PULP
PENNSYLVANIA
UTILITY LAW PROJECT

November 28, 2016

VIA E-FILING
Secretary Rosemary Chiavetta
PA Public Utility Commission
400 North Street
Harrisburg, Pennsylvania 17120

Re: Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period of June 1, 2017 through May 31, 2021, Docket No. P-2016-2526627

Dear Secretary Chiavetta,

Please find the enclosed **Answer of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)** to the Petition the Retail Energy Supply Association (RESA) for Reconsideration of the Commission's October 27, 2016 Final Order, filed today in the captioned docket. Copies are being served pursuant to the attached Certificate of Service.

Respectfully,

Patrick M. Cicero
Counsel for CAUSE-PA

Enclosures

CC: Certificate of Service
Office of Special Assistants – ra-OSA@pa.gov

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 of June 1, 2017 through May 31, 2021	: : : :	Docket No. P-2016-2526627

CERTIFICATE OF SERVICE

I hereby certify that on this day, November 28, 2016, I have served copies of **Answer of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)** to the Petition the Retail Energy Supply Association (RESA) for Reconsideration of the Commission's October 27, 2016 Final Order via email and first-class mail upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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Dated: November 28, 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

ANSWER OF THE COALITION FOR AFFORDABLE UTILITY SERVICES AND ENERGY EFFICIENCY IN PENNSYLVANIA ("CAUSE-PA")

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

PENNSYLVANIA UTILITY LAW PROJECT

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November 28, 2016

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I. INTRODUCTION

The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), through its counsel at the Pennsylvania Utility Law Project, files this Answer to the Petition for Reconsideration filed by the Retail Energy Supply Association (RESA) to the Pennsylvania Public Utility Commission's ("Commission") final order in *Petition of PPL Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2017 through May 31, 2021*, Docket No. P-2016-2526627, Order entered October 27, 2016 (Final Order).

RESA's arguments for reconsideration are without merit and should be denied as they do not meet the standards necessary for reconsideration, and impermissibly seek a proverbial second bite at the apple. Throughout its Petition, RESA distorts the evidentiary record and the Commission's Final Order. Rather than point to any true error, RESA relies on hyperbole and statements that are not contained in the record. Ultimately, RESA's argument is hollow and its petition is meritless because it is unsupported by law or fact. For the reasons stated more fully below, RESA's petition should be denied.

A. The Commission's Final Order and RESA's Petition for Reconsideration

In its Final Order, the Commission determined - based upon a review of the evidence in the record - that the Joint Parties[1] produced substantial evidence that reasonable restrictions on access to the competitive market by CAP customers who wish to remain in CAP are necessary to balance the competing objectives within the Electricity Generation Customer Choice and

[1] As referenced throughout, the Joint Parties refer to PPL Electric Utilities Corporation (PPL), the Office of Consumer Advocate (OCA), the Bureau of Investigation and Enforcement (I&E), and the CAUSE-PA. The Joint Parties all signed on to the Joint Litigation Position which proposed the CAP-SOP that is the subject of RESA's petition for reconsideration.

Competition Act, 66 Pa. C.S. § 2801 *et seq.*, ("Choice Act"). Specifically, the Commission found:

> Based upon our review of the evidence of record, the Exceptions of RESA and Replies thereto, as well as the applicable legal decisions and regulatory requirements, we are persuaded by the position of the Joint Parties that their proposed CAP-SOP is a reasonable and appropriate recommendation to address the unique circumstances in this case which have resulted from the unrestricted ability of PPL's CAP customers to engage in the competitive electric marketplace. We find that the Joint Parties have met their burden of proof that the CAP-SOP proposal has merit and that the Commission should adopt this proposal on an interim basis. We do not come to this conclusion lightly, as this Commission has been steadfast in its support of the competitive electric generation market in Pennsylvania. However, based upon the substantial and unrefuted evidence presented by PPL in this proceeding, it is incumbent upon the Commission to address this matter in a reasonable and prudent fashion to balance the competing objectives within the Competition Act. It is vitally important that the existing CAP programs be administered in a financially responsible fashion consistent with our obligations under the Competition Act to foster competitive electric markets.
>
> We conclude that our decision to approve the CAP-SOP is consistent with the Commonwealth Court's decision in CAUSE-PA. In that case, the Court held that we have the authority under Section 2804(9) of the Competition Act, for the purpose of ensuring that universal service plans are adequately funded and cost-effective, to approve CAP rules that would limit the terms of an offer from an EGS which a customer could accept and remain eligible for CAP benefits. CAUSE-PA at 1103. The Court stated as follows:
>
> > 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.
>
> *Id*. at 1104. In this case, the Parties presented substantial evidence in support of the proposed CAP-SOP, as well as evidence regarding why other alternatives would not be reasonable. The data provided by PPL in this proceeding demonstrated the economic harm experienced as the result of unrestricted CAP customer shopping decisions. The identified economic harm affects the ability of CAP customers to remain on CAP, as higher costs result in a quicker erosion of the CAP customers' limited allocation of CAP credits and also affects non-CAP customers by increasing the subsidy they incur to support the universal service objectives within the Competition Act. We find that this unrefuted evidence is sufficient to permit the

> Commission to impose CAP rules that may partially restrict or limit the ability of these customers to shop for electricity. In essence, we agree with the ALJ that mitigation is required to balance the interests between shopping and non-shopping customers. The CAP-SOP proposal of the Joint Parties, however, does not eliminate the ability of these customers to participate in the competitive marketplace. To the contrary, these customers will retain the ability to shop by participation in a form of the SOP, which provides a 7% discount off the PTC price in effect at the time of enrollment, which has been determined to be very successful in Pennsylvania since its inception.
>
> Next, in consideration of RESA's position that there are several reasonable alternatives available in lieu of the proposed CAP-SOP option, we are in agreement with the ALJ that it is not feasible to require the Joint Parties to identify all possible alternatives. Rather, we find that several alternatives were, in fact, considered by the Parties, but that they ultimately determined that the Joint Litigation Position was the most reasonable such alternative. We conclude that none of the alternatives suggested by RESA are acceptable alternatives. We further agree with the ALJ that RESA's recommendation to impose no restrictions on CAP shopping and to only encourage CAP customers to use the SOP if they do shop is simply insufficient. We conclude that this recommendation fails to protect CAP shoppers from the negative effects of paying more than the PTC and maximizes the burden on other Residential customers who fund the CAP program and, as such, is not a viable alternative.[2]

