POST & SCHELL PC
ATTORNEYS AT LAW

17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Main Fax
www.postschell.com

Michael W. Hassell

mhassell@postschell.com
717-612-6029 Direct
717-731-1985 Direct Fax
File #: 163476

November 28, 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 Answer of PPL Electric Utilities Corporation in Opposition to the Petition for Reconsideration of Retail Energy Supply Association in the above-referenced proceeding. Copies will be provided as indicated on the Certificate of Service.

Respectfully submitted,

Michael W. Hassell

MWH/skr
Enclosure

cc: Certificate of Service
Honorable Charles E. Rainey Jr.

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).

VIA E-MAIL AND FIRST CLASS MAIL

Aron J. Beatty
Christy M. Appleby
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1923

Gina L. Miller
Bureau of Investigation & Enforcement
400 North Street, 2nd Floor West
P.O. Box 3265
Harrisburg, PA 17105-3265

Steven C. Gray
Office of Small Business Advocate
300 North Second Street, Suite 1102
Harrisburg, PA 17101

Todd S. Stewart
Hawke McKeon & Sniscak LLP
100 N. 10th Street
Harrisburg, PA 17101
Counsel for NextEra Energy Power Marketing, LLC

Pamela Polacek
Adeolu A. Bakare
Alessandra L. Hylander
McNees, Wallace & Nurick
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17108-1166
Counsel for PPLICA

Kenneth L. Mickens
The Sustainable Energy Fund of Central Eastern Pennsylvania
316 Yorkshire Drive
Harrisburg, PA 17111

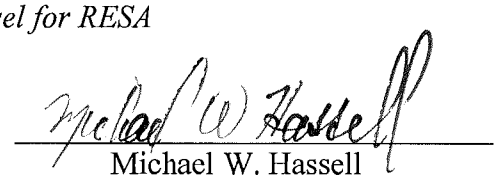
Patrick M. Cicero
Elizabeth R. Marx
Joline Price
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
Counsel for CAUSE-PA

Charles E. Thomas III
Thomas, Niesen & Thomas, LLC
212 Locust Street, Suite 600
Harrisburg, PA 17101
Counsel for Noble Americas Energy Solutions LLC

H. Rachel Smith
Asst. General Counsel
Exelon Business Services Corp.
100 Constellation Way, Suite 500C
Baltimore, MD 21202
Counsel for Exelon Generation Company

Deanne M. O'Dell
Karen O. Moury
Eckert Seamans Cherin & Mellott, LLC
213 Market St., 8th Floor
Harrisburg, PA 17101
Counsel for RESA

Date: November 28, 2016



Michael W. Hassell

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

ANSWER OF PPL ELECTRIC UTILITIES CORPORATION IN OPPOSITION TO THE PETITION FOR RECONSIDERATION OF RETAIL ENERGY SUPPLY ASSOCIATION

Kimberly A. Klock (Pa. Bar I.D. 89716)
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18101
Phone: 610-774-5696
Fax: 610-774-6726
E-mail: kklock@pplweb.com

David B. MacGregor (Pa. Bar I.D. 28804)
Michael W. Hassell (Pa. Bar I.D. 34851)
Christopher T. Wright (Pa. Bar I.D. 203412)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: 717-612-6029
Fax: 717-731-1985
E-mail: dmacgregor@postschell.com
E-mail: mhassell@postschell.com
E-mail: cwright@postschell.com

Counsel for PPL Electric Utilities Corporation

Dated: November 28, 2016

I. INTRODUCTION

1. PPL Electric Utilities Corporation ("PPL Electric" or the "Company") submits this Answer in Opposition to the Petition for Reconsideration filed by Retail Energy Supply Association ("RESA"). RESA seeks reconsideration of that portion of the Pennsylvania Public Utility Commission's ("Commission") Order entered October 27, 2016, at Docket No. P-2016-2526627 ("*Final Order*"), that approved the Customer Assistance Program Standard Offer Referral Program ("CAP-SOP"). The terms of the CAP-SOP were set forth in a Joint Litigation Position Among Certain Parties Regarding CAP Shopping ("Joint Litigation Position") that was jointly supported by PPL Electric, the 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"). By Order entered November 16, 2016, two days following the filing of RESA's Petition for Reconsideration, the Commission granted reconsideration, pending further review and consideration on the merits.[1]

