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May 2, 2012

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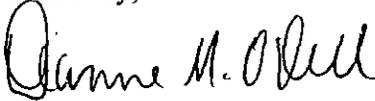
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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 the Retail Energy Supply Association ("RESA") enclosed for filing please find an original and nine copies of its Main Brief with regard to the above-referenced matter. Please note that Attachment A contains proprietary information and is being provided in a sealed envelope and should be handled accordingly. Copies being served in accordance with the attached Certificate of Service.

Sincerely,



Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Elizabeth H. Barnes w/enc.
Cert. of Service w/enc.

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

MAIN BRIEF OF THE RETAIL ENERGY SUPPLY ASSOCIATION

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I. INTRODUCTION AND PROCEDURAL HISTORY

In this proceeding, Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”), and West Penn Power Company (“West Penn”) (collectively the “Companies” or “FirstEnergy”) propose to implement a default service plan and various retail market enhancements for the period of June 1, 2013 through May 31, 2015. Critically important is the fact that during this time period, the Commission will be continuing to implement improvements “to ensure that a properly functioning and workable competitive retail electricity market exists in the state” – a process started as a result of the merger of the four electric distribution companies (“EDCs”) of FirstEnergy.¹ The “improvements” identified by the Commission are: (1) “retail market enhancement programs” that move stagnant default service customers into the competitive market (the “Intermediate Work Plan”); and, (2) restructuring default service as it exists today so that it is provided by the competitive market rather than the EDCs (the “Long Term Work Plan”).

Cognizant of the June 1, 2013 expiration of the default service plans for the Companies as well as other large EDCs, the Commission has provided specific guidance about the default service plans that should be implemented in this transition period.² In addition to the structure of the default service plans, the Commission has also provided guidance about the structure and

¹ *Investigation of Pennsylvania’s Retail Electricity Market*, I-2011-2237952 Order entered April 29, 2011 at 2, citing *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company*, Docket Nos. A-2010-2176520 and A-2010-2176732 Order entered March 8, 2011 at 46.

² *Investigation of Pennsylvania’s Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952, Final Order entered December 16, 2011 (“*Default Service Order*”).

content of the various retail market enhancements that it expects to be addressed in the default service plan proceedings.³

The Commission's overall objectives must not and cannot be ignored when analyzing the default service plan offered here by FirstEnergy. In fact, the Retail Energy Supply Association ("RESA"),⁴ a trade association of electric generation suppliers ("EGSs"), submits that the record in this proceeding does not support adoption of the Companies' proposed default service procurement plan and its retail market enhancement programs as consistent with the Electricity Generation Customer Choice and Competition Act ("Competition Act")⁵ or the Commission's articulated goals of: (1) moving forward to restructure default service as it exists in Pennsylvania today; and, (2) incenting consumers to select alternative suppliers from the competitive market. Therefore, RESA recommends that various modifications be implemented regarding the proposed procurement plan – most significantly: (1) removing the exclusive reliance on 24-month contracts; (2) ensuring that power is not procured too far in advance of delivery; and, (3) lowering the wholesale supplier load caps. These changes will create a more market-reflective and market-responsive default service plan more reasonably calculated to comply with the requirements of the Competition Act and meet the goals set by the Commission, all of which are especially crucial in this transitional period.

³ *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Tentative Order entered March 2, 2012 ("*Intermediate Work Plan Final Order*").

⁴ RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

⁵ 66 Pa. C.S. § 2801, et. seq.

In addition, RESA recommends that the retail market enhancements offered by the Companies be modified. While most of RESA's suggested modifications are consistent with the guidance of the Commission in its Intermediate Work Plan, a few modifications are recommended in consideration of the record evidence showing the unique circumstances in the FirstEnergy service territories. All of RESA's recommendations in this regard are offered with the goal of ensuring that these programs have the greatest chance of achieving success since such success will benefit all stakeholders and consumers.

As explained further below, adopting all of RESA's proposed modifications will lead to a default service plan that is: (1) legally required by the Competition Act; (2) consistent with the goals articulated by the Commission; and, (3) necessary for the development of a properly functioning and workable competitive retail electric market in the FirstEnergy service territories – territories which serve more than one-third of Pennsylvania's electric customers (35.6%).⁶

A. Summary of RESA's Positions

RESA recommends that the Commission make the following modifications to the proposed default service plan offered by FirstEnergy:

Residential Portfolio

- Move 2012 and 2013 auction dates to be closer to the date of delivery, reduce the amount of 24 month contracts and include some 12 month contracts.

Commercial Procurement Portfolio

- Eliminate all 24-month contracts from the portfolio and replace with 12-month contracts in addition to the other 10% of the portfolio which is comprised of spot market purchase and move the 2012 and 2013 auction dates to be closer to the date of delivery.

⁶ RESA St. No. 1 at 18.

Load Cap

- Lower the load cap that can be served by any single wholesale supplier to 50%

RESA recommends that the Commission make the following modifications to the retail market enhancements proposed by FirstEnergy:

Opt-in Auction

- The Commission should conduct a survey-like “test” of the likely customer response before the auction is implemented
- Utilize a 12 month term for the opt-in auction
- Conduct the auction after the enrollment rather than prior
- Shopping customers should not be eligible to participate and the restriction should be included on promotional materials
- Small business customers with loads at or below 25kW should be eligible to participate
- The auction should have both a 50% supplier load cap and a four winning bidder minimum requirement.
- Customers participating on Customer Assistance Programs (“CAP”) should be eligible to participate in both the opt-in auction and the standard offer referral program and the CAP support should be made portable

Standard Offer Referral Program

- The term of the product should be 12 months but the period of 7% off the Price to Compare (“PTC”) discount should be four months
- Residential and small business customers should be eligible to participate

New/Mover Referral Program

- Companies should not incur significant costs to create a “hot transfer” capability; but should develop a procedure whereby the EDC enrolls an applicant or moving customer that knows the EGS from which he or she wishes to take service

Cost Recovery

- Recover costs of all the retail market enhancement programs from the proposed Market Adjustment Charge (“MAC”), if approved, or; alternatively, from the Default Service Support (“DSS”) Rider

Time-Of-Use Rates

- Each EDC can satisfy its obligation by certifying that Time Of Use (“TOU”) rates are being offered by EGSs in its service territory

B. Procedural History

On November 17, 2011, the Companies filed a Joint Petition for Approval of their Default Service Implementation Plans for the period beginning June 1, 2013 through May 31, 2015 (“Joint Petition”). Each Company is an electric distribution company (“EDC”) and is currently the default service provider (“DSP”) in its respective service area.⁷ The Joint Petition sets forth proposals for the second default service procurement plan for each Company. Notice of the Joint Petition was published in the *Pennsylvania Bulletin* on December 3, 2011.⁸

The Joint Petition was assigned to Administrative Law Judge (“ALJ”) Elizabeth H. Barnes. On December 22, 2011, a prehearing conference was held by ALJ Barnes. At that time, *inter alia*, the Companies motion for consolidation was granted and RESA’s timely Petition for Intervention was granted. An Amended Scheduling Order was issued on December 29, 2011.⁹

⁷ The Companies currently provide default service pursuant to Commission-approved default service plans that will expire on May 31, 2013. See Docket Nos. P-2009-2093053 and P-2009-2093054 (Met-Ed and Penelec) (Order entered November 6, 2009); Docket No. P-2010-21576862 (Penn Power) (Order entered October 21, 2010); Docket No. P-000722342 (West Penn) (Order entered July 25, 2008).

