PULP
PENNSYLVANIA
UTILITY LAW PROJECT

September 17, 2020

**Via E-File**

Honorable Elizabeth Barnes
Administrative Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120
ebarnes@pa.gov

**Re: Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program for the Period of June 1, 2021 through May 31, 2025**
**Docket No. P-2020-3019356**

***CAUSE-PA Reply Brief***

Dear Judge Barnes,

Attached, please find **Reply Brief of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)**.

Copies will be circulated electronically in accordance with the attached Certificate of Service.

Respectfully submitted,
**PENNSYLVANIA UTILITY LAW PROJECT**
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CC: Per Certificate of Service
Secretary Rosemary Chiavetta

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program for the Period of June 1, 2021 through May 31, 2025 | : : : | Docket No. P-2020-3019356 |

## CERTIFICATE OF SERVICE

I hereby certify I have on this day served copies of the **Reply Brief of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA)** in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party) and consistent with the Commission's March 20, 2020 Emergency Order.

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**BEORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program for the Period of June 1, 2021 through May 31, 2025 | : : : | Docket No. P-2020-3019356 |

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# REPLY BRIEF OF THE COALITION FOR AFFORDABLE UTILITY SERVICES AND ENERGY EFFICIENCY IN PENNSYLVANIA

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September 17, 2020

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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 Reply Brief in response to the Main Briefs of PPL Electric Utilities (PPL), as well as the various competitive supplier parties in this proceeding, including the EGS Parties,[1] and StateWise,[2] Starion Energy PA, Inc. (Starion); Inspire Energy Holdings, LLC (Inspire).

Consistent with the arguments advanced in CAUSE-PA's Main Brief and as further explained herein, the proposals advanced by the various supplier parties in this proceeding should be rejected, as each fail to recognize and remediate the substantial financial harms identified in this proceeding. Rather, the Commission must adopt critical reforms to the program rules governing PPL's Customer Assistance Program (CAP) and Standard Offer Program (SOP) to: (1) approve PPL's proposal to end CAP shopping, along with CAUSE-PA proposed safeguards that avoid imposing financial penalties on economically vulnerable consumers and other residential ratepayers; and (2) return inactive SOP participants to default service at the conclusion of the SOP term before they unwittingly roll onto a high-cost, variable rate contract. These CAP and SOP program reforms are soundly within the Commission's jurisdiction to adopt, and are critically necessary to remediate the certain and substantial financial harm to low income customers and other residential ratepayers that is undeniably occurring within PPL's Customer Assistance and Standard Offer Programs.

[1] The EGS Parties include: Interstate Gas Supply, Inc., Shipley Choice, LLC, NRG Energy, Inc., Vistra Energy Corp., Engie Resources, LLC, WGL Energy Services, Inc., and Direct Energy Services, LLC.
[2] StateWise includes: Energy Pennsylvania LLC and SFE Energy Pennsylvania, Inc.

## II. ARGUMENT

### A. CUSTOMER ASSISTANCE PROGRAM SHOPPING

CAUSE-PA stands firmly on the conclusion reached in its Main Brief: The only CAP shopping proposal on the record capable of ameliorating the identified harm is PPL's proposal to end its CAP-SOP and prohibit CAP shopping, as modified by CAUSE-PA's proposal to allow shopping customers to enter CAP and transition to default service without facing a supplier-imposed penalty or fee. (CAUSE-PA MB at 25-32). As explained below, the Commission has the clear authority to approve this proposal to protect low income customers' ability to access and enroll in CAP, even if it would require suppliers to terminate a contract before the contract expires. Each of the alternative proposals advanced by other parties in this proceeding fail to fully address the certain and substantial harm to CAP customers, residential ratepayers, or both. As such, it is critical that the Commission adopt PPL's CAP shopping proposal, as modified by CAUSE-PA's proposal, to prohibit CAP shopping without imposing undue barriers on the ability of economically vulnerable consumers to enter CAP.

#### 1. PPL's proposal to prohibit shopping customers from entering CAP, without additional protections to ensure customers may enter CAP without financial penalties, will create new harms to low income customers and other residential ratepayers.

In its Main Brief, PPL argues that its proposal to require all CAP customers to return to default service will protect CAP customers and other residential ratepayers from certain and substantial financial harm. (PPL MB at 31). CAUSE-PA agrees. CAP shopping has undeniably caused substantial financial harm to both CAP customers and other residential ratepayers over a prolonged period of time, and it is now time to end CAP shopping for good.