2. In its Petition for Reconsideration, RESA relies on the Commonwealth Court decision in *Coalition for Affordable Util. Servs. & Energy Efficiency in Pa. v. Pa. PUC*, 120 A.3d 1087 (Pa. Cmwlth. 2015) ("*Coalition*"), and argues that the Commission can only impose limits on CAP shopping if the proponents demonstrate that there are no reasonable alternatives to restrictions on shopping, and only if such restrictions do not affect the shopping choices available to CAP customers. RESA's interpretation of the Commission's authority to impose limits on CAP shopping misapplies the Commonwealth Court's decision in *Coalition*. Further, this argument was fully considered, addressed, and rejected by the *Final Order*. RESA has not

[1] The Commission's Order noted that it needed to act on the Petition for Reconsideration within 30 days of the Commission's *Final Order* or otherwise lose jurisdiction if a Petition for Review was timely filed.

offered any basis to support reconsideration of the Commission's authority to impose limits on CAP shopping.

3. RESA also argues the *Final Order* erred by not engaging in an analysis of alternatives to limitations on CAP customers' ability to shop for electric supply from electric generation suppliers ("EGSs"). In support, RESA argues that there is no record evidence of other alternatives considered by the parties or the Commission before approving the CAP-SOP. RESA's argument is based on an incorrect legal and evidentiary standard and, moreover, is factually incorrect and contrary to the record. The record in this proceeding clearly demonstrates that the parties and *Final Order* considered and rejected alternatives to the CAP-SOP. Thus, RESA's has failed to meet the Commission's standards for reconsideration.

4. RESA further argues the *Final Order* failed to give the proper weight to its evidence regarding whether EGSs would participate in CAP-SOP. RESA contends it submitted "substantial evidence" to support its claim that CAP-SOP will fail because EGSs will not participate. RESA applies the wrong legal standard to the Commission's decision. "Substantial evidence" is the standard applied in appellate review to determine whether a Commission decision is supported by the record. The correct legal standard to be applied by the Commission is preponderance of the evidence. Moreover, the Commission, as the trier of fact, determines the weight to be accorded to the evidence. In this case, the Commission chose to give greater weight to the evidence and arguments presented by PPL Electric, I&E, OCA and CAUSE-PA, who demonstrate both that action was necessary to revise the shopping rules for CAP customers and that an SOP-type mechanism for CAP shopping customers, similar to the SOP mechanism that has been extremely successful on the Company's system, would be successful. RESA's

opposition to the *Final Order* on the basis that it ignored "substantial evidence" is erroneous and fails to meet the standards for reconsideration.

5. Finally, RESA presents two alternative requests for relief in its Petition for Reconsideration. RESA first asks that the Commission refuse to adopt any limits on CAP shopping and, instead, adopt PPL Electric's initial, and now withdrawn, proposal to encourage all CAP customers to participate in the traditional SOP.[2] As explained in detail in PPL Electric's Response Brief, RESA's "do nothing" approach and the withdrawn initial CAP shopping proposal are inadequate to address the unrefuted significant and adverse current impacts of unrestricted CAP shopping. Moreover, RESA has failed to offer any basis that would support reconsideration of this rejected CAP shopping proposal.

6. In the alternative, RESA argues that the Commission should grant reconsideration and remand for further hearings to consider alternatives to the Joint Litigation Position. RESA argues that it was not provided enough time to explore alternatives to the Joint Litigation Position, and that there are operational issues that should be examined. RESA's argument amounts to a request for a second bite at the apple. RESA's implied contention that it had insufficient time to investigate the CAP-SOP ignores the substantial record that was developed on the issue of CAP shopping from the very beginning of this case, including the various alternatives proposed and evaluated by the parties. Moreover, RESA has not identified any evidence it would offer at rehearing which was not available at the time of the hearings. Indeed,

[2] 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. *See* PPL Electric St. No. 1, pp. 47-48.

RESA has not even specified any of the unexplored alternatives it would provide if rehearing were granted.

7. For these reasons, as more fully explained below and in PPL Electric's Initial and Response Briefs, and Exceptions and Reply to Exceptions, RESA's Petition for Reconsideration should be denied on the merits.

