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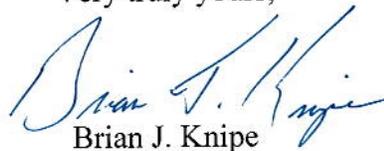
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669 and P-2011-2273670

Dear Secretary Chiavetta:

On behalf of FirstEnergy Solutions Corp., I have enclosed for electronic filing the *Main Brief of FirstEnergy Solutions Corp.* Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Brian J. Knipe

For BUCHANAN INGERSOLL & ROONEY, P.C.

BJK/kra

Enclosures

cc: The Honorable Elizabeth H. Barnes (via email and first class mail)
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Petition Of Metropolitan Edison Company,	:	Docket Nos.	P-2011-2273650
Pennsylvania Electric Company, Pennsylvania	:		P-2011-2273668
Power Company And West Penn Power	:		P-2011-2273669
Company For Approval Of Their Default	:		P-2011-2273670
Service Programs	:		

**MAIN BRIEF OF
FIRSTENERGY SOLUTIONS CORP.**

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I. INTRODUCTION AND PROCEDURAL HISTORY

Introduction/Summary of Argument

The Joint Petitioners, Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), Pennsylvania Power Company ("Penn Power") and West Penn Power Company ("West Penn") (collectively, the "Companies") have proposed default service programs ("DSPs") to establish the terms and conditions of default service from June 1, 2013 to May 31, 2015, a period during which the Pennsylvania Public Utility Commission ("Commission") intends to transition Pennsylvania to an optimal end-state of electricity default service. As FirstEnergy Solutions Corp. ("FES") explains below, the default service procurement plans the Companies have proposed will meet the objectives of the Pennsylvania Electricity Generation Customer Choice and Competition Act ("Choice Act"), as amended by Act 129 of 2008 ("Act 129"), 66 Pa. C.S. §§ 2801-2818.

The evidence of record demonstrates that the DSPs, among other things, include a prudent mix of contracts designed to ensure the least cost over time, will maximize price stability for smaller customers, and will promote shopping within the confines of Act 129. FES submits that these qualities of the DSPs will create the best platform allowed by Act 129 for Pennsylvania to move to end-state default service beginning June 1, 2015. FES, which provides wholesale and retail energy and related products to customers located primarily in the Mid-Atlantic and Midwest regions, and participates in competitive wholesale power procurements conducted by electric distribution companies ("EDCs") to serve their default service customers, respectfully urges the Commission to approve the wholesale default service procurement plans as proposed by the Companies.

The Companies, in addition to proposing the terms and conditions under which they will procure and provide default service, have proposed retail market enhancement programs for Residential customers, including a Retail Opt-in Auction ("Opt-In Program") and a Standard Offer Customer Referral Program ("Referral Program"). The Companies amended these proposed programs midway through these proceedings, in response to the Commission's issuance of its Intermediate Work Plan ("IWP") guidelines in a Final Order entered March 2, 2012. See *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Final Order entered March 2, 2012) ("IWP Order"). FES is a licensed electric generation supplier ("EGS") in Pennsylvania, and supports the Commission's efforts to further promote retail electric competition. FES preferred certain aspects of the Companies' initial proposal relating to these programs, which properly considered two important overarching principles that FES believes are important in designing programs intended to promote retail electric competition:

1. The most important consideration in designing customer programs should be to give customers the lowest available pricing.
2. There should be no restrictions on qualified EGS participation in any of the programs.

FES St. No. 1-R at 6-7. While FES believes the Companies' initial proposal better aligned with these principles, it believes the Companies' amended proposals are a reasonable response to the *IWP Order* guidelines and still take these principles into account. When there is a deviation from the guidelines, it is justified by good cause, including EDC operational constraints, or supported by the evidence of record and supported substantially by the parties to these

proceedings. Accordingly, FES does not oppose the retail market enhancement programs as amended by the Companies.

Procedural History

On November 17, 2011, the Companies filed a Joint Petition for Approval of their Default Service Programs for the two-year period starting June 1, 2013 ("Joint Petition"). The Companies also filed a Motion to Consolidate these proceedings. Notice of the Joint Petition was published in the Pennsylvania Bulletin on December 3, 2011, 41 Pa.B. 6484-85, setting a deadline of December 19, 2011 for protests and interventions.

Notices or Petitions to Intervene were filed by the Commission's Bureau of Investigation and Enforcement, the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), the Met-Ed Industrial Users Group, the Penelec Industrial Customer Alliance, the Penn Power Users Group, the West Penn Power Industrial Intervenors, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), ARIPPA, Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (collectively, "Constellation"), Direct Energy Services ("Direct"), Dominion Retail, Inc. ("Dominion"), FES, Exelon Generation Company, LLC and Exelon Energy Company, PECO Energy Company, The Pennsylvania State University, the Retail Energy Supply Association ("RESA"), Washington Gas Energy Services, Inc., and the York County Solid Waste & Refuse Authority.

On December 22, 2011, all parties participated in a prehearing conference before the ALJ. At the prehearing conference, the ALJ granted the Companies' Motion to Consolidate, granted all requests for intervention, adopted the official service list and litigation schedule for

these proceedings, and adopted modifications of the Commission's regulations regarding discovery. The ALJ issued a Protective Order on January 23, 2012.

The parties took discovery and served written direct, rebuttal and surrebuttal testimony. Evidentiary hearings were held on April 11 and 12, 2012, during which various witnesses were subjected to cross-examination in connection with their written testimony and exhibits.

Pursuant to the Second Prehearing Order issued December 29, 2011 and the common briefing outline approved by the ALJ, FES hereby submits this Main Brief.

II. DEFAULT SERVICE PROCUREMENT AND IMPLEMENTATION PLANS

A. Procurement groups

1. West Penn's Proposed Consolidation of Service Types 20 and 30

FES reserves the right to reply to other parties' arguments on this issue.

B. Residential and Commercial Class Default Service Procurement

1. Summary and Overview of Each Party's Position

In its witness's written testimony, the primary issues FES addressed included the term of default service supply contracts and load caps. Following are overviews of the parties' positions on these issues.

Term of Contracts: The Companies propose to procure 90% of default service supply for Residential and Small commercial and industrial ("C&I") customers through 24-month load-following full requirements contracts. The Companies would procure these contracts on two dates, in November 2012 and January 2013. The Companies' witness Stathis explained that this approach is intended to provide time diversity and rate stability to pricing for these customers. Met-Ed/Penelec/Penn Power/West Penn St. No. 4 at 6. As explained below, FES supports the

use of 24-month default service contracts, which provide smaller customers with price stability and predictability that customers can use to evaluate competitive alternatives, as well as a cost for power that is both adequate and reliable and also economical relative to other options. The modifications proposed by various parties fail to meet the requirements of Act 129 or the Commission's recent directives regarding the structure of EDCs' upcoming default service plans.

Load Caps: FES does not support any supplier caps, which interfere with the ability of competitive market forces that allow for head to head competition and deliver lower prices, inevitably increase the price customers pay for default service, and are unnecessary to protect customers from a potential wholesale supplier default, a highly unlikely scenario for which numerous protections are already built into the default service procurement process. The Companies propose that each qualified bidder in the descending clock auctions be subject to a 75% load cap that limits the number of tranches a bidder can win, on an aggregated load basis for all auction products and for each auction. The load cap is implemented by ensuring that each bidder's initial eligibility does not exceed the load cap in an auction. The Companies observe that the 75% level is consistent with caps the Commission has approved in the past, to strike a balance between supplier diversity and achieving the lowest cost price from the descending clock auction. As explained below, the further reduction to the cap proposed by RESA lacks evidentiary support and should be rejected.

2. Term of Contracts

FES supports the Companies' proposal to procure 90% of their default service supply for Residential and small C&I customers using 24-month full requirements contracts starting June 1, 2013. This proposal is supported by the preponderance of evidence in the record. With respect to price stability, the Companies explained that the 24-month term is intended to bring rate

stability into the ultimate pricing for Residential and small C&I customers. Met-Ed/Penelec/Penn Power/West Penn St. No. 4 at 6, 8. FES witness Banks explained that wholesale contract lengths of 24 months provide customers with price certainty and predictability in the price-to-compare ("PTC") during the entire term of the 2 year default service program. As a result, longer term contract lengths facilitate the transition to end-state default service starting June 1, 2015. FES St. No. 1-R at 19. Given the Commission's efforts to further promote retail electric competition, customers will experience significant changes starting in 2013 when the Commission, EDCs, EGSs and other stakeholders are expected to be implementing the various programs recommended in the *IWP Order*. Default service customers will be receiving voluminous information to educate them about shopping and how to evaluate competitive offers. A PTC that is relatively certain for two years provides customers with a better guide for evaluating retail offers during this transitional period. This will reduce an aspect of customer confusion relating to customer choice and their electric generation service. FES St. No. 1-R at 19.

In addition, the relatively stable PTC will give retail shoppers more certainty to enter into a fixed price retail contract and realize savings. Similarly, retail suppliers can benefit from 24-month wholesale procurements since they will have a defined default service product against which they can develop a wider variety of short- and longer-term products that respond to customer needs and expectations regarding their electric generation service. FES St. No. 1-R at 20.

Further, the Companies explained that these contracts are very familiar to bidders. Met-Ed/Penelec/Penn Power/West Penn St. No. 4 at 6, 8. Also, longer term contracts require fewer

auctions, and therefore decrease the overall administrative costs of the auctions paid for by customers. Met-Ed/Penelec/Penn Power/West Penn St. No. 4-R at 4; FES St. No. 1-S at 6.

Moreover, the Companies' witnesses testified that the contracts would coincide with the two-year default service program period, and enable the Companies to minimize, to the extent possible, the procurement of default service beyond May 31, 2015, in compliance with the Commission's recent guidance on EDCs' upcoming default service plans. Met-Ed/Penelec/Penn Power/West Penn St. No. 4 at 7; see *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952 (Final Order entered December 16, 2011) ("Upcoming DSP Final Order"), slip op. at 19. As explained below in Section II.B.4, the OCA's recommendation contradicts this Commission directive and must be rejected.

The OCA recommends modifications to the Companies' procurement of supply for Residential customers. After carving out 20% of Residential tranches for the Companies' Retail Opt-In Auction Program, and another 20% of tranches to be served using a "block and spot" approach, the OCA recommends that the Companies procure supply for the remaining 60% of tranches using 24-month contracts for half the tranches and 12-month contracts for half the tranches. When the 12-month contracts expire, they would be replaced with 24-month contracts which will extend into the first year of the subsequent default service plan. The OCA explains that this would extend price certainty for about 35% of the Residential load into the first year of the next plan. OCA St. No. 1 at 24-25.

The OSBA recommends modifications to the Companies' procurement of supply for small C&I customers. The OSBA recommends that the Companies eliminate 24-month contracts entirely, and initially procure half their small C&I default service requirements through

one-year contracts, and half through a 6-month contract. When the 6-month contract expires, it would be replaced with a 12-month contract. Every 6-months the Companies would replace expiring contracts with new 12-month contracts. To accommodate the Commission's expressed desire that supply contracts do not extend beyond May 2015, the last procurement would be a 6-month contract. OSBA St. No. 1 at 15-16.