That said, PPL's proposal to also prohibit shopping customers from enrolling in CAP – without also adopting strong CAP rules that allow CAP applicants to easily return to default service

without facing categorically unaffordable fees and penalties - will cause additional harm to both CAP customers and other residential ratepayers and is therefore unjust and unreasonable. Indeed, PPL's proposal will not protect ALL customers from the harms of pre-program CAP shopping, as PPL claims, unless the additional CAP rules recommended by CAUSE-PA are also adopted. (See PPL MB at 31.)

First, failure to prohibit suppliers from charging an early termination or cancellation fee upon entry into CAP would impose a de facto CAP entry fee for shopping customers. As addressed further below, this plainly contradicts numerous provisions of the Choice Act.[3] CAP customers are desperately poor, and have proven that they categorically cannot afford to maintain service without assistance. (CAUSE-PA MB at 16-32; CAUSE-PA St. 1 at 5, 30-33). As CAUSE-PA expert Harry S. Geller explained in surrebuttal testimony:

> Restricting access to CAP in this way imposes an insurmountable barrier on economically vulnerable households who have already evidenced an inability to pay full tariff rates – accelerating the accrual of arrearages and exposing vulnerable customers to an increased risk of involuntary termination of service.

(CAUSE-PA St. 1-SR at 5:5-8). The impact of persistent unaffordability on low income CAP customers was already discussed at length in CAUSE-PA's Main Brief, and – for the sake of brevity – will not be reiterated here. (CAUSE-PA MB at 16-32). Suffice to say here, the imposition of additional barriers to enrollment in CAP will exacerbate payment trouble for low income families, increasing the likelihood that PPL's most vulnerable families will be subject to the loss of critical electric service to their home. (Id.).

Second, PPL's proposal to institute a blanket restriction on shopping customers from entry into CAP will likewise cause additional financial harm to other residential ratepayers, as it will likely increase the level of arrearages accrued while the shopping customer remains out of CAP.

[3] 66 Pa. C.S. §§ 2802(9), (10), (17), 2804(9).

As the record in this case shows, low income shopping customers that are not enrolled in CAP are charged considerably higher rates than low income default service customers. From January 2015 to April 2020, confirmed low income customers not enrolled in CAP were charged $57,645,147. (CAUSE-PA St. 1 at 10, T.2 & Exh. 2). In the five-month period from January to May 2020, confirmed low income customers not enrolled in CAP were charged an average of $106.29 more than the default service price. (CAUSE-PA St. 1 at 11, T.3 & Exh. 2). As Mr. Geller explained, this unnecessary and excessive increase in basic service costs can "exacerbate unaffordability and increase uncollectible expenses." (CAUSE-PA St. 1 at 11:9-13). If a low income shopping consumer cannot promptly enter CAP to remediate identified unaffordability, the level of arrearages deferred for forgiveness is likely to be higher than it otherwise would have been if and when the customer is later permitted to enroll in the program. (See CAUSE-PA St. 1 at 34:16-18; CAUSE-PA 1-SR at 5:8-11). This would create an unnecessary and ineffective programmatic cost that will be borne by other residential ratepayers. (CAUSE-PA St. 1-SR at 5:8-11). Similarly, if low income shopping customers are ultimately terminated for nonpayment before being admitted to CAP, the level of uncollectible expenses - which are also borne solely by residential consumers – will likewise increase. (See CAUSE-PA St. 1 at 11:9-13).

PPL argues in its Main Brief that it is unable to impose a CAP rule that would prohibit the imposition of early termination or cancellation fees. PPL is wrong. Quite the contrary, PPL has the clear authority to design and impose CAP rules that would restrict charges imposed on CAP customers, and the Commission has the authority to approve and oversee those CAP rules. (CAUSE-PA St. 1-SR at 8-12). Section 2804(9) of the Choice Act provides, in relevant part:

> The commission shall ensure that universal service and energy conservation policies, activities and services are **appropriately funded and available** in each electric distribution territory. … Programs under this paragraph shall be subject to the

> administrative oversight of the commission which will ensure that the programs are **operated in a cost-effective manner**.[4]

The Commonwealth Court's decision in CAUSE-PA et al. v. Pa. PUC, interpreting this section, was *explicit* that the Commission has the authority and in fact the obligation to impose CAP rules to prohibit the imposition of early termination and cancellation fees on CAP customers to fulfill its explicit obligations to ensure that universal service programs are appropriately funded, available, and cost-effective. (CAUSE-PA St. 1-SR at 4:8-14).[5]

