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July 19, 2016

*VIA ELECTRONIC FILING*

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
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 please find the Response Brief of PPL Electric Utilities Corporation in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Christopher T. Wright

CTW/skr
Enclosure

cc: Honorable Susan D. Colwell
Certificate of Service

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Date: July 19, 2016

Christopher T. Wright

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---|---|---|
| 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 |

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# RESPONSE BRIEF OF PPL ELECTRIC UTILITIES CORPORATION

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**TO ADMINISTRATIVE LAW JUDGE SUSAN D. COLWELL:**


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Dated: July 19, 2016

Attorneys for PPL Electric Utilities Corporation

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## I. INTRODUCTION

In this proceeding, PPL Electric Utilities Corporation ("PPL Electric" or the "Company") requests Pennsylvania Public Utility Commission ("Commission") approval of its fourth Default Service Program and Procurement Plan ("DSP IV Program") to establish the terms and conditions under which PPL Electric will acquire and supply Default Service or provider of last resort service ("Default Service"), from June 1, 2017 through May 31, 2021 (the "DSP IV Program Period"). Contemporaneously with the filing of Response Briefs, a Joint Petition for Partial Settlement ("Partial Settlement") is being filed by PPL Electric, the Commission's Bureau of Investigation and Enforcement ("I&E"), the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), PP&L Industrial Customer Alliance ("PPLICA"), Retail Energy Supply Association ("RESA"), and Exelon Generation Company, LLC ("ExGen"), all parties to the above-captioned proceeding (hereinafter, collectively "Signatory Parties").[1] This Partial Settlement resolves all the issues and concerns raised by the active parties in the instant proceeding except shopping by customers enrolled in PPL Electric's Customer Assistance Program ("CAP"), which was reserved for litigation.

On July 8, 2016, in accordance with the schedule set forth in Administrative Law Judge Susan D. Colwell ("ALJ") ALJ's June 16, 2016 Briefing Order, certain parties submitted Initial Briefs in support of their various positions on the single issue reserved for litigation in the above-captioned proceeding. The parties that submitted Initial Briefs included: PPL Electric, I&E, OCA, CAUSE-PA, and RESA. In their Initial Briefs, PPL Electric, I&E, OCA, and CAUSE-PA all supported the CAP Standard Offer Program ("CAP-SOP") shopping proposal set forth in PPL Electric's rejoinder testimony, PPL Electric Statement No. 1-RJ. RESA, on the other hand,

[1] Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), the Sustainable Energy Fund ("SEF"), NextEra Energy Power Marketing, LLC ("NextEra"), and Noble Americas Energy Solutions LLC ("Noble") are not parties to the Partial Settlement but have indicated that they do not object.

opposed the adoption of any limits on CAP shopping in this proceeding and, instead, supports an approach that would allow the unrefuted significant adverse impacts from CAP shopping to continue until the Commission addresses CAP shopping is a future collaborative or statewide proceeding.

Pursuant to Sections 5.501 and 5.502 of the Commission's regulations, 52 Pa. Code §§ 5.501 and 5.502, and the ALJ's June 16, 2016 Briefing Order, PPL Electric herein submits this Response Brief on the single issue reserved for litigation. PPL Electric's Initial Brief anticipated, and responded to, many of the arguments that have been raised by RESA on the CAP shopping issue reserved for litigation. In several instances, PPL Electric's position is fully set forth in its Initial Brief and further response is not necessary. Certain arguments, however, require further response. In responding to RESA, PPL Electric will minimize repetition of arguments set forth in its Initial Brief.

For the reasons explained below, the revised CAP shopping proposal presented in PPL Electric's rejoinder testimony, and jointly supported by PPL Electric, I&E, OCA, and CAUSE-PA, should be adopted.

## II. REPLY ARGUMENT

The single issue reserved for litigation in this proceeding is whether there should be limitations on CAP customers' ability to shop for electric supply from electric generation suppliers ("EGSs") and, if so, what limitations should be applied to CAP shopping. This issue presents three questions that were briefed by the each of the Briefing Parties pursuant to the common brief outline jointly agreed to by all parties: (1) does the Commission have legal authority to implement restrictions on CAP shopping; (2) whether the record evidence supports

restrictions on CAP shopping; and (3) whether the CAP shopping proposal jointly supported by PPL, I&E, OCA, and CAUSE-PA should be adopted in this proceeding.

## A. LEGAL AUTHORITY FOR CAP SHOPPING RESTRICTIONS

The Briefing Parties all agree that the Commission has legal authority under the Electricity Generation Customer Choice and Competition Act ("Choice Act"), 66 Pa.C.S. §§ 2801-2815, to impose restrictions on CAP customers' ability to shop for competitive electric generation supply. As explained in the Initial Briefs of PPL Electric, I&E, OCA, and CAUSE-PA, the Commonwealth Court in *Coalition for Affordable Util. Servs. & Energy Efficiency in Pa. v. Pa. PUC*, 120 A.3d 1087 (Pa. Cmwlth. 2015), *appeal denied by,* 2016 Pa. LEXIS 723 and 2016 Pa. LEXIS 724 (Pa., Apr. 5, 2016) ("*Coalition*"), concluded that the Commission has authority under the Choice Act, in the interest of ensuring that universal service plans are adequately funded and cost-effective, to impose CAP rules that limit a participating customer's ability to choose an EGS and remain eligible for CAP benefits. (*See* PPL Electric Initial Brief, Section VI.A; I&E Main Brief, Section VI. A; OCA Initial Brief, Section VI.A; and CAUSE-PA Initial Brief, Section VI.A)

RESA also relies on the Commonwealth Court decision in *Coalition.* However, RESA argues that the Commonwealth Court's holding in *Coalition* limits the Commission's authority to impose limits on CAP shopping only "upon a showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition." (RESA Initial Brief, p. 15) According to RESA, this means that the "parties proposing rule restrictions on the ability of CAP customers to shop have the burden of proof and ultimately the burden to persuade the Commission that there are no reasonable alternatives to their proposed restrictions on competition." (RESA Initial Brief, p. 15) RESA also contends that, pursuant to the Court's holding in *Coalition*, the Commission may rely on substantial evidence to reject restrictions on

CAP shopping. (RESA Initial Brief, p. 15) RESA's interpretation of the Commission's authority to impose limits on CAP shopping misapplies the Commonwealth Court's decision in *Coalition.*

In *Coalition, supra,* the Commonwealth Court reviewed the Commission's determination to reject a CAP shopping program proposed by PECO Energy Company ("PECO"). PECO's CAP shopping proposal included a price ceiling on the rates EGSs could charge CAP customers. PECO also proposed a CAP customer education initiative intended to educate CAP customers about shopping. *Id.* at 1091. The OCA intervened in the proceeding and recommended that EGSs choosing to participate in PECO's CAP shopping program also be prohibited from imposing cancellation or termination fees. *Id.* Thus, there were three CAP shopping proposals at issue in the PECO CAP shopping proposal: (i) a price ceiling; (ii) a customer education initiative; and (iii) prohibition on cancellation/termination fees.