II. BACKGROUND ON CAP SHOPPING

8. OnTrack is the Company's CAP. Concerns about the harmful effects of unrestricted CAP customer shopping on PPL Electric's system predate this proceeding.[3] In accordance with directives from the Commission, PPL Electric conducted CAP shopping collaborative meetings in December 2015 and January 2016. (PPL Electric St. No. 3, p. 6) As explained in further detail in PPL Electric's Initial Brief, the data presented by PPL Electric in the collaborative and in its case-in-chief demonstrated the harmful impact of unrestricted shopping by OnTrack customers. The net financial impact of OnTrack shopping is an increase of approximately $2.7 million annually in the energy charges paid for supply by OnTrack customers. (PPL Electric St. No. 3, p. 12) This increase in annual energy charges for OnTrack customers is paid by other residential customers through the Universal Service Rider ("USR").

9. PPL Electric's evidence further demonstrated the harm to CAP shopping customers from higher energy bills. Customers are removed from the OnTrack program when

[3] In the Company's 2014-2016 Universal Service and Energy Conservation Plan ("USP Plan"), the Commission directed PPL Electric to address CAP shopping in its next Default Service Program and Procurement Plan proceeding. *See PPL Electric Utilities Corporation Universal Service and Energy Conservation Plan for 2014-2016 Submitted in Compliance with 52 Pa. Code § 54.74*, Docket No. M-2013-2367021, p. 18 (Final Order entered Sept. 11, 2014). Further, in the Company's 2015 base rate case, the Commission directed PPL Electric to obtain and provide to parties data regarding CAP shopping and to undertake a collaborative with interested stakeholders to evaluate CAP customer participation in the competitive shopping market. Following that collaborative, interested parties reserved the right to "evaluate further revisions to the CAP customer participation in the competitive shopping market and to recommend changes to CAP customer shopping in the Company's next default service procurement plan proceeding." *Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. R 2015 2469275, p. 13 (Final Order entered Nov. 19, 2015).

they exceed their maximum CAP credit. (PPL Electric St. No. 3, p. 4) The CAP credit is the difference between the fixed OnTrack payment and the total OnTrack customer electric bill. Consequently, the higher the total bill, the faster the OnTrack customer will reach the maximum CAP credit and be removed from the OnTrack program. (PPL Electric St. No. 3, p. 4)

10. PPL Electric initially proposed that the Commission undertake a statewide investigation of CAP shopping. In addition, the Company proposed an effort to encourage OnTrack customers to sign up for the current SOP, which would give the customers an initial discount and an opportunity to cancel contracts, without fees or penalties, if their SOP price later exceeds the default price.

11. These proposals were not supported by OCA or CAUSE-PA. These parties questioned the efficiency of merely encouraging SOP participation in controlling the substantial added cost of OnTrack shopping that was being borne by non-CAP residential customers, and in reducing the incidences of OnTrack customers being removed from the OnTrack program for exceeding their maximum CAP credit. Moreover, in their respective direct testimonies the OCA and CAUSE-PA each initially proposed CAP shopping proposals that would not allow OnTrack customers to contract with an EGS for a price higher the price to compare ("PTC"). (OCA St. No. 2, pp. 21-22; CAUSE-PA St. No. 1, p. 33-34)

12. Later, in response to criticisms of the feasibility of these proposals, CAUSE-PA revised its proposal in its surrebuttal testimony. Working off of the framework of using SOP for OnTrack customers, CAUSE-PA proposed the use of a CAP-SOP, with re-enrollment on an annual basis and at any time that the PTC falls below the customer's SOP contract price. (CAUSE-PA St. 1-SR, pp. 19-20) EGSs would have the right to choose to participate in the program.

13. The CAP-SOP proposed in CAUSE-PA's surrebuttal testimony was acceptable to PPL Electric with a few minor changes explained in the Company's rejoinder testimony. Ultimately, PPL Electric, I&E, OCA, CAUSE-PA agreed to the CAP-SOP contained in the Joint Litigation Position. The Joint Litigation Position did not provide for automatic mid-contract re-enrollment if the CAP-SOP price exceeded the PTC. The Joint Litigation Position also clarified the process of moving OnTrack customers to the new CAP-SOP. Further, the Joint Litigation Position made clear that EGSs would not be forced to participate in CAP-SOP.