Critical to this discussion is the fact that the Choice Act defines the term "universal service and energy conservation" as applying to all low-income customers, and explicitly inclusive of CAP:

> Policies, protections and services that help **low-income customers** to maintain electric service. **The term includes customer assistance programs**, termination of service protection and policies and services that help low-income customers to reduce or manage energy consumption in a cost-effective manner, such as the low-income usage reduction programs, application of renewable resources and consumer education.[6]

CAP is the sole universal service program available to PPL's low income customers that is designed to address chronic unaffordability, consistent with the requirements in the Choice Act. All low income customers, the group identified by the Choice Act, must have the ability to access CAP without delay whether they are shopping at the time they apply or not – and without risk of incurring potentially substantial financial penalty through the imposition of an early termination or cancellation fee.

[4] 66 Pa. C.S. § 2804(9).
[5] CAUSE-PA et al. v. Pa. PUC, 120 A.3d 1087, 1103-04 (Pa. Commw. Ct. 2015); Retail Energy Supply Ass'n v. Pa. PUC, 185 A.3d 1206, at 1221-1222 (Pa. Commw. Ct. 2018) (explaining the court's prior decision in CAUSE-PA et al. regarding the Commission's authority to prohibit the imposition of early termination or cancellation fees on CAP customers.).
[6] 66 Pa. C.S. § 2803 (emphasis added).

PPL's proposal to strictly prohibit low income shopping customers from enrolling in CAP serves to exacerbate unaffordability for low income consumers at precisely the time they need help in the form of policies, protections, and services. This directly contradicts the Commission's mandate in the Choice Act to ensure that universal service programs – including CAP – are "available" to PPL low income customers.[7] If PPL's proposed rule to prohibit CAP eligibility for low income shopping customers is approved, without modification, CAP would no longer be "available" to those in need. PPL attempts to cast its proposal to categorically exclude shopping customers from enrolling in CAP as permitting low income customers to make an "informed decision" about whether to keep shopping or to enroll in CAP. (PPL MB at 39). But as Mr. Geller explained in his surrebuttal testimony:

> Under PPL's proposed CAP rule, low income customers who are under contract with a supplier prior to the time they either need or desire to seek assistance through CAP will be forced to make a Hobson's choice to either (1) incur categorically unaffordable rates for an unknown period of time until their existing contract expires, or (2) pay a fee to a supplier as a condition to enrolling in CAP. **This is not an 'informed decision' – it is a compelled outcome which will necessarily result in further financial harm to a customer who is payment troubled and actively seeking assistance through CAP.**

(CAUSE-PA St. 1-SR at 4:21 to 5:5) (emphasis added).

Rather than force economically vulnerable consumers to make this unconscionable choice, it is critical that PPL allow shopping customers to enroll in CAP, provided they consent to return to default service immediately upon entry into the program. In turn, it is likewise critical that PPL prohibit suppliers from imposing cancellation or termination fees to ensure that such fees do not present an insurmountable barrier to enrollment in CAP. This is the only reasonable alternative on the record capable of preventing a multitude of harm to low income customers, CAP customers, and other residential ratepayers, while also ensuring that CAP remains both accessible and cost-

[7] 66 Pa. C.S. § 2804(9).

effective. As the Commonwealth Court has already held, it is clearly within the Commission's authority to impose such rules in furtherance of its obligation under the Choice Act to ensure that universal service programs are "appropriately funded and available" and "operated in a cost-effective manner."

**2. The Commission has the authority to approve CAP rules that require suppliers to return customers to default service without financial penalty upon entry into CAP.**

Contrary to the arguments raised by a number of suppliers, including StateWise and the EGS Parties, the Commission has the authority to impose CAP rules that would require CAP customers to return to default service upon entry into CAP and that would prohibit suppliers from imposing a cancellation or termination fee.

(a) *The Commission's proposed CAP shopping policy statement is neither binding nor final, and does not account for the facts and circumstances uncovered in this and other ongoing default service plan proceedings.*

The EGS Parties and StateWise argue that CAUSE-PA's proposal to require CAP enrollees to return to default service upon enrollment in the program – and to prohibit the imposition of early termination or cancellation fees – are inconsistent with the Commission's *proposed* policy statement on the issue. (StateWise MB at 2-3; EGS Parties MB at 9). While the EGS Parties and StateWise attempt to cast the Commission's pending, proposed policy statement as a final, binding statement of law – this is not at all the case. (See EGS Parties MB at 9).