The Commission rejected the PECO price ceiling proposal for three reasons: (i) the Commission lacked authority to impose a ceiling on EGS rates; (ii) the proposed ceiling was not in the best interest of CAP participants because it would limit the diversity of shopping programs, likely translate to higher prices for CAP customers, and potentially lead to customer confusion with frequent price changes; and (iii) PECO's proposed customer education program would ensure CAP customers understand and properly manage their energy bills. *Id.* at 1092. The Commission also rejected the OCA's proposal to prohibit cancellation/termination fees for two reasons: (i) the Commission lacked legal authority; and (ii) imposing such limitation could lead to higher shopping prices for CAP participants and/or fewer EGSs willing to provide service to CAP participants. *Id.* at 1092-93.

On reconsideration, the Commission reiterated its position that it lacked authority for a price ceiling and to prohibit termination/cancellation fees. The Commission also rejected the argument that EGSs rates above the default service rate could have impacts on both CAP and non-CAP customers, finding that there was no evidence introduced in that proceeding to support such a finding. *Id.* at 1093-94.

On appeal, the Commonwealth Court concluded that the Commission clearly has authority to impose limits on CAP shopping, stating:

> [W]e conclude that the [Commission] has the authority under Section 2804(9) of the Choice Act, in the interest of ensuring that universal service plans are adequately funded and cost-effective, to impose, or in this case approve, CAP rules that would limit the terms of any offer from an EGS that a customer could accept and remain eligible for CAP benefits.... Moreover, the Choice Act expressly requires the [Commission] to administer these programs in a manner that is cost-effective for both the CAP participants and the non-CAP participants, who share the financial consequences of the CAP participants' EGS choice.

*Id.* at 1103 (emphasis added). Thus, the Court concluded that not only does the Commission have authority to impose limits on CAP shopping, the Commission is expressly required by the Choice act to ensure that CAP is administered in a manner that is cost-effective for both CAP and non-CAP customers.

After concluding that the Commission has authority to impose limits on CAP shopping, the Commonwealth Court went on to explain that the Commission's CAP shopping decision must be supported by substantial evidence:

> So long as it "provides substantial reasons why there is no reasonable alternative so competition needs to bend" to ensure adequately-funded, cost-effective, and affordable programs to assist customers who are of low-income to afford electric service ... , the [Commission] may impose CAP rules that would limit the terms of any offer from an EGS that a customer could accept and remain eligible for CAP benefits -- *e.g.*, an EGS rate ceiling, a prohibition against early termination/cancellation fees, etc."

* * *

> As we held above, however, the General Assembly has reserved within the [Commission] the authority to "bend" competition to further other important aspects of the Code, including the Choice Act, where it provides substantial reasons why the restriction on competition is necessary (*i.e.*, there are no reasonable alternatives).

*Id.* at 1104, 1107 (internal citation omitted). PPL Electric submits that the above-quoted language, which RESA heavily relies on, is nothing more than a simple restatement of the requirement that the Commission's CAP shopping determination, whether it rejects or approves the program, must be supported by substantial evidence of record.[2]

RESA, however, interprets the Court's statement regarding "substantial reasons" to impose a burden on the parties proposing limits on CAP shopping to not only support their CAP shopping proposal with substantial evidence, but also to demonstrate substantial reasons why there are no reasonable alternatives to the parties CAP shopping proposal. (RESA Initial Brief, p. 15) Stated otherwise, it appears that RESA interprets the Court's holding in *Coalition* to impose two burdens of proof on parties proposing limits on CAP shopping: (i) the standard burden of proof to support their CAP shopping proposal; and (ii) a new burden to disprove that there are any possible alternatives to the CAP shopping proposal. RESA's interpretation of the Court's holding in *Coalition* should be rejected for several reasons.

First, despite RESA's assertion to the contrary, the Court did not reject the PECO CAP shopping proposal because PECO failed to introduce evidence to demonstrate that there are no reasonable alternatives to PECO's CAP shopping proposal. Rather, the Court affirmed the Commission's rejection of PECO's price ceiling because the "[Commission] was not persuaded that Petitioner's evidence provided substantial reason to justify limiting competition by imposing

[2] It is well settled that any adjudication of the Commission must be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193, n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704).

a price ceiling on EGSs as part of the PECO CAP Shopping Plan." *Id.* at 1107. The Court explained that it could not and would not re-weigh the evidence. *Id.* Clearly, the Court affirmed the Commission's rejection of PECO's proposed CAP shopping price ceiling because the Commission's decision was not supported by substantial evidence.

Second, the Court's decision concerning the OCA's proposed termination/elimination of CAP shopping fees demonstrates that the Court did not establish a new standard requiring disproval of any alternatives. Rather, the Court reversed the Commission's rejection of the OCA's proposal to eliminate CAP shopping termination/cancellation fees on the basis that the Commission's decision was not supported by substantial evidence. Specifically, the Court found that the Commission's rejection of the OCA proposal out of concern for the impact such a rule would have on competition and choice, *i.e.*, that elimination of the termination/cancellation fees would result in fewer EGSs willing to provide service to CAP participants, was not supported by substantial evidence. *Id.* at p. 1108. Clearly, the Court's disposition of these two issues was based on whether the Commission's decision was supported by substantial evidence; not on whether the OCA demonstrated that there were no reasonable alternatives to eliminated termination/cancellation fees for CAP shopping, as suggested by RESA.

