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October 26, 2020

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, Filing Room
Harrisburg, PA 17120

RE: Petition of PPL Electric Utilities Corporation for Approval of Its Default Service Plan for the Period From June 1, 2021 through May 31, 2025, Docket No. P-2020-3019356; **EXCEPTIONS OF 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 TO RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ELIZABETH BARNES**

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Exceptions of 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 to Recommended Decision of Administrative Law Judge Elizabeth Barnes in the above-captioned matter. Copies of the Exceptions have been served in accordance with the attached Certificate of Service.

Thank you for your attention to this matter. If you have any questions related to this filing, please do not hesitate to contact me.

Very truly yours,

Todd S. Stewart
Counsel for EGS Parties

TSS/jld
Enclosures
cc: Administrative Law Judge Elizabeth Barnes (via electronic mail)
Office of Special Assistants (via email - ra-OSA@pa.gov)
Per Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party)

VIA ELECTRONIC MAIL ONLY

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DATED: October 26, 2020

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF INTERSTATE GAS SUPPLY, INC., SHIPLEY CHOICE LLC, NRG ENERGY, INC., VISTRA CORP., ENGIE RESOURCES LLC, WGL ENERGY SERVICES, INC., AND DIRECT ENERGY SERVICES, LLC TO RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ELIZABETH BARNES

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DATED: October 26, 2020

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I. INTRODUCTION

NOW COME Interstate Gas Supply, Inc., Shipley Choice LLC, NRG Energy, Inc., Vistra Corp., ENGIE Resources LLC, WGL Energy Services, Inc., and Direct Energy Services, LLC ("EGS Parties"), and hereby Except, pursuant to 52 Pa. Code § 5.533, to the Recommended Decision ("RD") issued by Presiding Administrative Law Judge Elizabeth Barnes, and served by the Commission's Secretary on October 15, 2020. The RD makes numerous errors of fact and of law and recommends courses of action that are unsupported in the record and which, simply stated, constitute bad policy choices.

The EGS Parties contested and therefore briefed two interrelated issues in this proceeding: 1) PPL's proposed modifications to its Standard Offer Program ("SOP"), which is a program required by the Commission by an Order issued in 2014[1]; and, 2) PPL's proposal to deny customers that participate in its customer assistance program ("CAP"), called "On-Track" in the PPL service territory, the statutory right to shop for electricity. In both instances the RD recommends the outcome proposed by PPL, largely without giving any serious consideration to the testimony offered by the EGS Parties, and in both instances, in the view of the EGS Parties, reaching the wrong conclusion. These Exceptions will identify those errors and suggest the appropriate modifications to the RD to achieve a just and reasonable result.

II. ARGUMENT

A. <u>Exception No. 1</u> – The RD erred by Adopting Findings of Fact Nos. 8, 9, 10 and 11. (RD pp. 27-34).

[1] *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Order entered March 1, 2012, slip op. p.30) ("*Final Work Plan Order*").

Findings of Fact Nos. 8-11 perpetuate the house of cards argument upon which PPL built its proposal to end-run the Commission's clearly stated rationale for SOP programs. That intention is that the program to be an "easy way" for customers to participate in the competitive market. Once enrolled, however, SOP customers are to be treated as any other customer.[2] PPL's reasoning for proposing to treat SOP customers differently, which was wholly adopted by the RD, is that if a customer pays any more than the PTC after its SOP contract expires, the customer is being overcharged by the supplier and the utility must take action to "protect" the customer. If PPL's rationale were to be adopted it would eviscerate the entire premise of the "Customer Choice and Competition Act", namely that it is the *customer* who is given the choice; even if those choices may appear to be based upon factors other than price or seem otherwise irrational.[3]

It is true that SOP is a voluntary program, but that does not mean the Commission can blithely toss aside the fact that EGS rates, once the SOP offer has reached its time limit, are subject to the market and not subject to regulation. To judge post-SOP rates as "overcharging" is not appropriate. And while the Commonwealth Court did allow for capped rates for Customer Assistance Program ("CAP") shopping (i.e., comparing EGS rates for CAP Shopping offers to the PTC), the underlying rationale for that holding is not present here. In the CAP circumstance the Court was willing to "bend" competitive rules—i.e., allow for a rate cap – in order to allow the CAP program to be cost effective. In the case of the SOP, there are no such concerns. The evidence is clear that there are ample offers that provide savings versus the price-to-compare in the market, that those offers are available to SOP customers at the end of their contracts, and that the largest group of SOP customers do choose another supplier before their contract ends. (EGS

[2] Final Work Plan Order, p. 32.
[3] 66 Pa.C.S. § 2806(a).