⁸ 41 Pa.B. 6484 (December 3, 2011); 41 Pa.B. 6485 (December 3, 2011).

⁹ The original scheduling order (dated December 22, 2011) was rescinded and replaced by this Amended Scheduling Order. On February 7, 2012, RESA filed a Motion requesting a modification of the schedule. Specifically, RESA requested that the non-Company testimony regarding the “competitive enhancements”

The active parties conducted discovery. During the discovery phase, the ALJ resolved some discovery disputes, including a dispute between FirstEnergy and RESA. Because FirstEnergy proposed wholesale supplier load caps, RESA sought data on the performance of those load caps to inform its recommendations regarding whether any changes in the proposed load cap levels or structure were justified.¹⁰ The Companies and FirstEnergy Solutions Corp. (“FES”) objected, and the ALJ declined to compel the Companies to respond to RESA’s discovery requests related to the load cap data.¹¹

The evidentiary hearing commenced on April 11, 2012 and ended on April 12, 2012. In addition to the Companies, the following parties submitted testimony on their behalf or otherwise participated in the hearings: RESA; ARIPPA; Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”); the Commission’s Bureau of Investigation and Enforcement (“I&E”); Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (“Constellation”); Dominion Retail, Inc. (“Dominion”); Exelon Generation Company, LLC and Exelon Energy Company (“Exelon”); FES; the Office of Consumer Advocate (“OCA”);¹² the Office of Small Business Advocate (“OSBA”); Washington Gas Energy Service (“WGES”); York County Solid Waste and Refuse Authority (“YCSWFA”);

be held in abeyance until the Commission issued the *Intermediate Work Plan Final Order*. RESA’s motion was denied on February 16, 2012.

¹⁰ The requested information would have shown if one or two suppliers, including any affiliates of the Companies, have dominated the procurement process used by the Companies in the wholesale auctions conducted during the existing default service period. If one or a small number of suppliers has consistently dominated the wholesale auctions, this could justify more robust load caps. If an affiliate of the Companies has been one of largest winning bidders, this could indicate that existing code of conduct or bidding rules need to be reexamined to prevent such market domination.

¹¹ *Order Denying The Retail Energy Supply Association's Motion To Compel*, March 16, 2012.

¹² The term “Consumer Advocate Groups” collectively refers to CAUSE-PA and OCA.

Met-Ed Industrial Users Group (“MEIUG”), Penelec Industrial Customer Alliance (“PICA”), Penn Power Users Group (“PPUG”), West Penn Power Industrial Intervenors (“WPPII”)¹³.

The record was closed on April 12, 2012 and the Competition Act and the Competition Act mandates that Commission issue a decision on the Joint Petition by August 17, 2012.¹⁴

C. Legal Standards

1. Burden of Proof

Section 332(a) of the Public Utility Code (“Code”) provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding.¹⁵ It is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”¹⁶ A preponderance of the evidence means evidence which is more convincing, by even the smallest amount, than that presented by the other party.¹⁷ Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence.¹⁸ More information is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.¹⁹

¹³ The term “Industrial Intervenors” collectively refers to MEIUG, PICA, PPUG, and WPPII.

¹⁴ 52 Pa. Code § 5.431(a).

¹⁵ 66 Pa. C.S. § 332(a).

¹⁶ *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

¹⁷ *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

¹⁸ *Mill v. Pa. PUC*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. PUC*, 623 A.2d 6 (Pa. Cmwlth. 1993).

¹⁹ *Norfolk and Western Ry. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa. Super. 1960); *Murphy v. Commonwealth, Dep’t. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

The Companies have the ultimate burden of proof in the proceeding and the initial burden of going forward with evidence showing that its proposals are lawful and reasonable.

2. Standards Applicable to Default Service

The Competition Act addresses the requirements that the Companies, as EDCs providing default service, must meet.²⁰ The Competition Act does not require a specific rate design methodology for non-shopping customers in the post transition period. Instead, it requires that the default service provider, acquire electric energy through a “prudent mix”²¹ of resources that must be designed: (i) to provide adequate and reliable service; (ii) to provide the least cost to customers over time; and, (iii) to achieve these results through competitive processes which includes auctions, requests for proposals and/or bilateral agreements.²²

The Competition Act also mandates that customers have direct access to a competitive retail generation market.²³ This is based on the legislative finding that “competitive market forces are more effective than economic regulation in controlling the costs of generating electricity.”²⁴ Thus, a fundamental policy underlying the Code is that competition is more effective than economic regulation in controlling the costs of generating electricity.²⁵

²⁰ See 66 Pa. C.S. § 2807(e).

²¹ 66 Pa. C.S. § 2807(e)(3.2).

²² 66 Pa. C.S. §§ 2807(e)(3.1).

²³ 66 Pa. C.S. § 2802(3).

²⁴ 66 Pa. C.S. § 2802(5). See *Green Mountain Energy Company, et al. v. Pa. PUC*, 812 A.2d 740, 742 (Pa. Cmwlth. 2002).

²⁵ 66 Pa. C.S. § 2802(5).

In addition to the foregoing statutory guidelines, the Commission has enacted default service regulations²⁶ and a policy statement²⁷ addressing default service plans. The regulations first became effective in 2007 and recent amendments to the regulations to incorporate statutory changes to the Competition Act as a result of the implementation of Act House Bill 2200, Act 129 which became effective in November 2008, are pending.²⁸

3. Standards Applicable to Competitive Retail Market Enhancements

In its order entered April 29, 2011, the Commission initiated an investigation²⁹ into Pennsylvania's retail electricity market.³⁰ With the input of stakeholders, the Commission entered a Tentative Order (on December 16, 2011) that issued for public comment the intermediate work plan, which identified issues, tasks and goals to be resolved and implemented prior to the expiration of the EDCs' next round of default service plans, in an effort to improve the retail electricity market.³¹ The Commission entered its *Intermediate Work Plan Final Order* on March 2, 2012.³²

²⁶ 52 Pa. Code §§ 54.181 to 54.189.