Third, the Court's acceptance of PECO's proposed CAP shopping customer education initiative was based on the evidence of record, not the failure to disprove any alternatives, as suggested by RESA. To be clear, the CAP shopping customer education initiative was actually proposed by and supported by a party to the proceeding, PECO. *Id.* The Court found that the petitioners, OCA and CAUSE-PA, failed to introduce evidence to demonstrate that PECO's proposed CAP shopping customer education initiative would not address the CAP shopping issue. Stated otherwise, the Court's holding regarding the CAP shopping customer education

initiative was based on an alternative that was actually proposed in the proceeding, supported by the record evidence, and not refuted by the weight of the evidence. The Court's finding regarding the CAP shopping customer education initiative was not, as suggested by RESA, based on a finding that the petitioners failed to disprove all possible alternatives to limits on CAP shopping.

Finally, RESA's interpretation that *Coalition* established a new requirement that parties proposing limits on CAP shopping must also demonstrate that there are no possible alternatives to the CAP shopping proposal is not a workable or reasonable interpretation. Under RESA's interpretation of the Court's holding in *Coalition*, parties proposing limits on CAP shopping would essentially be required to disprove any and all possible alternatives to the CAP shopping proposal, regardless of whether any such alternatives were even proposed during the proceeding. This would mean that parties proposing limits on CAP shopping would not only have to introduce evidence to refute CAP shopping alternatives actually proposed, they also would have to self-identify any and all possible alternatives that were not proposed and then introduce evidence why the un-proposed alternatives are not reasonable. RESA's proposed evidentiary standard for CAP shopping is analogous to the insuperable difficulty inherent in proving a negative. *See, e.g., Tincher v. Omega Flex*, 104 A.3d 328, 409, 628 Pa. 296, 431 (2014) ("proving a negative is generally not desirable as a jurisprudential matter because of fairness concerns related to anticipating and rebutting allegations"); *Fazio v. Pittsburgh Rys. Co.*, 321 Pa. 7, 182 A. 696, 698 (1936) ("[i]t is a well-recognized principle of evidence that he who has the positive of any proposition is the party called upon to offer proof of it. It is seldom, if ever, the duty of a litigant to prove a negative until his opponent has come forward to prove the opposing

positive").[3] RESA's proposed evidentiary burden is unreasonable and inconsistent with appellate case law.

For these reasons, RESA's interpretation of the Commonwealth Court's decision in *Coalition*, *supra*, should be rejected. The law is clear that the Commission has legal authority to impose restrictions on CAP shopping when necessary to ensure that CAP is administered "in a manner that is cost-effective for both the CAP participants and the non-CAP participants," *Coalition*, 120 A.3d at 1103, provided the Commission's CAP shopping decision is supported by substantial evidence of record. Additionally, as the Commonwealth Court held in *Coalition*, to the extent that any alternatives to CAP shopping limitations are proposed, the Commission must consider the weight of the evidence to determine whether the record demonstrates that such alternative proposals are reasonable or should be rejected. This, however, does not mean that, as suggested by RESA, parties are required to disprove any and all un-proposed alternatives to CAP shopping programs before the Commission may approve a CAP shopping program that is actually proposed and supported by the evidentiary record.

Based on the foregoing, the Commission clearly has authority to impose restrictions on CAP customers' ability to shop for competitive electric generation supply provided the Commission's determination is supported by substantial evidence.

### B. THE SUBSTANTIAL ADVERSE IMPACTS OF UNRESTRICTED CAP SHOPPING ARE UNREFUTED

In its Initial Brief, PPL Electric explained the substantial evidence it introduced in the proceeding regarding the CAP shopping statistics and data in PPL Electric's service territory.

[3] In the rare circumstances a party is required to affirmatively prove a negative, a statute or regulation expressly states this burden and defines what the party must prove. *See, e.g.*, *Commonwealth v. 1997 Chevrolet*, 106 A.3d 836 (Pa. Cmwlth. 2014) (noting that the Pennsylvania Forfeiture Act places the burden on a property owner to prove a negative, *i.e.* a lack of knowledge that is reasonable under the circumstances); *DOT v. Agric. Lands Condemnation Bd.*, 5 A.3d 821, 826 (Pa. Cmwlth. 2010) (noting that the Pennsylvania Agricultural Land Preservation Policy requires an applicant-condemnor to prove a negative, *i.e.* that no reasonable and prudent alternative to condemning lands within an agricultural security area exists under 71 P.S. § 106(b)).

(*See* PPL Electric Initial Brief, pp. 13-16) As explained therein, the evidence introduced by the Company demonstrates that unrestricted CAP shopping in PPL Electric's service territory currently has and will continue to have significant and adverse impacts on both CAP customers and other Residential customers that pay for CAP costs. Specifically, the CAP shopping data and statistics demonstrate that unrestricted CAP shopping in PPL Electric's service territory has resulted and will likely continue to result in: (i) CAP customers exceeding their CAP credits at a faster pace than they would have if they did not shop, which puts these low-income customers at risk of early removal from CAP; and (ii) a substantial increase (estimated at approximately $2.7 million annually) in the CAP costs paid for by other Residential customers. (*See* PPL Electric Statement No. 3, pp. 9-13) I&E, OCA, and CAUSE-PA likewise explained that there are substantial and important reasons why restrictions on CAP customers' ability to shop for competitive electric generation supply within the Company's service territory are needed. (*See* I&E Main Brief, Section VI.B; OCA Initial Brief, Section VI.B; and CAUSE-PA Initial Brief, Section VI.B)

Importantly, no parties offered <u>any</u> testimony or evidence to refute PPL Electric's CAP shopping data and statistics provided in this proceeding. Thus, it is undisputed that unrestricted CAP shopping in PPL Electric's service territory currently has and likely will continue to have significant and adverse impacts on both CAP customers and other Residential customers that pay for CAP costs.