RESA argues that reconsideration is warranted because the Commission "erred as a matter of law by not engaging in the legal analysis of reasonable alternatives to the restrictions proposed in this proceeding."[3] Even a cursory review of the Commission's Final Order demonstrates that this simply is untrue. As the Commission points out, the legal standard does not require the Joint Parties to come up with all possible alternatives. Rather, the Commission explained that the Joint Parties met their burden by addressing "several alternatives" and refuting the alternatives suggested by parties opposing the Joint Litigation position.[4] The Commission specifically found that the Joint Parties considered several different alternatives – PPL's original proposal, CAUSE-PA's original proposal, and the OCA's proposal – and that they coalesced around the CAP-SOP,

[2] Final Order at 53-55 (internal footnotes and citations to authority omitted).
[3] *Petition of the Retail Energy Supply Association for Reconsideration of the Commission's October 27, 2016 Final Order* at 10, ¶ 13 (*Petition for Recons.*)
[4] Final Order at 55.

as outlined in PPL witness Rouland's rejoinder testimony, as the most reasonable alternative to prevent certain and substantial harm to CAP customers and residential ratepayers given the facts of the proceeding.[5] Moreover, the Commission specifically found that the *only* alternative suggested by RESA in the proceeding – to encourage CAP customers to use the SOP if they do shop – is "insufficient [because it] fails to protect CAP shoppers from the negative effects of paying more than the PTC and maximizes the burden on other Residential customers who fund the CAP program and, as such, is not a viable alternative."[6] Thus, contrary to RESA's assertion, the Commission applied the proper legal standard in analyzing reasonable alternatives. The Commission addressed the alternatives proposed by the parties in the proceeding and concluded, based on the record, that the CAP-SOP was a necessary and reasonable interim solution to address the unrefuted evidence of harm that unrestricted CAP shopping has had for CAP customers and ratepayers who pay for CAP.

RESA also asserts that "the Commission overlooked and/or failed to give proper weight to the evidence in the record showing why the proposed CAP-SOP restrictions would eliminate EGS provided products for CAP participants."[7] This too is baseless. In its Final Order, the Commission specifically considered the evidence presented by RESA:

> In its Exception No. 2, RESA states that the CAP shopping proposal supported by the proponents of CAP shopping restrictions would result in a CAP-SOP proposal doomed to fail because the restrictions would result in EGSs being unwilling to provide service through the CAP-SOP.
>
> . . .
>
> RESA asserts that the CAP-SOP proposal . . . would create a single and exclusive method for a CAP customer to obtain electric supply from an EGS. RESA opines that the proposal completely removes the unrestricted right of CAP customers to shop for the EGS of their choice as they would be restricted to either default service or to a uniform product to be delivered by a randomly-selected EGS. Furthermore,

[5] *Id.*
[6] *Id.*
[7] *Petition for Recons.* at 10, ¶ 13.

> RESA states that the EGSs would also be restricted in their ability to offer tailored competitive products to these customers. Next, RESA avers that to serve these customers, EGSs would have to agree to initially price the product at seven percent off the then-effective PTC and pay a $28 referral fee to PPL to serve that customer.[8]

In response to these arguments, as well as the arguments of the Joint Parties, and, most significantly, the evidence in the record, the Commission found that RESA's position was nothing more than speculation:

> Based upon our review and analysis of the evidence of record, as well as the Exceptions and Replies thereto, we shall reject the position espoused by RESA that EGSs will not participate in the proposed CAP-SOP shopping proposal. In consideration of RESA's argument on this issue that the CAP-SOP proposal will result in a lack of EGS participation, we conclude that as the current SOP program has extensive EGS participation this argument is speculative. We find that RESA's position amounts to unsupported assertions and has no basis whatsoever in the record. Additionally, the proposed CAP-SOP includes a provision that the Parties will have the ability 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.[9]

The fact that RESA may disagree with this conclusion does not mean that it was incorrect. While RESA may regret that did not present convincing evidence, it had ample opportunity to do so through direct, rebuttal, surrebuttal, and rejoinder testimony, through the taking of discovery, and through the cross examination of witnesses. The fact that it submitted scant and speculative assertions that, as the Commission aptly observed, "has no basis whatsoever in the record" does not mean that the Commission erred. The Commission made a determination based on the record before it, and correctly found that there was simply no credible evidence to support RESA's argument. There is no basis for the Commission to reconsider its decision.

[8] Final Order at 56 -57.
[9] *Id.* at 66.