III. STANDARDS FOR RECONSIDERATION AND REHEARING

14. The Commission's standard for granting reconsideration following final orders is set forth in *Duick v. Pennsylvania Gas and Water Co.*, 56 Pa. P.U.C. 553, 559 (1982) (emphasis added):

> A petition 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 this code section to rescind or amend a prior order in whole or in part. In this regard we agree with the Court in the Pennsylvania Railroad Company case, wherein its was said that "[p]arties ..., cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them...." What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

Thus, for a petition to warrant reconsideration by the Commission, it must demonstrate new and novel arguments that were raised below by the petitioner, but not previously considered by the Commission. The Commission has cautioned that the last portion of the operative language of the *Duick* standard – "by the Commission" – focuses on the deliberations of the Commission, not the arguments of the parties. *See Pa. PUC v. PPL Electric Utilities Corporation*, Docket No. R-

2012-2290597, p. 3 (May 22, 2014). Therefore, a petition for reconsideration cannot be used to raise new arguments or issues that should have been but were not previously raised.

15. A petition seeking relief under the *Duick* standard may properly raise any matter designed to convince the Commission that it should exercise its discretion to rescind or amend a prior order in whole or part. Importantly, however, the *Duick* standard does not permit a petitioner to raise issues and arguments considered and decided below such that the petitioner obtains a second opportunity to argue properly resolved matters. *Id.* As explained by the Pennsylvania Supreme Court, petitions for reconsideration of a final agency order may only be granted judiciously and under appropriate circumstances because such action results in the disturbance of final agency orders. *City of Pittsburgh v. Pa. Dep't of Transp.*, 490 Pa. 264, 416 A.2d 461 (1980).

16. The Commission may refuse a request for rehearing if it is not apparent that evidence to be offered was not available at the original hearing. *City of Philadelphia v. Pa. PUC*, 138 A.2d 698 (Pa. Super. 1958).

17. As explained below, RESA's Petition clearly fails to satisfy the applicable standards for granting reconsideration or rehearing and, therefore, should be denied.

IV. RESA FAILS TO IDENTIFY ANY REASONS WHY RECONSIDERATION SHOULD BE GRANTED UNDER THE *DUICK* STANDARDS

A. RESA CONTINUES TO ADVOCATE FOR THE WRONG LEGAL STANDARD, WHICH WAS PROPERLY REJECTED BY THE COMMISSION

18. RESA contends that the *Final Order* should be reconsidered because the Commission failed to place upon the proponents of shopping restrictions the burden to show that no reasonable alternatives to the Joint Litigation Position exist. (Petition for Reconsideration, pp. 3, 9-11) RESA presented this contention previously in briefs and Exceptions, and it was

properly rejected by the Commission. (*Final Order*, p. 55) Thus, this contention fails to satisfy the standards for reconsideration set forth in *Duick*, and should be rejected.

19. The Commission found that Section 2804(9) of the Electricity Generation Customer Choice and Competition Act ("Choice Act"), 66 Pa.C.S. § 2804(9), and the Commonwealth Court's holding in *Coalition* provide the Commission with authority, 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. (*Final Order*, pp. 42-46) RESA also relies on the Commonwealth Court decision in *Coalition* regarding the Commission's authority to impose limits on CAP shopping. However, RESA argues that, under *Coalition*, the proponents of shopping restrictions had the burden of showing no reasonable alternatives to their proposed restrictions exist. (Petition for Reconsideration, pp. 9, 11) RESA's interpretation of the Commission's authority to impose limits on CAP shopping misapplies the Commonwealth Court's decision in *Coalition*.

20. In *Coalition*, the Commonwealth Court reviewed the Commission's determination to reject a CAP shopping program proposed by PECO Energy Company ("PECO"). On appeal, the Commonwealth Court concluded 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 CAP is administered in a manner that is cost-effective for both CAP and non-CAP customers.

21. 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, 1007 (internal citation omitted). 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 limits on CAP shopping, must be supported by substantial evidence of record.[4]

22. RESA, however, interprets the Court's statement regarding "no substantial alternatives" to impose a burden on the parties proposing limits on CAP shopping to demonstrate substantial reasons why there are no reasonable alternatives to the parties' CAP shopping

[4] 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).

proposal. ((Petition for Reconsideration, pp. 9, 11) RESA's interpretation of the Court's holding in *Coalition* was properly rejected by the Commission.