Parties" St. No. 1, 15:16-17:13). The evidence also shows that a very small group of SOP customers, 20% or less, remain on a hold over contract after 4 months. (EGS Parties' St. No. 1, 15:7-16:10). It would be disastrous to make such a monumental policy choice of forcing all SOP customers back to default service, based on such a small group, particularly where there is such potential to harm the rest of the market and harm to a presently successful SOP program.

B. <u>Exception No. 2</u> – The RD erred as a matter of Law in concluding that "The PTC is an appropriate measure of whether the current SOP design is successful." (RD, p. 29)

Nearly the entire RD is premised on the mistaken approach of measuring the competitive market, by comparing the prices offered by suppliers to the default service rate, also known as the Price-to-Compare or "PTC". There can be no mistake that comparing the PTC to a supplier rate is no less apt than comparing a banana to a watermelon. Simply put, an EGS must recover its entire cost of doing business through its rates, while the default service provider, here PPL, need only recover its incremental costs of energy and a few other expenses in the PTC. Most of the costs of providing default service are recovered through distribution rates. (EGS Parties St. No. 1-R, 6:21-9:2; EGS Parties' St. 1-SR, 3:21-4:19). Most importantly, the EDC recovers no profit on default service, which fact standing alone makes the point – the PTC cannot be what it purports to be – a measure of the "fairness" of supplier rates. The products are not the same, the cost structures are not the same, and the market power as between the utility and the suppliers is vastly lopsided in favor of the utilities. (EGS Parties' St. No. 1-R, 3:1-4:9). Moreover, the rates charged by suppliers are not subject to regulation,[4] and so to make a regulatory decision based on the

[4] 66 Pa.C.S. §§ 2802(14) and 2806(a) ; *Coalition for Affordable Utility Services and Energy Efficiency v. Pa. P.U.C.*, 120 A.3d 1087 (2015)("*Cause Pa*")(The Commonwealth Court found that "the PUC lacks the authority to regulate EGS rates under Chapter 13. This means that the PUC may not review EGSs rates to determine whether the rates are "just and reasonable." 66 Pa.C.S. § 1301. It also means that the PUC lacks the authority to compel EGSs to file tariffs. *Id.*

comparison is misguided.[5] Concluding that the PTC is an appropriate benchmark was in error, particularly since the comparison is based on entirely different products.

The entire analysis on pages 28-29 of the RD, regarding the comparison of EGS rates to the PTC, is also lacking factually, in that it fails to consider that nearly 80% of customers who accept a one-year SOP offer have selected a different plan by the fourth month after the end of that year. (EGS Parties' St. No. 1, 15:8-16:10). Even so, it is not possible, based upon this record, to ascertain whether those customers (the 20% who did not switch away) affirmatively chose to stay with the SOP supplier for reasons other than price. If the Commission feels that some sort of education is required, perhaps it could be directed to this small subset of customers who simply fail to re-engage the market after their initial acceptance of an SOP offer. At bottom, it was an error of law, and an error of fact for the RD to support the notion that the PTC is an appropriate comparison for the fairness of EGS rates. The RD should be reversed on this point.

C. <u>Exception No. 3</u> – The RD errs as a matter of Law in Authorizing PPL to Implement a Different End-of-Contract Rule for SOP than for All Other Customers. (RD. pp. 30-31).

In its Order establishing the requirement for all EDCs to implement standard offer programs, the Commission was quite explicit that customers who enrolled in the program were to be subject to the Commission's end-of-contract regulations, i.e., be treated the same as other customers:

- All existing customer notification requirements apply, including notices and the timing of those notices relating to proposed changes in the terms and conditions of the EGS-customer relationship.

