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November 14, 2016

Via Electronic Filing

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

Re: 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

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Petition of the Retail Energy Supply Association ("RESA") for Reconsideration of the Commission's October 27, 2016 Final 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. Charles E. Rainey, Jr., Chief Administrative Law Judge w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Petition for Reconsideration 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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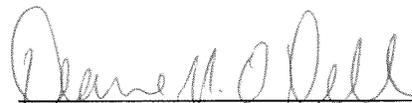
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Date: November 14, 2016

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PPL Electric Utilities Corporation :
for Approval of a Default Service Program and : Docket Nos. P-2016-2526627
Procurement Plan for the Period June 1, 2017 :
through May 31, 2021 :

**PETITION OF THE RETAIL ENERGY SUPPLY ASSOCIATION
FOR RECONSIDERATION
OF THE COMMISSION'S OCTOBER 27, 2016 FINAL ORDER**

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PETITION FOR RECONSIDERATION
OF THE COMMISSION'S OCTOBER 26, 2016 FINAL ORDER

Pursuant to Section 703(g) of the Public Utility Code,¹ and Section 5.572 of the Pennsylvania Public Utility Commission's ("Commission") regulations,² the Retail Energy Supply Association ("RESA")³ submits this Petition for Reconsideration of the Commission's Final Order entered October 27, 2016 ("*Final Order*"). This Petition is narrowly focused on just one issue – the Commission's decision to severely limit (and very likely erase) the competitive generation supply choices available to nearly 50,000 residential customers enrolled in PPL Electric Utilities Corporation's ("PPL's") customer assistance program ("CAP").⁴ To be clear, RESA appreciates that the Commission did not reach its conclusions "lightly" as noted in the *Final Order*.⁵ Notably, two Commissioners dissented from the resolution of this issue with a third associating himself with the comments of one of the dissenting Commissioners. While RESA appreciates and acknowledges the concerns raised in this proceeding regarding the preservation of scarce universal service funds and the desire of the Commission to adopt measures to balance the interests between shopping and non-shopping customers, respectfully, neither the appropriate nor lawful balance has been struck here and RESA urges the Commission to grant this request for reconsideration.

¹ 66 Pa. C.S. §703(g).

² 52 Pa. Code §5.572.

³ 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.

⁴ As of December 31, 2015, 46,936 PPL customers were enrolled in CAP. *Report on 2015 Universal Service Programs & Collections Performance of the Pennsylvania Electric Distribution Companies & Natural Gas Distribution Companies*, Pennsylvania Public Utility Commission at 42.

⁵ *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, Order entered October 27, 2016, at 53. ("*Final Order*").

Pursuant to the *Final Order*, current PPL CAP shopping customers (nearly 21,000) would be forced back to default service (without their consent) effective June 1, 2017 as their current fixed-price electric generation supplier (“EGS”) contracts expire.⁶ This will happen regardless of: (1) whether or not their current EGS price is lower than the PPL price-to-compare (“PTC”); or, (2) the customer received any other benefit from selecting the particular EGS. Going forward, the only potential EGS alternative to PPL’s default service for all of PPL’s nearly 50,000 CAP customers would be a brand new CAP-Standard Offer Program (“CAP-SOP”) offering just one particular EGS provided product with no option for customization or alternatives. The details for the newly proposed CAP-SOP were set forth for the first time in PPL’s rejoinder testimony.⁷ Notably, RESA’s expert witness offered testimony demonstrating why the restrictions ultimately included as part of the newly proposed CAP-SOP would result in no EGSs electing to offer service through the CAP-SOP, leaving the nearly 50,000 PPL CAP customers without any EGS-provided alternative to PPL’s default service.

While the *Final Order* does rightly acknowledge the need to be reasonable and prudent when limiting the right of customers to shop, the outcome directed by the Commission does not achieve this result. Rather, if implemented, the *Final Order* will have the unprecedented result of forcing PPL’s CAP customers who have affirmatively selected an EGS based on the factors that are important to them (including price savings, price stability, energy management tools, or value-added services) to be returned to PPL’s default service without their consent. Going

⁶ Current CAP shopping customers on month-to-month EGS contracts, would be returned to default service at the time of their annual CAP recertification.

