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November 2, 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; **REPLY 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 EXCEPTIONS FILED BY CAUSE-PA TO THE RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ELIZABETH BARNES**

Dear Secretary Chiavetta:

Enclosed for electronic filing with the Commission is the Reply 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 Exceptions Filed by Cause-PA to the 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](mailto: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**

Honorable Elizabeth Barnes  
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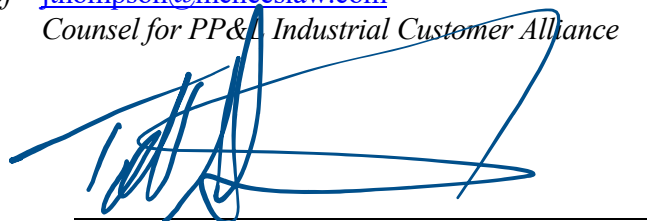
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Todd S. Stewart

DATED: November 2, 2020

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

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**REPLY 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 EXCEPTIONS FILED BY CAUSE-PA  
TO THE RECOMMENDED DECISION  
OF ADMINISTRATIVE LAW JUDGE ELIZABETH BARNES**

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DATED: November 2, 2020

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**AND 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 (the “EGS Parties”), pursuant to 52 Pa. Code § 5.535, and hereby reply to the Exceptions filed by CAUSE-PA to the Recommended Decision of Administrative Law Judge Elizabeth H. Barnes. CAUSE PA’s single Exception is limited to a single issue -- the RD’s having not adopted a position promoted by CAUSE PA in the case. CAUSE PA submits that any EGS contracts with any customer who apply for PPL’s Customer Assistance Program (“CAP”), be immediately terminated without fee or penalty, so the CAP-applied customers can return to default service without obligation. (CAUSE PA Exception No. 1).

## **I. INTRODUCTION**

The short response to CAUSE PA’s Exception is that there is no provision in the Pennsylvania Public Utility Code,<sup>1</sup> 66 Pa.C.S. §§ 101, *et seq.* (“Code”), that would authorize the Pennsylvania Public Utility Commission (“Commission”) to require a supplier to forgo the benefit of its bargain and its contractual rights (i.e., the money it would have earned and/or early termination fees) as a pre-condition for providing service in the market, yet that is what CAUSE PA proposes. In addition to this rather obvious lack of any statutory authority, there is also the conflict with prior court decisions on similar matters, and the clear violation of both the United States and Pennsylvania Constitutions’ prohibitions of laws that interfere with the obligation of contracts. CAUSE PA’s arguments are entirely without merit and its exception should be dismissed.

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<sup>1</sup> The Code does include Section 508 that authorizes the Commission to “vary, reform and revise” individual contracts of specific utilities, but this provision does not allow for the cancellation of utility contracts and has not been applied to EGSs. Moreover, parties to the contract must be provided notice and an opportunity to be heard –elements notably absent from CAUSE-PA’s proposal here.



## II. REPLIES TO EXCEPTIONS OF CAUSE-PA

CAUSE PA provides a set of equally unavailing arguments as to why its position should have been adopted, none of which are legally correct or at all persuasive, and each should be rejected. For the ease of the reader, the EGS Parties will address these in the order they appear.

1. CAUSE PA claims that “affordability challenges” are a basis for allowing CAP customers to instantly void an otherwise legally binding contract. (CAUSE PA Exceptions, p.3). While the EGS Parties are not unsympathetic to the plight of low-income customers, it is nonetheless clear that low income customers are legally permitted to shop for electricity<sup>2</sup> in Pennsylvania, are allowed to sign contracts and must be required to abide by those contracts. Their status as “low-income” does not abrogate the laws of contracts that otherwise apply. Moreover, CAUSE PA’s argument continues to misstate the accusation that shopping customers are “charged” rates higher than default service customers. This statement is misleading at best. Customers sign up for contracts that provide for certain rates. If a supplier were to charge a rate not allowed by contract, the accusation might be true, but that is not what CAUSE PA is arguing. Rather, CAUSE PA argues that any contract at a rate higher than the Price-to-Compare is “overcharging” which is incorrect. The record of this case makes it clear that the Price-to-Compare is not an accurate proxy for an actual retail rate, rather it is an incremental cost of energy rate. If default service providers were required to include all the costs associated with providing default service, the price to compare might be a fair comparison, but today it is not. (EGS Parties’ St. No. 1-R, 7:18-8:17). CAUSE PA’s arguments regarding low-income customers miss the mark.