23. As explained in PPL Electric's Reply to Exceptions, there are a number of reasons why RESA's interpretation of *Coalition* was properly rejected in the *Final Order*. First, the Court did not reject the PECO CAP price ceiling proposal because PECO failed to introduce evidence to demonstrate there were "no reasonable alternatives" to a price ceiling. 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 a price ceiling on EGSs as part of the PECO CAP Shopping Plan." *Id.* at 1107 (emphasis added). The Court explained it could not and would not re-weigh the evidence. *Id.*

24. Second, the Court's decision concerning the OCA's proposed termination/elimination of CAP shopping fees demonstrates the Court did not establish a new standard requiring "no reasonable alternatives" as asserted by RESA. 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 was based on whether the Commission's decision was supported by substantial evidence; not on whether the OCA demonstrated there were no reasonable alternatives to eliminating termination/cancellation fees for CAP shopping as argued by RESA.

25. 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 claimed by RESA. The Court's holding regarding the CAP shopping customer education initiative was based on an alternative actually proposed in the proceeding, supported by 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 other alternatives to limits on CAP shopping.

26. Finally, as recognized in the *Final Order*, RESA's argument that parties proposing limits on CAP shopping must demonstrate there are no alternatives to the CAP shopping proposal is not a workable or reasonable interpretation. (*Final Order*, p. 55) Under RESA's interpretation of the Court's holding in *Coalition*, parties proposing limits on CAP shopping would be required to disprove any and all reasonable alternatives to the CAP shopping proposal, regardless of whether any such alternatives were even proposed during the proceeding. This would mean 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 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.[5] RESA's proposed evidentiary burden is unreasonable and inconsistent with appellate case law.

[5] *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"). 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*

27. RESA also appears to assert that the Commonwealth Court's decision in *Coalition* stands for the proposition that the Commission does not have authority to adopt the CAP-SOP, because a prohibition on early termination fees is a less restrictive alternative. (Petition for Reconsideration, pp. 12-13.) RESA's contention that *Coalition* prevents adoption of CAP-SOP is an incorrect interpretation of that decision.

28. As the Commission correctly recognized in its *Final Order*, the Court in *Coalition* held that the Commission has the authority to approve rules limiting the offers that a CAP customer may accept, for the purpose of ensuring that universal service plans are adequately funded and cost-effective. (*Final Order*, p. 53.) Contrary to RESA's claims, the Court did not decide that the only restriction the Commission has authority to apply is to prevent the application of early termination fees on CAP customers.

29. In PPL Electric's DSP IV, the evidence of record is clear and unrefuted that unrestricted shopping by OnTrack customers was extremely detrimental both to OnTrack customers and to the non-CAP customers who paid the cost of CAP credits. The Commission correctly exercised its authority to impose greater restrictions to address these serious problems.

30. Based on the foregoing, RESA's request for reconsideration should be denied because it is based on an incorrect legal interpretation of the Court's holding in *Coalition* that the proponents of CAP shopping limitations must show that there are no reasonable alternatives to limits on CAP shopping. The Commission fully considered and properly rejected RESA's interpretation of *Coalition*. (*See Final Order*, pp. 40-56) Importantly, other than merely repeating its incorrect legal and evidentiary standard, RESA failed to offer any reasons to

---

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)).

support reconsideration of the Commission's determination regarding the legal standard to impose limits on CAP shopping.

B. RESA'S ARGUMENT THAT THE RECORD EVIDENCE IS DEVOID OF ANY OTHER ALTERNATIVES IS WITHOUT MERIT AND CONTRARY TO THE RECORD

31. RESA contends that the *Final Order* should be reconsidered because the Commission erred by not engaging in an analysis of reasonable alternatives to imposing limitations on CAP shopping. (Petition for Reconsideration, p. 10-13) In support, RESA contends the record evidence is devoid of any other alternatives that were considered by the parties or the Commission before approving the CAP-SOP. (Petition for Reconsideration, p. 12) RESA therefore argues that the record does not support a finding that no other reasonable alternatives exist. (Petition for Reconsideration, p. 12) RESA arguments are without merit, unsupported by the record, and fail to meet the threshold for reconsideration.