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§ 1302. Moreover, the power of the PUC under Section 1304 of the Code to ensure that rates are not unlawfully discriminatory does not extend to the rates charged by EGSs". *Id.* § 1304", *Id.* at 120 A.3d 1101).

[5] 66 Pa.C.S. § 2806(a).

- At the conclusion of the standard offer period, absent affirmative customer action to enter into a new contract with the EGS, the customer's enrollment with a different EGS or the customer's return to default service, the customer will remain with the EGS on a month-to-month basis, and shall not be subject to any termination penalty or fee. However, this should not deter an EGS from offering longer, fixed-term prices.[6]

In fact, the very condition that is at issue here, whether SOP customers should be returned to default service or remain with their supplier absent an affirmative choice, was debated in the Comments considered by the Commission before reaching the conclusion quoted above.[7] The Commission chose to simply allow the regulations to apply, and for SOP customers to be treated like all other customers. The so-called "evidence" relied upon in the RD shows that the Commission made the correct choice. The vast majority of customers are making affirmative choices within 4 months of the end of their contract, with the largest group making a choice before their contract even ends. (EGS Parties' St. No. 1, 15:8-16:10). To implement PPL's proposal would be to have the tail wagging the dog. The RD simply ignores the evidence that directly refutes the chosen outcome, and in that it commits error.

It is true that the Commission is able to change its position over time.[8] But it also is true that when the Commission does change its view, that choice must be overt and must be supported by the record and provide a good reason for doing so.[9] There is no good or distinguishable reason to not follow what the Commission has done before and make a short-sighted exception for a single

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[6] *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Order entered March 1, 2012, slip op. p.30) ("*Final Work Plan Order*").
[7] *Id*. at 23-27.
[8] *Bell Atlantic - Pennsylvania, Inc. v. Pa. PUC,* 672 A.2d 352, 354 (Pa. Cmwlth. 1995) (While the Commission is not bound by the rule of *stare decisis*, it must render consistent opinion and should either follow, distinguish, or overrule its precedent).
[9] *National Fuel Gas Distribution Corporation v. Pennsylvania Public Utility Commission,* 677 A.2d 861 (Pa.Cmwlth.1996) (Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion).

EDC's end-of-contract SOP changes; such sweeping changes to Commission policy should be done through the policy and rulemaking process. Further, Customers who enroll in the SOP, just like customers who enroll with a supplier in the ordinary course of business, receive two notices at the end of their contract and must heed those notices or end up in a roll-over contract at the supplier's going rate. PPL's SOP customers are able to switch away without penalty, and most of them do before the contract ends. PPL's largely unsupported claim (PPL MB at 14) adopted wholeheartedly by the RD, that it receives "complaints" from customers who fail to take any action, and end up on a rollover rate despite having received two notices, does not provide any justification for changing the program. Complaints are inevitable no matter what PPL were to do and are an unfortunate fact of life. Simply put, all customers who shop must take on the responsibility that goes along with shopping, if SOP customers end up with a different procedure at the end of the SOP, will PPL again seek a waiver the "normal" end of contract procedure at 52 Pa. Code § 54.10 for all other customers? Where does it end? This is not the sort of change that should be imposed on a one-off basis, particularly as here where PPL, without expressly asking, proposed that it receive a waiver from the Commission's Regulations for its program. No other EDC has proposed to require suppliers to obtain affirmative consent to retain SOP customers at the end of their contract. In short, the record lacks the substantial evidence required to alter the regulatory requirement that currently attaches to all customers[10], and to carve out an exception for PPL. The RD errs by recommending otherwise.

The RD also errs by suggesting that EGSs may offer any contract price to customers reaching the end of their SOP contract. (RD at 31). This suggestion mistakes reality. If the recommended waiver of the regulations were to be approved, EGSs will likely lose all or most of

[10] The only exception would be certain CAP customers.

their SOP customers, regardless of price, because customers will be required to opt-in to the subsequent contract, which is not the way the market works today. The ALJ fails to consider the ramifications of this monumental change to the program, on the basis of trying to "protect" a small number of customers who fail to act. The RD must be reversed on these points.

D. <u>Exception No. 4</u> – The RD Errs by Authorizing PPL to "Educate" SOP customers as to their Options near the end of their SOP contracts. (RD pp. 33-34).