B. Legal Standard

The Public Utility Code (Code) establishes a party's right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) (rehearing) and 703(g) (rescission and amendment of orders).[10] Such requests for relief must be consistent with Section 5.572 of the Commission's Regulations[11] relating to petitions for relief following the issuance of a final decision. The standards for granting a petition for reconsideration were set forth in *Duick v. Pennsylvania Gas and Water Co.* (*Duick*).[12]

> 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 it 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. Absent such matters being presented, we consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error.[13]

Additionally, a petition for reconsideration is properly before the Commission where it pleads newly discovered evidence that was not in existence or discoverable through the exercise of due diligence prior to the expiration of the time within which to file a petition for rehearing under the provisions of Subsection 703(g).[14] Accordingly, under the standards of *Duick*, a petition for reconsideration may properly raise any matter designed to convince the Commission that it should exercise its discretion to amend or rescind a prior order, in whole or in part. Such petitions are likely

[10] 66 Pa. C.S. § 703(f), (g).
[11] 52 Pa. Code § 5.572
[12] *Duick v. Pa. Gas & Water Co.*, 56 Pa. P.U.C. 553 (1982)
[13] *Id.* at 559 (citing *Pa. RR Co. v. Pa. PUC*, 179 A. 850 (Pa. Super. 1953)).
[14] 66 Pa. C.S. § 703(g).

to succeed only when they raise "new and novel arguments" not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. It also has been held that, because a grant of relief on such petitions may result in the disturbance of final orders, reconsideration should be granted judiciously and only under appropriate circumstances.[15]

II. RESPONSE TO PETITION FOR RECONSIDERATION

Unrestricted CAP shopping, has caused extensive, unnecessary, and preventable financial harm to economically vulnerable CAP customers and the PPL ratepayers who pay for CAP. This fact is not in dispute and is made clear by the fact that these customers – CAP and non-CAP PPL ratepayers who pay for the CAP – have paid more than $2.7 million annually than they would have paid had all CAP customers been on default service.[16] Furthermore, RESA does not dispute in its petition that the Commonwealth Court in *Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) et al. v. Pa. PUC* [17] determined 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 can accept and remain eligible for CAP benefits."[18] Instead, the core of RESA's argument is that Commission did not have the benefit of all possible alternatives before approving the CAP SOP, and therefore erred in its legal analysis. RESA also argues that the Commission failed to properly

[15] *West Penn Power v. Pa. PUC*, 659 A.2d 1055 (Pa. Commw. 1995), *appeal denied* 544 Pa. 619, 674 A.2d 1079 (1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).
[16] *See Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period of June 1, 2017 through May 31, 2021,* Docket No. P-2016-2526627, Initial Decision dated August 10, 2016 (*Initial Decision*) at 22, Finding of Fact #92. This figure constitutes the net harm to CAP customers and ratepayers and factors both CAP customers who shopped and saved and those who paid more than the price to compare.
[17] *Coalition for Affordable Util. Servs. & Energy Efficiency in PA (CAUSE-PA) et al. v. Pa. PUC*, 120 A.3d 1087 (Pa. Commw. Ct. 2015)
[18] *Id.* at 1103-04 (citing 66 Pa. C.S. § 2804(9))

give weight to RESA's speculative assertion that the proposed CAP-SOP restrictions would eliminate choice of CAP customers. RESA is incorrect on both counts.

RESA introduced no evidence that the Commission found credible, reliable, or substantial in support of its arguments. As such, RESA resorts to distortion and hyperbole asserting that PPL's CAP customers "would be forced back to default service (without their consent)."[19] RESA further urges the Commission "not to shut down shopping or otherwise eliminate choice for CAP customers."[20] RESA asserts that the Commission's approval of the CAP-SOP proposal is an "unlawful frustration of the right to shop that cannot survive the Commonwealth Court's legal test."[21] Thus, according to RESA, the Commission should (1) adopt PPL's initial proposal that did not restrict shopping for CAP customers, but merely recommended that they participate in the existing SOP; or, (2) remand the CAP shopping issue to the ALJ to introduce additional evidence of other reasonable alternatives that may exist.[22] In essence, RESA argues that either no action should be taken to rectify the substantial financial harm to PPL, or that it should be given the opportunity to re-litigate issues that have already been fully vetted through a nine-month hearing process at great expense to all parties. For the reasons more fully articulated below, each of RESA's positions is without merit.

A. The Commission properly applied the legal standard and concluded that there is a substantial basis in the record for the CAP-SOP and that no reasonable alternative to the CAP-SOP existed based on the record of the proceeding.

RESA makes several related arguments concerning the sufficiency of the Commission's analysis and consideration of possible alternatives to the CAP-SOP proposed by the Joint Parties. Specifically, RESA argues that the reasonable alternatives of the parties "were not made part of

[19] *Petition for Recons.* at 2.
[20] *Id.* at 4.
[21] *Id.*
[22] *Id.* at 18, ¶ 28.

the record in this proceeding", and that "the Commission did not identify what those alternatives were or engage in the necessary legal analysis of whether they could be implemented."[23] The crux of RESA's argument is that the Joint Parties each raised various proposals - through the course of several rounds of testimony - to address the harm caused by unrestricted CAP shopping, but ultimately determined that the most prudent approach was the proposal that originated in CAUSE-PA's rebuttal testimony, as modified by PPL's rejoinder, and ultimately contained in the Joint Litigation position. RESA argues that this procedure somehow deprived the Commission of the opportunity to consider other alternatives. In essence, RESA asserts that PPL, CAUSE-PA, the OCA, and I&E should have briefed the merits of their original proposals for the Commission's consideration, despite the fact that - after weighing each parties' proposal – the parties had already agreed that the CAP-SOP proposal set forth in PPL's rejoinder testimony was the most viable and reasonable approach. This argument carries no weight.

Each of the Joint Parties engaged in good faith consideration of each other's proposals and coalesced around the proposal presented in PPL's rejoinder testimony. During the hearing in this case, the Joint Parties, while acknowledging that the record contained conflicting proposals about how to resolve the identified problem of harm caused to CAP customers and other ratepayers who pay for CAP as a result of unrestricted CAP shopping, each agreed to abandon their former CAP shopping proposals in favor of the CAP-SOP proposal outlined in the Joint Litigation Position of the parties.[24] More damaging to RESA's argument, however, is that with the exception of PPL's initial proposal, RESA also did not brief any of the other alternatives.[25]

[23] *Petition for Recons.* at 10, 14.
[24] Tr. at 37-38.
[25] It is important to note that although the parties did not brief each of their original proposals, those proposals were in the record through the parties testimony and it is clear that the Commission had all of the possible alternatives in front of it that were presented on the record.

