ECKERT SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

Deanne M. O'Dell
717.255.3744
dodell@eckertseamans.com

September 6, 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 Exceptions of the Retail Energy Supply Association ("RESA") 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. Susan D. Colwell w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Exceptions upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email

Michael W. Hassell, Esq.
David MacGregor, Esq.
Christopher T. Wright, Esq.
Post & Schell
17 North Second St., 12th Fl.
Harrisburg, PA 17101-1601
mhassell@postschell.com
dmacgregor@postschell.com
cwright@postschell.com

Paul E. Russell, Esq.
Kimberly A. Klock, Esq.
Associate General Counsel
PPL Service Corporation
Two North Ninth St.
Allentown, PA 18101
PERussell@pplweb.com
kklock@pplweb.com

Aron J. Beatty, Esq.
Christy M. Appleby, Esq.
Office of Consumer Advocate
555 Walnut Street, 5th Fl.
Harrisburg, PA 17101-1923
abeatty@paoca.org
cappleby@paoca.org

Gina Lauffer, Esq.
Bureau of Investigation & Enforcement
PA Public Utility Commission
PO Box 3265
400 North St., 2nd Floor West
Harrisburg, PA 17105-3265
ginlauffer@pa.gov

Steven C. Gray, Esq.
Office of Small Business Advocate
300 North Second St., Suite 202
Harrisburg, PA 17101
sgray@pa.gov

Patrick M. Cicero, Esq.
Elizabeth Marx, Esq.
Joline Price, Esq.
Pennsylvania Utility Law Project
118 Locust St.
Harrisburg, PA 17101
pulp@palegalaid.net

H. Rachel Smith, Esq.
Assistant General Counsel
100 Constellation Way, Suite 500C
Baltimore, MD 21202
holly.smith@exeloncorp.com

David P. Zambito, Esquire
Cozen O'Connor
17 North Second St., Suite 1410
Harrisburg, PA 17101
dzambito@cozen.com

Todd S. Stewart, Esquire
Hawke, McKeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101
tsstewart@hmslegal.com

Charles E. Thomas, III, Esquire
Thomas, Niesen & Thomas, LLC
212 Locust St., Suite 600
P.O. Box 9500
Harrisburg, PA 17101
cet3@tntlawfirm.com

Kenneth L. Mickens, Esq.
316 Yorkshire Drive
Harrisburg, PA 17111
kmickens11@verizon.net

Pamela Polacek, Esq.
Adeolu A. Bakare, Esquire
Alessandra L. Hylander, Esq.
McNees, Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166
abakare@mwn.com
ppolacek@mwn.com
ahylander@mwn.com

Heather M. Langeland, Esq.
PennFuture
200 First Avenue, Suite 200
Pittsburgh PA 15222
langeland@pennfuture.org

Deanne M. O'Dell, Esq.

Date: September 6, 2016

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

EXCEPTIONS OF RETAIL ENERGY SUPPLY ASSOCIATION

Daniel Clearfield, Esquire
Attorney ID #26183
Deanne M. O'Dell, Esquire
Attorney ID #81064
Sarah C. Stoner, Esquire
Attorney ID #313793
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-6000 (phone)
(717) 237-6019 (fax)

Attorneys for Retail Energy Supply Association

Date: September 6, 2016

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I. INTRODUCTION

The issue before the Commission is whether the existing and unfettered shopping right of approximately 41,074 customers in the service territory of PPL Electric Utilities Corporation ("PPL") who also participate in PPL's customer assistance program ("CAP") should be revoked on an interim basis pending a statewide approach. In its place – if the Initial Decision ("ID") is adopted (which it should not be) – would be one exclusive method for those customers to potentially obtain supply from an electric generation supplier ("EGS") (i.e. the "CAP-SOP"). However, this exclusive method is not likely to result in any competitive options for the customers because it contains restrictions that would discourage EGSs from offering service. Therefore, adoption of the ID would effectively close the door to the competitive market for all PPL's CAP customers. The Retail Energy Supply Association ("RESA")[1] strongly urges the Commission not to take this course.