32. RESA's argument is fundamentally flawed because it is based on an incorrect legal standard. RESA's argument is based on the proposition that the Commission has authority to impose limits on CAP shopping only where the proponents of restricting the right to shop have met their legal burden to prove that: (1) there are no reasonable alternatives to the proposed restrictions on competition; and (2) the restrictions do not adversely affect available choices for CAP customers. (Petition for Reconsideration, p. 9, 11-13) As explained above, this is not the correct legal and evidentiary standard. Thus, RESA's argument that the Commission erred by not engaging in an analysis of reasonable alternatives to limitations on CAP shopping is based on an incorrect legal standard. For this reason alone, RESA's request for reconsideration should be denied.

33. Even assuming, *arguendo*, that RESA's legal interpretation is correct, RESA's argument that the record evidence is devoid of any other alternatives is without merit and

contrary to the record. As explained in Section II above, various CAP shopping alternatives were presented in the direct testimonies of the OCA and CAUSE-PA in response to the initial proposal offered by the direct testimony of PPL Electric. Indeed, RESA concedes in its Petition for Reconsideration that different CAP shopping alternatives were presented by OCA and CAUSE-PA. (Petition for Reconsideration, p. 14, n. 34) Each of these alternatives was thoroughly evaluated and analyzed through the parties' respective rebuttal, surrebuttal, and rejoinder testimonies, including testimony submitted by RESA. (Petition for Reconsideration, p. 14, n. 34) Therefore, RESA's assertion that alternatives were not offered for the record is incorrect, and forms no basis for reconsideration.

34. In an effort to meet the *Duick* standards for reconsideration, RESA argues that the "Commission may have overlooked the procedural manner in which the restrictions of the CAP-SOP were put on the record." (Petition for Reconsideration, p. 12) RESA suggests that because the CAP-SOP was set forth in PPL Electric's rejoinder testimony, the parties did not introduce evidence that there were no other reasonable alternatives to the CAP-SOP. (Petition for Reconsideration, pp. 10, 12) RESA's argument, however, completely disregards that CAP shopping alternatives were offered and considered as early as the parties' direct testimonies and the parties, including RESA, had ample opportunities to respond to and develop alternatives through multiple rounds of testimony and discovery. RESA also overlooks that the CAP-SOP was initially proposed in the surrebuttal testimony of CAUSE-PA (CAUSE-PA St. No. 1-SR, pp.; 18-20), and that the parties had the opportunity to reply to the CAP-SOP proposal in rejoinder testimony and/or engage in cross-examination on the CAP-SOP proposal. RESA's attempt to rely on the "procedural manner" in which the parties presented and evaluated the

various CAP shopping proposals introduced into the record is misplaced and, moreover, fails to meet the threshold for reconsideration.

35. Based on the foregoing, the *Final Order* properly rejected RESA's interpretation and RESA has offered no basis to reconsider that determination. Further, RESA's request for reconsideration should be rejected because the record clearly demonstrates that, as found by the *Final Order*, several alternatives were, in fact, introduced into the record and considered by the parties.

C. RESA'S CHALLENGE TO THE WEIGHT GIVEN EVIDENCE IS NOT A BASIS FOR RECONSIDERATION.

36. RESA also contends that reconsideration should be granted because the Commission overlooked or failed to give proper weight to evidence that EGSs would not participate in CAP-SOP. RESA contends that its position that EGSs will not participate in CAP-SOP is supported by substantial evidence of record, and that the Commission therefore erred in dismissing such evidence. (Petition for Reconsideration, pp. 13-17) RESA's argument, however, is nothing more than a request that the Commission reweigh the evidence, *i.e.*, reject the evidence presented by the other parties and accept the evidence presented by RESA. RESA's request fails to meet the threshold for reconsideration.

37. As a preliminary matter, RESA's contention that its position that EGSs will not participate in CAP-SOP is supported by substantial evidence applies the incorrect legal standard. Substantial evidence is a standard of review applied by appellate courts in reviewing an agency decision.[6] However, the standard applied by the Commission to decide an issue is