Throughout the entire evidentiary phase of this proceeding, RESA failed to offer any solution to the proven financial harm occurring in PPL's service territory. In fact, RESA was itself either opposed to or silent with regard to PPL's proposals to address CAP shopping in every round of testimony.[26] It was not until briefing that RESA first endorsed PPL's original proposal, a fact that was recognized by the ALJ in her Initial Decision.[27] RESA did not address or rebut CAUSE-PA's original or refined proposals in testimony or briefing – except to say that they would not work – and provided no proposed refinements or alternatives. And yet, RESA now argues that the Commission's decision to accept the Joint Litigation position of the parties as a reasonable alternative was flawed because it was deprived of a record of the other proposals and/or some unknown and unarticulated set of speculative alternatives. This argument cannot withstand scrutiny and it is merely another attempt by RESA to recast the legal burden in this proceeding from one that requires a showing that there are no *reasonable* alternatives to one requiring a showing that there are no *possible* alternatives. RESA's insisted in its exceptions that "[t]he availability of a single 'reasonable alternative' makes the imposition of restrictions on shopping unlawful,"[28] and in essence makes the same argument here. The Commission properly rejected this argument:

> [W]e are in agreement with the ALJ that it is not feasible to require the Joint Parties to identify all possible alternatives. Rather, we find that several alternatives were, in fact, considered by the Parties, but that they ultimately determined that the Joint Litigation Position was the most reasonable such alternative. We conclude that none of the alternatives suggested by RESA are acceptable alternatives. We further agree with the ALJ that RESA's recommendation to impose no restrictions on CAP shopping and to only encourage CAP customers to use the SOP if they do shop is simply insufficient. We conclude that this recommendation fails to protect CAP shoppers from the negative effects of paying more than the PTC and maximizes the

[26] *See* RESA St. 1 at 11-14; RESA St. 1-R at 12-13; RESA St. 1-SR at 7-12; RESA St. 1-RJ at 1-4.
[27] *Initial Decision* at 48 ("RESA did not present a reasonable alternative to be considered until briefing, and even then, relied upon the record and original plan proposed by the Company. Therefore, only two plans are presented here.")
[28] RESA Exceptions at 5.

> burden on other Residential customers who fund the CAP program and, as such, is not a viable alternative.[29]

In its Petition for Reconsideration, RESA adds a new wrinkle to its argument, stating that it was deprived – and consequently so was the Commission – of the opportunity to present alternatives because "[p]rocedurally, the brand new CAP-SOP proposal as approved in the Final Order was not entered into the record until PPL's rejoinder testimony."[30] RESA further argues that "the fact that the CAP-SOP proposal became the other parties' Joint Litigation Position very late in the proceeding denied the Commission the opportunity to fully assess the specific restrictions being proposed and – most significantly for purposes of this reconsideration request – potential alternatives."[31] RESA asserts that, because of the late stage at which the CAP-SOP developed, "the record is devoid of any evidence of other alternatives that were considered by the parties or by the Commission before advancing and approving the specific restrictions set forth in the CAP-SOP,"[32] and that reliance in the Final Order "on the representation by some of the parties . . . that no reasonable alternatives exist is insufficient to meet the Commission's legal duty" because "the record in this proceeding does not support a finding that specific restrictions set forth in the CAP-SOP are the only ones that can/must be implemented."[33] RESA's argument is flawed for several reasons.

First, RESA's arguments are merely a different iteration of that which has already been rejected by the Commission. The Commission determined that "it is not feasible to require the Joint Parties to identify all possible alternatives. Rather, we find that several alternatives were,

[29] Final Order at 55.
[30] *Petition for Recons.* at 10, ¶ 15.
[31] *Petition for Recons.* at 11, ¶ 16.
[32] *Petition for Recons.* at 12, ¶ 17.
[33] *Id.*

in fact, considered by the Parties, but that they ultimately determined that the Joint Litigation Position was the most reasonable such alternative."[34] Any other standard would be unworkable.

Second, RESA's assertion that the CAP-SOP proposal was only introduced in PPL's rejoinder – while true in the technical sense – is inherently misleading. Throughout the exchange of testimony in this case, the parties exchanged proposals concerning appropriate restrictions for CAP customers entering the competitive market. These proposals were refined as the proceeding progressed. PPL initially proposed no such restrictions and sought merely to encourage CAP customers to enroll in its existing SOP.[35] For its part, CAUSE-PA initially proposed in direct testimony that CAP shopping customers should be prohibited from entering into a contact with an EGS in which they will pay at any time rates higher than the price to compare and/or early termination or cancellation fees.[36] In response to CAUSE-PA's initial proposal, PPL filed rebuttal testimony from Michael Wukitsch and James Rouland, which collectively, raised questions about the feasibility of CAUSE-PA's initial proposal. In response, CAUSE-PA proposed the CAP-SOP in its surrebuttal testimony on June 3, 2016. On June 15, 2016, RESA filed rejoinder testimony that addressed its objections to CAUSE-PA's CAP-SOP proposal. On June 15, 2015, PPL filed written rejoinder testimony that adopted CAUSE-PA's CAP-SOP proposal, with minor revisions. It was this rejoinder testimony that became the Joint Parties' Joint Litigation position and was ultimately adopted by the Commission.

[34] Final Order at 55.
[35] *See Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period of June 1, 2017 through May 31, 2021,* Docket No. P-2016-2526627, Petition filed January 29, 2016 at ¶ 120.
[36] *See* CAUSE-PA Statement No 1 at 33-34.