This matter is of significant importance because the Electricity Generation Customer Choice and Competition Act ("Competition Act") has bestowed upon all customers the right to freely shop and recognizes that greater competition in the electricity generation market benefits all classes of customers, including those of low income.[2] As the Commonwealth Court has noted, the "overarching goal" of the Competition Act is competition.[3] Thus, while the

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1 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.

2 66 Pa. C.S. § 2802(7); *Coalition for Affordable Util. Servs. and Energy Efficiency in Pennsylvania, et al. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1106 (Commw. Ct. 2015), appeal denied, 2016 WL 1383864 (Pa. Apr. 5, 2016) ("*Commonwealth Court CAP Shopping Decision*").

3 *Commonwealth Court CAP Shopping Decision* at 1101.

Commission has the legal authority to "bend" the right of customers to shop it can only do so where the proponents of restricting the right to shop have met their legal burden to prove: (1) that there are no reasonable alternatives to the proposed restrictions on competition; and, (2) that the restrictions do not adversely affect available choices for CAP customers.[4] This threshold legal burden has not been met in this case and the Administrative Law Judge ("ALJ") erred by concluding otherwise in the ID.

As explained further in Exception Number 1 below, the ID applies the wrong legal standard in assessing whether the Proponents of CAP Shopping Restrictions[5] have met their burden. Specifically, the ALJ's reliance on the agreement reached by the Proponents of CAP Shopping Restrictions, over the objections of RESA – a trade organization of numerous EGSs – is not a sufficient basis upon which to determine that there are no reasonable alternatives. In addition, the ALJ's apparent reliance on CAP shopping data in this case was also erroneous because that data cannot satisfy the legal burden of showing that there are no reasonable alternatives to restricting the right to shop.

Further, as explained in Exception Number 2, the ID erroneously ignores how the restrictions that would be imposed would adversely affect the available competitive choices for customers. Although the ALJ does appear to recognize that the participation of EGSs in the proposed program is necessary to provide at least this one option for CAP customers to receive supply from an EGS, her recommended modification to the proposal supported by the Proponents of CAP Shopping Restrictions (i.e. the "PPL Rejoinder Proposal") is simply not

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

5 PPL, Bureau of Investigation & Enforcement ("BI&E"), Office of Small Consumer Advocate ("OCA") and Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA") (collectively, the "Proponents of CAP Shopping Restrictions").

enough to overcome the record evidence that EGSs are not likely to participate in this program. If no EGSs participate in the proposed program, then upon removing the current right of PPL's CAP customers to freely shop, they will have no choice but to receive default service.

Adopting the recommendations of the ID: (1) would remove the existing unfettered shopping right of PPL CAP customers (about half of these customers – 20,738 – are shopping); (2) leave them with only a single product that would be completely dependent on the willingness of EGSs to offer it (which the record shows they are not likely to do because of the restrictions on that product); and, (3) would only be implemented as an interim solution pending the results of a statewide collaborative on CAP shopping. Implementing this result would be a slippery slope that should be avoided at all costs. This is because the restrictions on CAP shopping in this proceeding would embark the Commission on a path away from a market where robust competition coupled with effective customer education results in the least-cost option for all customers (including CAP customers) and towards a market where the Commission determines what product and terms will be made available to a certain subset of customers. This is not the market envisioned by the Competition Act nor is such result legally supportable by the record in this case. Interestingly, the ID states that "a statewide initiative to determine the scope of the problem and the best uniform way to address it makes sense, and it is recommended here."[6] Acting now as recommended by the ALJ to take away the statutory rights of customers to pursue an interim process that could be replaced by something entirely different would be unfortunate, unnecessarily costly and not in the public interest.

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6 ID at 57. This is consistent with the views of PPL, I&E, and OCA which all stressed the PPL Rejoinder Proposal would only be an interim solution. PPL Initial Brief at 23; I&E Initial Brief at 27; OCA Initial Brief at 5.