⁷ In its direct testimony, PPL proposed that CAP shopping be addressed on a statewide basis and, in the interim, that CAP customers be encouraged to participate in PPL’s customer referral standard offer program. PPL St. No. 1 at 48. In its rebuttal testimony, PPL opposed additional restrictions on shopping for CAP customers. PPL St. No. 1-R at 38-45. In surrebuttal testimony, CAUSE-PA proposed the concept of developing a brand new CAP-SOP to offer CAP customers the opportunity to select an EGS-provided product. CAUSE-PA St. No. 1-SR at 19. In rejoinder, PPL set forth a CAP-SOP structure largely similar to the concepts set forth in CAUSE-PA’s surrebuttal. PPL St. No. 1-RJ at 7-8.

forward, the only EGS product potentially available for these nearly 50,000 PPL CAP customers would be completely dependent on EGSs electing to offer service through the brand new CAP-SOP. Ironically, the brand new CAP-SOP would impose restrictions on the type of product that can be offered (for example, must be 7% off the PTC) which are far more restrictive than those considered and rejected by the Commonwealth Court for PECO's CAP customers (in that case, PECO proposed that EGSs be required to cap their pricing to CAP customers at or below the PTC).⁸ By approving a never-before-implemented CAP-SOP that requires EGSs to cap their prices at 7% off the PTC (and pay PPL a \$28 referral fee), the *Final Order* imposes pricing restrictions that are far more restrictive than those rejected by the Commonwealth Court.

While the Commission may have the legal authority to impose certain limited and narrowly tailored restrictions on the right of shopping, the Commission does not have the authority to implement such restrictions without engaging in the proper legal analysis which did not occur here. Specifically, because the "overarching goal of the Choice Act is competition," the Commonwealth Court requires that restrictions on the right to shop can only be considered upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.⁹ And, the Commission may rely on substantial evidence showing that proposed restrictions may adversely affect available choices for CAP customers and should be rejected.¹⁰ As explained more fully below, in the *Final Order* the Commission: (1) did not engage in the required legal analysis of reasonable alternatives – and in fact, did not even identify what other alternatives were considered – to the restrictions proposed in this proceeding; and, (2) overlooked and/or failed to give the proper weight to the evidence in the record showing

⁸ *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*").

⁹ *Id.* at 1104, 1106.

¹⁰ *Id.* at 1107-1108.

why the proposed and never-before-implemented CAP-SOP restrictions would almost certainly eliminate EGS provided products for CAP participants.

Through this reconsideration, RESA urges the Commission to not shut down shopping or otherwise eliminate choice for CAP customers. Forcing currently shopping CAP customers to return to default service is not a reasonable way to address the concerns in this proceeding. Likewise, restricting all CAP customers to just PPL's default service and potentially just one EGS provided alternative (which RESA continues to believe will not be viable) is also not reasonable. Notably, the Commission did refer the issue of whether or not to initiate a statewide initiative to address CAP shopping issues to the Office of Competitive Market Oversight.¹¹ Imposing the severe limitations on the right of nearly 50,000 of PPL's CAP customers to shop now is premature and will result in irreversible and unnecessary damage that can be avoided through a more deliberate and cautious process. In sum, the forcible return of current CAP customers to PPL default service and the future choice between default service and only one EGS product through the CAP-SOP is an unlawful frustration of the right to shop that cannot survive the Commonwealth Court's legal test. Thus, RESA urges the Commission to correct this outcome through this reconsideration.

Rather, a more nuanced and legally sound interim approach (which RESA supports) would be to order implementation of PPL's Initial Proposal. Importantly, PPL's Initial Proposal did not restrict shopping for CAP customers. The PPL Initial Proposal did, however, recommend encouraging CAP customers to participate in the existing SOP and set forth processes to better inform and educate CAP customers about the availability of SOP.¹² To the extent this approach is still deemed to be insufficient in the future, then the Commission can take

¹¹ *Final Order* at 56.

¹² PPL St. No. 1 at 48.

informed action once it has adequately explored less restrictive means to limiting CAP shopping.¹³

If, however, the Commission continues to believe that forcibly returning existing CAP customers to default service and restricting the EGS-provided options to them is appropriate, it should remand the CAP shopping issue to the Administrative Law Judge (“ALJ”) so that a record may be developed on other reasonable alternatives that may exist to the shutting down of shopping and limiting EGS-provided options to a CAP-SOP structure that is not likely to be viable and was not introduced until PPL’s rejoinder testimony. Because the only vetting of other reasonable alternatives occurred during confidential settlement discussions, the Commission has not had the opportunity to engage in the necessary legal analysis of these options before restricting CAP customers from participating in the retail market. From an implementation and operational standpoint, the specifics of the CAP-SOP proposal were not offered until the rejoinder phase of this proceeding. As such the record is devoid of a full vetting the restrictions as well as the technical and operational details important to successful implementation. While RESA does not support restricting CAP customer shopping options to one product through the CAP-SOP as proposed here,¹⁴ a full and fair vetting of the proposed restrictions and, importantly, how they are going to be operationally implemented is of vital importance. Without such a process, the very real possibility exists that the actions taken in the context of this proceeding could irrevocably harm the retail competitive market and undermine all of the good work of this Commission over many years to foster the development of a workably competitive retail market

¹³ Even if, upon reconsideration, the Commission still desires to pursue the CAP-SOP option, it could do so without also shutting down shopping for CAP customers.