RESA itself acknowledged that the CAP-SOP proposal contained in the Joint Litigation Position of the Joint Parties was substantially similar to CAUSE-PA's proposal in its June 3, 2016 Rebuttal Testimony:

> Both CAUSE-PA and the OCA made suggestions in testimony about ways to restrict shopping for CAP customers. RESA submitted testimony in response to each of these suggestions. CAUSE-PA first offered in surrebuttal testimony the concept of creating a new CAP-SOP using similar features from the traditional SOP. RESA submitted rejoinder testimony setting forth its concerns regarding this concept. *Ultimately, PPL's rejoinder testimony adopted nearly all of the suggestions from the CAUSE-PA surrebuttal and set forth some operational details for the newly proposed program.*[37]

This chronology is significant for several reasons, all of which clearly demonstrate that RESA had ample opportunity to respond to the CAP-SOP proposal. First, RESA had the option to respond to the core of the CAP-SOP through its rejoinder testimony and, in fact, took advantage of that opportunity. Second, RESA could have cross examined both CAUSE-PA's witness and PPL's witness about the CAP-SOP proposal, but instead chose to waive cross examination of both witnesses. Third, RESA could have objected to admission of that portion of PPL's rejoinder testimony dealing with the modified CAP-SOP proposal if it believed that it was the improper subject of rejoinder testimony, but chose instead to allow that evidence into the record. Fourth, RESA could have requested that the ALJ permit it to supplement the record with additional evidence rebutting the rejoinder testimony of PPL if it believed that such testimony had unfairly changed the contents of the record. RESA did not make this request. RESA's claim of procedural unfairness therefore rings hollow.

As noted by the ALJ in the initial decision, the burden of proof in this case required a showing "that alternatives have been evaluated and rejected in favor of the plan ultimately

[37] *Petition for Recons.* at 14, n. 34 (emphasis added).

promoted, and to counter the alternatives raised by the party or parties opposing the choice."[38] RESA raised no alternatives during the evidentiary stage of the proceeding, but ironically – now that the record is closed, and the parties' experts are unable to respond – has come forward with no less than five alternatives through its briefing, exceptions, and now through its petition for reconsideration.[39]

In its briefing, in exceptions, and again here, RESA advocates for PPL's original proposal – to continue to allow unrestricted CAP shopping and encourage CAP customers to enroll in the SOP. This alternative was explicitly addressed by the Commission both in the Initial Decision of the ALJ and in its Final Order.[40] RESA also improperly attempted to raise additional alternatives in its main brief and its exceptions.[41] RESA specifically suggested the following alternatives in exceptions: maintain the status quo; wait to take action until a statewide collaborative; revise the rules for CAP credits; make revisions to CAP rules to educate customers on CAP or inquiring about CAP about the SOP and encouraging them to enroll.[42] RESA's first two alternatives were not really alternatives at all – they maintain the status quo, either indefinitely or for an undefined period of time until a statewide collaborative may be held and changes are perhaps made as a result of that collaborative. As discussed at length in CAUSE-PA's Main Brief and Reply Brief and the ALJ's Initial Decision, unrestricted CAP shopping is causing clear and immediate harm, both to CAP customers and to the non-CAP residential ratepayers who pay for the CAP program.[43] Both of

[38] *Initial Decision* at 48.
[39] The alternative raised in the Petition for Reconsideration is essentially a reiteration of its support of PPL's initial proposal and is, thus, really nothing new.
[40] *See* Final Order at 55 ("We further agree with the ALJ that RESA's recommendation to impose no restrictions on CAP shopping and to only encourage CAP customers to use the SOP if they do shop is simply insufficient. We conclude that this recommendation fails to protect CAP shoppers from the negative effects of paying more than the PTC and maximizes the burden on other Residential customers who fund the CAP program and, as such, is not a viable alternative.")
[41] RESA Main Brief at 19; RESA Exceptions at 6-7.
[42] RESA Exceptions at 6-7.
[43] CAUSE-PA Main Brief at 13-22; CAUSE-PA Reply Brief at 15-17; *Initial Decision* at 49-53.

these "alternatives" suggested by RESA allow that harm to continue, and delay any remediation of that harm.[44] As such, they are not reasonable alternatives to the restrictions proposed by the Joint Parties. RESA's third alternative, making changes to the CAP structure to address the harms, is unsupported by any evidence on the record. RESA first raised this proposed alternative in its Main Brief – after the record was closed – and the reasons why it is insufficient to ameliorate the substantial and certain harm evidenced in this proceeding were addressed at length in CAUSE-PA's Reply Brief.[45] CAUSE-PA incorporates those arguments here by reference. As explained there, "regardless of the CAP structure, harm from unrestricted CAP shopping is certain to occur to ratepayers, low income CAP customers, or both."[46]

Notwithstanding the fact that RESA's proposals were unsupported by any evidence in the record, were not subject to rebuttal by the many expert witnesses who testified in this proceeding, and were insufficient to ameliorate the harm to CAP customers rendering them ineffective as alternatives to the CAP-SOP proposal, the Commission nonetheless addressed them in its Final Order. Specifically, on pages 41-43 of the Final Order, the Commission outlines each of RESA's proposed alternatives and ultimately reaches the following conclusion after reviewing the record and arguments by all parties: "We conclude that none of the alternatives suggested by RESA are acceptable alternatives."[47]

By raising argument again that were already addressed by the Commission, RESA is grasping at proverbial straws and has not satisfied its burden of demonstrating that it is entitled to reconsideration. The record supports the Commission's determination, and RESA has produced nothing – in the evidentiary record, in its briefs, its exceptions, or this request for reconsideration

[44] *Id.* at 17.
[45] CAUSE-PA Reply Brief at 9-13.
[46] CAUSE-PA Reply Brief at 13.
[47] Final Order at 55.