RESA recommends modifications to the Companies' procurement of both Residential and small C&I supply, to "provide for greater market responsiveness," RESA St. No. 1 at 12, and to "result in a more market reflective price," RESA St. No. 1-S at 3. With respect to Residential customers, RESA recommends that the Companies move the proposed November 2012 auction to January 2013, for June 2013 delivery, and procure all supply for the corresponding tranches through 24-month contracts. The Companies would then move the proposed January 2013 auction to March 2013, for June 2013 delivery, and procure all supply for the corresponding tranches through 12-month contracts. When the 12-month contracts expired, they would be replaced with new 12-month contracts, which the Companies would procure through a third auction in March 2014, for delivery in June 2014.

With respect to Commercial customers, RESA initially recommended that the Companies eliminate all 24-month contracts and replace them with 12-month contracts, to be procured in two auctions held in March 2013 and March 2014. RESA St. No. 1 at 13. Subsequently, RESA adopted the OSBA's recommendations for small C&I customers, citing the use of 6-month contracts in the last default service procurement. RESA St. No. 1-R at 6.

FES disagrees with the proposed modifications of RESA and the OSBA, which rely heavily on 12-month and even 6-month contracts, and the OCA's proposed use of 12-month contracts as well. Two-year fixed price supply contracts will provide much more certainty with

regard to the PTC than the one-year or six-month supply contracts preferred by these parties. With one-year or six-month supply contracts, consumers trying to compare default service to market based offers will have difficulty determining if market based offers provide better value than default service. FES St. No. 1-S at 6. The RESA and OSBA recommendations for more market-reflective and market-responsive pricing and less price stability are appropriate for end-state default service beginning on June 1, 2015, but not the upcoming transition to end-state default service. FES St. No. 1-S at 5. Further, these proposals ignore the requirements of Act 129 in 2008. Act 129 requires a prudent mix of contracts, including spot market purchases, short-term contracts and long-term contracts of between five and 20 years. 66 Pa. C.S. § 2807(e)(3.2). The prudent mix of contracts must be designed to ensure: (1) adequate and reliable service; (2) the least cost to customers over time; and (3) compliance with the requirements of subsection (e)(3.1) of Act 129 regarding competitive procurement. 66 Pa. C.S. § 2807(e)(3.4). The Commission has recognized the General Assembly's intent to move away from the Choice Act's former "prevailing market price" standard and to instead require each EDC to procure a prudent mix of contracts to achieve least cost over time. *Implementation of Act 129 of October 15, 2008; Default Service and Retail Electric Markets*, Docket No. L-2009-2095604 (Final Rulemaking Order entered October 4, 2011) ("Default Service Rulemaking Order"), slip op. at 20.

Through Act 129, the General Assembly also established price stability as a key policy goal to be addressed in default service plans. This is indicated in the Preamble to Act 129, where the General Assembly identifies as the objectives of the Commonwealth to be served by Act 129, among other things, that "[t]he health, safety and prosperity of all citizens of this Commonwealth are inherently dependent upon the availability of adequate, reliable, affordable, efficient and

environmentally sustainable electric service at the least cost, *taking into account any benefits of price stability over time* and the impact on the environment, and that "[i]t is in the public interest . . . to implement energy procurement requirements designed to *ensure that electricity obtained reduces the possibility of electric price instability*, promotes economic growth and ensures affordable and available electric service to all residents." Preamble to Act 129 (emphasis added). As a result, an important objective of the Companies' default service plans must be to ensure price stability.

In its recent *Default Service Rulemaking Order*, the Commission recognized these changes in the law and the need to be concerned with rate stability as well as a cost for power that is adequate, reliable and, if not the absolute lowest cost, "economical relative to other options:"

Finally, it should be noted that the "least cost over time" standard should not be confused with the notion that default prices will always equal the lowest cost price for power at any particular point in time. In implementing default service standards, Act 129 requires that the Commission be concerned about rate stability as well as other considerations such as ensuring a "prudent mix" of supply and ensuring safe and reliable service. *See* 66 Pa. C.S. §§ 2807(e)(3.2), (3.4) and (7). In our view, a default service plan that meets the "least cost over time" standard in Act 129 should not have, as its singular focus, achieving the absolute lowest cost over the default service plan time frame but, rather, a cost for power that is both adequate and reliable and also economical relative to other options.

Default Service Rulemaking Order, slip op. at 11-12. Accordingly, default service providers must consider price stability and reliability when developing a procurement plan that meets the "least cost over time" standard. RESA's and OSBA's proposals do not.

To the contrary, RESA emphasized in testimony that its proposed contract length modifications are designed to make default service rates "market reflective" and "market responsive." *See, e.g.,* RESA St. No. 1 at 9-12; RESA St. No. 1-S at 3. The Commission

recently concluded that the "market reflective" and "market responsive" standards are inconsistent with Act 129, which is concerned with the benefits of price stability for customers:

Finally, we disagree with RESA's assertion that the "least cost" standard mandates that a default service plan be reasonably likely to result in a "market-reflective and market-responsive" service rate that recovers all costs related to providing default service. We interpret this standard, not contained in either the Competition Act or Act 129, to mean a preference for short term and spot price supplies which ignore both the Act 129 concerns of price stability and a "prudent mix" of products. **We do not believe that adoption of RESA's suggested standard is consistent with the "least cost" standard contained in Act 129 and would not adequately protect retail customers from volatility and risks inherent in the energy market. Price stability benefits are very important to some customer groups, so an interpretation of "least cost" that mandates subjecting all default service customers to significant price volatility through general reliance on short term pricing is inconsistent with Act 129's objectives.** This is especially true given that the statute specifically enumerates short-term (up to 4 years) and long-term (over 4 to 20 years) contracts as part of the "prudent mix" of contracts that should be included in a default service plan. 66 Pa. C.S. § 2807(e)(3.2).

Default Service Rulemaking Order, slip op. at 41 (emphasis added).

The incongruity between RESA's proposal and the current law under Act 129 is illustrated by the similarity of the recommendations it made for default service procurement for small customers in West Penn Power's 2007 default service proceeding at Docket No. P-00072342. In that proceeding, which was litigated under the Choice Act's former "prevailing market prices" standard, RESA proposed that the majority of contracts for small customers (i.e., ST-10 and ST-20) be 12-month or shorter contracts, as follows:

Type Contract	ST-10	ST-20	ST-30	ST-40
2-Yr	25-30%	27%		
1-Yr	25-30%	64%	88%	Option 100%
6-Mos	20-25%			
3-Mos				
Spot Market	15-20%	9%	12%	Option 100%

See Petition of the West Penn Power Company d/b/a Allegheny Power for Approval of its retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period, Docket No. P-00072342 (Opinion and Order entered July 25, 2008), slip op. at 14. In these proceedings, as in 2007, RESA has proposed substantial reliance on 12-month and 6-month contracts. However, the former "prevailing market prices" standard which governed the 2007 case has been replaced by the "prudent mix" and "least cost over time" standards. While the law in Pennsylvania governing default service contract lengths has changed, RESA's proposals have not changed with them, and are still designed to meet the "prevailing market prices" standard.

RESA contended in Surrebuttal Testimony that FES is mistaken to suggest that 100% reliance on 24-month contracts provides "price certainty and predictability" because the Companies' proposal contemplates reconciliations. RESA St. No. 1-SR at 3. However, FES also addressed the reconciliation issue in its Surrebuttal Testimony, acknowledging that the PTC will not be 100% certain, given the Companies' proposal to procure 10% of their supply for Residential and Commercial Customers from the spot market and the resulting need for periodic reconciliation of the PTC. FES witness Banks explained that two-year fixed price supply contracts will provide much more certainty with regard to the PTC than 12-month or six-month supply contracts. With 12-month or six-month supply contracts, consumers trying to compare default service to market based offers will have difficulty determining if market based offers provide better value than default service. FES St. No. 1-S at 6.

3. Procurement Dates

a) Number of Procurements Per Delivery Year

FES reserves the right to reply to other parties' arguments on this issue.

b) Dates of Procurements Relative to Delivery Year

FES believes that the default service supply procurements, consistent with the Companies' proposal, should be for 24 months with all procurements completed prior to the start of the 24-month default service delivery period, to maximize price stability during the default service plan. FES St. No. 1-R at 19. The proposals of the OCA, OSBA and RESA require the Companies to conduct procurements during the delivery period. As explained above, none of these parties' proposals allow for the price stability which is so important under Act 129. Further, while much of the OSBA's analysis focuses on the projected size of risk premiums relating to contracts of different lengths, the OSBA presented no evidence comparing the projected size of any risk premium against any projected change in market prices from where they are currently to where the OSBA expects them to be between June 1, 2014 to May 31, 2015.

RESA's proposal would move the Companies' procurements from November, 2012 and January, 2013 to January and March, 2013. The rationale for RESA's proposal is that the procurements should occur closer to the start of the delivery date so that prices obtained are more reflective of market prices. The problem with this proposal is that the Companies' proposed Opt-In Program cannot proceed under this schedule, since the Companies have proposed that the EGS auction take place after the wholesale procurements but before customers are solicited to opt-in. If the wholesale procurements are not completed until March, 2013, there is not sufficient time left to hold the EGS auctions and customer solicitation and sign-up before June,

2013. For a further discussion of timing considerations in the Companies' DSP, see Section IV.A.4., below.

4. Laddering of Contracts Beyond June 1, 2015

FES believes that the DSP should not include any new procurements that extend beyond May 31, 2015. This is consistent with the position of the Companies, which proposed 24-month contracts to coincide with the 2-year default service period, and to enable the Companies to minimize procurements beyond May 31, 2015, when the Commission has indicated, in its *Upcoming DSP Final Order*, that it intends to begin the end-state of default service. Met-Ed/Penelec/Penn Power/West Penn St. No. 4 at 7. The OCA, to remedy what it refers to as the "hard stop" problem, OCA St. No. 1 at 17, offers its alternative procurement proposal, described above in Section II.B.2. As explained earlier, the OCA proposes replacing a substantial number of 24-month contracts in the Companies' proposal with 12-month contracts, with the one year contracts being replaced by two year contracts to create a laddering effect. OCA St. No. 1 at 25. While the OCA argues that the appeal of its proposal is that it provides contract laddering and avoids a "hard stop," OCA St. No. 1-R at 12, the "hard stop" the OCA rejects is precisely what the Commission requires, in order to avoid additional challenges implementing end-state default service starting June 1, 2015. The OCA's proposal will prolong the Commission's orderly transition to a new end-state default service product. See FES St. No. 1-S at 5. Accordingly, the OCA's recommendation must be rejected.

5. OCA' s Proposal to Continue the Use of Block Purchase Components With Spot Transactions for Residential Customers

FES reserves the right to reply to other parties' arguments on this issue.

6. The OCA's Proposed "Hold Back" for Retail Opt-In Auction

FES reserves the right to reply to other parties' arguments on this issue.

7. Procurement Method – Descending Price Clock Auction

FES reserves the right to reply to other parties' arguments on this issue.

8. Load Cap

FES is not in favor of any supplier load caps in wholesale procurement plans. As FES witness Banks testified, load caps artificially limit supplier participation, which inevitably increases the total price customers will pay for default service. FES believes that the better policy is to allow natural competition to determine the cost of electric generation service, consistent with the policies supporting the Choice Act. FES St. No. 1-R at 22; see 66 Pa. C.S. § 2802(5).