In its Initial Brief, RESA notably does not dispute any of the detailed evidence introduced in this proceeding regarding CAP shopping within PPL Electric's service territory. Rather, RESA attempts to criticize the undisputed CAP shopping data and statistics because, according to RESA, they are "focused on a single point in time" and do not take into account that

the CAP customer may have "obtained some benefit or incentive for switching (such as a lower price, a gift card, or energy audit)." (RESA Initial Brief, p. 20) RESA's attempt to discredit the CAP shopping statistics and data introduced in this proceeding is without merit and should be rejected.

First, RESA's arguments are not based on any evidence of record in this proceeding. RESA appears to contend that PPL Electric's statistics and data are flawed because there is no evidence to show that CAP customers may not have paid a higher EGS price for the entire contract term and because there is no evidence that the CAP customers did not obtain some other unknown benefit or incentive. RESA's logic is fundamentally flawed because it improperly attempts to shift the burden of proof. It is clear that the Company introduced evidence that demonstrates that unrestricted CAP shopping has and likely will continue to have significant adverse impacts for both CAP and non-CAP customers. Thus, PPL Electric met its *prima facie* burden with respect to the impacts of CAP shopping. Consequently, the burden then shifted to RESA to introduce evidence into the record that refuted the Company's evidence regarding the impacts of CAP shopping.[4] To the extent that RESA contends that the Company's CAP shopping statistics are inaccurate or otherwise flawed because they focus on a single point in time or fail to account for any unknown benefits or incentives received by CAP customers, it was incumbent on RESA to introduce record evidence of such, not the other parties. RESA,

[4] If the party seeking a rule or order from the Commission sets forth a *prima facie* case, then the burden shifts to the opponent. *McDonald v. Pa. Railroad Co.*, 348 Pa. 558, 36 A.2d 492 (1940). Establishing a *prima facie* case requires either evidence sufficient to make a finding of fact permissible or evidence to create a presumption against an opponent which, if not met, results in an obligatory decision for the proponent. Once a *prima facie* case has been established, if contrary evidence is not presented, there is no requirement that the party seeking a rule or order from the Commission produce additional evidence in order to sustain its burden of proof. *District of Columbia's Appeal*, 343 Pa. 65, 21 A.2d 883 (1941); *Application of Pennsylvania-American Water Company for Approval of the Right To Offer, Render, Furnish or Supply Water Service to the Public in Additional Portions Of Mahoning Township, Lawrence County, Pennsylvania*, Docket No. A-212285F0148, 2008 Pa. PUC LEXIS 874 (Opinion and Order entered Oct. 29, 2008).

however, failed to do so. RESA cannot prove such facts without any evidence. RESA's contentions are not supported by evidence and improperly attempt to shift the burden of proof.

Second, RESA's contention that PPL Electric's CAP shopping data and statistics "focused on a single point in time" and did not take into account "whether the CAP customer paid a higher price for the entire time of their contract with the EGSs" is contrary to the record. (*See* RESA Initial Brief, p. 20) As explained in the Company's Initial Brief, PPL Electric evaluated the impacts of CAP shopping over a 46-month period, not a single point in time as suggested by RESA. (*See* PPL Electric Initial Brief, pp. 13-15) Moreover, PPL Electric's 46-month analysis of the prices paid by CAP shoppers was a monthly analysis, *i.e.*, it analyzed the prices that CAP shoppers paid each month under their EGS contracts as compared to the PTC in effect each month during this 46-month period. (*See* PPL Electric Initial Brief, pp. 13-15; *see also* PPL Electric Exhibit MSW-2, pp. 3-4; PPL Electric Statement No. 3, pp. 9, 11) Thus, contrary to RESA contention, PPL Electric's analysis did not focus on a single point in time and, instead, took into account the monthly prices paid by individual CAP customers each month over a 46-month period and whether those prices were higher or lower than the PTC in effect at the time.

Third, RESA's contention that PPL Electric's CAP shopping statistics and data did not take into account whether CAP customers may have obtained some other unknown benefit or incentive (RESA Initial Brief, p. 20), fails to refute the fact that unrestricted CAP shopping has and likely will continue to have significant adverse impacts to both CAP and non-CAP customers. There is absolutely nothing in the record that quantifies these unknown benefits or incentives purportedly received by CAP shoppers. As such, there is nothing in the record to demonstrate that these unknown benefits or incentives outweigh the clear harm that unrestricted

CAP shopping has caused to both CAP and non-CAP customers in PPL Electric's service territory. Furthermore, even assuming, *arguendo*, that there was evidence of these unknown and unquantified benefits/incentives, such evidence would still not refute the fact that unrestricted CAP shopping, even with these unknown benefits/incentives, has resulted in and will likely continue to result in: (i) CAP customers exceeding their CAP credits at a faster pace than they would have if they did not shop, which puts these low-income customers at risk of early removal from CAP; and (ii) a substantial increase (estimated at approximately $2.7 million annually) in the CAP costs paid for by other Residential customers.[5]

Rather than introducing evidence to refute the significant adverse impacts that unrestricted CAP shopping currently has and likely will continue to have within the Company's service territory, RESA instead argues that the Company, I&E, OCA, and CAUSE-PA have failed to meet their burden to show CAP shopping restrictions are needed because they failed to introduce evidence that there are no reasonable alternatives to the jointly proposed CAP-SOP. (*See* REA Initial Brief, pp. 17-18) In support, RESA argues that expanding the amount of CAP credits or adopting PPL Electric's initial, now withdrawn CAP shopping proposal are both reasonable alternatives to the jointly proposed CAP-SOP, and that the Company, I&E, OCA, and CAUSE-PA failed to introduce substantial reasons why these alternatives are not reasonable. (*See* RESA Initial Brief, pp. 18-19, 21-23)

PPL Electric will fully address RESA's alternative CAP shopping proposals in the section below. (See Section II.C.1, *infra*) However, RESA's argument regarding the burden to prove there are no reasonable alternatives is without merit because, as explained above, it is based on RESA's misinterpretation of the Commonwealth Court's holding in *Coalition*, *supra*.

[5] For example, PPL Electric's data on CAP shopping reflects both the effects of shopping above the PTC and below the PTC, and results in approximately $2.7 million in additional costs that are paid by other Residential customers. Similarly, gift cards do not reduce the costs borne by non-CAP Residential customers.