¹⁴ Indeed RESA continues to maintain that the proponents of restrictions on shopping did not meet their initial legal threshold of proving that restrictions are necessary. However, for purposes of this reconsideration only, RESA assumes for argument’s sake that this initial legal threshold has been satisfied. This petition for reconsideration is narrowly focused on the specific restrictions being proposed and their impact.

consistent with the requirements of the Electricity Generation Customer Choice and Competition Act.¹⁵

In support of this Petition, RESA states as follows:

I. BACKGROUND

1. On January 29, 2016, PPL filed a petition, along with supporting direct testimony, proposing to establish the terms and conditions under which it will procure default service supplies, provide default service to non-shopping customers, satisfy requirements imposed by the Alternative Energy Portfolio Standards Act¹⁶ and recover all associated costs on a full and current basis for the period from June 1, 2017 through May 31, 2021.

2. Regarding the issue of placing restrictions on the shopping right of PPL's customers who also participate in PPL's customer assistance program, PPL urged that CAP shopping be addressed on a statewide basis but proposed, in the interim, that CAP customers be encouraged to participate in PPL's customer referral SOP (the "PPL Initial Proposal"). More specifically, PPL proposed that any customers that inquire about its CAP (or other low-income programs) or are enrolled in PPL's CAP be informed of the availability of the SOP.¹⁷ The PPL Initial Proposal would not have placed any restrictions on the ability of CAP customers to shop.

3. Direct, rebuttal, surrebuttal and rejoinder testimony of parties other than the PPL was served on or before June 16, 2016 and was admitted into the record on that date. The following testimony of Matthew White was admitted on behalf of RESA: (1) RESA St. No. 1 which includes Exhibits MW-1 to MW-4; (2) RESA St. No. 1-R which includes Exhibit MW-5; (3) RESA St. No. 1-SR which includes Exhibit MW-6; and (4) RESA St. No. 1-RJ.

¹⁵ 66 Pa. C.S. §§ 2801, *et seq.*

¹⁶ 73 P. S. §§ 1648.1 - 1648.8 and related provisions of 66 Pa. C. S § § 2813-2814.

¹⁷ PPL St. No. 1 at 48.

4. At the June 16, 2016 hearing, the parties informed the ALJ that an agreement had been reached on all issues except for the right of customers participating in PPL's CAP to freely shop for competitive supply from an EGS. The issue was reserved for litigation.

5. Also at the June 16, 2016 hearing, a Joint Litigation Position among PPL, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement ("I&E"), the Office of Consumer Advocate ("OCA"), and the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA") (collectively, "Proponents of CAP Shopping Restrictions") was entered into the record. Pursuant to the Joint Litigation Position, the Proponents of CAP Shopping Restrictions expressed their support to resolve the reserved issue consistent with the testimony of PPL as set forth in the rejoinder testimony of PPL Witness James R. Rouland (PPL St. No. 1-RJ).

6. Consistent with PPL's rejoinder testimony, the Joint Litigation Position recommends that the Commission initiate a statewide collaborative and/or initiate a rulemaking to address CAP shopping issues. In the interim, however, the Joint Litigation Position supports the creation of a brand new CAP-SOP shopping program that would become the only vehicle for CAP customers to shop in PPL's service territory. Existing shopping CAP customers would be transitioned to PPL's default service starting on June 1, 2017. Pursuant to the PPL Rejoinder Proposal the only EGS provided option for PPL's customers would be offered through the brand new CAP-SOP. EGSs would be able to elect whether or not to offer service through the CAP-SOP and the terms of participation would require EGSs to agree provide a 7% discount off the PTC at the time of enrollment with no opportunity to market other non-CAP-SOP products to its CAP-SOP customers.¹⁸ At the end of the CAP-SOP contract term, the EGSs would be required

¹⁸ PPL St. No. 1-RJ at 7-8.

to either return the customer to PPL's default service or send them to the CAP-SOP (to be referred to another EGS or perhaps the same EGS if that EGS was still participating). Per the terms of the CAP-SOP, at that point in time, the CAP customer could only be charged a rate 7% off the then-effective PTC. For EGSs to serve CAP customers through the CAP-SOP, the EGS would be required to pay the standard \$28 referral fee. RESA did not and does not support the Joint Litigation Position.