As FES witness Banks explained, all customers benefit from competition at the wholesale level. This is particularly the case for EDCs such as the Companies, which are in the control area of PJM Interconnection L.L.C. ("PJM"), one of the world's largest competitive wholesale power markets. The Companies' proposed solicitations will allow sophisticated wholesale market participants to compete on a head to head basis to supply the lowest cost fixed price, full requirements products from the wholesale markets, based on each competitor's assessment of data from PJM's transparent markets, and each competitor's own expertise in managing costs and risks. FES St. No. 1-R at 22-23.

The Companies propose a limit of 75% on the number of tranches that each qualified bidder can win in their wholesale default service auctions, on an aggregated load basis for all auction products and for each auction. Met-Ed/Penelec/Penn Power/West Penn Ex. BAM-1

(Default Service Bidding Rules) at 8 (Section 4.2.2). The Companies' witness Stathis testified that 75% is an appropriate level to strike a balance between supplier diversity and achieving the lowest price. Too low a load cap may dissuade suppliers from participating to the fullest extent possible, and thereby result in a higher price for default service supply. Met-Ed/Penelec/Penn Power/West Penn St. No. 4-R at 10.

FES disagrees with RESA's recommendation to lower the load cap to 50%. RESA St. No. 1 at 17. According to RESA, load caps in wholesale procurements protect both the EDC and default service customers by limiting EDC's exposure and by mitigating the impact on default service rates if any single wholesale supplier is not able to meet its contractual obligations. RESA St. No. 1 at 17-18.

In surrebuttal testimony, RESA's witness Williams asserted that the Companies' witness Stathis had provided no evidence that a lower load cap may dissuade suppliers from participating in the auction or result in higher prices. RESA St. No. 2-S at 8. However, FES, which is a competitive wholesale supplier, did present evidence that it could result in higher prices, which RESA inexplicably fails to mention. As FES witness Banks explained in rebuttal testimony, RESA's proposed wholesale supplier load cap ensures that the lowest bidder cannot serve more than 50% of the default service load, and that higher cost bidders must serve some of the load, resulting in higher default service prices. One important consequence of a wholesale supplier load cap is that the resulting default service price will not be as low as it could be absent the cap. The lower the supplier load cap, the higher the resulting default service price. FES St. No. 1-R at 22. Thus RESA's position is inconsistent with the current legal standard applicable to default service procurement which is that supplies constitute "the least cost to customers over time." 66 Pa. C.S. § 2807(e)(3.4)(ii).

The Companies' proposed 75% load cap is consistent with the Commission's prior orders. As the Companies' witness Stathis explained, the Commission previously approved a 75% load cap for Met-Ed, Penelec and Penn Power. Met-Ed/Penelec/Penn Power/West Penn St. No. 4-R at 10. In the prior default service proceeding of Met-Ed and Penelec, the Commission explained the factors it considers in setting the 75% load cap:

The level at which the load cap is set must balance supplier diversity and achieving the lowest price in the supply auctions. All other things being equal, supplier diversity would mitigate the impact on customers of a supplier's default. However, a load cap would also limit the amount of default generation supply that the lowest cost bidder can provide, which would necessarily increase the total average cost to serve default load.

Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of Their Default Service Programs, Docket Nos. P-2009-2093053, P-2009-2093054 (Opinion and Order entered November 6, 2009), slip op. at 16. In that case, the Commission rejected the recommendation of RESA, Direct Energy and the OSBA for a 50% load cap, explaining that "we view load caps as part of the analysis in meeting the 'least cost over time' standard." Slip op. at 18. While RESA attempts to attack Ohio procurements to which the Commission alluded in its 2009 Order, RESA St. No. 1 at 18-19, RESA has presented no evidence that the existing 75% load cap for Met-Ed, Penelec and Penn Power has been inadequate in achieving supplier diversity while meeting the "least cost over time" standard.

It is also worth noting that while the Commission, in its recent order recommending various features of EDCs' upcoming default service plans, saw the need to address such subjects as "Default Service Plan Time Period" and "Energy Contract Durations," it did not identify the issue of load caps as one requiring its attention. See *Upcoming DSP Final Order*.

While there is a preponderance of the evidence and Commission precedent supporting the Companies' proposed 75% load cap, or no load cap, RESA's recommendation for a 50% cap

suffers from a lack of supporting evidence and analysis. Importantly, RESA acknowledged in response to discovery that witness Williams does not know whether or not her positions are that of any individual RESA members. See FES Ex. TCB-2 (FES I-3). To the contrary, witness Williams explained that "RESA is not aware of nor does it record or disclose the individual positions of its members on any issue." FES Ex. TCB-2 (FES-I-3). It is incredible that a witness who appears to testify on behalf of an organization would not know for how many members, if any, of the organization the witness is actually speaking. Certainly, RESA cannot claim that the positions advanced by witness Williams are based on the actual experience of any default service suppliers, much less that they are representative of the majority of EGSs.

Also, witness Williams did not conduct any Pennsylvania-specific analysis of wholesale load caps in support of her recommendation. She did not review, analyze or consider any wholesale supply load caps in any state or jurisdiction other than New Jersey when preparing her testimony in this proceeding. See FES Ex. TCB-2 (FES I-5).

RESA witness Williams testified that "[w]holesale load caps are a competitive safeguard because they limit the EDC's exposure to contract failure of any particular wholesale supplier." RESA St. No. 1 at 18. In discovery, however, witness Williams could not identify any actual situations that support or confirm her concerns, see FES Ex. TCB-2 (FES I-4), nor point to any studies, analyses or reports supporting her contentions, see FES Ex. TCB-2 (FES I-7). When asked whether she or RESA is aware of any instances in the past five years in which a wholesale electric supplier has not been able to meet its contract obligations, witness Williams cited unspecified public records:

Public records show that there have been numerous bankruptcies in the past five years of wholesale electric suppliers. The fact that these entities filed for bankruptcy is evidence that they were unable to meet their contractual obligations.

See FES Ex. TCB-2 (FES I-6). Even if one accepts witness Williams' apparent belief that bankrupt entities are *de facto* unable to meet their contractual obligations, RESA subsequently stipulated with FES that its witness is not aware of any public records to support her concerns regarding wholesale supplier contract failure:

Ms. Williams is not aware of any publicly available information regarding a wholesale supplier not being able to meet its obligations related to the provision of default service in the last 5 years.

See RESA Ex. 1 (Stipulation between FES and RESA). Accordingly, RESA's expressed concerns with wholesale supplier default are speculative, at best.

FES's witness Banks made the foregoing points in Rebuttal Testimony. Although RESA had the opportunity to respond through surrebuttal testimony with empirical evidence supporting witness Williams' claims regarding the risk of wholesale supplier default, or even through cross-examination concerning witness Banks' rebuttal, it declined to do either. Rather, witness Williams merely repeats her assertion that "it stands to reason" that if a wholesale supplier has more than half or three quarters of the default service load obligation, and subsequently defaults, the price for customers served by that load will be impacted. RESA St. No. 1-S at 9. Once again, witness Williams is offering general policy arguments, speculation and unsubstantiated hypothetical scenarios of bankruptcies and associated contract defaults, which are not backed up by any real world example of a wholesale supplier default that resulted in higher default service prices.

Drawing on the *actual* experience of a wholesale power supplier, FES witness Banks testified a load cap is not an appropriate means of avoiding the potential adverse consequences of a supplier default. Supplier load caps are neither necessary nor appropriate to protect EDCs and default service customers. The Companies' proposed wholesale default service procurement

plans already include numerous protections against supplier default. Prospective bidders must prove they have the financial capability to participate in these transactions. Winning bidders must provide credit assurance on an ongoing basis which ensures that the Companies and their customers are made whole for any losses due to non-performance or default. Before suppliers are allowed to bid they must thoroughly prove their creditworthiness and provide pre-bid guarantees. FES St. No. 1-R at 21. Finally, the Companies have addressed the possibility of supplier default in their proposed contingency plans. Met-Ed/Penelec/Penn Power/West Penn St. No. 4 at 11-14. The above measures protect default service customers and EDCs more directly and appropriately than reducing the amount of load one supplier can win in wholesale procurements.

Accordingly, the great preponderance of evidence, Commission precedent and the legal standard for default service procurement all support imposing no load cap on the Companies' default service procurement. To the extent the Commission sets a load cap, RESA's recommendation should be rejected, and the cap should be set no lower than the 75% the Companies have proposed.

C. Industrial Class Hourly-Priced Default Service

1. Summary and Overview of Each Party's Position

FES reserves the right to reply to other parties' arguments on this issue.

D. Use of Independent Evaluator

FES reserves the right to reply to other parties' arguments on this issue.

E. AEPS Requirements

1. Non-Solar Photovoltaic Requirements

FES reserves the right to reply to other parties' arguments on this issue.

F. Solar Photovoltaic Requirements

FES reserves the right to reply to other parties' arguments on this issue.

G. Contingency Plans

1. Full Requirements Products

FES reserves the right to reply to other parties' arguments on this issue.

2. AEPS Requirements

FES reserves the right to reply to other parties' arguments on this issue.

H. Supplier Master Agreements

1. Credit Requirements

FES reserves the right to reply to other parties' arguments on this issue.

2. Monthly Versus Weekly Settlements

FES reserves the right to reply to other parties' arguments on this issue.

III. RATE DESIGN AND COST RECOVERY

A. Residential and Commercial Classes: Price to Compare Default Service Rider

FES reserves the right to reply to other parties' arguments on this issue.

B. Industrial Class: Hourly Pricing Default Service Rider

FES reserves the right to reply to other parties' arguments on this issue.

C. Market Adjustment Charge

1. Summary and Overview of Each Party's Position

FES reserves the right to reply to other parties' arguments on this issue.

2. Position of Parties Opposed

FES reserves the right to reply to other parties' arguments on this issue.

3. RESA's Proposed Modification

FES reserves the right to reply to other parties' arguments on this issue.

4. Dominion's Proposed Modification

FES reserves the right to reply to other parties' arguments on this issue.

D. Default Service Support Rider

1. Non-Market Based Transmission Charges

FES reserves the right to reply to other parties' arguments on this issue.

2. Generation Deactivation Charges

FES reserves the right to reply to other parties' arguments on this issue.

3. Unaccounted-For Energy Costs

FES reserves the right to reply to other parties' arguments on this issue.

4. Economic Load Response Charges

- a) Constellation's Proposal regarding Economic Load Response Charges to Load Resulting from PJM ELR Payments under FERC Order No. 745**

FES reserves the right to reply to other parties' arguments on this issue.

E. Solar Photovoltaic Requirements Charge Rider

FES reserves the right to reply to other parties' arguments on this issue.

F. Time Of Use Rate Proposals for West Penn and Penn Power

- a) Summary and Overview of Each Party's Position**

FES reserves the right to reply to other parties' arguments on this issue.

- b) The OCA's Position**

FES reserves the right to reply to other parties' arguments on this issue.

- c) RESA's Proposal**

FES reserves the right to reply to other parties' arguments on this issue.

G. Reconciliation of Default Service Costs and Revenues

- a) Summary and Overview of Each Party's Position**

FES reserves the right to reply to other parties' arguments on this issue.