Moreover, even if RESA's proposed alternatives to CAP shopping are reasonable, which they are not for the reasons explained below, no party has refuted the facts that unrestricted CAP shopping has had significant adverse impacts to both CAP and non-CAP customers in PPL Electric's service territory. This unrefuted evidence demonstrates that a change to CAP shopping is needed to administer CAP shopping in a manner that is cost-effective for both CAP participants and non-CAP participants who shoulder the cost of CAP. *See Coalition*, at 1103.

Based on the foregoing, RESA has failed to introduce any evidence in this proceeding to rebut the significant adverse impacts that CAP shopping in PPL Electric's service territory currently has and will continue to have on both CAP customers and other Residential customers that pay for CAP costs. Therefore, the unrefuted record evidence in this case clearly demonstrates that appropriate limits on CAP customers' ability to shop and remain eligible for CAP should be adopted to mitigate the adverse impacts of CAP shopping.

## C. CAP SHOPPING PROPOSALS

### 1. RESA's CAP Shopping Proposals are Not Reasonable Alternatives to Address the Impacts of CAP Shopping

RESA initially opposed any restrictions on CAP shopping. (RESA Statement No. 1-R, p. 12; RESA Statement No. 1-RJ, p. 4; Tr. 36) However, it is Initial Brief, RESA contends that there are two proposals under consideration to address the impacts of CAP shopping, the jointly proposed CAP-SOP and PPL Electric's initial, now withdrawn CAP proposal ("Initial CAP shopping proposal"). (*See* RESA Initial Brief, p. 23) RESA also appears to propose a third alternative to address the impacts of CAP shopping, adjusting the CAP credits to align with the prices offered by EGSs. (*See* RESA Initial Brief, p. 19) As explained below, RESA's alternative proposals are not reasonable alternatives because they lack evidentiary support and, moreover, fail to address the unrefuted adverse impacts that CAP shopping in PPL Electric's

service territory currently has and will continue to have on both CAP customers and other Residential customers that pay for CAP costs.

**a. RESA's "Do Nothing and Wait" Approach to CAP Shopping**

RESA initially proposed that CAP shopping be permitted to continue without any restrictions and not be addressed until a future statewide collaborative or proceeding. (RESA Statement No. 1-R, p. 12; RESA Statement No. 1-RJ, p. 4; Tr. 36; PPL Electric Exhibit JMR-9) PPL Electric fully explained in its Initial Brief why RESA's proposal to "do nothing and wait" is not a reasonable or appropriate alternative to address the impacts of CAP shopping. (*See* PPL Electric Initial Brief, p. 18) The arguments set forth therein, which will not be repeated here, clearly demonstrate that a "do nothing and wait" approach should be rejected because it fails to address the actual existing and substantial adverse impacts that CAP shopping has today and will continue to have within PPL Electric's service territory.

Additionally, it should be noted that RESA has apparently abandoned its initial "do nothing and wait" approach. Although RESA argued in testimony and at the hearing that it opposed any restrictions on CAP shopping (RESA Statement No. 1-R, p. 12; RESA Statement No. 1-RJ, p. 4; Tr. 36), RESA failed to discuss this proposal in its brief. It is well established that when parties have been ordered to file briefs and fail to include all the issues they wish to have reviewed, the issues not briefed have been waived. *Commonwealth v. Snyder*, 977 A.2d 28, 50 (Pa. Cmwlth. 2009); *Pa. PUC v. Metropolitan Edison Company*, Docket Nos. R-00061366 et al., 2006 Pa. PUC LEXIS 116 (Order entered October 31, 2006) (citing *Jackson v. Kassab*, 812 A.2d 1233 (Pa. Super 2002); *Brown v. PA Dep't of Transportation*, 843 A.2d 429 (Pa. Cmwlth. 2004)); *see also Pa. PUC v. Columbia Gas of Pennsylvania*, Docket Nos. R-00049783, 2005 Pa. PUC LEXIS 14 at *165-66; 245 P.U.R.4th 1 (November 4, 2005) (concluding as reasonable the ALJ's recommendation that when parties have been directed to file briefs and fail to include an

issue in their briefs, the unbriefed issues may properly be viewed as having been waived). Accordingly, RESA has waived or abandoned its initial "do nothing and wait" CAP shopping proposal and, therefore, RESA's initial proposal must be rejected.

**b. RESA's Support for the Initial CAP Shopping Proposal**

In its Initial Brief, RESA argues that the Company's Initial CAP shopping proposal is a "reasonable way to mitigate some of the concerns" about CAP shopping. (See RESA Initial Brief, p. 22) PPL Electric's initial CAP shopping proposal included the following: (i) a recommendation that the Commission promptly initiate a statewide collaborative open to all interested stakeholders and/or initiate a new rulemaking proceeding to evaluate CAP shopping issues on a uniform, statewide basis; and (ii) as an interim measure until a statewide CAP shopping proposal has been properly developed with input from all interested stakeholders, a proposal to encourage all CAP customers to participate in the traditional SOP that is open to all Residential customers. (PPL Electric St. No. 1, pp. 47-48) RESA's support for the Company's Initial CAP shopping proposal is without merit and should be rejected.

As a preliminary matter, PPL Electric's Initial CAP shopping proposal is no longer being proposed. Indeed, as a result of multiple rounds of testimony and discovery in this case, PPL Electric formally withdrew this proposal in a Joint Litigation Position that was entered into the record over RESA's objection. (*See* Tr. p. 38) To be clear, the Initial CAP shopping proposal is not being offered or supported by the Company -- it has been withdrawn. Absent testimony or evidence of its own, PPL Electric seriously questions whether RESA can advocate and support another party's proposal that has been formally withdrawn.