For all these reasons, RESA urges the Commission to reject the recommendations of the ID and grant these Exceptions. Pending a longer term solution,[7] it is reasonable to either maintain the status quo (where CAP customers can freely shop) or direct the implementation of the "PPL Initial Proposal," which would educate and encourage CAP customers to participate in PPL's existing customer referral standard offer program ("SOP").[8] Neither of these alternatives would place restrictions on competition or the CAP customers' freedom to choose an EGS nor would they foreclose future action on this issue as may be determined through a statewide collaborative process.

II. EXCEPTIONS

A. Exception No. 1: The ID Erroneously Concludes That The Proponents Of CAP Shopping Restrictions Met Their Burden Of Providing That Restrictions On The Statutory Right To Shop Are Necessary (ID at 39-56; FOF # 72-111; Ordering ¶ 6)

The Commonwealth Court clearly set forth the legal analysis that is to be applied when interpreting the Competition Act and how it is to be interpreted when there are potentially conflicting objectives (i.e. right to shop and maintaining affordability of electricity).[9] That legal analysis recognizes that, while the "overarching goal" of the Competition Act is competition, the Commission does have the authority to "bend" competition to further other important aspects of the Competition Act.[10] Such "bending" of competition, however, may only occur upon a

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7 The Proponents of CAP Shopping Restrictions agreed that the Commission should initiate a statewide collaborative and/or initiate a new rulemaking proceeding to address CAP shopping issues. Corrected Joint Litigation Statement at 2. Notably, both PPL and BI&E made clear that they support a statewide collaborative to address CAP Shopping issues on a uniform, statewide basis. PPL St. No. 1 at 47; PPL St. No. 1-RJ at 9; BI&E St. No. 1-SR at 15.

8 PPL's existing SOP allows customers to select a specific EGS (rather than being randomly-assigned to an EGS).

9 *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

10 *Commonwealth Court CAP Shopping Decision* at 1101, 1104, 1106, 1107-1108; RESA Initial Brief at 14-15.

showing of substantial reasons why there are no reasonable alternatives to the proposed restriction on competition.[11] Satisfying this burden – as the Proponents of CAP Shopping Restrictions are required to do – is of particular importance here because, presently, there are no restrictions on the ability of PPL's CAP customers to shop. Any restrictions imposed will impact the existing right of PPL's CAP customers (approximately 41,074) to freely shop, and the actual decisions made by those CAP customers who are to shopping (20,738). In this case, the ALJ erred by concluding that this legal threshold has been met. She does this by: (1) failing to properly analyze the alternatives to restricting the right to shop presented in the record of this proceeding; and, (2) erroneously relying on the CAP shopping data presented in this case as sufficient to support a finding that restrictions on CAP shopping are necessary.

1. The ID Fails To Properly Analyze The Alternatives To Restricting The Right To Shop Presented In The Record Of This Proceeding

The ALJ erred in concluding that there are no reasonable alternatives to creating a CAP rule that would limit a participating customer's ability to choose an EGS.[12] The record in this proceeding includes reasonable alternatives to restricting the ability of CAP customers to freely shop. The availability of a single "reasonable alternative" makes the imposition of restrictions on shopping unlawful. That being said, the existence and viability of the following reasonable alternatives were improperly ignored by the ALJ and the Proponents of CAP Shopping Restrictions.

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11 *Commonwealth Court CAP Shopping Decision* at 1104, 1106.

12 ID at 39-56.

The first reasonable alternative is to do nothing. The maintenance of the status quo is a reasonable alternative. Nothing in the record shows any compelling necessity for action at this time. This is especially true given the record support for a statewide collaborative.

The second alternative is to take action following a statewide collaborate. The ALJ and Proponents of CAP Shopping Restrictions support the commencement of a statewide collaborative open to all interested stakeholders and/or initiate a new rulemaking proceeding to address CAP shopping issues on a uniform, statewide basis.[13] Assuming that a collaborative will take place, that collaborative could identify one or more "reasonable alternatives" to the restrictions being proposed, at this time, by the Proponents of CAP Shopping Restrictions. It is reasonable to wait until the end of the collaborative, rather than create shopping restrictions that may be changed or removed in the future. There is no justification to unduly restrict the shopping rights of PPL's CAP customers in advance of that collaborative. The ID contains no discussion as to why reliance upon the results of a collaborative is not a reasonable alternative to the immediate elimination of a CAP customers' right to shop.