- b) The OCA's Proposal**

FES reserves the right to reply to other parties' arguments on this issue.

c) The OSBA's Proposal

FES reserves the right to reply to other parties' arguments on this issue.

H. Other Tariff Changes (Conforming West Penn to Other Companies)

FES reserves the right to reply to other parties' arguments on this issue.

IV. COMPETITIVE MARKET ENHANCEMENTS

A. Retail Opt-In Aggregation Program

1. Summary and Overview of Each Party's Position

In a Tentative Order entered October 14, 2011 in the Retail Markets Investigation proceeding (the "RMI"), the Commission recommended that EDCs include an opt-in auction program within their upcoming DSPs. *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*; Docket No. I-2011-2237952 (Tentative Order entered October 14, 2011). Following its review of comments filed by interested parties on the Tentative Order, the Commission directed that such programs be included in EDCs' next DSP filings. *Upcoming DSP Final Order*, slip op. at 33, 44. The *IWP Order* contained the Commission's guidance on specific components to be included in EDCs' retail opt-in auction programs. The Companies filed their DSPs after the October 14, 2011 Tentative Order was issued but before the issuance of both the *Upcoming DSP Final Order* and the *IWP Order*. The Companies' DSPs included a proposed Retail Opt-in Aggregation Program (the "Opt-In Program"). The Opt-In Program originally proposed in the Companies' filings consisted of a percent-off PTC product with no bonus payment to customers and a 24-month term. Bidding was proposed to occur through an ascending clock auction to be conducted between January and May 2013, after the Companies' wholesale procurement auctions are

completed, and all residential customers (including CAP customers) would be eligible. No customer participation caps or supplier load caps were included in the Companies' original proposal. Met-Ed/Penelec/Penn Power/West Penn St. Nos. 5 and 7; Ex. No. BAM-2. After the *IWP Order* was issued, the Companies revised their Opt-In Program proposal in some respects, though the revised proposal retained some components of their original plan. The Companies' final Opt-In Program proposal contains the following elements:

- 12 month term
- Descending clock auction
- Fixed price at least 5% lower than PTC at time of auction
- Residential customers only, no small commercial or industrial
- No customer bonus payment
- 50% customer participation cap
- 50% supplier load cap
- EGS auction prior to customer enrollment
- EGS auction after wholesale procurement auctions
- Cost recovery through a non-bypassable DSSR

Met-Ed/Penelec/Penn Power/West Penn St. Nos. 5-R and 7-R; Ex. No. BAM-3 and BAM-4. FES addressed the Companies' revised Opt-In Program proposal in witness Banks' Rebuttal and Surrebuttal Testimony. FES St. Nos. 1-R and 1-S. In general, with the exception of the supplier load caps proposed by the Companies, FES agrees with the terms of the Opt-In Program proposal. Other parties have taken issue with various components of the program listed above. Where FES' position differs from that of other parties or the Companies, the particular issue is discussed in detail in the associated sections below.

2. Customer Eligibility

a) Small Commercial and Industrial

The Companies propose that the Opt-In Program should not be open to small commercial and industrial customers. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at p. 19. FES

believes that retail enhancement programs should be open to non-shopping customers in all rate classes. However, the Companies' proposal is consistent with the Commission's determination in the *IWP Order*, though FES notes that the Commission stated in the *IWP Order* that it will review the success of the residential auctions and determine whether a similar program would be suitable for the small commercial and industrial sector. *IWP Order* at 42-43.

b) Shopping Customers

The Companies propose that the Opt-In Program should be open to residential default service and residential shopping customers, but that all marketing, notifications and consumer education efforts would be targeted only at non-shopping residential customers. MetEd/Penelec/Penn Power/West Penn St. No. 7-R at p. 18. This proposal is consistent with the Commission's determination in the *IWP Order*. *IWP Order* at 42. FES supports the Company's proposal.

3. Program Length

The Companies' original proposal was for a program length of 24 months. In their Rebuttal Testimony the Companies revised their proposal to shorten the program length to 12 months. In its Rebuttal Testimony FES supported a contract length of 12 to 24 months, on the basis that customers will benefit from the stability and greater savings provided by longer-term supply contracts. A longer term contract with no early termination fees gives customers an attractive price with a free option since, if during the term of the longer term contract better price offers become available, customers in the retail opt-in auction program are free to leave for the lower price without early termination fees. Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 24-25; FES St. No. 1-R at 11. Customers who are dissatisfied with their price can return to

default service or shop with another EGS at any time. FES St. No. 1-R at 11. FES recognizes that the *IWP Order* guidelines call for a program length of six billing cycles. However, the *IWP Order* recognizes that EDCs may propose deviations from the guidelines contained therein, if such deviations are "justified by good cause shown, which includes showing operational constraints, or supported by evidence produced during an EDC's default service proceeding and supported substantially by interested parties in the default service proceeding." *IWP Order* at 6-7.

In the subject proceeding, most parties support a program length of 12 months, Constellation St. No. 1 at 31; OCA St. No. 1 at 33; RESA St. No. 2 at 17, with the exception of CAUSE-PA, which supported the Companies' original proposal of a 24 month program term. FES also supported the 24 month program term length; however, FES believes that the Companies' revised proposal is better than the even shorter term recommended in the *IWP Order*. FES submits that the Companies' proposed deviation from the Commission's suggested term length has been supported on the record in this proceeding and substantially by parties hereto.

4. Timing of Solicitation and Auction

The Companies have proposed that the Opt-In Program EGS auction occur between January and March, 2013, after the Companies' wholesale procurement auctions have been completed. Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 25. The Companies also propose that customer solicitation for participation in the Opt-In Program should occur after the EGS auction, so that customers will know the pricing for the program before they sign up. Power flow for the Opt-In Program would begin in June, 2013.

FES agrees with the Companies' proposed schedule. Bidders in wholesale default service procurements are experienced in calculating the risks involved in procurements where the numbers of customers may vary before and during the term of their contracts, so it is appropriate to hold the default service auctions first. Customers will likely want to know the price they will receive before they decide whether to participate in the Opt-In program, so customer solicitation after the EGS auction occurs is also appropriate. EGSs are knowledgeable industry participants who will be able to decide whether the Opt-In Program is an attractive proposition based on their business models. Finally, FES notes that the Companies' proposed schedule is consistent with the *IWP Order* guidelines, in which the Commission correctly notes that the schedule proposed by the Companies will mitigate customer confusion and prevent a negative perception if the EGS auction does not fully subscribe all available tranches with the result that some customers who opt in to the auction either will not receive the service or receive a different price and/or product. *IWP Order* at 55.

FES disagrees with the recommendations of parties that propose variations on the timing and sequence of the wholesale default service auction, the EGS auction and customer solicitation proposed by the Companies. Constellation, Dominion and RESA propose that that the customer solicitation should occur first, then the EGS auction. RESA St. No 2 at 19-20; RESA St. No. 2-R at 16-18; RESA St. No. 2-S at 7-8; Dominion Retail St. No. 1 at 7; Constellation St. No. 1 at 31. Dominion argues that holding the customer solicitation first will enable suppliers to bid on a known quantity of customers, and thus more suppliers would participate. After the EGS auction, customers would be able to rescind or cancel if they change their minds. The OCA opposes this proposal, arguing that conducting the customer enrollment absent price information will serve to discourage customer participation. OCA St. No. 2-R at 7; OCA St. No. 2-SR at 9. Further, OCA

avers that requiring customers to rescind their participation in the program if they do not like the outcome of the auction in essence changes it into an "opt-out" rather than an opt-in program.

FES believes the Companies' proposed schedule strikes an appropriate balance among the different interests involved in the complicated process of putting the Commission's retail enhancements in place and should be approved.

5. Timing for Providing Full Terms and Conditions to Customers

FES reserves the right to reply to other parties' arguments on this issue.

6. Customer Participation Cap

a) Summary and Overview of Each Party's Position

FES in general does not support any participation caps in the Commission's retail enhancement programs, which are inconsistent with getting customers the lowest available price (see Section 7. below). The Companies' original proposal contained no customer participation limits. The subsequent *IWP Order*, however, contains the guideline of a fifty percent (50%) customer participation cap, defined as total non-shopping customers enrolled (not solicited). *IWP Order* at 59-60. In their Rebuttal Testimony the Companies revised their proposal to include a fifty percent customer participation cap consistent with the *IWP Order*.

b) The Companies' Proposal (50%)

As stated above, the Companies propose a fifty percent customer participation cap in its revised Opt-In Proposal. Although FES does not support a customer participation cap, it recognizes that the Companies' proposal is consistent with the *IWP Order* guideline on the issue. Most parties support the customer participation cap proposed by the Companies, with the exception of the OCA, which proposes a customer participation cap of twenty percent.

c) The OCA's Proposal (20%)

FES disagrees with the position of the OCA, which proposes that the customer participation cap be limited to 20% of residential customers, setting aside a corresponding usage amount from the Companies' wholesale procurement. The OCA is the only party proposing such a low percentage for a customer cap. The OCA's rationale for its proposal is that it recognizes the risks involved in substantially reducing the amounts wholesale suppliers will bid on for the default service auction, while allowing customer participation in the Opt-In Program. The OCA's proposal reflects its interest in maintaining what it perceives as the viability of the current default service structure at the expense of the Opt-In Program. The OCA's proposal would artificially limit customer participation in the Opt-In Program in favor of maintaining the current default service paradigm for most residential customers. Imposing the low customer participation cap will discourage EGSs from participating in the opt-in auction, particularly if other parties' recommendations are adopted whereby participating EGSs have to bear the costs of the auction and/or a bonus payment is involved. The OCA's proposal is contrary to the Commission's objectives, as expressed throughout the RMI and in the *IWP Order*, and should be rejected.

7. Supplier Participation Load Cap

a) Summary and Overview of Each Party's Position

Again, FES opposes load caps, consistent with the principles of giving customers the lowest available pricing and not restricting qualified EGS participation in programs designed to promote retail competition. In their DSP filings the Companies originally proposed no supplier participation load cap. In their Rebuttal Testimony, the Companies introduced various modifications to the proposed retail opt-in auction, in response to recommendations set forth in

the *IWP Order*. The modifications include the introduction of a 50% cap on the load a participating supplier can win in the proposed retail opt-in auction, as described in the Rebuttal Testimony of the Companies' Witness Fullem. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 30.

b) The Companies' Proposal

In their DSP filings the Companies originally proposed no supplier participation cap. In their Rebuttal Testimony, the Companies introduced a 50% supplier load cap. As FES Witness Banks testified, FES is strongly opposed to any supplier caps. While supplier diversity is one important factor in building a competitive retail market, another important factor is getting customers the best pricing available in the marketplace. This is best accomplished by allowing the markets to work without unnecessarily and artificially limiting competition among participants. Supplier load caps interfere with the natural operation of competitive market forces, which Pennsylvania, through the Choice Act, has recognized to be more effective than regulation in controlling the cost of electric generation service. FES St. No. 1-R at 12. The proposed cap on supplier participation will ensure that customers do not receive the lowest price, particularly when a bidder who is willing to serve more than the capped amount of load happens to be the lowest bidder. FES St. No. 1-S at 4.

c) Dominion Retail's Proposal

FES disagrees with the proposal of Dominion, which asserts that a 25% supplier load cap is important to avoid designing an auction that allows one EGS to dominate the auction. Dominion St. No. 1 at 5-7. However, Dominion confirmed in discovery that witness Butler did not prepare or rely upon any studies, analyses or other supporting material regarding his view

that the Companies' proposed retail opt-in auction could allow one supplier to "dominate." Ex. TCB-1 (FES I-12). Thus, Dominion's position is unsupported and should be rejected.