²⁷ 52 Pa. Code §§ 69.1802 to 69.1817.

²⁸ *Proposed Policy Statement Regarding Default Service and Retail Electric Markets*, Docket No. M-2009-2140580, Final Policy Statement entered September 23, 2011; *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 ("Act 129 Rulemaking"). The Act 129 Rulemaking was disapproved by the Independent Regulatory Review Commission ("IRRC") on March 15, 2012. On May 1, 2012, the Commission resubmitted the proposed regulations without modifications. A final decision from IRRC is pending.

²⁹ For ease of reference, the actual Investigation will be referred to as either the "Investigation" or "RMI."

³⁰ *Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952, Order entered April 29, 2011.

³¹ *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Tentative Order entered December 16, 2011 ("*Intermediate Work Plan Tentative Order*").

³² *Intermediate Work Plan Final Order*.

In its *Intermediate Work Plan Final Order*, the Commission correctly concluded that, while the shopping statistics are encouraging, “there is definite room for improvement to achieve the robust competitive market envisioned by the General Assembly.”³³ The Commission stated that measures should be used to “kick-start” retail competition.³⁴ These measures include a plan for an opt-in auction and a referral program.³⁵ The Commission also directed that a “new/mover” referral program be created pursuant to which each new or moving customers would be informed of the options for taking service from a competitive supplier and be “hot transferred” to a specific EGS, if, at the time of initiation of distribution service, the new or moving customer has identified an EGS from which the customer wished to receive generation service.³⁶ The *Intermediate Work Plan Final Order* also set forth the Commission’s view of the structure and timing of the previously endorsed “standard offer” referral programs as well as opt-in auctions.³⁷

It should be noted the *Intermediate Work Plan Final Order* is characterized by the Commission as “guidance.” But, the Commission did make clear that “to the extent that an EDC chooses to deviate from the guidelines, [it] expect[ed] the differences to be justified by good cause shown, which includes operational constraints, or supported by evidence produced during an EDC’s default service proceeding and supported substantially by interested parties in the

³³ *Id.* at 3 quoting with approval *Investigation of Pennsylvania’s Retail Electricity Market*, Opinion and Order entered July 28 Order at 7.

³⁴ *Id.* at 32.

³⁵ *Id.* at 13-14, 33-34.

³⁶ *Id.* at 14-20.

³⁷ *Id.* at 30-78.

default service proceeding.”³⁸ The Commission also acknowledged that it “would have to accommodate any ‘unique situations’ confronted [in the individual default service plans].”³⁹ Accordingly, merely asserting that a contrary policy position is superior to that which the Commission has adopted is an insufficient basis on which to diverge from the directives of the *Intermediate Work Plan Final Order*.

II. DEFAULT SERVICE PROCUREMENT AND IMPLEMENTATION PLANS

A. Procurement Groups

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

RESA takes no position on this issue.

B. Residential and Commercial Class Default Service Procurement

In sum, RESA makes the following recommendations regarding the procurement plan proposed by FirstEnergy:

Residential Portfolio

- Move 2012 and 2013 auction dates to be closer to the date of delivery, reduce the amount of 24 month contracts and include some 12 month contracts.

Commercial Procurement Portfolio

- Eliminate all 24-month contracts from the portfolio and replace with 12-month contracts (with 90% fixed price and 10% spot market priced) and move the 2012 and 2013 auction dates to be closer to the date of delivery.

³⁸ *Id.* at 6-7.

³⁹ *Id.* at 36.

Load Cap

- Lower the load cap that can be served by any single wholesale supplier to 50%

1. Summary and Overview of Each Party's Position

a. Companies' Proposal

The Companies propose to acquire full-requirements service for residential, commercial and industrial service customers through descending-clock auctions from the period of June 2013 through May 2015. For the residential and commercial classes, FirstEnergy proposes to hold two separate auctions in November 2012 and January 2013 for 24-month generation service products. The 24-month products will be comprised of tranches that consist of 10% spot real-time energy with the remaining 90% of energy requirements supplied at a fixed price per megawatt hour. For the industrial class, FirstEnergy will hold one auction for a 24-month real-time spot product with suppliers bidding on the level of adder to be included with the real-time price.⁴⁰ The Companies propose a wholesale supplier load cap of 75% on an aggregated load basis across all auction products for each auction such that no bidder may bid on and win more than the load cap.⁴¹

RESA believes that the Companies' proposal must be modified to ensure that it is more market responsive consistent with the Competition Act and the goal of fostering the development of the retail electricity market. As explained below in section II.B.2, FirstEnergy's proposed reliance on 90% two-year contracts and just 10% spot market priced purchases for the residential and commercial customers must be modified because securing the price for the power two years

⁴⁰ Met-Ed/Penelec/Penn Power/West Penn St. No. 6 at 6-7.

⁴¹ Met-Ed/Penelec/Penn Power/West Penn Exhibit BAM-1 at Section 4.2.

prior to delivery will result in default service rates that bear no relationship to the price of energy at the time the power is delivered to consumers.

As explained below in section II.B.3.b, the proposed timing of the procurement auctions is too far in advance of the delivery date and will result in pricing that does not reflect the market price at the time of delivery for that corresponding supply. This means that wholesale suppliers will need to incorporate a higher level of risk into the contract price which will artificially increase the resulting default service rate thus making it less market reflective.

Finally, as explained below in section II.B.8, the Companies' proposed 75% wholesale supplier load cap must be lowered to promote greater wholesale supplier diversity. From the only evidence that was able to be adduced here (the Companies' and their affiliated EGS were able to successfully block access to more detailed information), diversity of supply appears to be a serious issue for these service territories.

b. Recommended Modifications of OCA

OCA makes several recommendations regarding the Companies' proposed procurement plan for residential customers. First, OCA recommends that 20% of the default service load be assigned to the Opt-In Auction Program. Second, OCA recommends that the remaining 80% of the default service load be divided into full requirements contracts (60% of the overall load) and "block and spot" procurements (20% of the overall load).⁴² For the portion of the default service load to be served by full requirement contracts, OCA recommends that half of the contracts in the first year be one-year contracts and the other half consist of two-year contracts. At the expiration of the one-year contracts, OCA recommends that they be replaced by two-year

⁴² OCA St. No. 1 at 24-25.

contracts which would extend beyond the expiration date for this default service plan.⁴³ Third, OCA recommends that Met-Ed, Penelec and West Penn Power each procure a 50 MW four-year, round-the-clock block to provide “rate smoothing” at the end of the currently proposed plan.⁴⁴ Finally, OCA recommends that the separate spot market procurement proposed by FirstEnergy be eliminated.⁴⁵

OCA’s uncompetitive, non-market responsive modifications should be rejected. As explained below in section II.B.4, creating a procurement plan that will extend beyond the procurement term expiration date of May 31, 2015 is not consistent with the Commission’s clear directive “that EDCs file plans limiting or eliminating the existence of short-term energy contracts extending past the date of upcoming default service plan time period; and . . . that EDCs limit the proportion of long-term contracts that make up their default service plan energy portfolios, and consider using already existing long-term contracts from previous or presently effective default service plans.”⁴⁶

As explained below in section II.B.5, OCA’s proposal to continue the Companies’ current “block and spot” purchases and to eliminate the Companies’ proposal to procure spot market supply will create a default service procurement plan unlikely to result in default service rates that promote the development of a robust, sustainable and competitive retail market because the resulting default service rates will be divorced from the market prices for energy.