The third reasonable alternative is revision of the structure of PPL's CAP program to minimize negative financial impacts. Revisions to the rules for CAP Credits could increase the ability of individual shopping customers to stay on CAP as long as possible. This can be done without any restriction on the CAP customers' right to shop. The ability of CAP customers to freely shop (i.e. maximizing their program benefits earlier) is directly related to the structure of PPL's CAP program. It is clear that PPL's CAP program "is currently structured to interact with default service rates" and the CAP Credits are designed "based on PPL's default service rates."[14]

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13 ID at 56-57.

14 CAUSE-PA St. No. 1-SR at 8 (emphasis added).

Based on that evidence, RESA explained that adjusting the CAP customer's CAP Credit to align with the price of a competitive supplier would be a reasonable alternative to restricting the right to shop.[15] That being said, there may be other reasonable alternatives within the PPL CAP Program that would not require restricting CAP Shopping but none have been offered in the record.[16] The ID contains no discussion as to why the modification of other CAP rules is not a reasonable alternative to the immediate elimination of a CAP customers' right to shop.

The fourth reasonable alternative is revision of the structure of PPL's CAP rules so that CAP customers are placed on equal footing with non-CAP customers. This can be done without any restriction on the CAP Customers' right to shop. PPL's direct testimony proposed to educate and encourage any customers inquiring about its CAP (or other low-income programs) or actually enrolled in PPL's CAP be informed of the availability of the SOP ("PPL Initial Proposal").[17] The availability of SOP would stimulate CAP customer participation in shopping and make available a product with a level of guaranteed savings with no early cancellation/termination fees.

Despite acknowledging that the PPL Initial Proposal was presented for consideration,[18] the ID does not determine that the PPL Initial Proposal is not a reasonable alternative to the PPL Rejoinder Proposal. The ID contains no comparison of why the PPL Initial Proposal, which does not restrict the right to shop, is not a "reasonable alternative" to the PPL Rejoinder Proposal, which restricts the right to shop. The conclusions reached in the ID were driven by the perceived

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15 RESA Initial Brief at 19.

16 RESA Initial Brief at 19.

17 PPL St. No. 1 at 48.

18 ID at 48.

need to protect CAP customers from "the negative effects of paying more than the PTC."[19] Those conclusions appear to have been reached without regard to any "alternatives" to preserving the right to shop, which was the focus of the directive from the Commonwealth Court.[20]

Rather than engaging in this analysis, the ID improperly shifted the threshold legal burden to RESA to propose alternate restrictions on CAP shopping.[21] RESA, however, did not propose any restrictions on the right to shop. It, therefore, does not have an obligation to provide substantial reasons showing that there are no reasonable alternatives to restricting the right of CAP customers to shop. Nor does it have an obligation to offer specific restrictions or revise shopping restrictions offered by other parties.

As the parties seeking to change the CAP rules, the Proponents of CAP Shopping Restrictions bear the threshold legal burden of proving that there is no "alternative" course of conduct to preserve and protect the unfettered right to shop for an EGS. The willingness of PPL and others to agree to a proposal that restricts the statutory rights of CAP Customers is not sufficient to show the lack of "reasonable alternatives." This is especially true with regard to the PPL Initial Proposal, which was supported by PPL until PPL's rejoinder testimony. It was only then that PPL changed course and presented the PPL Rejoinder Proposal calling for the creation of a separate and distinct shopping program (CAP-SOP) for CAP Customers.

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19 ID at 61.

20 Moreover, using the PTC as the benchmark by which competitive market pricing should be measured is not an accurate reflection of market pricing. As the Commission has already acknowledged, "when the quarterly reconciliation process (which makes the EDCs whole despite errors in forecasts) is layered over these price projections, risk premiums and EDC reconciliation accounting practices, the result is that EGSs are competing with a PTC that, at any given time, may not be reflective of current market conditions." *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952, Final Order entered February 15, 2013 at 13-14.