Again, FES believes that there should be no restrictions on qualified EGS participation in any program intended to promote retail electric competition. Consistent with this principle, the Commission's *IWP Order* recommends that retail market enhancement programs be open to all appropriately-licensed EGSs. *IWP Order* at 45. However, Dominion, further to its purported concern that one supplier could dominate the Opt-In Program, recommended in its Direct Testimony that the Companies' affiliate, *i.e.*, FES, be prohibited from participating in the program. According to Dominion witness Butler, percent-off products such as those originally proposed by the Companies are "difficult," because most EGSs cannot hedge or control risks in connection with a guaranteed percent-off product which is a percent off an estimated price such as the PTC which may change. While witness Butler acknowledges that there are EGSs that commonly promote guaranteed percent-off products, he asserted that they are most often EGSs that are affiliated with incumbent utilities. Therefore, witness Butler claimed that EGS affiliates of EDCs somehow have an unfair advantage over non-affiliated EGSs. FES recognizes that witness Butler somewhat retreated from this position in his Surrebuttal Testimony, ostensibly due to the revisions in the Companies' retail enhancement programs that changed the product from guaranteed percent-off to fixed price. Dominion St. No. SR-1 at 9. However, FES will respond to witness Butler's unsupported allegations because they are incorrect and inappropriate regardless of the programs and products at issue in any EDC's DSP proceeding.

The proposal to restrict affiliate participation in retail enhancement programs is inconsistent with the Commission's *IWP Order*, which recommends that retail market enhancement programs be open to all appropriately-licensed EGSs. *IWP Order* at 45.

Dominion's proposal to eliminate affiliated suppliers from competition also conflicts with the goal of ensuring supplier diversity, which Dominion espoused in connection with its recommendation to impose a supplier participation cap. Dominion St. No. 1 at 7.

More importantly, Dominion's assertions are not only unsupported, but inaccurate as well. The risks associated with offering percent-off products are not unique to non-affiliated EGSs. Affiliated suppliers are subject to the same risks as any other supplier when offering a percent off product and they are not advantaged in any way in managing those risks. Affiliated EGSs must hedge against volatility in the same way as non-affiliated EGSs. Consequently, there is no difference in the risk experienced by either type of EGS, and Dominion's proposal to prohibit EDC-affiliated EGSs from participating in the retail opt-in auction failed to address witness Butler's stated concerns with the risk associated with percent-off products. FES St. No. 1-R at 8-9. Dominion's suggestion to prohibit affiliates from participating is bad policy and amounts to nothing more than a desperate attempt to improperly eliminate a competitor from the process.

In addition, FES's exploration of Dominion's recommendation through discovery established that it lacks foundation. Specifically, Dominion's view that EGSs who promote guaranteed percentage-off products "are most often affiliated with incumbent utilities" is not supported by any studies, analyses or other supporting material that witness Butler relied upon or prepared. Rather, the only support for witness Butler's statement is witness Butler's unsupported observations of alleged FES activities in Ohio and Pennsylvania. Ex. TCB-1 (FES I-5). Further, Dominion confirmed in discovery that Dominion itself offered a percent-off product to residential customers in PECO Energy Company's Market Share Threshold auction. Ex. TCB-1 (Met-Ed/Penelec/Penn Power/West Penn I-2). Dominion is not affiliated with PECO Energy

Company. Therefore, witness Butler's assertion that only affiliated companies offer percent-off products is belied by his own company's retail product offering. Dominion's claim that there are "benefits" in prohibiting EGSs that are affiliates of incumbent utilities from participating in retail opt-in auctions is similarly lacking in support. Discovery confirmed that this assertion is based solely on witness Butler's unspecified observations of retail markets, rather than any studies, analyses or other empirical supporting material. Ex. TCB-1 (FES I-7).

d) RESA's Proposal

FES also urges the Commission to reject the proposal of RESA, which recommends the imposition of a 25% supplier cap with a minimum of four winning bidders, allegedly to ensure participation by a diverse number of suppliers, each bringing their own "individual strengths and business models" to the auction for the benefit of retail end users. RESA St. No. 2 at 24. For the reasons stated in subpart b) above, FES disagrees with RESA's analysis and proposal. RESA explained in discovery that it does not know whether or not the positions it takes are the positions of any individual RESA member. Ex. TCB-2 (FES I-11). As a result, the positions expressed by RESA witness Kallaher appear to be purely theoretical, and not based on the actual experiences or preferences of any energy business.

8. Composition of Product Offer

a) Discount from PTC

The Companies' original proposal called for a guaranteed percent-off PTC product with no bonus payment (see subsection b), below). FES witness Banks testified that FES supports the Companies' percent-off PTC price proposal. FES St. No 1-S at 2. The subsequent *IWP Order* guidelines state that the opt-in auction product should consist of a fixed price that is at least 5%

lower than the PTC at the time of the auction, and a \$50 bonus payment payable after three billing cycles. In their Rebuttal Testimony the Companies revised the proposed product to be a fixed price that is at least 5% lower than each Company's PTC at the time of the auction, but declined to include a bonus. While FES preferred the Companies' original proposal, the Companies' modified proposal is a reasonable response to the *IWP Order* guidelines. In their Surrebuttal Testimonies, CAUSE-PA and the OCA stated their preference for the originally proposed percent-off product. OCA explained the rationale for this position, which is that the fixed price set lower than the PTC at the time of the auction could result in a price higher than the effective PTC at any given time during the offer term. The OCA noted, however, that its concern is mitigated if customers can leave the Opt-In Program and return to default service. Accordingly, the Companies' modified proposal should be adopted.

b) "Bonus" Payments

FES believes that the Opt-In Program product should not include a bonus payment. As stated above, the Companies' original and revised proposals do not include any bonus payments to participating customers. The Companies' Witness Fullem explained the rationale for not including a bonus payment, which deviates from the guidelines in the *IWP Order*. *IWP Order* at 70. Witness Fullem states that inclusion of a bonus payment with the fixed-price product in the Companies' revised proposal would result in a product very similar to those already offered in the Companies' service areas, which non-shopping customers obviously have not chosen to take. Since the *IWP Order* seeks to offer non-shopping customers a product different from those previously available, the Companies determined that the bonus payment would not attract additional participation in the retail market in their territories. Witness Fullem also opined that inclusion of the bonus payment in the Companies' Opt-In Program is tantamount to a "bait and

switch" and might attract EGSs who will take advantage of a perceived status quo bias and charge "higher-than-market" prices after the initial service period expires, leading to customer complaints and tarnishing of the EDCs' reputation due to their involvement in the Opt-In Program process. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 32-33. FES agrees with this rationale and believes the Companies' proposal should be adopted.

There is an utter lack of credible evidence in the record in support of bonus payments. RESA witness Kallaher asserts in testimony that a bonus payment should be included in the Opt-In Program because "[t]here is evidence that consumers like the idea of receiving a bonus upfront," and "customers generally very much like the notion of receiving an upfront 'signing bonus' as an inducement for participating in the opt-in auction." RESA St. No. 2 at 21, 22. This evidence consists of RESA Ex. CHK-2, a slide presentation prepared by an entity called The Tarrance Group to summarize the conduct and results of focus group sessions purportedly conducted by the Tarrance Group on behalf of Direct Energy in October, 2011. The slides state that "[t]he research determined that the 'rebate check' or 'signing bonus' is one of the top tier selling points of this program." RESA Ex. CHK-2 at 10. RESA witness Kallaher put this and other conclusions reached by the Tarrance Group in his direct testimony. Tr. 225, ll. 1-5.

None of the alleged 47 participants of the focus groups testified in these proceedings. Tr. 225, ll. 11-13. No employee of the Tarrance Group testified in these proceedings, either, Tr. 225, ll. 14-16, and witness Kallaher could not even identify the Tarrance Group employees who conducted the survey, Tr. 225, l. 17 to 226, l. 6. Nor did witness Kallaher attend any of the focus group sessions, Tr. 229, ll. 22-24. As a result, RESA Ex. CHK-2 contains statements not made by witness Kallaher while testifying at hearing. Since neither the participants in the focus group, nor those who conducted the focus group, testified in these proceedings, and the statements in

RESA Ex. CHK-2 — that consumers like the idea of receiving a signing bonus as an inducement for participating in an opt-in auction — are being offered in evidence to prove the truth of the matter asserted, i.e., that bonuses will induce customers to opt-in, the statements meet the definition of "hearsay" under Pa.R.E. 801(c) and therefore can be given no probative weight.

The Pennsylvania Commonwealth Court has recognized several requirements of generally accepted survey principles that a survey must meet in order for the survey to be admissible in evidence:

1. A proper universe must be examined and a representative sample chosen;
2. The persons conducting the survey must be experts;
3. The data must be properly gathered and accurately reported;
4. The questionnaires and the manner of interviewing must meet the standards of objective surveying and statistical techniques; and
5. The survey must be conducted independently of the attorneys involved in the litigation.

Eways v. Board of Commissioners of Berks County, 717 A.2d 8, 12 (Pa. Cmwlth. Ct.), *appeal denied*, 557 Pa. 649, 734 A.2d 396 (1998) (citing *Baumholser v. Amax Coal Company*, 630 F.2d 550 (7th Cir. 1980) and *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978)). Of these criteria, the Tarrance Group focus group study, which arguably does not qualify as a survey, only met the last one.

Under *voir dire* by FES, witness Kallaher admitted that his knowledge of the report was limited to the information contained in RESA Ex. CHK-2 and from employees of Direct Energy who were present at the focus group sessions outlined in the report (Tr. 223, l. 24-25 and 224, l. 1-4); that he could not describe the expertise or background of the Tarrance Group employees who conducted the focus groups (Tr. 226, ll. 8-16); that he has never conducted a focus group study (Tr. 226, ll. 17-22); that his experience with designing focus group studies was limited to

designing lines of questions to be asked to participants in the instant study as well as one other study in 1994 (Tr. 226, l. 23 to 227, l. 8); that he did not participate in determining the number of men and women chosen to participate in the Tarrance Group study (Tr. 227, ll. 9-14); that he did not know how the focus group participants were chosen (Tr. 227, l. 15 to 228, l. 7); that he did not know the assumptions the Tarrance Group made about the participants' ability to understand the topics and issues discussed in the focus groups (Tr. 228, l. 8 to 229, l. 8); that he did not know how much time was allocated to each issue discussed in the focus group sessions (Tr. 229, l. 25 to 230, l. 2) or whether exactly the same subjects were covered in each of the focus groups (Tr. 230, ll. 7-14); and that he did not know whether there are generally accepted standards for the conduct of focus groups (Tr. 230, ll. 15-17). In this case, there is no way to know if the proper universe was examined and a representative sample was chosen, if the persons conducting the focus group were experts, if the data was properly gathered or accurately reported, or if the questionnaires and manner of interviewing met standards of objective surveying and statistical techniques. RESA simply does not know. Because the foundation laid for offering the Tarrance Group slide presentation into evidence in this proceeding falls far short of meeting the requirements of *Eways*, it is hearsay which is inadmissible in evidence under Pa.R.E. 802.