– that undermines the fact that the Commission's decision to approve the CAP-SOP is consistent with the Commonwealth Court's decision in *CAUSE-PA et al*. The Commission summed it up as follows:

> In this case, the Parties presented substantial evidence in support of the proposed CAP-SOP, as well as evidence regarding why other alternatives would not be reasonable. The data provided by PPL in this proceeding demonstrated the economic harm experienced as the result of unrestricted CAP customer shopping decisions. The identified economic harm affects the ability of CAP customers to remain on CAP, as higher costs result in a quicker erosion of the CAP customers' limited allocation of CAP credits and also affects non-CAP customers by increasing the subsidy they incur to support the universal service objectives within the Competition Act. We find that this unrefuted evidence is sufficient to permit the Commission to impose CAP rules that may partially restrict or limit the ability of these customers to shop for electricity. In essence, we agree with the ALJ that mitigation is required to balance the interests between shopping and non-shopping customers. . . .
>
> Next, in consideration of RESA's position that there are several reasonable alternatives available in lieu of the proposed CAP-SOP option, we are in agreement with the ALJ that it is not feasible to require the Joint Parties to identify all possible alternatives. Rather, we find that several alternatives were, in fact, considered by the Parties, but that they ultimately determined that the Joint Litigation Position was the most reasonable such alternative. We conclude that none of the alternatives suggested by RESA are acceptable alternatives. We further agree with the ALJ that RESA's recommendation to impose no restrictions on CAP shopping and to only encourage CAP customers to use the SOP if they do shop is simply insufficient. We conclude that this recommendation fails to protect CAP shoppers from the negative effects of paying more than the PTC and maximizes the burden on other Residential customers who fund the CAP program and, as such, is not a viable alternative.[48]

Based on the foregoing, RESA's request for reconsideration should be denied. The Commission properly applied the legal standard announced in *CAUSE-PA et al.*, properly weighed all of the evidence, including alternatives that were not in the record, and ultimately reached the proper conclusion to adopt the CAP-SOP. This determination should not be disturbed.

[48] Final Order at 53-55 (internal footnotes and citations to authority omitted).

B. The Commission properly determined the RESA did not provide sufficient evidence that no EGSs would participate in the CAP-SOP program or that the safeguards contained in the CAP-SOP were insufficient in the event that were to happen.

RESA's second ground for reconsideration rests on rehashing its argument that the CAP-SOP is doomed to fail because the restrictions would result in EGSs being unwilling to provide service through the CAP-SOP.[49] RESA opines that the $28 referral fee would cause many EGSs to not participate, and argues that if EGSs do not participate, then CAP customers will not have any opportunities at all to receive supply from an EGS and will be deprived of the ability to receive tailored competitive products.[50] These arguments were previously made by RESA and rejected by the Commission, and RESA has come forward with nothing new in its request for reconsideration. PPL, the OCA, I&E, and CAUSE-PA each addressed these arguments in response to RESA's exceptions, which are incorporated herein by reference.[51]

RESA's allegation regarding lack of EGS participation in the CAP-SOP is inconsistent with the fact that the existing traditional SOP has been highly successful. In particular, EGSs currently participating in PPL's traditional SOP are required to pay the very same $28 referral fee and, because EGS participation in the CAP-SOP is completely voluntary, EGSs are free to elect to not participate and, thereby, avoid the $28 referral fee altogether. RESA has also failed to introduce any evidence of the "value-added" products and services that could be available and failed to demonstrate that the value of these "value-added" products and service outweigh the clear and unrefuted harm that unrestricted CAP shopping has caused to both CAP and non-CAP customers in PPL's service territory. Nor did RESA put forth any evidence that CAP customers have benefitted from these "value-added" products. Rather, even with the current ability to participate

[49] *See Petition for Recons.* at 13-15, ¶¶19-21
[50] *Id.*
[51] PPL Replies to Exceptions at 16-18; OCA Replies to Exceptions at 13-14; CAUSE-PA Replies to Exceptions at 15-16; I&E Replies to Exceptions at 15-17.

in any available non-commodity products and services, the record demonstrates that CAP shopping has had significant adverse impacts.

RESA asserts that it is somehow significant that no EGSs signed on to the Joint Litigation Position and that the opinion of its witness is entitled to additional weight. However, RESA does not get to determine which evidence the Commission finds persuasive and which it finds speculative. The Commission's adjudication must be based upon substantial evidence.[52] But not all evidence is substantial, and more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.[53]

Here, the Commission correctly found that RESA's concerns were mere suspicions that have no basis in the record:

> Based upon our review and analysis of the evidence of record, as well as the Exceptions and Replies thereto, we shall reject the position espoused by RESA that EGSs will not participate in the proposed CAP-SOP shopping proposal. In consideration of RESA's argument on this issue that the CAP-SOP proposal will result in a lack of EGS participation, we conclude that as the current SOP program has extensive EGS participation this argument is speculative. We find that RESA's position amounts to unsupported assertions and has no basis whatsoever in the record. Additionally, the proposed CAP-SOP includes a provision that the Parties will have the ability 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.[54]

Indeed, RESA's evidence is tenuous at best. RESA asserts at various points that if any CAP shopping restrictions are put into place, it "could result in EGSs electing not to serve CAP customers"[55] or that "no EGSs would be willing to serve customers"[56] based on the CAP-SOP

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[52] *See Mill v. Pa. Pub. Util. Comm'n,* 447 A.2d 1100 (Pa. Commw. 1982); *Edan Trans. Corp. v. Pa. Pub. Util. Comm'n,* 623 A.2d 6 (Pa. Commw. 1993); 2 Pa. C.S. § 704.
[53] *See Norfolk & Western Ry. v. Pa. Pub. Util. Comm'n,* 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemp. Comp. Bd. of Review,* 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Dep't. of Pub. Welfare, White Haven Center,* 480 A.2d 382 (Pa. Commw. 1984).
[54] Final Order at 66.
[55] RESA Statement 1-R at 13:14-15.
[56] RESA Statement 1-RJ at 4:6-7.