The RD would authorize PPL's proposal to "educate" SOP customers at or near the end of their contracts, without even conditioning the approval on a Commission review of the materials and content. The RD appears to blindly accept without question that the materials are "not yet available" and accepts without question the representation that PPL will not seek to promote default service over service from EGSs. Such a finding has no basis in the record. Having not reviewed what PPL intends to use in its education materials, the ALJ committed reversible error, and literally put the cart (approval without evidence) before the horse (what PPL intends to educate). There was no evidence, let alone substantial evidence that the "educational materials" are proper or necessary, let alone the details of how PPL will present its "education." Without such facts in the record, there is nothing preventing PPL from using the education materials to persuade customers to default service, which is prohibited not only by the Commission's Code of Conduct Regulations, 52 Pa. Code § 122, but also by a Commonwealth Court decision on the subject.[11] Yet, without any basis, the RD simply opened the door to potential misconduct. The RD proposed no process for which to review the "not yet available" materials.[12] With being open

[11] *Mid-Atlantic Power Supply Ass'n v. Pa. Pub. Util. Comm'n*, 755 A.2d 723 (Pa. Cmwlth. 2000) (*MAPSA*).

[12] The RD acknowledges that PPL offered to make the materials available to parties before providing to customers but this hardly satisfies any due process concerns.

to mischief without process to approve the education materials, there will only be one recourse if the materials are improper – that is suppliers will be left to file a complaint and bear the costs of litigation when PPL inevitably puts something objectionable in the "educational" materials. As discussed by the EGS Parties' witness, PPL's zeal to "educate":

> [A]ppears to be driven by the same false narrative that underpins the proposal to send SOP customers back to default service, namely that SOP customers are somehow disengaged or passive and thus unable to make appropriate decisions for themselves without PPL stepping in to "help." As shown above, according to PPL's own data, SOP customers make affirmative choices in the market at a much higher rate than PPL's overall residential customer population. There is absolutely no demonstrated need for a campaign designed to "educate" a customer population nearly 80 percent of which makes some affirmative shopping decision within 16 months of enrolling in the program. Moreover, the "outreach campaign" PPL proposes is excessive. . ."PPL Electric will undergo an outreach campaign including calls, letters, emails and/or text messages (according to customer preference) to discuss the options available to the customer. The materials will help the customer become a proficient shopper after the SOP contract expires. This will include a reference to the PaPowerSwitch.com website, and a discussion of key shopping terms. The goal is to teach customers how to properly evaluate offers so they can become confident shoppers.[13] While we do not oppose education, we have serious concerns about PPL's intentions when it purports to be "educating" customers who have already made the affirmative choice to shop. If PPL is concerned about customers being informed of how to shop, perhaps they should target their efforts to those who have not yet made that choice. The Commission already requires suppliers to send two notices with very specific wording regarding a customer's options at the end of their fixed term contracts[14] . . . the Commission should be very specific as to what PPL or any EDC can say in such communication to ensure that PPL's "education" does nothing to erode the value of that contract to the EGS that paid the price to be a party to it. (EGS Parties' St. No. 1, 20:5-21:12).

Moreover, if PPL is concerned that a subset of SOP customers are being passive, then it should have specifically identified only those customers as the targets for their education efforts, rather than seeking to influence customers that already will have made affirmative choices.[15] PPL's

[13] PPL St. No. 4 - LaWall-Schmidt at p. 14, lines 11-17.
[14] 52 Pa. Code §§ 54.5 & 54.10.
[15] Ironically, PPL laments that customers are ignoring the two required notices sent by suppliers yet it now proposes to send yet another communication, "PPL Electric is concerned that these

approach is overkill and unnecessary and should be rejected or at the least, modified so as to be more appropriate for the task.

E. Exception No. 5 – The RD Erroneously Approves PPL's Proposal to Deny a Class of Customers (CAP) the Statutory Right to Choose their Supplier. (RD pp. 34-37).