⁴³ *Id.* at 25.

⁴⁴ *Id.*

⁴⁵ *Id.* at 26.

⁴⁶ *Default Service Order* at 19.

Finally, as explained below in section II.B.6, RESA strongly opposes OCA's proposal to hold back 20% of the default service load to be assigned to the Opt-In Auction Program because the Commission has already concluded a 50% standard is reasonable and the record does not provide any evidentiary support for deviating from this recommendation.

c. Recommended Modifications of OSBA

OSBA recommends that the initial procurement for small commercial and industrial customers secure half of their default service requirements through one-year default service contracts and half of their requirements through a six-month contract. After every subsequent six month period, OSBA recommends that the Companies would conduct a procurement to replace the expiring default service contract with a new 12-month contract.⁴⁷ OSBA further recommends that – to the extent the Commission retains its desire to have all contracts expire in May 2015 with the expiration of the default service plan term – the last default service procurement would be for a six month contract.⁴⁸ As explained below in section II.B.1.c, RESA does not oppose OSBA's recommendations.

2. Term of Contracts

Section 2807(e)(3.2) requires that the electric power procured pursuant to Section 2807(e)(3.1) shall include a prudent mix of:

- (i) Spot market purchases.
- (ii) Short-term contracts.
- (iii) Long-term purchase contracts. . .

⁴⁷ OSBA St. No. 1 at 15.

⁴⁸ *Id.* at 16.

Section 2807(e)(3.4) requires that the “prudent mix” of contracts shall be designed to ensure: (i) adequate and reliable service; (ii) the least cost to customers over time; and, (iii) compliance with the competitive procurement requirements of Section 2807(e)(3.1).⁴⁹ Thus, the Competition Act requires that a “prudent mix” of spot, long-term, and short-term contracts is one which – when considered holistically – is the mix which is most reasonably likely to result in a sustainable, competitive retail market, which will ensure that all consumers receive the least cost generation over time. Approving a plan that will promote retail competition empowers consumers to assess these risks for themselves and choose the product that best meets their individual needs and risk tolerance levels. To stimulate competition, the default service plan must produce default service rates that are market-reflective, market-responsive and include all of the relevant costs incurred by the EDC in providing default service.⁵⁰ As explained by RESA witness Williams, the development of retail competition for mid-sized commercial customers in Maryland illustrates the value market responsive pricing has on retail competition.⁵¹

In this case, RESA does not support FirstEnergy’s proposal to rely on a two year product that is comprised of 90% fixed price and 10% spot market priced for the residential and commercial customers, nor does RESA support OCA’s proposed modifications to add a one 50 MW four-year, round-the-clock block. Such heavy reliance on two-year contracts with the addition of another four-year purchase is uncompetitive and will almost certainly result in default service prices that are decoupled from wholesale market prices, resulting in shattering the little shopping that is occurring in the service territories of the Companies. This is because the

⁴⁹ 66 Pa. C.S. § 2807(e)(3.1).

⁵⁰ RESA St. No. 1 at 9-10.

⁵¹ *Id.* at 10.

substantial reliance on full requirements contracts of two years with the addition of a four year contract is likely to diverge significantly (either upward or downward) from the then-current market price which is not likely to produce the least cost for customers.⁵² Such a procurement design virtually guarantees that prices will be substantially out of line with current market conditions at the time of delivery and will not sustain retail market development. This is because an EGS evaluating its prospects for a viable business could not reasonably conclude that a default service rate which includes two-year and four-year fixed price contracts will follow market prices. This anticipation that future rates will be divorced from market prices creates substantial risk for new suppliers wishing to enter the market and will impede new market entry.

The Companies attempt to downplay this concern by pointing out that the contracts “will reflect market pricing at the time they are purchased.”⁵³ This, however, is immaterial to RESA’s point that the default service rate at the time of delivery will not be market-reflective because nobody can predict how the market price may have changed between procurement and delivery. Even the Companies repeatedly concede this point, i.e. “there is no certainty that a market – the current market price will be significantly different one or even two years out in time.”⁵⁴ The Companies appear to be intentionally missing the point or trying to distract away from it. Regardless, there is no record dispute that the longer the contract term the more out-of-market the default service rate will be at the time of delivery regardless of whether it is higher or lower. There is, likewise, no record dispute that if the market price at the time of delivery is

⁵² *Id.* at 11.

⁵³ Tr. at 142 (Stathis).

⁵⁴ Tr. at 143 (Stathis).

significantly different (either higher or lower), that difference will have a negative impact on the ability of EGSs to compete.

The only certain way to address this concern is by adopting RESA's recommendation that the Companies replace the 24-month contracts with some 12-month contracts as set forth in RESA Exhibit AW-1. For the residential class, the first auction would include 15 tranches of 24-month contracts while the subsequent two auctions would include a total of 30 tranches of 12-month contracts. This would result in a product comprised of 24-month fixed price contracts (45%), 12-month fixed price contracts (45%), and spot price (10%). For the commercial classes, all 24-month contracts would be replaced with 12-month contracts.⁵⁵ This would result in a product comprised of 12-month fixed price contracts (90%), and spot price (10%). RESA does not support the modifications offered by OCA regarding contract terms.

The only certain way to address this concern is by adopting RESA's recommendation that the Companies replace the 24-month contracts with some 12-month contracts as set forth in RESA Exhibit AW-1. For the residential class, the first auction would include 15 tranches of 24-month contracts while the subsequent two auctions would include a total of 30 tranches of 12-month contracts. For the commercial classes, all 24-month contracts would be replaced with 12-month contracts.⁵⁶ RESA does not support the modifications offered by OCA regarding contract terms.

The Companies and FES objected to RESA's proposed modifications disputing the benefits of a default service procurement plan comprised of shorter term contracts and claiming

⁵⁵ RESA St. No. 1 at 14.