7. On July 19, 2016, a Joint Petition for Approval of Partial Settlement ("Partial Settlement") by and between PPL, I&E, OCA, OSBA, PPL Industrial Customer Alliance ("PPLICA") and RESA was filed consistent with the representations made during the June 16, 2016 hearing. RESA filed a Statement in Support of the Partial Settlement on July 19, 2016. RESA supports the approval of the Partial Settlement as set forth in the *Final Order*.

8. Upon consideration of the record and the various briefs filed by the parties, the Administrative Law Judge ("ALJ") issued an Initial Decision which recommended approval of the Partial Settlement. Regarding the CAP shopping issue, the ALJ recommended approval of the Joint Litigation Position but proposed that at the end of the CAP-SOP term the EGS serving the customer should have the flexibility to charge rates up to and equal to the PTC to CAP customers if their written contracts so provide.¹⁹

9. Upon review of the exceptions filed, the Commission issued its *Final Order* approving the Partial Settlement and restricting the right of CAP customers to shop consistent with the proposal supported by the Joint Litigation Position.

10. For the reasons explained more fully below, RESA requests that the Commission grant reconsideration of the *Final Order* and direct that: (1) PPL's CAP customers will continue

¹⁹ I.D. at 62-63.

to have access to the competitive market; and, (2) PPL's Initial Proposal to better inform and encourage CAP customers to participate in the existing SOP shall be adopted. If, however, the Commission elects to shut down shopping for existing and future PPL CAP customers, then RESA urges the Commission to direct that the CAP shopping issue be remanded to the ALJ so that a record may be developed on other reasonable alternatives that may exist and, to the extent appropriate, a full and fair vetting of the restrictions of the proposed CAP-SOP including operational implementation details.

II. STANDARDS FOR RECONSIDERATION

11. Requests 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 the Public Utility Code to rescind or amend a prior order in whole or in part.²⁰ Parties cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them. What the Commission expects in petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission. Additionally, a Petition for Reconsideration is properly before the Commission where it pleads newly discovered evidence, alleges errors of law, or a change in circumstances.²¹

12. The Commonwealth Court has set forth the legal standard the Commission is required to apply when considering restricting the right of customers to freely shop. The burden of proof and ultimately the burden to persuade the Commission to enact the specific restrictions proposed lies with the proponents of restrictions on shopping.²² This legal burden specifically requires that – because the “overarching goal of the Choice Act is competition” – restrictions on

²⁰ *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553 (1982).

²¹ *Id.*

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

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.²³ Then, even if this legal threshold is met, the Commission may rely on substantial evidence showing why the proposed restrictions should be rejected which can include a showing that the restrictions would adversely affect available choices for CAP participants.²⁴

III. BASIS FOR RECONSIDERATION

13. Reconsideration of the *Final Order* is warranted here for two reasons. First, the Commission erred as a matter of law by not engaging in the legal analysis of reasonable alternatives to the restrictions proposed in this proceeding. Second, the Commission overlooked and/or failed to give the proper weight to the evidence in the record showing why the proposed CAP-SOP restrictions would eliminate EGS provided products for CAP participants.

14. Regarding the analysis of alternatives to the proposed restrictions, the Commission found “that several alternatives were, in fact, considered by the Parties, but that they ultimately determined that the Joint Litigation Position was the most reasonable such alternative.”²⁵ Notably, however, because those alternatives were not made part of the record in this proceeding, the Commission did not identify what those alternatives were or engage in the necessary legal analysis of whether they could be implemented to avoid the over-reaching shopping restrictions advocated by the Joint Litigation Position.

15. Procedurally, the brand new CAP-SOP proposal as approved in the *Final Order* was not entered into the record until PPL’s rejoinder testimony. Prior to that time, PPL recommended that CAP shopping be addressed on a statewide basis but proposed, in the interim, that CAP customers be encouraged to participate in SOP. More specifically, PPL proposed that

²³ *Id.* at 1104, 1106.

²⁴ *Id.* at 1107-1108.

²⁵ *Final Order* at 55.

any customers inquiring about its CAP (or other low-income programs) or enrolled in PPL's CAP be informed of the availability of the SOP.²⁶ According to PPL, this interim proposal would have encouraged CAP customers to obtain competitive retail supply at a rate lower than the then-effective PTC and avoid early contract cancellation/termination fees for canceling EGS service (because they are not permitted through SOP).²⁷ This initial proposal would not have restricted the right of CAP customers to freely shop but would have addressed some of the concerns expressed by the advocates. PPL supported this initial proposal through rebuttal testimony and only in rejoinder testimony did PPL offer the brand new CAP-SOP which was ultimately approved in the *Final Order*.