Thus, witness Kallaher was sponsoring a document of which he had no firsthand knowledge to support his argument that customers want a bonus payment in order to sign up with a retail service provider. RESA Ex. CHK-2 was offered into evidence in this proceeding absent sponsorship by anyone with direct knowledge of how the focus groups were chosen, what was discussed during the focus groups or the methodology used by The Tarrance Group in choosing the focus group participants. While the same report was put into the record in the RMI during one of the *en banc* hearings, the persons testifying during the RMI *en banc* hearings were not

under oath, nor were they subject to cross-examination. The evidentiary standards in formal adjudications such as this are higher, and while FES's objection to this exhibit on hearsay grounds was overruled on procedural grounds, Tr. 236, ll. 3-11, RESA Ex. CHK-2 remains hearsay and FES submits it should be given no evidentiary weight whatsoever.

Further, while Pennsylvania law permits experts to base their opinions on evidence that is otherwise inadmissible if the evidence is of the type reasonably relied upon by experts in their field of expertise, Pa.R.E. 703, the opinions may not be "hearsay in disguise." *See, e.g., Woodward v. Chatterjee*, 827 A.2d 433, 444 (Pa. Super. Ct. 2003). When an expert witness has consulted sources, and "uses that information, together with his own professional knowledge and experience, to arrive at his opinion, that opinion is regarded as evidence in its own right and not as hearsay in disguise." *Woodward*, 827 A.2d at 444 (quoting *Primavera v. Celotex Corp.*, 415 Pa. Super. 41, 608 A.2d 515, 518-19 (1992)). An expert may not act as a mere conduit or transmitter by simply repeating another's opinion or data without bringing to bear on it his own expertise and judgment. *Woodward*, 827 A.2d at 444. In this instance, RESA witness Kallaher, who has not been presented as an expert in the area of focus group studies, has simply repeated the Tarrance Group's conclusions without adding anything to them by using his own judgment to formulate an opinion. This is not permitted by Pennsylvania law, and RESA witness Kallaher's "opinion" that up-front bonuses will induce customers to opt-in to retail auctions should not be admitted. Again, while FES's objection to this exhibit on hearsay grounds was overruled on procedural grounds, Tr. 236, ll. 3-11, witness Kallaher's opinion should be given no weight.

Under general administrative law, hearsay evidence, properly objected to, is not competent evidence to support a finding; hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding, if it is corroborated by any

competent evidence in the record, but a finding of fact based solely on hearsay will not stand. *Walker v. Unemployment Comp. Bd.*, 367 A.2d 366 (Pa. Cmwlth. 1976). There is no other evidence in the record that could support a finding of fact that an up-front bonus will make customers more likely to opt-in to a retail opt-in auction. While Dominion witness Butler appears to be in favor of a larger bonus than the \$50 in the *IWP Order*, he states that the "starting discount" for the EGS auction should be lowered to 2% if a bonus is included. Dominion Retail St. No. SR-1 at 4-5. Moreover, Dominion offers absolutely no support, or even any rationale, for this proposal. Accordingly, there is no other evidence in the record to support the inclusion of a \$50 bonus payment, RESA's recommendation of a bonus payment should be rejected, and the Companies' proposal should be approved.

c) Provision of Standard Contracts Specifying All Terms and Conditions of Service

FES reserves the right to reply to other parties' arguments on this issue.

9. RESA's Proposal to Conduct Testing of Various Marketing Channels before Implementing the Program

FES believes that the Companies should not conduct any pilot programs prior to the proposed Opt-In Program. In fact, the *IWP Order* rejected a proposal that pilot programs be implemented prior to the full-scale Retail Opt-In Auctions. *IWP Order* at 45-48. The Companies have not proposed a pilot program in this proceeding. RESA is attempting to resurrect the pilot program proposal but calls it a "test" program in which, as witness Kallaher explained, the Commission would "form a task force" to "identify all reasonable channels for possible customer enrollment in the opt-in auction, and then choose the most promising for inclusion in the test." RESA St. No. 2-R at 12, 1. 7-9. Witness Kallaher further explained that

the test would approach "small, statistically significant random samples of customers" who "would be presented with offers in various shapes and the results provided to the EGSs so that they can better gauge the likely response to the auction." RESA St. No. 2-SR at 17, l. 8-10. Under cross-examination witness Kallaher stated that any customer who indicated interest in a particular product would in fact become a customer of the EGS making the offer (Tr. 249, l. 17-20). Further, this test program would be conducted "in advance of the Companies' first wholesale solicitation for default supply." RESA St. No. 2-R at 12, l. 9-11.

The Commission is not expected to act on the Companies filing until its August 2, 2012 public meeting. The Companies' first default supply auction is scheduled to occur in November, 2012. In other words, the test envisioned by RESA would have to be designed and completed in three months. This includes the Commission's designation of the task force, the task force identifying "all reasonable channels for possible customer enrollment in the auction" then choosing some, then somehow identifying a "statistically significant subset of customers" for solicitation, then soliciting those customers "to discover what percentage of those customers actually respond to the solicitation through the channel being tested," then the responding customers being signed up to the service they chose "through a process designed by the task force." RESA St. No. 2-R at 12, l. 3-29. Costs for this test are expected to be paid by "voluntary contributions from EGSs and wholesale suppliers." RESA St. No. 2-R at 12, l. 35 and 13, l. 1. All of this is expected to be completed before November, 2012, according to witness Kallaher.¹ He did not provide a timeline in his testimony, but the Companies' witness Fullem estimated that the testing could not be completed until the middle of February, 2013 at the earliest, and

¹ FES recognizes RESA is proposing that the Companies' initial wholesale procurement not occur until January, 2013 (see section II.B.3.b) above). However, even this delay would not allow sufficient time for RESA's "test" program to be completed.

inclusion of any lessons learned in a Commission-approved program would take several more months at least. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-SR at 3-4.

FES respectfully submits that RESA's proposal here is simply a pilot program with another name. Witness Kallaher's belief that such a program could be designed from the ground up and completed in sufficient time to incorporate any lessons learned into the Companies' full-scale Opt-In Program defies credulity. Regardless of witness Kallaher's attempts to characterize his "test" program as smaller scale than the pilot programs previously proposed, the time constraints recognized by the Commission for implementing pilot programs in the *IWP Order* are even more pronounced now.

10. Customer Options on Program Expiration and Notices to Customers of Contract Expiration

The Companies propose that at the end of the contract term for the Opt-In Program, the opt-in EGS must provide the notices required by the Commission's regulations at 52 Pa. Code § 54.5(g)(1). If the customer does not affirmatively choose to receive service from a different EGS or elect default service, the customer will remain with the EGS that supplied service under the opt-in; the EGS is free to set the price for those customers that remain with it. Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 27.

The Companies' proposal is consistent with the *IWP Order*, which follows current Commission renewal notice guidelines. The guidelines provide for two notices to customers, one fifty-two to ninety days before the end of the program and the other at least forty-five days before the program ends. *Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Changes Affecting Customer Service; Amendment re: Supplier Contract Renewal/Change Notices*, Docket No. M-2010-2195286 (Order entered

September 23, 2010). The latter notice will provide new terms and conditions for service and a date by which the customer must take action. If the customer does not do so, the guidelines provide that the customer will remain with the supplier on a month-to-month basis, without the risk of the imposition of termination penalties or fees. *IWP Order* at 73-75.

FES supports the Companies' proposal. As the Commission stated in the *IWP Order*, customers subject to these conditions will have already affirmatively made the choice to participate in the Opt-In Program and will have received all required notices advising them that a change in terms and conditions will occur, what those changes will be and what options are available to them. Returning these customers to default service at the conclusion of the Opt-In Program as the OCA and CAUSE-PA propose would, as the Commission notes, "not only ignore the purpose of the entire program, [but] also fail to give effect to that customer's initial choice." *IWP Order* at 74. As a result, the Companies' proposal should be adopted and the OCA and CAUSE-PA proposals should be rejected.

11. Structure of Opt-In Auction – Descending Price Clock Auction versus sealed Request for Proposals

The Companies have proposed to use a descending clock auction process for its Opt-In Program auctions.² *Met-Ed/Penelec/Penn Power/West Penn St. No. 5* at 23. FES supports the use of a descending clock auction, which results in a lower price for the customer by allowing participants to see indicative price information and adjust their bids accordingly in real time. The transparency and flexibility of the descending clock process enables bidders to know where they stand during the process and to bid more aggressively against each other to secure the opportunity to serve customers, driving down the ultimate price to the customer. In this instance,

² The Companies' original proposal was for an ascending clock auction but was changed to descending clock, due to the product being revised from percent-off to fixed price. *See* Exs. BAM-2 and BAM-3, Sections 5.1.

participants would enjoy even greater flexibility because the four Companies propose to conduct four auctions simultaneously. Therefore suppliers would be able to substitute products by switching among the four descending clock auctions. In other words, a supplier who is underbid in a round of one of the auctions may immediately move to another of the auctions. FES St. No. 1-S at 2-3.

Dominion, RESA and the OCA offered testimony in support of the sealed bid process, on the basis that it is less expensive and complicated than the descending clock auction process. Dominion Retail St. No. 1 at 8; RESA St. No. 2 at 23; OCA St. No. 1 at 34, fn.3. Dominion witness Butler also opined that the sealed bid process would produce equally competitive prices to a descending clock auction. The Commission did not provide a recommendation for either method in the *IWP Order*, stating that both would work well to provide a single clearing price. *IWP Order* at 78.

In their Rebuttal Testimony the Companies responded to the assertion by other parties that a descending clock auction is inappropriate and costly. The Companies' witness Miller stated that his firm has designed and managed a range of different bidding formats including both the sealed bid and clock-type of auctions. While no one bidding format is best for all situations, Witness Miller explained that the descending clock auction is preferable in this case for number of reasons, a primary one being that multiple, similar products are going to be bid across all four EDCs in this proceeding. Met-Ed/Penelec/Penn Power/West Penn St. No. 5-R at 4-7. Witness Miller responded to witness Butler's assertion that a sealed bid process would result in equally favorable prices to those produced by a descending clock auction, saying that such an assertion does not address all the objectives and factors associated with the Companies' Opt-In Program. The descending clock format transparently allows bidders to respond to

declining price levels and changes in relative prices by permitting switching among products and enabling bidders to offer their best bids. By contrast, a sealed-bid auction would make it difficult if not impossible for bidders to offer their best bids. Further, witness Miller stated that in his experience a sealed bid process is not necessarily less costly than a descending clock auction, and that with multiple products on offer over the four EDCs in this proceeding, the descending clock auctions are likely to result in lower prices than would result from a sealed bid format. Finally, witness Miller testified that the sealed bid auction format in the context of the Companies' Opt-In Program would actually make it more complicated than a descending clock auction for bidders to formulate, express and submit their best bids.