Notwithstanding the foregoing, the withdrawn Initial CAP shopping proposal should be rejected because it is inadequate to address the unrefuted significant and adverse impacts of CAP shopping. The withdrawn Initial CAP shopping proposal supported by RESA is essentially a

modified version of RESA's "do nothing and wait" approach that adds a proposal to encourage, but not require, CAP customers to consider enrolling in the Company's traditional SOP available to all Residential customers. As explained above and in the Company's Initial Brief, the "do nothing and wait" approach fails to address the actual existing and substantial adverse impacts that CAP shopping has today and will continue to have within PPL Electric's service territory and, therefore, is not a reasonable or appropriate CAP shopping alternative. (*See* PPL Electric Initial Brief, p. 18)

The Company acknowledges that it initially proposed to encourage CAP customers to enroll in the traditional SOP until the issue of CAP shopping was addressed on a statewide basis. This proposal was initially offered by PPL Electric because, at the time it filed the DSP IV Petition, the Company was unable to identify any other feasible CAP shopping proposal. (See PPL Electric Statement No. 1, pp. 46-47) However, as a result of the multiple rounds of testimony and discovery in this case, it became apparent to the Company that simply encouraging CAP customers to enroll in the traditional SOP would not likely address the significant adverse impacts of CAP shopping. In contrast, the Joint Litigation Position can reduce the use of CAP credits and can reduce the cost borne by non-CAP residential customers.

The fundamental flaw in the withdrawn Initial CAP shopping proposal is that even if CAP customers were encouraged to enroll in SOP and take advantage of the 7% discount off the PTC at the time of enrollment, there is no assurance that any CAP customers will voluntarily enroll in the SOP. Consequently, there is no assurance that encouraging CAP customers to voluntarily enroll in the traditional SOP will address the substantial and adverse impacts of CAP shopping.

Shopping does not directly affect a CAP customer's monthly payment amount, which is a fixed monthly amount based upon ability to pay. (PPL Electric St. No. 1, p. 44) As a result, there is no requirement, or even incentive, for CAP customers to voluntarily enroll in the traditional SOP where they see no immediate benefit to their fixed monthly payment amount. Consequently, simply encouraging CAP customers to voluntarily enroll in SOP would continue, and potentially increase, the unrefuted adverse impacts of CAP shopping.

Additionally, as explained by CAUSE-PA, even if CAP customers voluntarily enroll in the traditional SOP, there is still a concern that, at the end of the 12-month fixed price SOP contract, these CAP customers may be subjected to the same conditions and potential harm that all CAP customers face when they enter the market outside of the SOP, including high variable and fixed rates and cancellation fees for contracts that they subsequently agreed to enter into or that they are placed into by default at the end of the SOP contract period. Again, absent a requirement or incentive to enroll in SOP, CAP shopping customers have no reason to avoid higher costs because their monthly payment amount is fixed. The result is higher costs paid by non-CAP customers or removal from CAP if a customer exceeds it allowed CAP credits.

For these reasons, PPL Electric submits that simply encouraging CAP customers to enroll in the traditional SOP is not sufficient to meet the express requirement in the Choice Act that the Commission ensure that CAP is administered "in a manner that is cost-effective for both the CAP participants and the non-CAP participants." *Coalition*, 120 A.3d 1087, 1103. Indeed, there is no assurance that simply encouraging CAP customers to enroll in the traditional SOP will mitigate the real and present adverse impacts that CAP shopping can have on CAP credits, risk of early removal from the OnTrack program, and the CAP costs that are paid for by other

Residential customers. Accordingly, the ALJ and Commission should reject the withdrawn Initial CAP shopping proposal.

### c. RESA's Proposal to Adjust/Increase the Maximum CAP Credits

As an alternative to addressing the impacts of CAP shopping, RESA also appears to propose to adjust or increase a CAP customer's CAP credits to align with the prices offered by EGSs. (*See* RESA Initial Brief, p. 19) RESA's proposal to increase the maximum CAP credits should be rejected for several reasons.

First, RESA's proposal was offered for the first time in its Initial Brief. As a result, the other parties did not have any notice or the opportunity to respond to the proposal. Approving RESA's proposal to increase the maximum CAP credits would clearly result in a denial of due process. *See Schneider v. Pa. PUC*, 479 A.2d 10 (Pa. Cmwlth. 1984) (Commission is required to provide due process to the parties, which requires that the parties are afforded notice and an opportunity to be heard).

Second, because RESA's proposal was offered for the first time in its Initial Brief, there is no record evidence to support this proposal. The Commission cannot approve RESA's proposal to increase the maximum CAP credits without record evidence to support it. *See Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193, n.2 (Pa. Cmwlth. 2008) (any finding of fact necessary to support an adjudication of the Commission must be based upon substantial evidence).

Third, this default service proceeding is not the appropriate proceeding to address RESA's proposal to increase the maximum CAP credits. Rather, the maximum CAP credits are set in the Company's base rate cases and universal service proceedings. (PPL Electric St. No. 3, p. 4)

Fourth, RESA's proposal to increase CAP credits to align with the prices offered by EGSs would be extremely burdensome. The Company's CAP shopping statistics indicate that over a 34-month period (January 2013 through October 2015), an average of 55% of CAP shoppers were paying an EGS price above the PTC, and 45% of CAP shoppers were paying an EGS price at or below the PTC. (PPL Electric St. No. 3, p. 8) However, the EGS rates paid by these CAP shoppers varied and were not all the same. Under RESA's proposal, the Company would be required to continually adjust the maximum CAP credits to align with the ever changing and different prices offered by EGSs. This would be extremely time consuming and would increase the costs incurred by the Company to implement CAP shopping, which costs would ultimately be paid by other Residential customers.

Finally, RESA's proposal to increase CAP credits to align with the prices offered by EGSs fails to satisfy the "cost effective" requirement of the Choice Act, as noted in *Coalition.* Although RESA's proposal may potentially mitigate the concerns regarding CAP shoppers exceeding their CAP credits at a faster pace due to EGS rates that are above the PTC, it does nothing to mitigate the substantial increase (estimated at approximately $2.7 million annually) in the CAP costs paid by other Residential customers. Rather than mitigating the costs paid by non-CAP Residential customers, RESA's proposal will almost certainly increase these costs. Every additional dollar that a CAP customer uses in higher CAP credits is another dollar of additional CAP costs paid by non-CAP Residential customers above the approximately $2.7 million excess already being incurred annually. Furthermore, if CAP customers are protected from exceeding any CAP limit, EGSs could offer CAP customers shopping rates that far exceed the PTC or even the competitive market rate because the CAP customers' CAP credits would be adjusted to align with the above-market prices and the CAP customers would continue to pay the

same fixed monthly amount. In addition, CAP customers could increase their usage without fear of exceeding their CAP credits. Such results would increase the CAP costs that are paid for by other Residential customers. Clearly, RESA's proposal is not a reasonable alternative to ensure that CAP is administered "in a manner that is cost-effective for both the CAP participants and the non-CAP participants." *Coalition*, 120 A.3d 1087, 1103.