16. RESA supported and continues to support PPL's initial proposal. While the Commission dismissed PPL's initial proposal as "insufficient,"²⁸ the fact that the CAP-SOP proposal became the other parties' Joint Litigation Position very late in the proceeding denied the Commission the opportunity to fully assess the specific restrictions being proposed and – most significantly for purposes of this reconsideration request – potential reasonable alternatives. Importantly, the proponents of shopping restrictions had the burden of showing no reasonable alternatives to their proposed restrictions exist. At best, the proponents may have shown that some form of restrictions may be appropriate, which RESA would dispute.²⁹ They clearly did not, however, show that there were no reasonable alternatives to the specific restrictions set forth in the Joint Litigation Position. By presenting the specific details of the CAP-SOP so late in the proceeding, a proper vetting of the specific restrictions or other reasonable alternatives did not

²⁶ PPL St. No. 1 at 48.

²⁷ PPL St. No. 1 at 48.

²⁸ *Final Order* at 55.

²⁹ It should also be noted that, only for argument's sake and because this reconsideration is limited in focus, the underlying assumption here is that the proponents of shopping restrictions met their initial threshold of proving that restrictions are necessary. RESA, however, does not concede that point through this petition nor does it waive its right to appeal that specific issue. RESA does not agree that restricting choice is good for customers nor does RESA agree that this record supports restricting choice for PPL's CAP customers.

occur on the record giving the Commission no independent ability to conclude that the restrictions of the Joint Litigation Position are the only ones that can be imposed.³⁰

17. Therefore, the reference in the *Final Order* to “several alternatives” that were “considered by the Parties” is not supported by the record. To the contrary, the record is devoid of any evidence of other alternatives that were considered by the parties or by the Commission before advancing and approving the specific restrictions set forth in the CAP-SOP presented for the first time on the record in PPL’s rejoinder testimony. Consequently, the reliance of the *Final Order* on the representation by some of the parties (this does not include RESA because RESA did not and does not support the CAP-SOP) that no reasonable alternatives exist is insufficient to meet the Commission’s legal duty. In other words, the record in this proceeding does not support a finding that the specific restrictions set forth in the CAP-SOP are the only ones that can/must be implemented. Because the Commission may have overlooked the procedural manner in which the restrictions of the CAP-SOP were put on the record and the fact that it did not have record support to conclude that no other reasonable alternatives to those restrictions were possible, reconsideration is appropriate.

18. On the contrary, the Commonwealth Court’s decision for PECO’s CAP customers specifically addressed whether or not restricting the prices EGSs could offer to CAP customers could withstand legal scrutiny. Ultimately, the Commonwealth Court did affirm the Commission’s conclusion that such restrictions on the prices EGSs could offer to CAP customers were anti-competitive and too severely limited the choices available to CAP customers. In that case, the Commonwealth Court only approved a restriction on the ability of EGSs to assess an

³⁰ This is further highlighted by both the recommendation of the Administrative Law Judge to modify one aspect of the proposed CAP-SOP and the statement of Vice Chairman Place in which he offers four solutions intended “to provide CAP customers with more substantive access to a range of competitive market products while remaining cognizant of market risk exposure.” I.D. at 62 (issued August 10, 2016); *Statement of Vice Chairman Place* at 2 (dated October 27, 2016).

early termination fee on PECO's CAP customers. Ironically, in this case, the pricing restrictions proposed in the brand new CAP-SOP are even more restrictive because they limit EGS offers to a price that is 7% below the PTC and require EGSs to pay PPL a \$28 referral fee to serve the customers. The Commonwealth Court's decision stands for the proposition that there is a less restrictive and legally supportable alternative to completely restricting the right of PPL's CAP customers to shop and only offering them the speculative potential to receive just one EGS provided product. Indeed, PPL's Initial Proposal would have been more consistent with the Commonwealth Court's determination and is a legally sustainable alternative to what was approved in the *Final Order*.

19. A second reason why reconsideration is appropriate is because the Commission appears to have overlooked and/or failed to give the proper weight to the evidence in the record showing why the proposed CAP-SOP restrictions would eliminate EGS provided products for CAP participants. This is important because the Commission places reliance on the never before implemented CAP-SOP as a way to not "eliminate the ability of [CAP] customers to participate in the competitive marketplace."³¹ In reaching this conclusion, the Commission: (1) concluded that "RESA's position amounts to unsupported assertions and has no basis whatsoever in the record;"³² and, (2) the "extensive EGS participation" in the current SOP program rendered RESA's concerns as "speculative."³³ Both of these conclusions were reached in error.