As discussed in the EGS Parties' Main Brief and Reply Brief, PPL has proposed to eliminate CAP shopping based primarily over a concern that a subset of customers may become CAP eligible while they remain on a valid contract with an EGS.[16] CAP customers would otherwise be eligible to participate in PPL's CAP SOP which provides guaranteed savings off the price to compare. It is clear, however, that those existing contracts cannot be terminated simply by the customer becoming CAP eligible.[17] Rather than propose a compromise solution as was done in the First-Energy Service territory, however, PPL decided to deprive CAP customers of the ability to shop at all, and to force CAP customers already shopping back into default service. This is a clear violation of the statute and the clear precedent.[18] The Choice Act clearly mandates that all customer classes must be allowed to shop, i.e., to take commodity service from a supplier of *their* choosing. Even in its two decisions addressing CAP programs, the Commonwealth Court recognized that allowing CAP customers to shop may have to bend – i.e., be subject to some restrictions – but the Court *never* suggested that the mandate for CAP customers to be able to shop be dismembered.[19] This Commission simply cannot ignore the law or disregard one section of the

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customers are simply failing to act upon, or are ignoring, notices advising them their contract is expiring . . ." PPL Electric St. No. 4, p. 12

[16] EGS Parties' MB at 9-12.

[17] EGS Parties' MB at 10-12.

[18] 66 Pa.C.S. § 2806(a) ("Choice Act"); *Coalition for Affordable Utility Services and Energy Efficiency v. Pa. P.U.C.*, 120 A.3d 1087 (2015) ("*CAUSE PA"*); *RESA v. Pa. P.U.C.*, 185 A.3d 1206, 1221 (Pa. Cmwlth. 2018) ("*RESA*")

[19] Id.

statute while claiming to give credence to another.[20] What PPL proposed and the RD approved would do just that and must accordingly be reversed.

The RD is based on statistics regarding CAP programs that have been revised by the Commission in its recent guidance,[21] and yet PPL put them back into play here as a basis for its end run on the statutory requirement and the RD, without analysis, adopted them as fact. Mr. Kallaher made a number of recommendations that if adopted would have addressed PPL's concerns:

> One would be to allow EGSs to retain their CAP SOP customers at the end of the initial 12-month term so long as they agree to serve those customers at or below the current PTC rate. The other would be to consider a modest reduction in the discount given to CAP customers on the SOP. The SOP serves as a permanent discount versus the default service rate for CAP customers, which EGSs support. Whether the level of the discount – currently seven percent – has the unintended consequence of reducing the overall level of participation and thus the total reduction in supply charges paid by CAP customers is something EGS and other stakeholders should work with PPL to discover. (EGS Parties' St. No. 1, 11:2-9).

However, rather than consider alternatives, PPL decided to throw in the towel and make the argument that depriving CAP customers of any subsidy if they shop is an allowable "rule" under a CAP program. As discussed above, the Commonwealth Court allowed rules to bend but *never* authorized the elimination of the right to choose as the price of participation in the CAP program.

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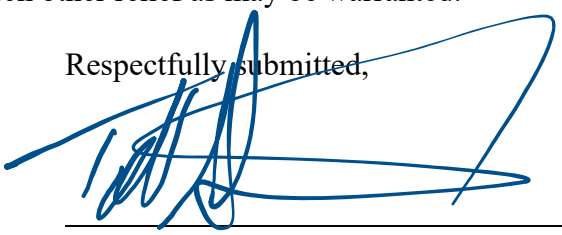
[20] 66 Pa.C.S. § 2806(a); This is in keeping with the statutory requirement that "all customers . . . shall have the opportunity to purchase electricity from their choice of electric generation suppliers." See EGS Parties M.B. at 9.

[21] See *Electric Distribution Company Default Service Plans – Customer Assistance Program Shopping*, Proposed Policy Statement Order, Docket M-2018-3006578, 49 Pa. Bul. 3083, June 15, 2019. See also, *Investigation into Default Service and PJM Interconnection, LLC, Settlement Reforms*; Docket No. M-2019-3007101, Issued January 23, 2020.

III. CONCLUSION

As described herein, and for the reasons stated in these Exceptions and in the EGS Parties' Main and Reply Briefs, the RD committed numerous errors of fact and law. The EGS Parties hereby request that the Honorable Pennsylvania Public Utility Commission grant its Exceptions, reverse the RD as identified herein and grant such other relief as may be warranted.

Respectfully submitted,



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DATED: October 26, 2020