The Commission's proposed policy statement on CAP shopping was just that: ***proposed***.[8] While the Commission staff issued a subsequent Secretarial Letter – at a separate docket – requesting that EDCs "consider the issues and concerns" surrounding CAP shopping in its Default

[8] Electric Distribution Company Default Service Plans – Customer Assistance Program Shopping, Proposed Policy Statement Order, Docket M-2018-3006578 (Feb. 28, 2019).

Service Plan, that Secretarial Letter did not dictate that utilities must follow the proposed policy statement.[9] Nor would it have been proper for the Commission staff to do so, as it would suggest the Commission staff acted to predetermine the issue – before a final policy statement was approved by the appointed Commissioners. Since the Commission collected comments on this issue, there has been substantial data unearthed in each of the three pending default service plan proceedings for PECO Energy, PPL Electric, and Duquesne Light – all of which indicate substantial and persistent charges across the residential customer class.[10] CAUSE-PA asserts that the actual, hard evidence uncovered and presented in this case must now be considered as carrying far greater weight than a proposed policy statement; and that the evidence uncovered in this case, the other pending default service plan proceedings, as well as the up-to-date experience gained with the CAP shopping rules adopted in the First Energy service territory, must be carefully considered by the Commission before issuing its final CAP shopping policy statement.

Importantly, even if the Commission had issued a final policy statement on the issue, policy statements – unlike statutes, regulations, and adjudications – do not establish binding norms and do not have the force of law.[11]

[9] See Investigation into Default Service and PJM Interconnection, LLC Settlement Reforms, Secretarial Letter, Docket No. M-2019-3007101 (Jan 23, 2020).

[10] See Petition of PECO Energy Co. for Approval of its Default Service Program for the Period from June 1, 2021 through May 31, 2025, Statement of CAUSE-PA in Support of the Joint Petition for Partial Settlement, at 2-3 (filed Aug. 12, 2020) ("In relevant part, Mr. Geller's testimony showed that residential shopping customers were charged over $733 million more (on net) than the default service price since 2015. Mr. Geller observed that in 2019, on a per customer basis, confirmed low income shopping customers were charged an average of $16.04 more each month for competitive electric supply than they would have been charged if they remained with default service."); see also Petition of Duquesne Light Co. for Approval of a Default Service Program for the Period of June 1, 2021 through May 31, 2025, CAUSE-PA Statement 1, Docket No. P-2020-3019522 (admitted to the public record on September 9, 2020).

[11] See Pa. Human Relations Comm'n v. Norristown Area Sch. District, 374 A.2d 671 (Pa. 1977); see also Nw. Youth Servs. Inc. v. Commw. Dep't of Pub. Welfare, 66 A.3d 301, 316-317 (Pa. 2013); Trans Servs., Inc. v. Underground Storage Tank Indemnification Bd., 67 A.3d 142, 155-56 (Pa. Commw. Ct. 2013).

*(b) Statutory and case law both support the sound conclusion that the proposed CAP rules are within the Commission's authority.*

The Commission has the clear authority pursuant to the Choice Act, and as interpreted by the Commonwealth Court, to impose CAP rules designed to ensure that CAP remains appropriately funded, cost-effective, and available across PPL's service territory to those in need - without undue delay or insurmountable costs.

First, and consistent with the discussion above in section A.1, CAUSE-PA asserts that the Commission has the clear authority to approve CAP rules that prohibit suppliers from charging CAP customers a termination or cancellation fee. As addressed above, and without belaboring the point, the Commonwealth Court has already issued explicit guidance on this issue in two published opinions.[12]

In turn, the Commission also has the clear authority to approve CAP rules that require a CAP customer to return to default service upon enrollment in CAP. Adoption of such a rule is the only reasonable alternative on the record capable of effectively remedying identified financial harm without creating additional, countervailing harms. (CAUSE-PA MB at 25-32). As the Commonwealth Court found in CAUSE-PA et al. v. Pa. PUC, and further solidified in Retail Energy Supply Association v. Pa. PUC, the Commission has the authority pursuant to its obligations under the Choice Act to "effectively limit competition and choice for low-income customers, provided there are no reasonable alternatives to restricting competition, so that other important policy concerns of the General Assembly, such as access, affordability, and cost-effectiveness, may be served."[13] As discussed elsewhere in this Reply Brief, and at length in CAUSE-PA's Main Brief, implementing a complete prohibition on CAP shopping and requiring

[12] CAUSE-PA et al., 120 A.3d at 1103-04; Retail Energy Supply Ass'n, 185 A.3d at 1221-22.
[13] Retail Energy Supply Ass'n, 185 A.3d at 1222 (citing CAUSE-PA et al., 102 A.3d at 1104, 1106)

new CAP enrollees to return to default service without penalty is the only reasonable alternative on the record that would ameliorate the current harm to CAP and non-CAP ratepayers and fulfill the requirements of the Choice Act.