20. RESA's position that the brand new CAP-SOP will lack EGS participation is fully supported by substantial evidence in this proceeding. First, RESA submitted expert testimony regarding the various proposals of the parties to restrict shopping and explaining why the restrictions ultimately forming the Joint Litigation Position would result in no EGSs participating

³¹ *Final Order* at 54.

³² *Id.* at 66.

³³ *Id.* at 66.

in the CAP-SOP.³⁴ The definition of “expert” is “whether the witness has any reasonable pretension to specialized knowledge on the subject under investigation.”³⁵ In this case, Matthew White presented direct, rebuttal, surrebuttal and rejoinder testimony and six supporting exhibits on behalf of RESA.³⁶ Mr. White is employed by Interstate Gas Supply, Inc. – a Pennsylvania licensed EGS – and was authorized to present testimony on behalf of RESA members which consists of many EGSs operating in Pennsylvania and around the country.³⁷

21. Mr. White’s testimony explained the various pitfalls of the CAP-SOP that would interfere with EGSs’ ability to offer this one and only product option that would be available to CAP customers. Specifically, he explained why requiring EGSs to guarantee a price that is always 7% below the effective PTC would present unworkable risks.³⁸ While EGSs currently participate in the SOP that is available to all customers, he noted that they are only required to commit to a 12-month price that is 7% off the PTC at the time of enrollment and they have advance notice of what that PTC will be prior to electing to participate in the SOP. Also, importantly, EGSs can market alternate EGS products to the customer they acquire through the SOP and have no requirement at the end of the SOP contract term to offer a specific price or product to the customer. Mr. White further described the unworkability of the CAP-SOP due to the need for significant changes to existing EDC and EGS protocols and the development of new such protocols. He also pointed to the requirement of the CAP-SOP for payment of a \$28

³⁴ Both CAUSE-PA and OCA made suggestions in testimony about ways to restrict shopping for CAP customers. RESA submitted testimony in response to each of these suggestions. CAUSE-PA first offered in surrebuttal testimony the concept of creating a new CAP-SOP using similar features from the traditional SOP. RESA submitted rejoinder testimony setting forth its concerns regarding this concept. Ultimately, PPL’s rejoinder testimony adopted nearly all of the suggestions from the CAUSE-PA surrebuttal and set forth some of the operational details for the newly proposed program.

³⁵ *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995).

³⁶ The direct, rebuttal, surrebuttal and rejoinder testimony of Matthew White, RESA Statements 1, 1-R, 1-SR, and 1-RJ, and Exhibits MW-1 through MW-6 were admitted into the record on June 16, 2016.

³⁷ See, *supra* at 8; *Joint Stipulation* at ¶¶ 4-5.

³⁸ While this feature was not included in the final CAP-SOP proposal, it is one that was discussed in earlier testimony to which Mr. White provided his response.

referral fee per customer as a barrier, especially when coupled with the fact that EGSs would only be able to serve CAP customers through the CAP-SOP. What this means is that the EGS electing to participate in the CAP-SOP would be prohibited from offering another EGS competitive product to the CAP customer at any time. Then, at the end of the CAP-SOP contract term, if the EGS wants to continue to serve the CAP customer it must readjust its price to be 7% off the then effective PTC and pay an additional \$28 referral fee to PPL. Mr. White's assessment of all of these issues lead him to conclude that EGSs would not elect to participate in the CAP-SOP program leaving CAP customers with only PPL's default service.³⁹ In sum, the detailed assessment of an industry expert that works for an EGS explained why specific features may not be workable for the EGS business model. It is difficult to see how EGSs could put on more clear evidence that the specific restrictions included in the never-before-implemented CAP-SOP could effectively eliminate any EGS-provided product for CAP customers.

22. Notwithstanding the Commission's dismissal of Mr. White's testimony here, the Commonwealth Court in the PECO CAP appeal ruled that similar testimony from another industry expert identifying the impact of proposed shopping restrictions on the market was "substantial evidence."⁴⁰ Thus, as an industry expert with actual experience working for an EGS and representing a group of EGSs, Mr. White's testimony constitutes substantial evidence⁴¹ consistent with Commonwealth Court precedent and the Commission erred by dismissing it.

23. In addition to Mr. White's testimony, PPL's own witnesses (until the rejoinder testimony) also identified many of same concerns detailed by Mr. White regarding the specific

³⁹ RESA St. 1-RJ at 3.