⁵⁶ *Id.*

that the 24-month contracts will “provide customers with price certainty and predictability.”⁵⁷ As further support for their misguided arguments, the Companies offered an analysis purporting to show that there is “not a statistically...significant difference between the 12 or the 24 month product, so you cannot say, based on this evidence that the 24 month product has a higher risk premium than the 12 month product.”⁵⁸ However these criticisms are not valid, nor is their supporting documentation. The Companies attempted to prove that there is no higher a risk premium added to 12 month products than 24 month products by conducting a statistical test of the risk premiums embedded in six specific point-in-time procurement auctions to conclude that there is no difference.⁵⁹ Reliance, however, upon historical procurements at a specific point in time is not indicative of future performance, just as the circumstances that are present in future procurements are not likely to mimic those in existence during past procurements. More than this, though, if the Companies were correct that there is no real difference from a “risk premium” perspective between 12 and 24-month contracts, then this further supports utilizing 12 month contracts because the longer period of time between pricing and delivery means a greater likelihood that those prices will diverge from current market prices.⁶⁰ Thus, since 12-months is a shorter period of time than 24-months, 12-month contracts will indisputably be more market reflective at the time of delivery than the longer 24-month contracts. Thus, the record and even the Companies’ own analysis support RESA’s proposed modification to shorten some of the contract terms.

⁵⁷ Met-Ed/Penelec/Penn Power/West Penn St. No. 4-R at 3-4, FES St. No. 1-R at 19, Tr. at 142.

⁵⁸ Tr. at 165 (Stathis); Companies’ Exhibit JDR-3.

⁵⁹ Companies’ Exhibit JDR-3.

⁶⁰ RESA St. No. 1-SR at 2-3.

Regarding the “price certainty and predictability” claims of the Companies and FES in support of their position to rely on 24-month contracts, the Competition Act does not legally mandate these goals of a default service procurement plan because, as just explained, longer term contracts will not lead to the most market reflective default service rate at the time of delivery. Moreover, setting aside everything else, certainty and predictability in the resulting default service rate cannot be guaranteed and, in fact, is not likely due to the inclusion of a reconciliation mechanism which, depending on how it is calculated, may create an “unstable” and completely unpredictable default service rate regardless of the length of the contracts.⁶¹

3. Procurement Dates

a. Number of Procurements Per Delivery Year

RESA’s proposed changes to the auction dates, the types of contracts to be procured and the delivery dates are set forth in RESA Exhibit AW-1.⁶² For the residential portfolio, RESA would add a third auction on March 2014 for delivery on June 2014 and all corresponding tranches should include 12-month contracts.⁶³

b. Dates of Procurements Relative to Delivery Year

Pursuant to the Companies’ proposal, all contracts would be procured at least five months prior to delivery and some would be procured seven months prior to delivery.⁶⁴ The proposed timing of the auctions are too far in advance of the delivery date and will result in pricing that does not reflect the market price at the time of delivery for that corresponding supply. The

⁶¹ *Id.* at 3.

⁶² RESA St. No. 1 at 3-4 ,12-13.

⁶³ *Id.* at 14-15.

⁶⁴ Met-Ed/Penelec/Penn Power/West Penn Exhibit DWS-1.

Commission has already recognized that the more distant a contract negotiation is from its implementation date, the greater the need to incorporate a higher level of risk into the contract price.⁶⁵ Based on the Companies' proposed procurement schedules, there would be a lag of five and seven months between procurement and delivery date.⁶⁶ The long procurement-to-delivery lead times means that across the default service program term, a substantial percentage of supply will be based on prices that are substantially "out of date" and do not reflect current market prices or conditions.⁶⁷

Accordingly, RESA recommends that the timing of the two proposed auctions be adjusted so that they will be closer in time to delivery. For the residential class, the November 2012 auction should be moved to January 2013 for June 2013 delivery. This shortens the lag time from seven months to five months. Also for the residential class, the January 2013 auction should be moved to March 2013 for June 2013 delivery. This will shorten the lag time from five months to three months. Finally, for the residential class, RESA proposes the addition of a third auction to be held in March 2014 for June 2013 delivery for a lag time of three months.⁶⁸

For the commercial classes, RESA recommend that the November 2012 auction be moved to March 2013 for June 2013 delivery and that the tranches for the proposed November and January auctions be combined and all procured in the March 2013 auction. This shortens the lag time from seven months to three months. Likewise, RESA recommends that the proposed January 2013 auction be moved to March 2014 and that all tranches be procured at the same time

⁶⁵ *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 at 37.

⁶⁶ Met-Ed/Penelec/Penn Power/ West Penn Exhibit DWS-1.

⁶⁷ RESA St. No. 1 at 11-12.

⁶⁸ *Id.* at 15-16.

for the second year of the default service plan period, again shortening the lag time from five months to three months prior to delivery in June 2014.⁶⁹

The Companies criticized RESA's proposal on several misguided grounds. First, they claimed that prices in advance of delivery may be "higher, lower or equal" to the price at delivery and this is a necessary outcome.⁷⁰ Second, they claimed that prices acquired closer to delivery "have shown higher, not lower, overall prices."⁷¹ Finally, the Companies claimed that the Companies' intent to allow suppliers to select their own Auction Revenue Rights ("ARRs") and Financial Transmission Rights ("FTR") negates the feasibility of shortening the procurement delivery times.⁷² The Companies are wrong on all three points.

Regarding points one and two, the Companies do rightly recognize that fixed prices for forward purchases of default service supply will almost certainly prove to be inaccurate but the conclusion they draw from this fact is faulty. While the Companies have provided some examples of instances where the result could be higher default service rates, this only proves RESA's point that contracts procured too far in advance of delivery will always diverge from the market price at the time of delivery. Whether that divergence will be higher or lower is unknowable and the only reasonable solution is to shorten the procurement delivery times as proposed by RESA. As to the third point, the Companies have provided no evidence to support

⁶⁹ RESA St. No. 1 at 15-16.

⁷⁰ Met-Ed/Penelec/Penn Power/West Penn St. No. 4-R at 8.

⁷¹ *Id.* at 6-7.

⁷² *Id.*

the claim that their ARR proposal somehow undermines their ability to shorten the procurement delivery window.⁷³

4. Laddering of Contracts Beyond June 1, 2015

RESA does not support the use of any default service contracts, regardless of the term, that extend beyond the expiration date of the default service plan term.⁷⁴ In its *Default Service Order*, the Commission recommended “that EDCs file plans limiting or eliminating the existence of short-term energy contracts extending past the end date of the upcoming default service plan time period; and ... that EDCs limit the proportion of long-term contracts that make up their default service plan energy portfolios, and consider using already existing long-term contracts from previous or presently effective default service plans.”⁷⁵

FirstEnergy has not proposed any such contracts in its filing and the recommendations of OCA to implement them must be rejected because doing so may undermine the efforts and progress of the Commission in the RMI proceeding to implement its Long Term Work Plan to restructure default service as it exists today.