proposal originally outlined in CAUSE-PA's surrebuttal testimony. Even today, under PPL's SOP, some suppliers choose not to enter PPL service territory or participate in the SOP. In fact CAUSE-PA and RESA entered into a joint stipulation that was admitted into evidence at the hearing, in which RESA acknowledged that its membership consists of just twenty-one (21) EGSs in Pennsylvania, and that its current membership list can be found at www.resausa.org.[57] Comparing the list of current RESA members who are licensed EGSs in Pennsylvania with the list of suppliers participating in PPL's SOP over various periods, shows that RESA members participate in the SOP at lower levels compared to non-RESA members.[58] Thus, RESA's assertion that these new rules could result in EGSs not wanting to serve customers is no different than what is already occurring. For their own individual business reasons, certain EGSs who are RESA members elect not to participate in the SOP, while other members are electing to do so. Moreover many other non-RESA members participate in the current SOP.

Furthermore, as to RESA witness White's assertion that "no EGS would be willing to serve customers" under a modified SOP, the Commission correctly concluded that there was no basis for this assertion whatsoever in the record.[59] Rather, it is clear that this assertion is his unsubstantiated *opinion*, rather than an established fact. As CAUSE-PA identified in its main

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[57] Joint Stipulation of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania and the Retail Energy Supply Association ("Joint Stipulation") ¶ 3.

[58] Compare CAUSE-PA **HIGHLY CONFIDENTIAL** Cross Examination Exhibit 1 at 6 with list of RESA members publically available at www.resausa.org. This exhibit was entered into the record at the hearing and is **HIGHLY CONFIDENTIAL**. The contents of it – specifically the *names of the EGSs participating in PPL's SOP* over each period from August 2013 through March 2016 – will not be listed here. It is available to Commission staff who need to see it and make the relevant comparison thus avoiding the need for a confidential filing.

[59] *See* Final Order at 66 stating:

> [W]e shall reject the position espoused by RESA that EGSs will not participate in the proposed CAP-SOP shopping proposal. In consideration of RESA's argument on this issue that the CAP-SOP proposal will result in a lack of EGS participation, we conclude that as the current SOP program has extensive EGS participation this argument is speculative. We find that RESA's position amounts to unsupported assertions and has no basis whatsoever in the record.

brief, RESA conceded that Mr. White did not poll or review the CAP-SOP proposal with all of RESA's members prior to making this assertion, but rather shared his testimony and discussed the proposal with just seven (7) RESA members prior to submission.[60] A review of the PUC's publically available website listing the licensed suppliers shows that there are currently two-hundred and eleven (211) EGSs licensed in PPL's service territory which serve residential customers.[61] Thus, at best, Mr. White was speaking on behalf of a mere 3.3% of all licensed EGSs when he definitively asserted that "no" supplier would be willing to serve EGSs under a modified CAP-SOP. The Commission correctly concluded that this is not substantial evidence.

Lastly, RESA asserts that the Commission itself engaged in unfounded speculation in accepting the argument that because EGSs are currently participating in the SOP, there would be sufficient or equivalent participation in the CAP-SOP.[62] It may be true that it is too early to predict the level of EGS participation in the CAP-SOP, but like the traditional SOP, EGSs' motives to enter will vary. This fact was recognized by RESA's own witness. In response to discovery submitted by the OCA and admitted into evidence in this proceeding via the Joint Stipulation between CAUSE-PA and RESA, RESA responded as follows:

> **REQUEST: OCA-I-4:** Does Mr. White agree that the EGS includes the potential for customer renewal at the end of the 12-monthy fixed price SOP contract in its decision to participate in the SOP and the potential to earn back the acquisition cost and profit? If not, explain the basis for your response?
>
> **RESPONSE:** No. The reasons to enter into the SOP varies widely depending on the EGS entering in the program so Mr. White cannot speculate on the reasons each EGS participates in a SOP.[63]

[60] Joint Stipulation ¶ 4
[61] See PUC Licensed Electric Suppliers, http://www.puc.state.pa.us/consumer_info/electricity/suppliers_list.aspx (last visited: June 15, 2016).
[62] *Petition for Recons.* at 16, ¶ 24.
[63] Joint Stipulation, RESA Response to OCA-I-4.

Thus, RESA's assertion that the Commission cannot speculate about the success of the CAP-SOP should be taken with a grain of salt because neither can RESA speculate about its failure. As RESA itself notes, "[t]he reasons to enter into the SOP varies widely depending on the EGS entering in the program"[64] and thus, just as they currently do, depending on the PTC at any given time EGSs may find that it is financially advantageous or disadvantageous to participate in the CAP-SOP. More to the point, however, the Commission recognized that although it cannot predict the future, "the proposed CAP-SOP includes a provision that the Parties will have the ability 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."[65] This proposal directly addresses RESA's concerns.

Based on the foregoing, the Commission properly rejected RESA's assertions as speculative. Nothing provided in its petition justifies reconsideration by the Commission.

C. The CAP-SOP approved by the Commission does not unlawfully limit a CAP customer's choice.

RESA asserts that "one of the most significant issues that will result from the *Final Order* is forcing currently shopping CAP customers to return to default service" and that this will be done "without their consent."[66] RESA's assertion is not true. The mechanics of the CAP-SOP **do not** require any CAP customer to remain on default service or return to default service without their consent. CAP customers are free to remain on default service or they are free to select an EGS through the CAP-SOP. This is apparent from a review of the CAP-SOP terms approved by the Commission:

> a) Effective June 1, 2017, the CAP-SOP is the only vehicle that a CAP customer may use to shop and receive supply from an EGS.

[64] Joint Stipulation, RESA Response to OCA-I-4.
[65] Final Order at 66.
[66] Final Order at 17 ¶ 26.