The EGS Parties argue that the facts here are distinguishable from the those considered by the Commonwealth Court in Retail Energy Supply Association v. Pa. PUC, asserting that the Court's decision only approved pricing restrictions on suppliers participating in PPL's CAP-SOP. (EGS Parties MB at 11). The EGS Parties argue that the Commission lacks authority to more broadly impose CAP rules on suppliers that are not voluntarily participating in the CAP-SOP. (Id.)

The EGS Parties' argument evidences a fundamental misunderstanding of the mandates in the Choice Act, and misapplies the Commonwealth Court's recent decisions regarding the Commission's authority and obligation to balance the coextensive goals of the Choice Act. While CAP participation is voluntary, in that a low income customer is under no obligation to participate in the program, the Commission's obligation under the Choice Act to ensure that universal service programs are appropriately funded, available, and cost-effective is decidedly not voluntary.[14] Pursuant to these Choice Act obligations, the Commission must adopt CAP shopping rules capable of remediating identified harm to the availability and cost-effectiveness of universal service programming. The EGS Parties are correct that the Commonwealth Court discussed and weighed the specific terms associated with the CAP-SOP, including the fact that the program was voluntary, to determine whether the program would strike the appropriate balance *in light of the evidence in that case*.[15] However, in doing so the Court did not rule out other types of restrictions on competition which may be necessary and appropriate to enable the Commission to fulfill its

[14] 66 Pa. C.S. §§ 2802(9), (10), (17), 2804(9).
[15] Retail Energy Supply Ass'n, 185 A.3d at 1222 (citing CAUSE-PA et al., 102 A.3d at 1104, 1106).

statutory obligations under the Choice Act based on evidence presented in subsequent cases, such as the case at bar here.[16]

Notably, the EGS Parties' arguments here are contradictory to its support of the First Energy CAP shopping model. (EGS Parties MB at 12). The First Energy CAP shopping model is not a specific program that suppliers can voluntarily opt in and out of like the CAP-SOP – it is a set of CAP shopping program rules that allow CAP customers to choose from **any** supplier, provided the product selected by the consumer is at or below the price to compare.[17] For the Commission to approve the First Energy CAP shopping rules – *which it has clearly already done* – it necessarily has the authority to approve the proposed PPL CAP shopping rules that would likewise apply to all suppliers.

Finally, it seems that the EGS Parties and other competitive suppliers in this case have ignored the fact that the Commission already imposes CAP shopping rules in the context of PPL's CAP-SOP that apply **to all suppliers, including those who have not opted to participate in PPL's CAP-SOP**. Specifically, the PUC requires suppliers to return customers to default service upon the conclusion of a contract term (for fixed term contracts) or 120 days (for variable rate contracts).[18] This CAP shopping rule – requiring all suppliers to return CAP customers to default service within a specified time - represents a rule imposed by the Commission which is precisely

[16] See id. at 1223.
[17] See Petition of Metropolitan Edison Company for Approval of a Default Service Program for the Period Beginning June 1, 2019 through May 31, 2023, Opinion and Order, at Docket Nos. P-2017-2637855 et al. (entered Nov. 2, 2018) (ordering First Energy to "implement the following Pennsylvania Customer Assistance Program *shopping rules*.").
[18] See 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, Final Order, Docket P-2016-2526627, at 26 (order entered February 9, 2018).

in line with the change now proposed, i.e., a deviation from standard contract terms that would otherwise roll into a new contract term at the conclusion of the fixed or variable rate term.[19]

*(c) The proposed CAP rules are consistent with the federal and state Constitution.*

The Commission should reject the unsupported claim of the EGS Parties that it is unconstitutional for the Commission to approve a CAP rule that would require CAP customers to return to default service and would prohibit the imposition of termination or cancellation fees. (EGS Parties at 11). In launching its constitutional claim, the EGS Parties cite to Article 1, Section 10 of the federal Constitution and Article I, Section 17 of the Pennsylvania Constitution, known generally as the constitutional Contracts Clause, and to a Pennsylvania Supreme Court decision which invalidated the Mortgage Deficiency Judgment Act of 1934. (EGS Parties MB at 11.)[20]