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

OCA recommended that 80% of the default service load be divided into full requirements contracts (60% of the overall load) and “block and spot” procurements (20% of the overall load).⁷⁶ For the portion of the default service load to be served by full requirement contracts,

⁷³ RESA St. No. 1-SR at 6-7.

⁷⁴ RESA St. No. 1-R at 3.

⁷⁵ *Default Service Order* at 19.

⁷⁶ OCA St. No. 1 at 24-25.

OCA recommended that half of the contracts in the first year be one-year contracts and the other half consist of two-year contracts. At the expiration of the one-year contracts, OCA recommended that they be replaced by two-year contracts which would extend beyond the expiration date for this default service plan.⁷⁷

OCA's proposal for the full requirement portion of the default service load must be rejected for two reasons. First, while replacing half of the two year contracts with one-year contracts is similar to RESA's recommendation, replacing the expired one-year contracts with two-year contracts is not.⁷⁸ OCA's proposal would result in a significant portion of the default service load (60%) being served by two year full requirements contracts.⁷⁹ The inclusion of such a significant amount of two year default service contracts as proposed by OCA is inconsistent with the policy of this Commonwealth because it will impair establishment of a robust competitive retail market that enables customers to choose from a variety of products and services customized to meet their unique and individual needs.⁸⁰ As explained above in section II.B.2, RESA does not support a default service procurement plan design that has primary reliance on two-year default service contracts because the result is likely to be default service rates that diverge significantly (either upward or downward) from the then-current market price.⁸¹ OCA's proposal would only exacerbate this concern.⁸²

⁷⁷ *Id.* at 25.

⁷⁸ RESA St. No. 1-R at 3.

⁷⁹ *Id.*

⁸⁰ RESA St. No. 1 at 11; RESA St. No. 1-R at 3.

⁸¹ *Id.*

⁸² RESA St. No. 1-R at 3.

Second, OCA’s full requirements default service approach would mean that half of the default service contracts would continue into the first year following the May 31, 2015 expiration of this default service plan.⁸³ As explained above in Section II.B.4, RESA does not support the use of any default service contracts, regardless of the term, that extend beyond the expiration date of the default service plan term. OCA’s recommendations extend beyond the two year date and thus are directly counter to the clear objective outlined by the Commission in its *Default Service Order*.⁸⁴ Permitting contracts to extend beyond the default service period would threaten the Commission’s ability to modify the default service structure, as it is seriously contemplating in its Retail Markets Investigation. OCA did not provide any compelling basis to ignore the directives of the Commission, and OCA’s recommendations, if accepted, would result in hindering the ability of the Commission to enact these much needed reforms.

For the portion served by “block and spot” procurements, OCA recommended that Met-Ed, Penelec and West Penn Power each procure a 50 MW four-year, round-the-clock block to provide “rate smoothing” at the end of the currently proposed plan.⁸⁵ OCA further recommended that the separate spot market procurement proposed by FirstEnergy be eliminated.⁸⁶ According to OCA witness Kahal, this approach will give the “Commission valuable experience” as “part of a legitimate search for best practices in the supply of default service.”⁸⁷

⁸³ OCA St. No. 1 at 25; RESA St. No. 1-R at 3.

⁸⁴ RESA St. No. 1-R at 4.

⁸⁵ OCA St. No. 1 at 25.

⁸⁶ *Id.* at 26.

⁸⁷ *Id.* at 24.

OCA's proposal for the "block and spot" portion of the default service load must be rejected. The inclusion of block and spot contracts imposes additional risk on all customers and is inconsistent with establishing default service rates in a manner that promotes the development of a robust sustainable competitive retail market because the underlying design of the procurement plan is not reasonably tailored to achieve a market responsive default service rate.⁸⁸ In fact, the Companies provided testimony showing that their cost of block-and-spot supply has been higher than the costs of full requirements contracts.⁸⁹ The Companies also expressed concern that the use of forward block purchases may leave the Companies with excess power if there is a decrease in electricity demand. This would, in turn, force the Companies to sell the excess power into the market at times when prices are relatively depressed resulting in higher, unanticipated costs for customers.⁹⁰ These unnecessary and potentially costly risks are not consistent with the Competition Act and the goals of this proceeding.

Finally, OCA proposes that adding block and spot eliminates the need for the 10% spot component of the Companies' default service procurement proposal.⁹¹ As explained above in section II.B.2, spot market purchases are an important part of a prudent mix of contracts that are designed to create a procurement plan likely to lead to market responsive default service rates consistent with the requirements of the Competition Act.

For all these reasons, RESA believes the mix of full-requirements and spot market products recommended by RESA is the more legally sound transition procurement approach for

⁸⁸ RESA St. No. 1-R at 4.

⁸⁹ Met-Ed/Penelec/Penn Power/West Penn St. No. 6-R at 3.

⁹⁰ *Id.* at 3-4.

⁹¹ OCA St. No. 1 at 26.

FirstEnergy's second default service plan following the expiration of rate caps and taking into consideration the efforts underway in the RMI process.⁹²

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

OCA recommended that 20% of the default service load be assigned to the Opt-In Auction Program which would place a cap on the amount of residential customers that would be able to participate in the retail opt-in auction.⁹³ In its *Intermediate Work Plan Final Order*, the Commission determined that no more than 50% of an EDC's default service customer base may participate in the retail opt-in auction.⁹⁴ OCA's proposal here would further limit the amount of default service customers that could participate in the auction.

RESA strongly opposes this hold back proposal and submits that OCA has not articulated any compelling reason to diverge from the Commission's 50% standard.⁹⁵ In choosing a 50% total participation cap, the Commission stated that it does not want to impose a lower cap that "may lead to the rejection of customers wishing to participate."⁹⁶ The OCA's position focuses almost exclusively on making sure the opt-in auction is not too successful in getting customers into the competitive market for fear that wholesale suppliers will perceive a market where most customers are shopping as "more risky" and, therefore, include a material risk premium.⁹⁷ This, however, is not a valid basis on which to structure these market-opening policies.⁹⁸ Indeed,

⁹² RESA St. No. 1-R at 4.

⁹³ OCA St. No. 1 at 30-33; OCA St. No. 2 at 11.

⁹⁴ *Intermediate Work Plan Final Order* at 60.

⁹⁵ RESA St. No. 2-R at 18-19.

⁹⁶ *Intermediate Work Plan Final Order* at 59.

⁹⁷ OCA St. No. 1 at 30; RESA St. No. 2-R at 18.