⁴⁰ *Commonwealth Court CAP Shopping Decision* at 1107. More specifically, in the PECO case, the Commonwealth Court reviewed the testimony of Christopher Kallaher which explained why requiring EGSs to place a hard cap on prices unrelated to market conditions at the time of sale is anti-competitive and unwarranted. He also explained the challenges to EGSs of providing a produce that would always be required to comply with a rate ceiling.

⁴¹ Pa. R.E. 702-705. *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995).

restrictions that were proposed on the record in this proceeding many of which ultimately morphed into the Joint Litigation Position.⁴² While PPL ultimately withdrew its initial proposal, the testimony analyzing many of the restrictions that were ultimately included in the Joint Litigation Position remains a part of the record and provides further support for the testimony of RESA's expert witness. Also noteworthy is the fact that no EGSs provided testimony or support for the restrictions that morphed into the newly proposed CAP-SOP. Likewise, no EGSs signed on to the Joint Litigation Petition. For these reasons, the Commission either erred in concluding that there was no record support for RESA's position or overlooked all the record evidence that formed the support for RESA's position.

24. Also, the Commission's rejection as "speculative" the testimony of RESA's witness that "EGSs will not participate the proposed CAP-SOP shopping proposal" based on the "extensive EGS participation" in the current SOP program⁴³ constitutes legal error because it is based on an unreasonable inference, not record evidence. As explained extensively in RESA's testimony, there are – on their face – fundamental differences between the current SOP and the never-before-implemented CAP-SOP including the ability of EGSs to offer those customers unrestricted, alternative EGS products at the end of the year. Therefore, it is not reasonable to extrapolate the participation levels from the existing SOP to the proposed program given the fundamental differences between the two. The *Final Order* relied on an inference that the level of participation by EGSs in the brand new CAP-SOP (which contains price and shopping restrictions) will mirror the existing level of participation by EGS in the traditional SOP (which lacks price and shopping restrictions).⁴⁴ But, that inference is no more than speculation.⁴⁵

⁴² PPL St. No. 1-R at 34-35, 38-45.

⁴³ *Final Order* at 66.

⁴⁴ *Final Order* at 66.

25. For all these reasons, reconsideration of the *Final Order* is warranted and RESA requests that the Commission grant this petition and the relief explained more fully below.

IV. RELIEF REQUESTED

A. The Commission Must Not Limit CAP Customers To Only Default Service Or The CAP-SOP

26. One of the most significant issues that will result from the *Final Order* is forcing currently shopping CAP customers to return to default service. PPL's CAP customers have had the ability to shop without restriction since 2010 and – at the time of the record in this proceeding – about 20,738 are shopping.⁴⁶ Approximately half of the shopping CAP customers are benefitting from EGS prices that are at or below the PTC.⁴⁷ Notwithstanding this fact, these customers too will lose any ability to shop if the *Final Order* is implemented. Under the proposal adopted by the Commission, CAP customers who have selected an EGS based on the factors that are important to them, including price savings, price stability or value-added services, are going to be returned to PPL's default service without their consent. Even assuming, for argument's sake, that EGSs are willing to participate in the CAP-SOP (which RESA submits is unlikely), forcing shopping customers to select between default service and a highly regulated CAP-SOP is not the same as giving customers a meaningful opportunity to choose an EGS – a right to which the Competition Act entitles them. The net result from the customer's perspective

⁴⁵ The speculative nature of the inference was acknowledged by the Commission. On page 66, the Commission stated that PPL could re-open this proceeding in the event, inter alia, that there is no EGS participation in the program. *Final Order* at 66.

⁴⁶ PPL St. No. 1 at 44; PPL Exh. MSW-1 at 6-8.

⁴⁷ PPL St. No. 3 at 8.

is the equivalent of government slamming – a shopping customer is being forced by the government to take service from PPL or some other randomly assigned EGS without any regard for the customer’s desires. This would be a negative shopping experience that would be counterproductive to maintaining and growing the residential retail market.

27. PPL’s Initial Proposal to address concerns about CAP customers paying EGSs a higher price than they would be paying PPL was to provide additional education to CAP customers about the availability of SOP and its initial 7% discount off the PTC. Given the overarching goal of providing competitive choices to consumers, this proposal did not seek to restrict shopping by CAP customers but rather to make them more informed and better educated consumers. If such efforts would not ultimately prove to be sufficient to address concerns about CAP customers paying prices that are higher than the PTC at any given time, the Commission could take further steps. However, moving to a situation where CAP customers essentially cannot shop and CAP customers who have shopped will either be forced onto a CAP-SOP or returned to default service is an overreaction by a regulatory agency that has consistently expressed its commitment to competitive retail energy markets. For these reasons, RESA urges the Commission to not shut down shopping for CAP customers.

