*

Indeed, in *Pike County* the Commission determined that the design and purpose of the program was not slamming.

The General Assembly is aware of the challenge posed by maintaining and improving the quality of the environment but has chosen to balance environmental concerns by other means.

The General Assembly has balanced the benefit of retail competition with environmental concerns. The General Assembly addressed electric generation from “alternative energy sources” in Alternative Energy Portfolio Standards Act (AEPS):

The electric energy sold by an electric distribution company or electric generation supplier to retail electric customers in this Commonwealth shall be comprised of electricity generated from alternative energy sources and in the percentage amounts as described under subsections (b) and (c).<sup>[44]</sup>

The Electricity Generation Customer Choice and Competition Act,<sup>45</sup> recognizes the importance of air quality and air quality standards, while also balancing the value of electric generation competition.<sup>46</sup>

In the Preamble to Act 129 of 2008, which revised the Electricity Generation Customer Choice and Competition Act to create the current default service framework incorporating AEPS requirements, the General Assembly declared that the following objectives were served by the Act:

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<sup>44</sup> 73 P.S. § 1648.3; *See also* 66 Pa.C.S. § 2814 (relating to additional alternative energy sources).

<sup>45</sup> 66 Pa.C.S. § 2801-2815.

<sup>46</sup> 66 Pa.C.S. § 2802(21).

(1) The health, safety and prosperity of all citizens of this Commonwealth are inherently dependent upon the availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at the least cost, taking into account any benefits of price stability over time and the impact on the environment. . . .

(2) It is in the public interest to expand the use of alternative energy and to explore the feasibility of new sources of alternative energy to provide electric generation in this Commonwealth.<sup>[47]</sup>

In short, the General Assembly has already struck a balance of interests in crafting a flexible default service framework that considers environmental interests, including procurement of renewable energy. Moreover, the General Assembly has not authorized the Commission to regulate municipal aggregations programs and has elected not to amend Section 2807 of the Public Utility Code to permit opt-out municipal aggregation.

The Boroughs dispute the effectiveness of these statutory provisions or prefer a different framework for greater procurement of renewable energy than what the General Assembly has required for default service in Act 129 and the AEPS Act. However, the Pennsylvania Constitution does not mandate that the Commission permit the Boroughs to operate CCAs to pursue those preferences.

Granting declaratory judgment here would effectively be an “endorse[ment] of opt-out programs as a general rule.” If the Commission accepts the emergent nature of responding to climate change, every municipality in the Commonwealth is faced with the same “emergency.” Authorizing the Boroughs opt-out municipal aggregation proposal

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<sup>47</sup> Preamble, Act 129 of 2008, P.L. 1592 (Oct. 15, 2008).

would create precedent for any municipality to request Commission authorization.<sup>48</sup> The potential result would be a host of piecemeal and fractured programs which could result in a patchwork of unique and potentially conflicting rules across the Commonwealth for both EDCs and EGSs, and their customers.<sup>49</sup>

There is a process in the structure of government, and the legislative and rulemaking process plays an important role in ensuring the stability and integrity of the government. Addressing climate change inherently involves the balancing of policy choices across multiple Commonwealth agencies. Therefore, administrative agencies like the Commission look to the legislative branch for guidance in developing regulations and the applications of regulations that serve the legislative mandates that choose the balance of competing policies and priorities. With appropriate legislative guidance, the regulatory review process can permit public participation in the promulgation of regulation. To that end, an agency must invite, accept, review and consider written comments from the public regarding the proposed regulation; it may hold public hearings if appropriate. After an agency obtains the Attorney General's approval of the form and legality of the proposed regulation, the agency must deposit the text of the regulation with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

Commission approval of the Boroughs' proposal is more likely to create uncertainty regarding the competitive supply market, default service obligations, utility customers' rights to seek relief from the Commission, etc. The Boroughs have therefore failed to adequately respond to the directive in the Rule to explain why the Commission

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<sup>48</sup> As evidenced by the letters in support of the petition filed at this docket, many municipalities are interested in adopting similar municipal aggregation programs.

<sup>49</sup> Indeed, as the Boroughs themselves point out in their petition: of the nine states that have adopted community choice aggregation, eight have done so by legislation. Only the New York Public Service Commission has approved a program by administrative action. For a detailed review of other state programs, *see* OCA Comments to the Restated Petition at 11-16.

should address their proposal by declaratory order rather than through rulemaking or legislation. While the Boroughs' proposal is well-motivated, the appropriate relief is not achieved with a declaratory order, but by seeking an appropriate legislative process that would provide consistent guidelines for all EGSs and EDCs that are regulated by the Commission and provide consistent and reliable protections for consumers. Addressing opt-out municipal aggregation on a case-by-case basis, which would certainly result if the Commission granted the Boroughs' Petition, risks imposing asymmetrical and inconsistent policies across the Commonwealth which would directly impact utilities operations and consumers ability to access safe and affordable utility services. The Boroughs do not address, or even acknowledge, the broad impacts of this proceeding – and whether those impacts are more properly handled through rulemaking or legislation.

In sum, declaratory judgment is discretionary, and the Commission will only grant declaratory relief in clear cases where judgment will remove uncertainty regarding the application or interpretation of Commission regulations. In the current law, there is no uncertainty: neither EGSs nor EDCs may participate in opt-out municipal aggregation because to do so violates the Public Utility Code and the Commission's regulations. In *Pike County*, the Commission concluded that the proposed program was not slamming as defined by the Public Utility Code. In *RESA Petition*, which was similar to the Boroughs' proposal, the Commission was clear that opt-out municipal aggregation constituted slamming. The Boroughs did not demonstrate that their proposed program does not violate the Public Utility Code.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Motion for Partial Judgment on the Pleadings by the Boroughs of Camp Hill, Carlisle, Hatboro, Lansdowne, Media, Narberth, State College and Swarthmore at Docket No. P-2024-3049623, is denied.

2. That the Boroughs of Camp Hill, Carlisle, Hatboro, Lansdowne, Media, Narberth, State College and Swarthmore have failed to show cause why the Petition for Declaratory Judgment at Docket No. P-2024-3049623, should not be dismissed.

3. That the Petition for Declaratory Judgment by the Boroughs of Camp Hill, Carlisle, Hatboro, Lansdowne, Media, Narberth, State College and Swarthmore at Docket No. P-2024-3049623, is denied.

Date: March 28, 2025

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/s/  
Mary D. Long  
Administrative Law Judge