2. CAUSE PA next attempts the sleight-of-hand argument of calling the proposal a “CAP Rule” seeking to equate a rule that would apply to all contracts for all customers to an actual

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<sup>2</sup> 66 Pa.C.S. § 2806(a).

rule of a program designed for CAP customers. The Commonwealth Court has made clear that the former are not CAP Rules and are not allowed, while the latter may be permitted.<sup>3</sup> Make no mistake, what CAUSE PA has proposed is NOT a CAP rule, it is a rule that will apply to all suppliers, the vast majority of which do not serve CAP customers. While it is true that the Code does provide for the continuation of programs for low income customers,<sup>4</sup> it also is true that “the ultimate choice of the electric generation supplier is to rest with the consumer.”<sup>5</sup> The point is that the Commission cannot ignore the plain letter of the law that rates for EGSs are not subject to rate regulation in favor of other provisions that requires the Commission to continue universal service programs. CAUSE PA would have the Commission ignore its responsibility to ensure a competitive market in favor of programs for low income customers – claiming that it is a zero sum game. It is not. CAUSE PA’s argument misses the point and should be disregarded.

3. CAUSE PA’s mantra throughout this proceeding is that suppliers are overcharging customers – a claim that is provably false. Not one piece of data on the record of this case suggests that any supplier charged any customer a rate higher than a contractually agreed-to-rate. While it may be true that some customers are paying rates that exceed the price to compare, one need only review the offers available on [www.PaPowerSwitch.com](http://www.PaPowerSwitch.com) to know that there typically are offers in every EDC service territory that are at prices less than the Price to Compare. If customers are paying rates higher than the price to compare (which is not at all a fair comparison as discussed at length in the EGS Parties’ Briefs in this matter) it could be that those customer have chosen to pay higher rates because the product may have additional benefits such as a longer term other benefits

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<sup>3</sup> *RESA v. Pa. P.U.C.*, 185 A.3d 1206, 1221 (Pa. Cmwlth. 2018). (The Court cited the fact that the CAP program was voluntary for suppliers as one of the bases for allowing the price cap rule).

<sup>4</sup> 66 Pa.C.S. § 2803(10 & 17).

<sup>5</sup> 66 Pa.C.S. § 2806(a).

not offered by the utility, or because those customers have neglected to review their contracts or utility bills and have failed to take charge of their electricity charges. If CAP customers had discounted rates available to them via an actual CAP shopping program that would provide service at rates at or less than default service rates, that also would refute the CAUSE PA misinformation. Such a program was proposed in this case and was rejected. (EGS Parties' St. No. 1, 11:2-9).

CAUSE PA's continual reference to their proposal as "CAP Rules" is telling – because the rules are not CAP Rules, the rule would cause every supplier contract to be potentially unenforceable, adding huge risk to suppliers, and increasing their costs, while putting default service further ahead on the list of costs a default provider does not need to recover and perpetuating the inequity of comparing the market-based prices that suppliers provide and the subsidized default service rate. CAUSE PA fails wholly to address the economic loss to suppliers and the life-threatening damage to the competitive market that would result in a rule that would allow any contract to be summarily terminated without notice or recourse. As noted above, there is nothing in the Code that would authorize the Commission to authorize such an action. In fact, there is a provision of the Code that does address the ability of the Commission to modify contracts of "public utilities".<sup>6</sup> This section allows the Commission to revise individual contracts "which embrace or concern a public right," but only *after* notice and an opportunity to be heard. CAUSE PA's proposal would violate Section 508 on several counts; it lacks any due process before depriving an EGS of the benefit of its bargain, and the individual contracts are notably lacking in any demonstration of involving a "public" right. Most critically, however, is the fact that even Section 508 does not permit the Commission to terminate such contracts, only to reform or revise them. Under the principal of statutory construction known as "*expressio unius est exclusio*

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<sup>6</sup> 66 Pa.C.S. § 508.

*alterius*” there is an inference that where certain items are listed or expressed in a statute, that items not included in the list are intentionally excluded.<sup>7</sup> The fact that the legislature gave the Commission the authority to revise and reform the contracts of utilities and did not empower the Commission to cancel such contracts is clear evidence that the General Assembly did not intend the Commission to wield such authority. Similarly, if one were to argue that EGSs are not public utilities and Section 508 does not apply, the same principal would apply. If the General Assembly saw fit to authorize the Commission to reform the contracts of utilities and NOT EGS, the intention not to do so is strongly inferred. There simply is no authorization for such a course of action. The Commission should reject CAUSE PA’s attempts to lead them down that path.