[6] The Commonwealth Court's standard of review in an appeal from a state agency's adjudication includes, among other things, whether necessary findings of fact were supported by substantial competent evidence. 2 Pa.C.S. § 704; *see Leung v. Pa. PUC*, 582 A.2d 719, 721 (Pa. Cmwlth. 1990); *Teltron, Inc. v. Pa. PUC*, 477 A.2d 599, 600 (Pa. Cmwlth. 1984) (citation omitted). Substantial evidence has been defined as "that quantum of evidence which reasonable minds might accept as adequate to support a conclusion." *Nat'l Fuel Gas Distrib. Corp. v. Pa. PUC*, 677

preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The preponderance of evidence standard requires proof by a greater weight of the evidence. *Commonwealth of Pa. v. Williams*, 557 Pa. 207, 732 A.2d 1167 (1999). This standard is satisfied by presenting evidence more convincing, by even the smallest amount, than that presented by another party. *Brown v. Commonwealth of Pa.*, 940 A.2d 610, 614, n.14 (Pa. Cmwlth. 2008). In weighing the evidence, the Commission may decide to give less weight to certain evidence if it decides, based on the totality of the record, that other evidence is more supportable and should be given greater reliance.

38. That is the case in this proceeding. As the Commission recognized, PPL Electric's current SOP has extensive participation. Therefore, the Commission chose not to rely upon the speculative assertion by RESA's witness that no EGS would participate in CAP-SOP. (*Final Order*, p. 66) The Commission was provided with evidence to demonstrate that RESA members are only 6 of the 16 EGSs currently participating in SOP, and thus could not speak for all EGSs. (*Final Order*, p. 61) Further, CAUSE-PA determined that RESA's witness only spoke on behalf of 3.3 percent of all EGSs licensed to serve on PPL Electric's system. (*Final Order*, p. 61) PPL Electric's witness also opined that EGSs likely would participate in CAP-SOP, given the success of SOP and the similarity of the programs. (*See* PPL Electric Statement No. 1-R, pp. 11, 13; PPL Electric Statement No. 1-RJ, p. 10) Thus, there is more than sufficient evidence of record to support the Commission's determination that EGSs will participate in CAP-SOP.

39. RESA claims that it is mere speculation for the Commission to decide that EGSs will participate in the new CAP-SOP based upon experience with SOP. RESA offers a classic

---

A.2d 861, 863-64 (Pa. Cmwlth. 1996) (quoting *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A.2d 1037, 1046 (Pa. 1980)); *see Pa. PUC v. Dep't of Transp.*, 346 A.2d 376, 378 (Pa. Cmwlth. 1975) (quotation omitted).

Catch 22. Under RESA's analysis, CAP shopping terms could never be revised, because proponents could never support changes that have not been tried before. The Commission properly rejected RESA's position in the *Final Order*, and RESA has offered no basis to reconsider that rejection.

40. The appraisal of conflicting testimony or other evidence, judging the credibility of witnesses and the evidence adduced, and a determination of the weight of evidence is the exclusive function of the Commission. Although RESA may be unhappy with the weight and credibility of the evidence accepted by the Commission, this is not a basis to support reconsideration. RESA has failed to identify any new or novel arguments that have been overlooked or not addressed by the Commission and, therefore, RESA's request for reconsideration should be denied.

V. RESA'S REQUESTS FOR RELIEF SHOULD BE DENIED

41. RESA seeks two alternative requests for relief in its Petition for Reconsideration. RESA first argues that the Commission should not adopt any limits on CAP shopping and, instead, should adopt PPL Electric's initial proposal to encourage all CAP customers to participate in the traditional SOP. The Commission previously considered and rejected these proposals and RESA has failed to offer any reason to support reconsideration here. In the alternative, RESA argues that the Commission should grant reconsideration and remand for further hearings to consider alternatives to the Joint Litigation Position. RESA's requests for reconsideration and rehearing should be denied.

A. RESA'S REQUEST FOR RECONSIDERATION OF ITS CAP SHOPPING PROPOSALS SHOULD BE DENIED

42. RESA argues that the Commission should not adopt any limits on CAP shopping. RESA, however, completely overlooks the CAP shopping data and statistics accepted by the

Commission, which demonstrate 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.[7] RESA's "do nothing" alternative would allow these adverse impacts of CAP shopping to continue without limit, thereby continuing the harm to CAP customers and to customers who pay CAP costs. For these reasons, the Commission properly rejected RESA's proposal to adopt no limits on CAP shopping. Further, RESA has failed to offer any basis that would support reconsideration of this previously considered and rejected CAP shopping proposal.