CAUSE-PA asserts that the EGS Parties' constitutional assertions are without merit. For a constitutional question to be implicated under the Contracts Clause, there must first be a "substantial impairment of a contractual relationship."[21] When evaluating the extent of a claimed contractual impairment, the courts will "consider whether the industry the complaining party has entered has been regulated in the past."[22] A significant factor in this analysis is whether the parties are "operating in a heavily regulated industry" – where changes in regulation that affect a contractual relationship are foreseeable.[23] The sale of electricity is a heavily regulated industry,

[19] See, e.g., Joint Stipulation of CAUSE-PA and Inspire Energy, Appendix A, CAUSE-PA I-3 (Inspire Disclosure Statement)
[20] The EGS Parties cite to Beaver County Building & Loan Ass'n v. Winowich et ux., 187 A. 481, 488-499 (Pa. 1936).
[21] Energy Reserves Group v. Kan. Power & Light Co., 459 US 400, 411 (1983). The standard applied in challenges raised under Article I, Section 17 of the Pennsylvania Constitution is the same applied under Article I, Section 10 of the federal Constitution. See S. Union Twp. v. Pa. DEP, 839 A.2d 1179 (Pa. Commw. Ct. 2003).
[22] Energy Reserves Group, 459 US at 411-412.
[23] Id. at 413-414; see also Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 369 (3d Cir. 2012) ("When a party enters an industry that is regulated in a particular manner, it is entering subject to further legislation in the area, and changes in the regulation that may affect its contractual relationships are foreseeable.").

and changes to regulation are plainly foreseeable. This is especially the case here, where the issue of CAP shopping – and the imposition of rules that may restrict CAP customer shopping – has been litigated in multiple proceedings for nearly a decade. (CAUSE-PA St. 1-R at 13 n.3.)[24]

If a regulation is found to substantially impair a contractual relationship (which is not the case here, given the highly regulated environment and the clearly foreseeable nature of CAP shopping rules), it will still pass constitutional muster if the state has "a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem."[25] The proposed CAP shopping rules in this case serve a significant and legitimate public purpose, enshrined in the Choice Act,[26] and are clearly designed to remedy a profound economic problem. Thus, even if the proposed CAP rules were found to substantially impair a supplier contract, the Commission nevertheless would fall squarely within its authority to implement regulations that serve a significant public purpose; namely, to remedy substantial, persistent, and well-documented financial harm to low income consumers and other residential ratepayers.

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[24] As Mr. Geller explained in rebuttal testimony:

> Indeed, as far back as May 1, 2012, when PPL Electric filed its Petition for approval of a default service program and procurement plan (DSP II) for the period of June 1, 2013 through May 31, 2015, the issue of harm caused by CAP customer shopping had already become an issue. As ALJ Colwell noted in her RD:
>
> > CAUSE-PA and OCA caused the Company to take a second look at its position, and at the time of briefing, PPL Electric expressed concern that OnTrack customers' shopping choices may be increasing costs to non-CAP residential customers who pay the cost of the program, or that those choices may be making it harder for the OnTrack customers to remain on the program.

CAUSE-PA St. 1 at 13, citing Petition of PPL Electric Utilities Corp. for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2013 through May 31, 2015, Recommended Decision, Docket No. P-2012-2302074, at 133-134 (Nov. 9, 2012).

[25] Energy Reserves Group, 459 US at 412 (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)).

[26] 66 Pa. C.S. § 2802(9), (10), (17) (Declaration of policy). **The Choice Act declared explicitly – as a matter of policy – that "electric service should be available to all customers on reasonable terms and conditions" and that "[t]he Commonwealth must, at a minimum, continue the protections, policies and services that now assist customers who are low income to afford electric service."** 66 Pa. C.S. § 2802(9)-(10) (emphasis added).

Finally, even if the constitutional provisions governing the impairment of contracts were to apply in this case, which is clearly not the case, the Commission could still avoid the issue entirely by adopting a transition plan. It is well settled that constitutional protections against the impairment of contracts applies to contracts in existence at the time a law is passed – not on future contracts.

**3. The alternative proposal advanced by Inspire to maintain the status quo fails to remediate harm to CAP customers and other residential ratepayers who pay for CAP.**

Inspire's proposal to maintain the status quo will not remediate the identified harm caused by lax compliance and enforcement of CAP shopping rules. (See CAUSE-PA MB at 32). In short, Inspire argues that the CAP-SOP is "in its infancy" – and needs more time to mature as a program. (Inspire MB at 10-12). Inspire points to PPL's failure to provide an email notice of new CAP enrollees in 2019, arguing that the substantial financial harm identified in the record could otherwise be remediated if PPL improves the timeliness in providing monthly notice to suppliers of recent CAP enrollments. (Inspire MB at 10). According to Inspire, continuing the CAP-SOP is "for the benefit of all ratepayers." (Inspire MB at 7-8, 12). Inspire claims that harm will be mitigated in time – noting that it "usually" returns customers to default service within 30 days of receiving notice that one of its customers has enrolled in CAP – rather than waiting for the contract to expire. (Inspire MB at 11).