4. CAUSE PA misstates the Constitutional Law impacts of its proposal. It is true that for a claim of impairment to be implicated, there must be a substantial impairment of a contractual relationship.<sup>8</sup> That is, however, the only part of CAUSE PA’s analysis that is accurate. To suggest that causing the cancellation of large numbers of contracts is not “substantial impairment” is simply ridiculous on its face.<sup>9</sup> Here there is a limited purpose that could otherwise be addressed

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<sup>7</sup> *Commonwealth v. Ostrosky*, 866 A.2d 423 (Pa. Super. 2005), *aff’d*, 909 A.2d 1224 (Pa. 2006); See also *In re Delmarva Power & Light Co.*, PUC Docket No. M-00001399, Opinion and Order (Order Entered September 7, 2001) (“[T]he rules on omissions of statutory text tell us that an appellate court (and, similarly, this Commission) cannot insert a word into a statute where the General Assembly has failed to supply it. *Worley v. Augustine*, 310 Pa.Super. 178, 183, 456 A.2d 558 (1983). We must also be guided by the maxim *expressio unius est exclusio alterius*, which establishes the inference that where certain things are designated in a statute,... all omissions... should be understood as exclusions”).

<sup>8</sup> *Energy Reserves Group v. Kan. Power & Light Co.*, 459 US 400, 411 (1983).

<sup>9</sup> *South Union Tp. v. Com.*, 839 A.2d 1179, 1188-89 (Pa. Cmwlth. 2003) (“Contract clause analysis involves three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. *Id.* When new legislation substantially impairs contractual relations, the State, in justification, must have a significant and legitimate public purpose behind the [law], such as the remedying of a broad and general social or economic problem. *Energy Reserves Group, Inc. v. Kansas Power and Light Company*, 459 U.S. 400, 411–412, 103 S.Ct. 697, 74 L.Ed.2d 569 (1983) (citation omitted). The court then must determine whether the change in the law [is based] upon reasonable conditions

by a less destructive approach. The interference with the contractual rights is obvious and complete – CAUSE PA’s proposal would cause any EGS contract to be summarily terminated any time a customer applied for CAP benefits, thus depriving the EGS of ALL economic value of the contract and any early termination fees that might apply; and because the EGSs may have hedged or purchased energy to cover the entire term of the customer’s contract, which could very well extend beyond the current year, the potential damage is only increased. CAUSE PA’s suggestion that the retail sale of electricity is “heavily regulated” and that changes that would impair contracts are foreseeable, is likewise wrong. The Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. § 2801 *et seq.*, became law in 1996. Since that time there has been no change to the fundamental premise that the Commission is not authorized to regulate the rates (i.e., economic value) in contracts between EGSs and customers, let alone authorize those contracts to be cancelled.<sup>10</sup> While there are certain aspects of EGS contracts that are subject to regulation, that regulation does not allow the Commission to terminate EGS contracts. What this means is that it was not foreseeable to anyone that the Commission would act without legislative authority to cancel contracts of suppliers. It also is vital to note that in all of the cases cited by CAUSE PA, the “action” to impair contracts was an act of the general assembly of a state, i.e., legislative

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and [is] of a character appropriate to the public purpose justifying [the legislations] adoption. *Id.* (citation omitted). Generally, the court will defer to the legislative judgment as to the necessity and reasonableness of a particular measure. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 505, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987).”

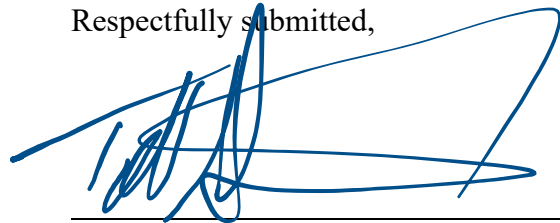
<sup>10</sup> 66 Pa.C.S. §§ 2801, *et seq.*; *Coalition for Affordable Utility Services and Energy Efficiency v. Pa. P.U.C.*, 120 A.3d 1087 (2015)(“*Cause Pa*”)(The Commonwealth Court found that “the PUC lacks the authority to regulate EGS rates under Chapter 13. This means that the PUC may not review 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.* § 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).

change. In Pennsylvania, the Statute clearly does not authorize state enforced termination of contracts, and the Commission cannot act outside the scope of its authority. Indeed, CAUSE PA cannot point to one section of the Code where the legislature allowed the Commission to unilaterally terminate contracts between EGSs and customers and the Commission simply cannot exceed its jurisdiction and authority or support CAUSE PA's proposed destruction to constitutional contract protections.

### III. CONCLUSION

CAUSE PA raises a number of arguments in support of its misguided efforts to cancel the contracts of any customer who applies for CAP without penalty or recourse. As discussed herein and the EGS Parties' Main and Reply Briefs and Exceptions, such an approach is fraught with illegality and should be rejected.

Respectfully submitted,



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DATED: November 2, 2020