43. Likewise, the Commission properly rejected RESA's proposal to adopt the Company's initial proposal to encourage all CAP customers to participate in the traditional SOP. As explained in detail in PPL Electric's Response Brief, the withdrawn initial CAP shopping proposal is inadequate to address the unrefuted significant and adverse current impacts of unrestricted CAP shopping.[8] Notably, RESA has failed to offer any basis that would support reconsideration of this rejected CAP shopping proposal.

B. THE COMMISSION SHOULD NOT REMAND FOR FURTHER HEARINGS

44. In addition to requesting reconsideration, RESA seeks remand of the CAP shopping issue. RESA contends that a remand is appropriate to develop a record on other alternatives to the CAP-SOP. RESA asserts that a hearing is appropriate because the Joint

[7] *See* PPL Electric Statement No. 3, pp. 9-13.

[8] *See* PPL Response Br., pp. 16-19.

Litigation Position was offered late in the proceeding. RESA further posits operational questions that it claims should be addressed through further hearings.

45. Initially, the Commission should not entertain RESA's request, at a rehearing stage, for further hearings on CAP-SOP. At no time at the hearing, briefing or exception stage of the proceeding did RESA claim that it was in some way denied an opportunity to develop a record on CAP shopping or to offer alternatives to address the harms experienced by OnTrack and non-CAP residential customers from the excessive CAP credits incurred from EGS prices in excess of the PTC. Rather, RESA chose to offer nothing for the record but continued unrestricted CAP shopping. RESA has not shown that there is any evidence it would offer at rehearing which was not available at the time of the hearings. Indeed, RESA has not even specified or otherwise identified these unexplored alternatives it would provide if rehearing were granted.

46. RESA's request for a remand for further hearings should be denied. RESA's implied contention that it had insufficient time to investigate the CAP-SOP ignores the substantial record that was developed on the issue of CAP shopping from the very beginning of this case, including the various alternatives proposed and evaluated by the parties. Contrary to RESA's attempt to portray the CAP-SOP as being offered for the first time in rejoinder, the concept of an SOP solution to the substantial harms to CAP and non-CAP residential customers from unrestricted shopping was first presented in PPL Electric's case-in-chief. The concept continued to be refined through subsequent rounds of testimony. RESA had full right of cross-examination of all parties that proposed restrictions on OnTrack shopping, and declined to exercise that right. RESA also had the right to present testimony and witnesses to oppose CAP shopping restrictions and exercised that right. The fact that RESA offered no reasonable

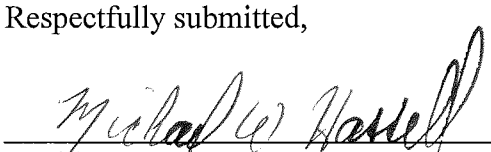
alternatives to CAP shopping limitations is not a basis for a remand for further hearings to consider unidentified alternatives.

47. RESA's assertion that claimed operational issues related to CAP-SOP require further hearings is similarly without merit. These operational questions will be resolved in the context of the terms of the CAP-SOP, in particular: (1) existing fixed term contracts entered into by CAP customers will not be terminated by PPL Electric; (2) CAP customers will be informed of their right to shop through the CAP-SOP, and not through other means; (3) because OnTrack customers may only shop through CAP-SOP, any EGS submission of new contracts for OnTrack customers not entered into through the CAP-SOP will be rejected; and (4) because SOP is a standard contract, no EGS may offer "value added offerings" under CAP-SOP. Thus, hearings are unnecessary.

VI. CONCLUSION

For the reasons explained in PPL Electric's Initial and Response Briefs, Exceptions and Reply Exceptions, and the Commission's *Final Order*, RESA's Petition for Reconsideration should be denied on the merits.

Respectfully submitted,



Kimberly A. Klock (Pa. Bar I.D. 89716)
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18101
Phone: 610-774-5696
Fax: 610-774-6726
E-mail: kklock@pplweb.com

David B. MacGregor (Pa. Bar I.D. 28804)
Michael W. Hassell (Pa. Bar I.D. 34851)
Christopher T. Wright (Pa. Bar I.D. 203412)
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101-1601
Phone: 717-612-6029
Fax: 717-731-1985
E-mail: dmacgregor@postschell.com
E-mail: mhassell@postschell.com
E-mail: cwright@postschell.com

Counsel for PPL Electric Utilities Corporation

Dated: November 28, 2016