Inspire's assertions sidestep the data showing that CAP shopping *for any length of time* will cause specific and quantifiable harm to CAP customers and other residential ratepayers. (CAUSE-PA St. 1 at 7-17). As the extensive data presented in this proceeding showed, residential shopping customers were charged substantially more than the default service price *each and every month since January 2016*. (CAUSE-PA St. 1 at Exh. 1). This is not simply a problem of waiting until an infant matures – the same pattern has persisted for the last seven years for CAP shopping

customers, even after CAP-SOP was implemented - and notwithstanding the fact that there were no suppliers participating in PPL's CAP-SOP for over a year. (CAUSE-PA St. 1 at Exh. 2, 3; PPL St. 3 at 8). In just the first five months of 2020, CAP shopping customers were charged nearly $1 million more than the default service price; in 2019, they were charged $2.9 million more than the default service price; and in 2018, they were charged $4.3 million more than the default service price – notwithstanding the fact that there were not any suppliers participating in the CAP-SOP from June 2018 until March 2020. (PPL St. 3 at 8; Inspire St. 1). There is also evidence in the record which suggests the highest price contracts may be targeted to low income communities and communities of color. (CAUSE-PA St. 1 at 14-17). Inspire's assertion that CAP-SOP produces benefits for all ratepayers, and its proposed solution to continue the CAP-SOP with minor improvements to program implementation, ignores the plain fact that allowing CAP customers to shop in the competitive market for any length of time causes serious and substantial financial harm. While Inspire alone asserts that it voluntarily returns new CAP enrollees to default service within 30 days of notification, that still fails to rectify the harm which occurs until the EGS has been notified and for the thirty days thereafter. Further, the voluntary actions of one supplier does not go far enough to remedy the clear and substantial harms that are and will continue to occur.

Moreover, the data produced in this proceeding does not support Inspire's claim that PPL's failure to provide email lists of new CAP enrollees to suppliers was a factor driving persistent, excessive pricing for CAP shopping customers. (See CAUSE-PA St. 1 Exh. 3). Inspire is correct that PPL was charged by the Commission with the responsibility of sending a monthly email list to suppliers to notify suppliers of new CAP enrollees.[27] But this is not the only method that

[27] 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, Final Order, Docket P-2016-2526627 (order entered February 9, 2018).

suppliers have at their disposal to comply with PPL's CAP shopping rules. To the contrary, suppliers have access to identify new CAP enrollees through supplier portal customer lists – which are updated daily – as well as through the Eligible Customer List, which allows suppliers to check CAP status at any time. (PPL St. 3-R at 7:7-12).

While CAUSE-PA is troubled by PPL's failure to produce additional email lists to suppliers in a timely manner to help further facilitate suppliers' timely return of new CAP enrollees to default service at the expiration of the contract period, there is no correlation in the data between the monthly charges in excess of the default service price for CAP shopping customers in the months that PPL allegedly failed to produce an emailed list of new CAP enrollees to suppliers to facilitate their timely return to CAP. (CAUSE-PA St. 1 at Exh. 3). In fact, the rate of excessive charges in these months was relatively lower than in months when PPL delivered timely lists of new CAP enrollees, further underscoring the lack of correlation. (Id.)

Unfortunately, the primary factor driving excessive CAP shopping pricing is far more likely attributable to suppliers' ongoing lack of compliance and PPL's inability to effectively monitor and enforce supplier compliance. As PPL witness Melinda Stumpf explained,

> PPL Electric has received several complaints from customers who were not dropped from their pre-program supply contract at the end of the term. This resulted in customers paying prices above the PTC for several months after the supply contract expired. This is technically in violation of CAP SOP, but PPL Electric does not have any visibility into pre-program contracts, or an effective way of enforcing the supplier's obligations under CAP-SOP. There is a concern that there are many CAP customers who are continuing to shop after their pre-program contract expired simply because they are unaware of the contract expiration date.