B. If Commission Continues To Maintain Shopping For CAP Customers Will Be Restricted, Then Commission Should Remand This Single Issue To The ALJ So That A Full Record May Be Developed On The CAP-SOP Proposal

28. For the reasons explained above, RESA urges the Commission to reconsider its decision to shut down shopping for CAP customers. If, however, the Commission elects to maintain this directive, then RESA urges the Commission to remand the issue of CAP shopping to the ALJ so that a full record may be developed on other reasonable alternatives that may exist to the restrictions proposed through the never-before-implemented CAP-SOP.

29. Importantly, the record is devoid of a full vetting of the CAP-SOP proposal and

the only substantial evidence on the record supports a finding that it is not likely to be successful (i.e. it is not likely to result in an EGS-provided product to CAP customers).

30. If the Commission elects to shut down the existing shopping market and prohibit future CAP customers from availing themselves of the competitive market, significant operational details need to be worked out. For example, how will EGSs' current CAP customers be notified that they will no longer be able to avail themselves of the EGSs' non CAP-SOP products? When an EGS organically acquires a potential new customer through its own marketing expenses only to learn that the customer participates in CAP, will the EGS have to pay PPL a \$28 referral fee to serve that customer (assuming the EGS is participating in the CAP-SOP)? EGSs are required to provide existing customers notices prior to the end of existing fixed term contracts.⁴⁸ How will EGSs know if the particular customer is enrolled in CAP such that those notices will not be accurate or meaningful? This issue is important from the standpoint of an EGS because sending this non-applicable and meaningless notice to an existing CAP customer would be a waste of time and money. The issue is also important from the perspective of the customer as receiving such notice would be confusing. Additionally, how will an EGS know when an existing customer enrolls in CAP and, at the point the customer enrolls, what will be the requirements of the EGS in regard to the then effective contract with the customer? How are EGSs supposed to manage any value-added offerings provided to the customer which are dependent on specific contract term lengths? This is not an exhaustive list of all the details which need to be addressed – and which were not in the proceeding here – if the CAP-SOP were to be implemented.

31. While some may argue that these “operational” issues should be worked out

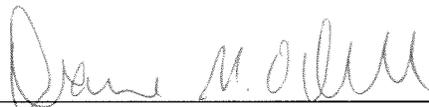
⁴⁸ 52 Pa Code § 58.10.

among the stakeholders without need for a record proceeding, the fact remains that the details of the CAP-SOP proposal approved in the *Final Order* were not put on the record until rejoinder circumventing the ability of parties to have an on-the-record discussion about these very significant matters – the outcome of which may very well have convinced all parties that such restrictions simply were not feasible or were even unfair to CAP customers. Also of significant importance is that EGS coordination and cooperation is of critical importance to transition customers from their existing shopping contracts, to deny future CAP customers any other products beyond the CAP-SOP and to coordinate with PPL on how these requirements will be implemented. There is no precedent in Pennsylvania for this as the Commission has not closed down an existing market before nor is there a CAP-SOP in place in any other service territory. To shut down an existing shopping market, appropriately addressing these operational issues is of significant importance and EGS involvement is critical. Failure to carefully manage these issues will result in a negative view of shopping for customers and will have long-lasting negative consequences regarding the efforts of the Commission to develop a fully functional competitive retail market.

V. CONCLUSION

32. In conclusion, RESA respectfully requests that the Commission grant reconsideration of the *Final Order* and direct that: (1) PPL's CAP customers will continue to have access to the competitive market; and, (2) PPL's Initial Proposal to better inform and encourage CAP customers to participate in the existing SOP shall be adopted. If, however, the Commission elects to shut down shopping for existing and future PPL CAP customers, then RESA urges the Commission to direct that the CAP shopping issue be remanded to the ALJ so that a record may be developed on other reasonable alternatives that may exist and, to the extent appropriate, a full and fair vetting of the restrictions of the proposed CAP-SOP including operational implementation details.

WHEREFORE, RESA respectfully request that the Commission grant this Petition for Clarification and/or Reconsideration and issue an order consistent with the recommendations set forth herein.



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Date: November 14, 2016

Attorneys for Retail Energy Supply Association

VERIFICATION

I, Matthew White, hereby state that: (1) I am the General Counsel Regulatory and Legislative Affairs for IGS Energy; (2) I am authorized to verify the facts in this petition on behalf of the Retail Energy Supply Association; and, (3) the facts above set forth in the attached Petition are 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).

Date: November 14, 2016

A handwritten signature in black ink, appearing to read 'Matthew White', written over a horizontal line.

Matthew White
General Counsel Regulatory and Legislative Affairs
IGS Energy