(b) Any CAP customer shopping request that does not get processed through the CAP-SOP will be denied.

(c) EGSs participating in the CAP-SOP must agree to serve customers at a 7% discount off the PTC at the time of enrollment. This price shall remain fixed for the 12-month CAP-SOP contract unless terminated earlier by the customer.

(d) CAP customers may terminate the CAP-SOP contract at any time and without any termination or cancellation fees or other penalties.

(e) A CAP customer who terminates a CAP-SOP contract or whose CAP-SOP contract reaches the end of its term can re-enroll in the CAP-SOP.

(f) At the conclusion of a 12-month CAP-SOP contract, the CAP customer will be returned to the CAP-SOP pool and be re-enrolled in a new CAP-SOP contract, unless the CAP customer requests to be returned to default service or is no longer a CAP customer.

(g) All CAP customer shopping fixed-term contracts in effect as of the effective date of the CAP-SOP will remain in place until the contract term expires and/or is terminated.

(h) Once the existing CAP customer shopping contract expires or is terminated, the CAP customer will have the option to enroll in the CAP-SOP or return to default service, but in any event will only be permitted to shop through the CAP-SOP.

(i) PPL Electric will revise its CAP recertification scripts/process so that all existing CAP shopping customers receiving generation supply on a month-to-month basis after June 1, 2017 will be required at the time of CAP recertification to enroll in the CAP-SOP or return to default service, but in any event will only be permitted to shop through the CAP-SOP.

(j) EGSs must enroll separate from the standard SOP to be a participating supplier in the CAP-SOP. EGSs are free to voluntarily elect to participate in none, one or the other, or both the traditional SOP and the proposed CAP-SOP. Enrollment will be for a three-month period, and shall conform to the enrollment process for the standard SOP. EGS may opt in to participate in the CAP-SOP on a

> quarterly basis, and are free to leave the CAP-SOP on a quarterly basis.[67]

Nowhere in these ordering paragraphs are CAP customers required to choose default service or be forcibly returned to default service. Rather, at all times, CAP customers who wish to remain in CAP are given two choices: select to be served by a supplier through the CAP-SOP program **or** remain with PPL on default service. The fact that customer's choices are more limited when they choose to enroll in the CAP is a function of the CAP program and the Commission's legal authority and obligation to ensure that universal service plans are adequately funded and cost-effective. In the exercise of this authority, it is clear that the Commission may – as it has elected to do so here – "impose CAP rules that would limit the terms of an offer from an EGS which a customer could accept and remain eligible for CAP benefits."[68] Contrary to RESA's arguments, the CAP-SOP does not restrict the right of a PPL electric customer to shop – rather, it is a limitation on participation in CAP, which addresses the effect of CAP customer shopping on the cost and efficiency of CAP, as well as the ability of payment troubled low-income customers to remain in CAP. CAP customers continue to retain the ability to shop. If a CAP wants to choose a supplier outside of the CAP-SOP, he or she can do so but must first request removal from CAP. However, *to obtain or retain the benefits of CAP*, which includes a more affordable bill, a CAP customer is limited to shopping through the CAP-SOP or remaining on default service. The Commonwealth Court has sanctioned just this sort of reasonable restriction to remedy acute harm. The CAP-SOP is a reasonable and necessary resolution to a significant and severe problem. As such, the Commission should reject RESA's attempt to mischaracterize it. To do otherwise would be to abandon the Commission's obligation

[67] Final Order at 69-71, para. 14(a)-(j).
[68] *See CAUSE-PA et al.*, 120 A.2d at 1104.

under the Choice Act to ensure that universal service programs are available and appropriately funded in each utility distribution territory.[69]

D. The Commission should not remand the CAP-SOP to the ALJ.

In a last ditch effort, RESA concludes by arguing that if the Commission elects to uphold its decision, it should remand the proceeding to the ALJ "so that a full record may be developed on other reasonable alternatives that may exist."[70] RESA contends that "the record is devoid of a full vetting of the CAP-SOP proposal" and "the significant operational details need to be worked out."[71] The Commission should not remand this proceeding. As more fully explained in Section II.A. above, RESA had ample opportunity to produce evidence of other alternatives in this proceeding and could have entered evidence on any of the issues that it raised. RESA could have cross-examined PPL's, the OCA's, and/or CAUSE-PA's witnesses, and had ample opportunity to ask each of the questions that it identifies in paragraph 30 of its Petition. The fact that it failed to do so is RESA's fault alone, and it should not be permitted to re-litigate these issues now. It is also worth noting that many of the questions asked by RESA in paragraph 30 of its petition are either answered through a careful reading of the CAP-SOP approved by the Commission or could readily be addressed in the collaborative the PPL has committed to hold with all interested stakeholders within 90 days of the final order in this proceeding. RESA has come forward with no evidence necessitating the reopening of the record in this proceeding and its request to do so must be denied.

[69] *See* 66 Pa. C.S. § 2804(9).
[70] *Petition for Recons.* at 18, ¶ 28.
[71] *Petition for Recons.* at 18-19, ¶¶ 28-30.

III. CONCLUSION

For the reasons explained above, CAUSE-PA asserts that RESA has failed to submit any argument which would allow the Commission to set aside or reconsider its approval of the Joint Parties' CAP-SOP proposal as a reasonable restriction on CAP shopping designed to effectively stem the harm to low income CAP customers and the ratepayers who finance the CAP program. The Commission's determination that the Joint Parties have met their burden of proof, and that the CAP-SOP proposal is reasonable to remedy significant and substantial harm to CAP customers and the residential ratepayers which finance CAP, is amply supported by the record and should not be disturbed. As such, CAUSE-PA urges the Commission to deny RESA's Petition for Reconsideration in its entirety.

Respectfully submitted,

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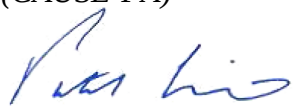

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