21 ID at 48.

Here, the ALJ wrongly concluded that it is "legally sufficient to show that alternatives have been evaluated and rejected in favor of the plan ultimately promoted, and to counter the alternatives raised by the party or parties opposing the choice."[22] Under that logic, the Proponents of CAP Shopping Restrictions can satisfy that burden by actively presenting any "cost-effective" proposal that restricts the right to shop.[23] The presentation of a restriction upon the shopping rights of non-CAP customers does not – in and of itself – show that there is no "alternative" course of conduct that would protect and preserve the right to shop. The ALJ then improperly shifted the burden to RESA to present a "middle" ground proposal. In doing so, the ALJ has simply ignored not only the reasonable alternatives presented in this case (discussed above) but also the clear direction of the Commonwealth Court to preserve and protect the statutory right of a CAP customer to freely choose an EGS.

2. Reliance On CAP Shopping Data Does Not Satisfy The Threshold Legal Burden

The ALJ appears to have agreed with PPL that the prima facie burden is upon PPL to show the impacts of CAP Shopping.[24] However, this is not the threshold legal burden to restrict the right to shop. The actual legal burden, as discussed above, is focused on whether there is a reasonable alternative to restricting the right to shop.

The data presented by PPL shows how customers have shopped in the past under PPL's CAP rules. Past shopping data may suggest the need to revise the CAP program on an ongoing forward basis. But, the data does not establish what revision(s) should be made. Nor does the data offer any insight into the existence or viability of any alternatives to restricting the right to

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22 ID at 47-48.

23 See PPL Reply Brief at 13-14

24 ID at 50-54; FOF# 83, 86-97; PPL Reply Brief at 11.

shop. Since the data does not relate to the existence or viability of any alternatives, it does not help the Proponents of the CAP Shopping Restrictions to overcome their legal burden.

The ALJ erred in concluding that the shopping data presented by PPL justifies the creation of a CAP rule that would restrict a participating customer's ability to choose an EGS.[25] The ALJ concluded that the shopping data was "substantial evidence to support the imposition of restrictions on CAP participants who want to shop."[26] While she agreed that the data does not present a complete picture,[27] the ALJ concluded that the data showed two things: that certain CAP customers may be saving a significant amount of money because of their choice of EGS and that other CAP customers may exceed their CAP credits at a faster pace because of their choice of EGS.[28] Such data merely shows that, under PPL's CAP rules, some CAP customers made better decisions than other CAP customers.

That data does not lead to the conclusion that CAP customers should no longer be able to avail themselves of the right to shop in the competitive market for the EGS of their choice. In fact, the data could lead to the conclusion (as discussed above) that the existing CAP rules could be changed to minimize negative financial impacts without any restriction on the right to shop. Simply put, neither the data nor the interpretation of the data relied upon the ALJ shows that the freedom to shop jeopardizes "the protections, policies, and services that now assist customers who are low-income to afford electric service."[29]

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25 ID at 47-56.

26 ID at 56.

27 ID at 54.

28 ID at 53.

29 66 Pa.C.S. § 2802(10).

B. Exception No. 2: The ALJ Erred In Recommending That PPL's Rejoinder Proposal Be Adopted, Either As Proposed Or As Modified By The ID (ID at 57-64; FOF # 72-111; Ordering ¶ 6)

Even if the Commission concludes that the Proponents of CAP Shopping Restrictions have met their legal burden of proving that restrictions on the ability of CAP customers to shop are necessary (which they have not for the reasons discussed above), the Commission may rely on substantial evidence showing the particular restrictions proposed should be rejected.[30] This evidence can include a showing that the restrictions would adversely affect available choices for CAP participants.[31] As set forth in the testimony of RESA Witness White, the restrictions supported by the Proponents of CAP Shopping Restrictions would result in a CAP-SOP proposal doomed to fail. This is because the restrictions would result in EGSs being unwilling to provide service through the CAP-SOP. These restrictions include limiting all offers to CAP customers to the confines of the CAP-SOP, requiring EGSs to pay a $28 referral fee for each CAP customer referred, requiring EGSs to make an initial price offer that is 7% off the then-effective PTC, and prohibiting EGSs from offering a competitive (non-CAP-SOP product) to CAP customers.[32] If EGSs do not provide service through the CAP-SOP, then CAP customers will have no opportunities at all to receive supply from an EGS.