⁹⁸ RESA St. No. 2-R at 18.

default service is just that – an option of last resort if customers for whatever reason do not shop. Holding back the number of customers who could participate in the opt-in auction in favor of “preserving” default service is no different than imposing an arbitrary cap on the amount of shopping that will be permitted or imposing limits on any other steps that would reduce customer load, such as self-supply. Any of those steps are plainly inconsistent with the policies of the Commonwealth, just like OCA’s attempt here to prevent too many customers from shopping by limiting the number of customers who may participate in the opt-in auction. It would be antithetical to the goal of developing robustly competitive retail markets to limit the ability of customers to participate in the competitive market – through the Opt-In Auction.

Moreover, there has been no evidence submitted supporting the assertion that having more customers shop would have a material effect on wholesale default service prices.⁹⁹ To the contrary, shopping produces material benefits. Customers will receive far greater benefits over time from the competitive pricing and value added service and products that come from full competition.¹⁰⁰ That is exactly what the Commission is working to accomplish with its Intermediate Work Plan, contrary to the OCA’s unsupported assertions which must be rejected.

Even setting these points aside, however, the risk premium is likely not to be significant if OCA’s proposal were adopted. If the opt-in auction occurs prior to all or some of the wholesale supply auctions, any risk premium should be significantly reduced or eliminated beyond what a FirstEnergy supplier would have to bear with or without the opt-in auction.¹⁰¹ Thus, OCA’s concerns are ill-founded and should be rejected.

⁹⁹ *Id.* at 35-37.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 18.

7. **Procurement Method – Descending Price Clock Auction**

RESA takes no position on this issue.

8. **Load Cap**

The Companies' propose to implement a load cap of 75% for all four FirstEnergy EDCs. The Companies have provided no evidence to support their proposal. RESA recommends that the proposed load cap should be lowered to 50% . Wholesale supplier load caps are a competitive safeguard because they limit the exposure to the EDC – and, therefore, default service customers – of contract failure of any particular wholesale supplier. This is because a lower load cap promotes greater supplier diversity which will protect default service customers by mitigating the impact on default service rates should any single wholesale supplier not be able to meet its contractual wholesale supply obligations.¹⁰² If a wholesale supplier fails to meet its contractual obligations, the Companies' proposed 75% load cap for wholesale supply of default service could create an extremely high replacement cost that would be borne by default service customers.

Moreover, diversity of supply is a crucial means of insuring that one or a few suppliers do not dominate the FirstEnergy wholesale auctions, which, in turn, could result in control of pricing such that other competitors are eventually driven out of this market. This in turn could adversely affect both wholesale and retail prices. As explained further in Confidential Attachment A, the evidence shows that the effect of the 75% load cap for Met-Ed, Penelec and West Penn Power appears to have been negligible.¹⁰³ This supports RESA's recommendation

¹⁰² RESA St. No. 1 at 17-18.

¹⁰³ **Confidential** Attachment A is only being filed with the Commission under seal and being provided only to the parties who have signed the protective order entered in this proceeding.

that it be lowered. With a lower load cap, the Commission will be preventing the wholesale supply agreements from being concentrated in one or a few large wholesale suppliers (including affiliated suppliers of the EDCs), This, in turn, will reduce the potential replacement costs associated with a single wholesale supplier and ensure a variety of wholesale suppliers can ultimately provide the underlying supply for default service.¹⁰⁴

This issue should be of particular concern to the Commission in these default service territories given the fact that the FirstEnergy family of companies includes EDCs and an affiliate (FES) has been a successful bidder in the their past wholesale auctions.¹⁰⁵ Unfortunately, the Companies and FES vehemently opposed providing the Commission more specific details about what entities were successful wholesale bidders and how many times FES was a successful bidder.¹⁰⁶ Nonetheless, the fact that they did not want the Commission to have this information should be evidence enough that lower wholesale supplier load caps are necessary to assure adequate competition and reasonable rates for these service territories.

While the Companies offered no evidence to support their proposed load caps, they did attempt to rebut RESA's recommendation in several ways. First, the Companies' relied on the Commission's previous approval of a 75% load cap for Met-Ed, Penelec and Penn Power.¹⁰⁷ However, that approval occurred prior to the merger of the FirstEnergy EDCs with West Penn Power. With approval of the merger, more than one-third of Pennsylvania's electric customers (35.6%) are served by the four FirstEnergy EDCs and their combined service territory covers

¹⁰⁴ RESA St. No. 1 at 18.

¹⁰⁵ Answer of FirstEnergy Solutions Corp. to the Retail Energy Supply Association's Motion to Dismiss Objections and Compel Response dated March 1, 2012 at 2 (FES acknowledged that it was a successful bidder in the Companies' past wholesale auctions).

¹⁰⁶ *Order Denying The Retail Energy Supply Association's Motion To Compel*, March 16, 2012.

¹⁰⁷ Met-Ed/Penelec/Penn Power/West Penn St. No. 4-R at 10.

approximately 70% of the Commonwealth in terms of square miles. Given these changed facts, and the increased potential for companies affiliated with FirstEnergy to dominate the wholesale supply auctions, RESA believes that a lower load cap is justified. In addition, while Met-Ed and Penelec relied upon the imposition of a 75% load cap in Ohio as support previously, the Public Utilities Commission of Ohio (“PUCO”) did not begin with a 75% load cap for FirstEnergy. In 2004¹⁰⁸ and 2006,¹⁰⁹ PUCO imposed bid load caps of sixty-five percent (65%) for FirstEnergy. Later, FirstEnergy, on its own accord,¹¹⁰ included a seventy-five percent bid load cap in the request for proposal procurement process that it used to purchase power in this matter for the term beginning January 4, 2009, and ending May 31, 2009.¹¹¹ There is no publicly available information on the percentage amount of load won by each supplier in that Ohio auction.

Second, the Companies also claimed that, “A lower load cap may in fact dissuade suppliers (including potentially lower-cost suppliers) from participating to the fullest degree

¹⁰⁸ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Competitive Bid Process to Bid Out Their Retail Electric Load*, PUCO Case No. 04-1371-EL-ATA, Order of October 6, 2004, at Finding 15, which is available at: <http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=04-1371>.

¹⁰⁹ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company far Approval of a Competitive Bid Process far Retail Electric Load*, PUCO Case No. 05-936, Order of January 25, 2006, at Finding 12, which is available at: <http://dis.puc.state.oh.us/CaseRecord.aspx?CaseNo=05-936-EL-ATA> .

¹¹⁰ *See In the Matter of the Application of Ohio Edison Company, et al.*, PUCO Case No. 08-935-EL-SSO, *et seq.*, Second Opinion and Order entered March 25, 2009, at concurring and dissenting opinion of Commissioner Roberto, at n.1 and concurring opinion of Commissioners Centolella and Lemmie at n4, which is available at: <http://dis.puc.state.oh.us/caserecord.aspx?caseno=08-935-EL-SSO>.