FES witness Banks testified that the descending clock auction format will confer benefits on customers that a sealed bid format cannot. FES St. No. 1-S at 2-3. In contrast with the transparency and flexibility of a descending clock auction, a static and opaque sealed bid auction only allows participants to submit a single bid, without the benefit of receiving indicative price information. Without transparent price information to guide their decisions, and with the opportunity to provide only a single bid, suppliers may bid tentatively. Speaking figuratively, the sealed bid auction provides participants with a single shot in the dark. The sealed bid auction runs counter to the notion of enabling competitive market forces to drive down the cost of electricity for customers. Therefore, FES urges approval of the Companies' proposal.

12. Recovery of Costs

a) All customers versus EGSs

The Companies propose to recover the costs of the Opt-In Program from all residential customers via the non-bypassable Default Service Support Rider ("DSSR") of each Company's tariff. Med-Ed/Penelec/Penn Power/West Penn St. No. 7 at 27. The Companies recognize that

their cost recovery proposal deviates from the *IWP Order* guidelines, but notes that recovering the costs from participating EGSs creates the risks that EGSs will choose not to participate, customers will choose not to participate because the prices achieved through the auction are unattractive or the EDCs' costs will not be recovered. Med-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 39.

FES believes the costs of the Opt-In Program should be recovered from all residential customers, who will benefit from the Opt-In Program and stand to experience significant savings from a robust, competitive retail electricity market, which may include an increase in the number of EGSs and/or lower pricing offers. The benefits of RMI programs will continue well beyond the expiration of the Opt-In Program proposed in this proceeding. Therefore the costs associated with this program should be recovered through the use of a non-bypassable rider such as the DSSR applicable to all customers who are eligible to participate in the programs.

b) Recovery through the Market Adjustment Clause as Proposed by RESA

FES reserves the right to reply to other parties' arguments on this issue.

c) Form of Recovery if EGSs to be responsible for all costs

As explained above, FES believes the costs of retail opt-in auctions should be recovered from all customers. The *IWP Order* provides that "most, if not all, of [the Retail Opt-in Auctions] costs should be recovered from participating suppliers" on the basis that "participating suppliers will be receiving customers via this program in a manner that negates almost all of the usual customer acquisition costs." The Commission directs EDCs to propose mechanisms to identify and recover the costs from participating suppliers in their DSPs. *IWP Order* at 84-85. If the Companies' preferred cost recovery mechanism described in subsection a) above is not

adopted and the Commission directs that participating EGSs pay for the Opt-In Program, the Companies' witness Fullem testified that the best way to do so would be for the costs of the auction to be divided equally among participating EGSs, with each EGS being required to pay the Companies their share before the beginning of the auction. Winning EGSs would then be responsible for all costs associated with the marketing and mailing of opt-in notices to the customers in the tranches that they win. Med-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 40.

The above-described cost recovery mechanism, while contrary to FES' position stated above, is certainly preferable to the proposal by CAUSE-PA that the costs of the opt-in auction be recovered from all EGSs through a discount on the Companies' purchase of receivables payments. There are several reasons this cost recovery method is inappropriate. First, an EGS which does its own billing does not participate in the Companies' purchase of receivables ("POR") programs. Not all EGSs in the Companies' service territories utilize the POR programs, so EGSs that participate in the Opt-In Program but do not participate in the POR programs would escape any cost responsibility if that is the avenue chosen for cost recovery. The Companies' tariff provisions in which the voluntary nature of EGS participation is described are as follows:

Met-Ed, Penelec & Penn Power:

(a) Eligibility: The POR program will be available only for EGSs who employ the Company's Consolidated EDC Billing option. Participation in the Company's POR program will be mandatory for any EGS that does employ the Consolidated EDC Billing option.

See Metropolitan Edison Company Electric Pa P.U.C. No. S-1, Original Page No. 38, Section 12.9(a), effective January 15, 2011; Pennsylvania Electric Company Electric Pa P.U.C. No. S-1, Original Page No. 38, Section 12.9(a), effective January 15, 2011; Pennsylvania Power

Company Electric Pa P.U.C. No. S-3, Original Page No. 38, Section 12.9 (a), effective June 1, 2011.

West Penn Power:

12.4.2 Purchase of Receivables ("POR") Program.

When a Registered EGS elects to use Company Consolidated Billing, the Company will purchase the Registered EGS's Basic Electric Supply receivables.

* * *

(b) In the event a Registered EGS converts a Customer from Company Consolidated Billing to Dual Billing, the Registered EGS and Company will each be responsible for its receivables effective as of the start of Dual Billing. EGSs' receivables incurred as a result of a Customer billed under a Dual Billing arrangement will not be included in the POR program.

See West Penn Power Supplement No. 1 Electric-Pa. P.U.C. No. 2S, First Revised Page No. 35 Superseding Original Page No. 35, Rule 12.4.2(b), effective March 30, 2012.

Second, the implementation of a POR discount may discourage new EGSs from entering the territory or encourage EGSs that currently participate to drop out of the POR program. Thus the use of a POR discount in connection with the Opt-in Program will have an effect that is the opposite of the Commission's desire expressed in the RMI to increase supplier participation in EDCs' service territories. Since POR programs were implemented for the purpose of attracting increased EGS activity in EDC service territories where they might otherwise not participate, it would be ill-advised to make POR programs unattractive to EGSs.

Recovery of costs through an EDC's POR program violates the principle that cost recovery should follow cost causation. A discount on purchased receivables should be used only for reasons that have a logical connection to the purposes of the POR program, not as a mechanism for recovering costs of programs completely unrelated to POR.

B. Standard Offer Customer Referral Program

1. Summary and Overview of Each Party's Position

The Companies initially proposed a Standard Offer Customer Referral Program consisting of weekly bidding by EGSs, with the winner chosen by the lowest price. The Companies proposed to conduct weekly solicitations that will result in 12 and 24-month fixed price offers. Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 28. Subsequent to the *IWP Order*, the Companies abandoned the weekly bidding proposal. Instead, the Companies propose, consistent with the *IWP Order*, certain components of a "New York" style Referral Program where Residential customers on default service, including CAP customers, are permitted to select an EGS or have one randomly assigned to them. Participating EGSs would serve each customer they enroll through the Referral Program for a 12-month term at a fixed price set at a discount of 7% below the PTC at the time of customer enrollment. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 43-44. Participating customers can leave the Referral Program at any time, without penalty, to accept a competitive offer from an EGS or to return to default service. All suppliers are eligible to participate.

FES preferred the Companies' initial "supplier of the week" proposal, which would have offered customers the lowest price available under the program, with stability and certainty for up to 24 months, but recognizes that the Companies' revised proposal is a reasonable response to the *IWP Order*. In addition, FES supports the Companies' inclusion of CAP customers. However, FES opposes requiring EGSs to bear the costs of the Referral Program.

2. Customer Eligibility

FES reserves the right to reply to other parties' arguments on this issue.

3. Term of the Standard Offer Product and Length of 7% Discount

FES has maintained throughout these proceedings that the term of the Standard Offer Program should be longer, i.e., between 12-24 months, to provide customers with stability and security. FES St. No. 1-R at 18. However, FES understands the Companies' modification of the Referral Program product to 12 months in response to the *IWP Order*. FES also agrees with the Companies' proposal that the length of the 7% discount should match the 12-month term of the Standard Offer Program.

FES strongly urges the Commission to reject any proposals to make the term shorter than 12 months. Specifically, the Commission should reject the OCA's proposal to reduce the term to 4 months. The OCA recommends a 4-month term, to eliminate the risk that during a 12-month term the PTC will fall below the standard offer price. OCA St. No. 2-S at 15. OCA also contends that the Referral Program should not be implemented at the same time as the opt-in auction because it will lead to customer confusion and potential customer dissatisfaction. OCA St. No. 2 at 15, St. No. 2-R at 9-10, St. No. 2-S at 13. In addition, OCA recommends that at the end of the discount period, customers should not remain with the EGS unless they have affirmatively agreed to a new offer presented. OCA St. No. 2 at 17, St. No. 2-R at 10, St. No. 2-S at 14. The OCA further recommends that participating EGSs pay the incremental costs to implement the Referral Program. OCA St. No. 2 at 18-19, St. No. 2-S at 15. A 12-month product is consistent with the Commission's *IWP Order*. The OCA's recommendation ignores the fact that the customer may terminate the Referral Program contract with the EGS at any time without incurring a termination penalty or fee.

The Commission should also reject the position of RESA, which supports the Companies' proposed 12-month term, but recommends that the 7% discount end after only 4 months, so that the program more closely resembles the "New York" style program which has a 3-month

introductory term. RESA St. No. 2-S at 22-25. RESA opposes requiring EGSs to bear the costs of the Referral Program. RESA argues that the Commission, by adopting certain components of the "New York" style referral program, intended for the standard offer's 7% discount to be a short-term introductory rate of only 4 months.

However, RESA's recommendation lacks any support in the *IWP Order*. In the *IWP Order*, the Commission very specifically set forth guidelines for the Standard Offer Customer Referral Program, including that:

- The standard offer should be provided for a minimum of four months, but should not exceed 1 year. The standard offer and its term should be uniform within an EDC's service territory.

IWP Order at 31. There is no possible reading of this passage that supports RESA's interpretation that the standard offer discount should diverge from the standard offer term. While the Commission's *IWP Order* adopted guidelines reflecting some components of the "New York" style program, the *IWP Order* did not adopt *all* components of the "New York" style program. One of the components the Commission did not adopt was the New York program's use of shorter-term introductory rates. That decision is supported by a preponderance of the evidence as well. As FES witness Banks explained, short-term "introductory" rates are "teaser" rates that could lead to offers that increase the price after the introductory period expires, leading to customer frustration with the shopping experience. Customers should not be forced to make another shopping decision after only a few months. An extremely short introductory period also gives suppliers insufficient time to cultivate relationships with customers before changing rates. FES St. No. 1-R at 17-18.

The Commission's decision not to adopt the "New York" style program in its entirety makes additional sense, considering that specific program's lack of success in promoting retail competition. As FES witness Banks illustrated in his Rebuttal Testimony and exhibits, New

York residential shopping rates did not increase significantly between December 2005 when the New York customer referral programs were adopted (6.7% statewide), and August 2011 (20.4% statewide). FES St. No. 1-R at 17; FES Ex. TCB-4. Even without a customer referral program, statewide residential shopping rates in Pennsylvania already exceed those achieved in New York with the help of its customer referral program.³ FES St. No. 1-R at 17; FES Ex. TCB-5. FES supports the Commission's adoption of a customer referral program, and understands the adoption of several components of a "New York" style referral program, and agrees with the Commission's decision not to adopt the short-term introductory rates of the New York model, which FES believes is a weakness of that model. FES disagrees with RESA's suggestion that the referral program as adopted by New York was successful because it did not result in additional complaints about unauthorized switches (or otherwise). RESA St. No. 2-S at 24. FES submits that a lack of complaints is not an adequate benchmark for the success of a program that is intended to increase retail shopping.