For these reasons, the ALJ and Commission should reject RESA's unsubstantiated proposal offered for the first time in its Initial Brief to increase CAP credits to align with the prices offered by EGSs,

**2. RESA's Opposition to the CAP-SOP is Contrary to the Weight of the Evidence**

As explained in the Company's Initial Brief, PPL Electric, OCA, and CAUSE-PA all initially proposed three separate and different CAP shopping proposals. However, as a result of multiple rounds of testimony and discovery in this case, PPL Electric, I&E, OCA, and CAUSE-PA jointly withdrew their three separate CAP shopping proposals and jointly supported the CAP-SOP shopping proposal set forth in PPL Electric's rejoinder testimony, PPL Electric Statement No. 1-RJ. (*See* Joint Litigation Position, Tr. p. 38) In its Initial Brief, PPL Electric explained in detail that the jointly proposed CAP-SOP is a reasonable CAP shopping alternative. (*See* PPL Electric Initial Brief, Section VI.C) As explained therein, the CAP-SOP is a fair and equitable balance of competing interests because it allows CAP customers to continue to shop while, at the same time, helping to mitigate the real and present adverse impacts that CAP shopping can have on CAP credits, risk of early removal from the OnTrack program, and the CAP costs that are paid for by other Residential customers.

RESA is the only party that opposes the jointly proposed CAP-SOP. According to RESA, the CAP-SOP should be rejected because: (i) it will eliminate the ability of CAP

customers to freely shop (RESA Initial Brief, pp. 24, 29); (ii) CAP customers will not be able to avail themselves of other "value-added" products and services (RESA Initial Brief, pp. 24, 27); (iii) it will necessitate changes to existing EDC and EGS protocols (RESA Initial Brief, pp. 24-26); (iv) it would cause customer confusion due to changing requirements (RESA Initial Brief, pp. 25-26); and (v) it will eliminate CAP shopping because no EGSs would be willing to serve customers under the CAP-SOP (RESA Initial Brief, pp. 27-29). RESA's opposition to the jointly proposed CAP-SOP is speculative, contrary to the record, and should be rejected. For these reasons, as further explained below, PPL Electric respectfully requests that the ALJ and Commission adopt the CAP-SOP shopping program jointly proposed and supported by PPL Electric, I&E, OCA, and CAUSE-PA.

RESA first argues that the CAP-SOP should be rejected because it will eliminate the ability of CAP customers to freely shop. (RESA Initial Brief, pp. 24, 29) RESA's argument is flawed because the CAP-SOP will continue to permit CAP customers to shop. Indeed, CAP customers will have the ability to feely elect to shop through the CAP-SOP or remain on default service. The only difference from the current unrestricted CAP shopping that exists today is that these low-income customers will only be able to receive an EGS rate that is lower than the PTC in effect at the time the CAP customers contract with an EGS. The CAP-SOP will not prohibit CAP shopping. It only imposes rules that will prevent CAP customers from paying a price above the PTC at the expense of other Residential customers.

In addition, RESA's argument completely disregards the unrefuted evidence that the current ability of CAP customers to freely shop in PPL Electric's service territory has resulted in and likely will continue to result in: (i) CAP customers exceeding their CAP credits at a faster pace than they would have if they did not shop, which puts these low-income customers at risk of

early removal from CAP; and (ii) a substantial increase (estimated at approximately $2.7 million annually) in the CAP costs paid for by other Residential customers. PPL Electric is an active supporter of retail electric generation competition, and supports the Commission's efforts to develop appropriate and reasonable initiatives to further develop the competitive market for retail electric generation supply. (PPL Electric Statement No. 1, p. 48) However, the unrefuted record evidence in this case clearly demonstrates that unrestricted CAP shopping currently has and will continue to have significant adverse impacts on both CAP customers and other Residential customers that pay for CAP costs.

RESA next argues that CAP customers will not be able to avail themselves of other "value-added" products and services under the CAP-SOP. (RESA Initial Brief, pp. 24, 27) The stated purpose of the Choice Act is to "create direct access by retail customers to the competitive market for the *generation of electricity*." 66 Pa.C.S. § 2802(12) (emphasis added). The non-commodity products and services referenced by RESA are not part of the competitive market for retail electric generation supply authorized by the Choice Act. Further, RESA's concern regarding the availability of non-commodity products and services to CAP customers also disregards that "the Choice Act *expressly requires* the [Commission] to administer these programs in a manner that is *cost-effective for both the CAP participants and the non-CAP participants*, who share the financial consequences of the CAP participants' EGS choice." *Coalition*, 120 A.3d 1087, 1103 (emphasis added). Non-CAP Residential customers should not have to pay for other "value-added" products and services through higher EGS charges.

In addition, RESA has failed to introduce any evidence to demonstrate that the value of these "value-added" products and services outweigh the clear and unrefuted harm that unrestricted CAP shopping has caused to both CAP and non-CAP customers in PPL Electric's

service territory. According to RESA, CAP customers currently have the ability to avail themselves to other "value-added" products and services, but will no longer have this ability under the CAP-SOP. (RESA Initial Brief, pp. 24, 27) However, even with the current ability to participate in these non-commodity products and services, the record demonstrates that CAP shopping has had significant adverse impacts.

RESA next argues that the CAP-SOP should be rejected because it will require changes to existing EDC and EGS protocols. (RESA Initial Brief, pp. 24-26) RESA's argument is a red herring because it ignores that the CAP-SOP will be based on the current Commission-approved SOP. Indeed, as explained in the Company's Initial Brief, the CAP-SOP will be substantially similar to and have many of the same features and protocols as the existing traditional SOP. (*See* PPL Electric Initial Brief, pp. 20-23) The features and protocols of the existing traditional SOP have been highly successful. (PPL Electric Statement No. 1-R, pp. 11, 13; PPL Electric Statement No. 1-RJ, p. 10) Indeed, RESA concedes that the existing traditional SOP, which the CAP-SOP will be based on, "has seen healthy customer and EGS participation and has largely been successful in encouraging customers to take advantage of lower cost options in the market place." (RESA Statement No. 1-R, p. 4) Because the processes and protocols for the CAP-SOP proposal would be the same or very similar to the existing traditional SOP, RESA's concern that the CAP-SOP will require changes to existing EDC and EGS protocols is not a basis to reject the CAP-SOP proposal. Furthermore, because EGS participation in the CAP-SOP is completely voluntary, EGS are free not to implement any new processes or protocols under the CAP-SOP.