(PPL St. 3 at 14:3-10). Without the ability to determine whether and when an EGS is required to return a CAP customer to default service, PPL will never be able to effectively monitor compliance with CAP shopping rules in order to stem the certain, substantial, and ongoing harm to CAP customers and other residential ratepayers.

Allowing more time for PPL's CAP-SOP to mature would simply allow more time for CAP customers and other residential ratepayers to incur substantial, ongoing financial harm. As such, Inspire's proposal to maintain the status quo should be rejected.

**4. The alternative proposal advanced by the EGS Parties to adopt the shopping plan implemented in the First Energy service territory fails to remediate harm to CAP customers and other residential ratepayers who pay for CAP.**

The EGS Parties argue for the adoption of a shopping plan that would "mirror the program that First Energy put into place." (EGS Parties St. 1 at 10:21-22; EGS Parties MB at 12). The inadequacy of the EGS Parties' proposal to effectively address the ongoing harm identified in this proceeding was addressed in CAUSE-PA's Main Brief. (CAUSE-PA MB at 30-31). CAUSE-PA incorporates those arguments by reference herein. Nevertheless, it is critically important to highlight here that First Energy's CAP shopping model includes the same transition rules for new CAP enrollees – allowing existing high-cost contracts to remain in place for either the full life of the existing contract for fixed priced contracts (which could be for multiple years) or 120 days for variable rate contracts.[28] Given the overlap between the PPL CAP-SOP and the First Energy CAP shopping model, it is likely that the very same excessive CAP shopping issues uncovered in this proceeding are occurring in the First Energy service territory. As such, adoption of the First Energy CAP shopping model would not remediate the serious and substantial harms identified in this proceeding, and would only serve to further delay resolution – leading to additional tens of millions of dollars in excessive costs borne by economically vulnerable consumers and other residential ratepayers.

[28] See Petition of Metropolitan Edison Company for Approval of a Default Service Program for the Period Beginning June 1, 2019 through May 31, 2023, Opinion and Order, at Docket Nos. P-2017-2637855 et al. (entered Nov. 2, 2018).

### 5. The Price to Compare is the appropriate benchmark for competitive market pricing.

Aptly named, the Price to Compare – or PTC – is the appropriate benchmark for measuring prices in the competitive market. The suppliers' provocative and unsupported suggestion that comparison of competitive market rates to the PTC is "unwarranted" – and even "illegal" – must be swiftly rejected. (EGS Parties MB at 7). The Commission has spent millions of ratepayer dollars to create the PaPowerSwitch website to allow ratepayers to compare offers against their utilities' current PTC – and the Commission and the Commonwealth Court have for years relied on the price to compare as a stable and reliable yardstick with which to set policies governing competitive market oversight. Indeed, while the EGS Parties boldly claim the PTC "was never intended to be a 'savings' comparison," (EGS Parties MB at 8), the Commission has repeatedly explained that the concept of the PTC was developed by the Commission with the explicit intent "to facilitate the comparison of prices on a uniform basis (i.e. apples-to-applies)."[29] Ultimately, the EGSs have put forward no sound legal, factual, or policy basis for such a radical shift in accepted, longstanding policy. (See CAUSE-PA St. 1-SR at 7-9). As such, its arguments attempting to undermine the important role of the PTC as a benchmark for competitive offers should be rejected.

## B. STANDARD OFFER PROGRAM PROPOSAL

CAUSE-PA stands on the arguments set forth in its Main Brief with regard to PPL's SOP proposals, and will not otherwise reiterate its lengthy arguments regarding PPL's SOP herein. (CAUSE-PA MB at 33-39). The arguments advanced by Starion and the EGS Parties with respect

[29] Rulemaking Regarding Electricity Generation Customer Choice, 52 Pa. Code Ch. 54, Final Rulemaking Order, Docket No. L-2017-2628991, at 5 (Feb 27, 2020); see also Final Order re: Guidelines for Fixed Price Labels for Products with a Pass-Through Clause, Docket No. M-2013-2362961 (order entered Nov. 14, 2013) (commonly referred to as the "Fixed Means Fixed Order").

to PPL's proposals are without merit, contrary to overwhelming record evidence, and should be rejected.

## III. CONCLUSION

Consistent with the discussion above and the arguments advanced in its Main Brief, CAUSE-PA urges the Honorable Administrative Law Judge Elizabeth H. Barnes and the Commission to reject the arguments advanced by PPL and the various supplier parties in this proceeding, and to adopt the proposed Findings of Fact, Conclusions of Law, and Ordering Paragraphs contained in Appendix A through C of its CAUSE-PA's Main Brief.

Respectfully submitted,

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