Incredibly, RESA asserts that FES's view is that there is "enough" shopping already and that additional competitive enhancements are not necessary because FES cites to Pennsylvania's superior shopping levels in recommending against complete adoption of a "New York" style customer referral program. RESA St. No. 2-S at 2. This misplaced argument is not only incorrect, since it mischaracterizes FES's Rebuttal Testimony, but the conclusion RESA draws, about the implication of FES's position, is illogical as well. In fact, it ignores FES's testimony in support of the adoption of retail market enhancement programs. FES St. No. 1-R at 6, 17. Put

³ RESA's suggestion that FES failed to "distinguish between the robust shopping in the large commercial and industrial sectors compared to the residential or even the small commercial sectors," RESA St. 2-S at 2, is misplaced, given FES's focus on Residential shopping statistics in its Rebuttal Testimony concerning the "New York" style referral program and its emphasis on shorter-term introductory rates.

simply, disagreeing with RESA on a detail of a customer referral program is not tantamount to opposing competitive market enhancements.

Dominion, in response to the Companies' initial "supplier of the week" proposal, urged the Commission in its Direct Testimony to make any combination of three modifications to the proposed program: 1) the same supplier cannot win the weekly auction two weeks in a row; 2) an affiliated supplier cannot participate in the referral program since it already has brand recognition; or 3) the same supplier cannot be selected for the 1 and 2 year price in the weekly auction. Dominion St. No. 1 at 11-12. In Surrebuttal Testimony, however, Dominion regards the Companies' subsequent modifications to the Referral Program as a "reasonable compromise," and "strongly agrees" with including all interested suppliers. Dominion St. No. 1-S at 4. In fact, Dominion goes so far as to say it "strongly agree[s] with [Company witness] Mr. Fullem's proposal to include all interested suppliers in the referral program and submit that such an outcome is what the . . . [IWP] Order suggests." Dominion St. No. 1-S at 4. Dominion further suggests in Surrebuttal Testimony that its proposal that affiliated suppliers be excluded from the Referral Program was merely a "fall back" proposal (a term that nowhere appears in its Direct Testimony), and that any complaints about his proposal "are now, for the most part, moot." See Dominion St. No. 1-S at 9.

Accordingly, Dominion appears to have implicitly withdrawn its proposal that an affiliated supplier cannot participate in the Referral Program, contingent on the Commission's approval of the Companies' revised Referral Program instead of their initial "supplier of the week" proposal. Even if the Commission were to approve the initial "supplier of the week" proposal, under no circumstances should any qualified supplier be restricted from participating in any retail market enhancement program. Dominion's unprecedented proposal is

anti-competitive, would increase prices, negates the rights and privileges of a retail supplier to whom the Commission has awarded a retail license, and is contrary to Dominion's claimed interest in supplier diversity. Further, the proposal is based upon false and irrelevant premises regarding brand recognition and is unsupported by evidence. Moreover, the proposal ignores the facts that under the Companies' initial proposal, price was the sole determinant of the winner, see FES Ex. TCB-1 (FES I-16), and that non-affiliated suppliers are offering lower prices in the Companies' four service territories than FES, see FES Ex. TCB-3. See FES St. No. 1-R at 13-15.

4. Recovery of Costs

a) All Customers versus EGSs

Subsequent to the Commission's preliminary findings in the *IWP Order* regarding recovery of Referral Program costs, the Companies maintained their original proposal that costs would be recovered through the Companies' non-bypassable DSS rider. Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 32, St. No. 7-R at 46. FES supports the Companies' proposal to recover costs of the Referral Program through a non-bypassable charge to all Residential customers. FES recognizes that in the *IWP Order*, the Commission agreed with the assertions of certain participants in the RMI that the bulk of the costs, including the costs of maintaining the referral programs once they are put into place, should be the responsibility of the participating EGSs. *IWP Order* at 32. FES respectfully disagrees with this finding, for the same reasons described above in connection with the Opt-in Auction program. As RESA explained, the Referral Program is intended to contribute to a retail market design that benefits all customers. RESA St. No. 2-S at 27-28. Customers stand to experience significant savings from a robust, competitive retail electricity market. Therefore, recovery for this program should be through a charge applicable to all customers eligible to participate in the program.

In addition, the Companies raised a valid concern on the record that EGSs may be discouraged from participating in the Referral Program if required to bear the costs. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 46. In fact, Dominion's witness Butler testified that responsibility for referral program costs may make the program not worthwhile for an EGS from a cost/benefit perspective. Dominion St. No. 1-R at 7. Similarly, RESA cautions that EGSs may choose not to participate in the Referral Program if the costs are relatively high and there is no way of gauging the extent of customer participation. RESA St. No. 2-R at 25. Moreover, RESA described the possible "free rider" problem, in which a program designed to recover costs from participating EGSs actually encourages EGSs to stay out of the program until other participating EGSs have paid the program's up-front costs. RESA St. No. 2-R at 25-26.

b) Recovery through the Market Adjustment Clause as Proposed by RESA

FES reserves the right to reply to other parties' arguments on this issue.

c) Form of Recovery if EGSs to be responsible for all costs

If the Commission requires participating EGSs to pay the costs of the program, the Companies propose that each participating EGS make an upfront payment of \$100,000 to fund start-up, and contribute to continuing monthly costs which will be divided by the number of participating EGSs. The Companies propose that the Referral Program only be commenced if a minimum of five EGSs make the initial payment. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 46.

FES respectfully disagrees with the preliminary conclusion reached by the Commission in the *IWP Order*, where the Commission found that the proposal of PECO Energy Company to recover program costs "through the discount on POR appears to be acceptable," and encouraged

the other EDCs to explore similar recovery in their own DS plan proceedings. *IWP Order* at 32. CAUSE-PA also recommends that costs of the Referral Program should be recovered from participating EGSs through a POR discount or some other mechanism. CAUSE-PA St. No. 1 at 29. However, the costs of retail enhancement programs have no relationship to the purpose of POR programs, which is to encourage supplier entry into an EDC's retail market. Use of a POR discount to recover these program costs frustrates this goal. Suppliers who do not participate in these programs yet participate in POR may nonetheless bear costs of the programs. Suppliers can avoid bearing program costs because participation in the POR programs is voluntary. Accordingly, if EGSs are to be responsible for all costs of Referral Programs, FES encourages the Commission to approve the Companies' proposal that each participating EGS make an upfront payment of \$100,000 to fund start-up, and contribute to continuing monthly costs which will be divided by the number of participating EGSs.

5. Constellation's Proposal to Require Customers to "Opt-In" in Order to Be Eligible to Participate

FES reserves the right to reply to other parties' arguments on this issue.

6. The OCA's Proposal to Sequence the Implementation of the Customer Referral Program

FES reserves the right to reply to other parties' arguments on this issue.

7. RESA's Proposal to allow the Standard Offer Customer Referral Program to Displace the New/Moving Customer Referral Program

FES reserves the right to reply to other parties' arguments on this issue.

C. Limiting Participation By Low-Income Customers In Proposed Retail Market Enhancements

FES believes all customers should be allowed to participate in retail market enhancement programs. FES supports the position of the Companies, which propose to include customers who participate in their customer assistance programs ("CAP") in the Opt-In Program and Customer Referral Program (Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 23, 29). In the *IWP Order* the Commission recognized that CAP customer participation in electric competition varies among EDCs, so left the issue of CAP customer inclusion in retail opt-in auction programs to be determined within each EDC's DSP. *IWP Order* at 43. The *IWP Order* guidelines state that at this time, CAP customers should be excluded from the Standard Offer Customer Referral Program. *IWP Order* at 31. However, FES supports the Companies' proposal to include CAP customers in their Referral Programs; the proposal is supported by good cause which includes the Companies' operational constraints, as well as substantial evidence described below in the discussion of CAUSE-PA's proposal. See Met-Ed/Penelec/West Penn/Penn Power St. No. 7-R at 43

1. CAUSE-PA's Proposal

FES disagrees with CAUSE-PA, which recommends that CAP customers should not be permitted to participate in the Companies' Opt-In Program and Referral Program. In its Direct Testimony CAUSE-PA supported the inclusion of CAP customers if seven criteria were adopted. CAUSE-PA St. No. 1 at 20-21. The Companies addressed the CAUSE-PA proposals in their Rebuttal Testimony. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 20-22. In its Surrebuttal Testimony, CAUSE-PA changed its position to recommend precluding CAP customers' participation in either the Opt-In Program or the Customer Referral Program.

CAUSE-PA St. No. 1-SR at 7. CAUSE-PA's rationale for its change in position is primarily that the Companies cannot guarantee that CAP customers' prices will never be more than the PTC for the duration of the programs, CAUSE-PA St. No. 1-S at 9, and that the programs do not provide that customers be returned to default service upon their completion. For the reasons described below and in Section IV.A.10, FES submits that the Commission should reject CAUSE-PA's recommendation on CAP customer participation. CAUSE-PA St. No. 1-S at 10. In the Companies' service territories, CAP customers are permitted to shop, and their benefits are portable and cannot be reduced if they switch to an EGS. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 42-43. Further, CAUSE-PA's requirement that customers be returned to default service upon the completion of service under the retail market enhancement programs is contrary to the Commission's guidelines. *IWP Order* at 32, 75.

2. The OCA's Proposal

Similar to the CAUSE-PA position, the OCA proposed in its Surrebuttal Testimony that CAP customers be excluded from the opt-in auction unless their bills will definitely be lower than the PTC during the entire auction term (OCA St. No. 2-SR at 12). While this criterion is likely satisfied by the opt-in product being a fixed price that is at least 5% below the PTC at the time of the auction, and the term being only twelve months rather than the originally proposed twenty-four, it cannot be guaranteed. However, while the below-PTC price cannot be guaranteed for the duration of the program, CAP customers will be free to leave the program for other, better products if available. As the Commission pointed out in the *IWP Order*, all customers in the Opt-In Program, whether CAP customers or not, have voluntarily chosen to participate (*IWP Order* at 74). For these reasons, the OCA's proposed exclusion of CAP customers from the Opt-In Program should not be adopted.

V. OPERATIONAL ISSUES

A. System "Enhancements" Proposed by Constellation

FES reserves the right to reply to other parties' arguments on this issue.

B. RESA's Proposal that that Companies Investigate Implementing a Secure, Web-Based System to Provide EGS Electronic Access to Customer Usage and Account Data

FES reserves the right to reply to other parties' arguments on this issue.

VI. AFFILIATED INTEREST APPROVAL

A. Approval of Contracts under Chapter 21 as Requested in the Joint Petition

FES reserves the right to reply to other parties' arguments on this issue.

VII. OTHER ISSUES

FES reserves the right to reply to other parties' arguments on any other issues raised by any party.

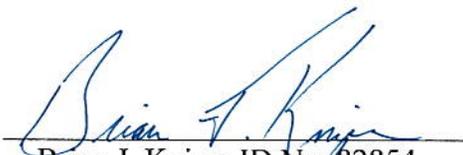
IX. CONCLUSION

For the foregoing reasons, the Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of Their Default Service Programs should be granted, in accordance with FirstEnergy Solutions Corp.'s recommendations.

Respectfully submitted,

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Dated: May 2, 2012

Attorneys for FirstEnergy Solutions Corp.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Petition of Metropolitan Edison Company, : P-2011-2273650
Pennsylvania Electric Company, Pennsylvania : P-2011-2273668
Power Company and West Penn Power Company : P-2011-2273669
For Approval of Their Default Service Programs : P-2011-2273670

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 § 1.54 (relating to service by a party).

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