RESA also argues that the CAP-SOP should be rejected because it could cause customer confusion due to changing requirements, which RESA describes as CAP customers "can shop, they cannot shop, they can shop but only under certain restrictions, etc." (RESA Initial Brief, pp.

25-26) RESA's argument is based on two features of the jointly proposed CAP-SOP: (i) the CAP-SOP is an interim measure until a uniform, statewide approach to CAP shopping can be developed; and (ii) until a uniform, statewide approach to CAP shopping can be developed, the parties are free to petition the Commission to re-open the CAP-SOP in the event that there is no EGS participation in the program and/or there are changes in retail market conditions that would otherwise justify reopening the CAP-SOP. RESA contends that these features could result in changing conditions on CAP customers' ability to shop, which RESA argues would lead to customer confusion. Although there is the potential that the CAP-SOP could initially be approved and later modified/changed as a result of either a statewide proceeding and/or a petition to re-open the CAP-SOP, PPL Electric submits that these changes in CAP shopping are unlikely to cause any more confusion for CAP customers than already exists today.

Changes to the CAP shopping program should not cause confusion to CAP customers because shopping does not directly affect a CAP customer's monthly payment amount.[6] (PPL Electric St. No. 1, p. 44) Indeed, CAP customers will continue to pay the same monthly amount regardless of whether the CAP-SOP is initially approved and then later modified/changed by the Commission. Thus, from a CAP customer's perspective, there will be little or no changes in CAP shopping even if the CAP-SOP is initially approved and later modified/changed by the Commission. It is difficult to understand how this would result in CAP customer confusion.

Lastly, RESA argues that the CAP-SOP will eliminate CAP shopping because no EGSs would be willing to serve customers under the CAP-SOP. (RESA Initial Brief, pp. 27-29) There is no evidence that no EGSs would be willing to participate in the CAP-SOP. Again, the proposed CAP-SOP is very similar to and has the same basic features as the existing, traditional

[6] This is because the CAP customer's monthly payment amount is designed to produce an affordable bill for the CAP customer.

SOP, including the $28 SOP referral fee. (PPL Electric Statement No. 1-RJ, p. 10) Notably, RESA concedes that PPL Electric's existing traditional SOP has been highly successful both from a customer and EGS participation perspective. (RESA Statement No. 1-R, p. 4) Thus, any speculation that EGSs may be unwilling to participate in the CAP-SOP is inconsistent with the undisputed fact that the exiting traditional SOP has been highly successful.

Although RESA argues that no EGSs would be willing to participate in the CAP-SOP, it must be remembered that RESA's 20 members only represent only a small fraction of the total EGSs licensed to supply Residential customers in PPL Electric's service territory.[7] RESA has no basis to assert that the non-RESA members would be unwilling to participate in the CAP-SOP. Further, RESA's Initial Brief and testimony repeatedly state that RESA's comments are not necessarily the view of any EGS members of RESA.[8] Thus, it is not even clear that RESA's own members actually agree that EGSs would be unwilling to participate in the CAP-SOP. RESA's assertion that no EGSs will participate in the CAP-SOP is simply nothing more than mere speculation and should be given little or no evidentiary weight.

Furthermore, while there is no factual basis to conclude that EGSs will not participate in the CAP-SOP, it must be remembered that: (i) even if the Commission adopts the CAP-SOP proposal, it is only an interim measure until a uniform, statewide approach to CAP shopping can be developed; and (ii) until a uniform, statewide approach to CAP shopping can be developed, the parties are free to petition the Commission to re-open the CAP-SOP in the event that there is no EGS participation in the program and/or there are changes in retail market conditions that would otherwise justify reopening the CAP-SOP. (PPL Electric Statement No. 1-RJ, p. 9)

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[7] *See* RESA Initial Brief, p. 1, n. 2; *see also* List of Suppliers Licensed by the PUC to serve in Pennsylvania, *available at*:

http://www.puc.state.pa.us/consumer_info/electricity/suppliers_list.aspx (last visited July 14, 2016).

[8] *See* RESA Initial Brief, p. 1, n. 2; RESA Statement No. 1, p. 2, n.1; RESA Statement No. 1-R, p. 1, n. 1; RESA Statement No. 1-SR, p. 1, n. 1; RESA Statement No. 1-RJ, p. 1, n.1.

Therefore, the CAP-SOP proposal already contemplates a remedy to address any actual or real concerns regarding EGS participation in the CAP-SOP.

Based on the foregoing, RESA's opposition to the jointly proposed CAP-SOP is speculative, contrary to the record, and should be given little if any weight. For the reasons explained herein, as well as those set forth in the Initial Briefs of PPL, I&E, OCA, and CAUSE-PA, PPL Electric respectfully requests that the ALJ and Commission adopt the jointly proposed CAP-SOP shopping program.

## III. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that Administrative Law Judge Susan D. Colwell issue an Initial Decision recommending that the Pennsylvania Public Utility Commission:

(a) Approve the proposals set forth in the "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," as modified by the terms and conditions of the partial settlement; and

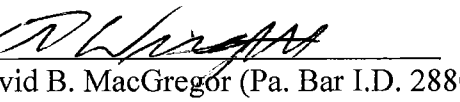
(b) Reject RESA's proposed "do nothing and wait" approach to CAP shopping;

(c) Reject the withdrawn Initial CAP shopping proposal;

(d) Reject RESA's proposal to adjust or increase CAP credits to align with the prices offered by EGSs; and

(c) Approve the CAP-SOP jointly proposed by PPL Electric, I&E, OCA, and CAUSE-PA.

Respectfully submitted,

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