In her analysis of this issue, the ALJ appears to recognize the importance of EGSs participating in the CAP-SOP and, therefore, did recommend a modification intended to address some of the concerns raised by RESA regarding the proposed restrictions.[33] The ALJ's recommended modification would allow EGSs to charge rates "up to and equal to the PTC" to

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30 *Commonwealth Court CAP Shopping Decision* at 1107-1108.

31 *Commonwealth Court CAP Shopping Decision* at 1107-1108.

32 RESA St. No. 1-RJ at 3.

33 ID at 62.

CAP customers after the end of the 12-month contract term if their contracts allow. According to the ALJ, this modification would provide an incentive to EGSs to participate in the CAP-SOP by: (1) eliminating the requirement that EGSs pay a new $28 referral fee after the end of the 12-month contract year; and, (2) allowing EGSs to provide a price to the CAP customer that is at the PTC (rather than 7% below the PTC as required for new customers).[34]

The ALJ's proposed modification of the PPL Rejoinder Proposal, however, does not save the proposal. Even if the legal threshold were met (which it was not as explained in the previous section), the end result with the modification will be the same as without it – EGSs will not be likely to participate in the CAP-SOP.

Importantly, the proposal with or without the modification would create a single and exclusive method for a CAP customer to obtain electric supply from an EGS.[35] It completely removes the unrestricted right of CAP customers to shop for the EGS of their choice. They are restricted to either default service or to a uniform product to be delivered by a randomly-selected EGS. The EGSs are also restricted in their ability to offer tailored competitive products to these customers. Further, to serve these customers, the EGSs would have to agree to initially price the product at 7% off the then-effective PTC and pay a $28 referral fee to PPL to serve that customer. While the ALJ's modification permitting EGSs at the end of the contract term to charge up to the PTC and not pay a new referral fee to PPL to continue to serve the customer is an effort to ameliorate some issues, it really does not resolve anything. Most likely, the customer will not remain with the EGS if the PTC decreases during their contract term given that there are no early cancellation fees for that customer to switch to another CAP-SOP supplier. For those

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34 ID at 62-63.

35 ID at 57; Corrected Joint Litigation Position at 4(a), 5(b).

customers who may be remaining through the end of the initial 12-month CAP-SOP, they too are likely to recognize that a lower price is possible by re-enrolling in the program with a different supplier. Moreover, by modifying the proposed CAP-SOP to allow CAP customers to remain with the EGS following the end of their 12-month contract term, the ID would essentially convert the agreement of the Proponents of CAP Shopping Restrictions from an interim solution, *which was intended to fill a one-year gap*, into a longer term (and implicitly permanent) solution.

For all these reasons and despite an apparently well-meaning attempt by the ALJ to address EGS concerns, the modification proposed by the ALJ does not offer a meaningful solution to the concerns in the record about the specifics of the CAP-SOP. Because these concerns are likely to result in no EGSs willing to provide service through the CAP-SOP, adopting the recommendations of the ID will leave CAP customers with no options to receive supply from an EGS thereby completely eliminating their statutory right to shop. As such a result would adversely affect available choices for CAP participants, it must be rejected.

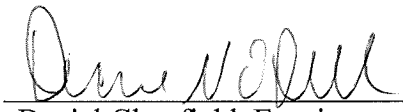
III. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission grant these exceptions, approve the Partial Settlement as submitted and:

(1) reject the restrictions on the ability of CAP customers to shop in the PPL Rejoinder Proposal as originally proposed and as modified by the ALJ and,

(2) direct either (a) the maintenance of the status quo or (b) implementation of the PPL Initial Proposal.

Respectfully submitted,



Daniel Clearfield, Esquire
Attorney ID #26183
Deanne M. O'Dell, Esquire
Attorney ID #81064
Sarah C. Stoner, Esquire
Attorney ID #313793

Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-6000 (phone)
(717) 237-6019 (fax)

Date: September 6, 2016