¹¹¹ *Id.* In March 2009, PUCO reluctantly approved a settlement without load cap for Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. *Id.* But, in doing so, two commissioners expressed a desire to retain a 65% load cap, and one commissioner expressed a desire for a 50% load cap. *Id.* at concurring opinion of Commissioners Centolella and Lemmie (65%), and at concurring and dissenting opinion of Commissioner Roberto (50%).

possible, and thereby result in a higher price for default service supply.”¹¹² FirstEnergy provided no evidence to support this assertion. In contrast, RESA provided an example of at least one other jurisdiction that has adopted a much lower load cap than RESA has proposed in this case, and which has conducted numerous auctions that resulted in sufficient participation by wholesale suppliers. The New Jersey Board of Public Utilities has found that its auctions have resulted in competitive prices and they have approved those auction results each time.¹¹³

Finally, FES in particular is focused on making the point that RESA witness Williams is not aware of any publicly available information regarding a wholesale supplier not being able to meet its obligations related to the providing of default service in the last five years.¹¹⁴ However, this point is meaningless. Historical information does not prove that this situation could not or would not occur in the future. Therefore, adopting RESA’s recommendation to take reasonable steps, with other added benefits which are consistent with other states, to ameliorate the potential impact of something that may happen in the future is perfectly logical and reasonable.

Because the Companies have not supported their request to impose a 75% wholesale supplier load cap and the record supports RESA’s proposal to lower it to 50%, RESA’s proposal should be adopted.

C. Industrial Class Hourly-Priced Default Service

1. Summary and Overview of Each Party’s Position

RESA supports the Companies’ proposal on this issue.

¹¹² Met-Ed/Penelec/Penn Power/West Penn St. No. 4-R at 10.

¹¹³ RESA St. No. 1 at 18-19, RESA St. No. 1-SR at 8-9.

¹¹⁴ Exh. RESA-1.

D. Use of Independent Evaluator

RESA takes no position on this issue.

E. AEPS Requirements

1. Non-Solar Photovoltaic Requirements

RESA takes no position on this issue.

2. Solar Photovoltaic Requirements

Met-Ed and Penelec have proposed to reduce the amount of Solar Photovoltaic Alternative Energy Credits (“SPAECs”) procured for large commercial and industrial shopping customers from 100% to 40%. Under this proposal, the remaining 60% of SPAECs required by large commercial and industrial shopping customers would be procured by their individual EGSs.

Because Met-Ed and Penelec already procure all of the solar requirements for all load serving entities, RESA’s preference would be to maintain this approach for the next procurement plan.¹¹⁵ Continuing this approach would be consistent with the Commission’s existing policy to encourage the development of solar resources in the Commonwealth. In its Solar Policy Statement, the Commission has advised the EDCs to enter into long-term contracts for the procurement of SPAECs from 5 to 20 years in length.¹¹⁶ Given the Commission’s stated policy of promoting long-term procurement of SPAECs, RESA believes that, in the near term, the EDCs are better positioned to engage in long-term SPAEC procurements than EGSs.¹¹⁷ EGSs

¹¹⁵ RESA St. No. 1-R at 13.

¹¹⁶ 52 Pa. Code § 69.2904.

¹¹⁷ RESA St. No. 1-R at 12.

lack the ability to enter into similar agreements primarily due to the lack of a statutory guarantee of cost recovery.¹¹⁸

Accordingly, if long-term SPAEC procurements by the EDCs continue, RESA believes that any SPAECs acquired through such procurements should be disposed of in a competitively neutral manner.¹¹⁹ This can be achieved by either continuing the practice currently utilized by Met-Ed and Penelec (procuring 100% of SPAECs for their entire system and allocating these SPAECs to all load serving entities) or through FirstEnergy's proposal in this proceeding to procure only a portion of the overall SPAEC requirements with EGSs becoming responsible for the remainder.¹²⁰

F. Contingency Plans

1. Full Requirements Products

RESA takes no position on this issue.

2. AEPS Requirements

RESA takes no position on this issue.

G. Supplier Master Agreements

1. Credit Requirements

RESA takes no position on this issue.

2. Monthly Versus Weekly Settlements

RESA takes no position on this issue.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ RESA St. No. I-R at 12-13.

3. Confidentiality

RESA takes no position on this issue.

III. RATE DESIGN AND COST RECOVERY

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

The Companies currently file their PTC rider ten days prior to its effective date. The Companies propose to change this to file it thirty days prior to its effective date.¹²¹ RESA supports this proposal as it provides suppliers more time to account for and react to the forthcoming price change.¹²²

B. Industrial Class: Hourly Pricing Default Service Rider

RESA supports FirstEnergy's proposal to eliminate any fixed-price options that were available from Met-Ed, Penelec and West Penn after the expiration of the generation rate caps.¹²³

C. Market Adjustment Charge

1. Summary and Overview of Each Party's Position

FirstEnergy proposed including a Market Adjustment Clause ("MAC") to the default service rate for non-shopping residential and commercial customers. According to FirstEnergy, the purpose of the MAC is to "compensate [the EDCs] for the value provided to default service customers for assuming the risks that attend the obligation to procure electric power for

¹²¹ Met-Ed/Penelec/Penn Power/West Penn St. No. 2 at 12.

¹²² RESA St. No. 1 at 24. RESA's proposed changes to the procurement schedule shortening the lag time between procurement and delivery (which are discussed in section II above) will not affect the ability of the Companies to make these filings within a 30 day rather than 10 day window.

¹²³ Met-Ed/Penelec/Penn Power/West Penn St. No. 2 at 19; RESA St. No. 1 at 17.

customers who cannot shop or choose not to shop and will encourage new retail suppliers to begin to offer competitive generation service in the Companies' service territories."¹²⁴

Specifically, FirstEnergy has proposed including the MAC as a component of the PTC for the residential and commercial customer classes in order to compensate the Companies for fulfilling the role of default service provider.¹²⁵ According to the Companies, the MAC would compensate the EDCs for specified risks of providing default service and recognize costs that they are not required to incur due to their status as a regulated entities.¹²⁶ FirstEnergy proposes to collect the MAC proceeds and (apparently) keep them as profit for the distribution utility.¹²⁷ FirstEnergy projected that, in total, it would collect some \$140 million from the MAC during the 2013-2015 default service supply plan period.¹²⁸

2. Position of Parties Opposed

The consumer advocate groups, I&E, and the Industrial Interveners all oppose imposition of a MAC to the default service rate. RESA believes that the MAC is reasonable and appropriate – if it is modified to remove any “profit” adder and FirstEnergy only retains amounts associated with real costs.¹²⁹ In fact, RESA strongly believes that there are no circumstances where an EDC should recover a “profit” on default service.¹³⁰ Profit on default service is contrary to well-established public utility ratemaking principles. Given the structure of default service and the

¹²⁴ Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 11.

¹²⁵ RESA St. No. 2 at 30.

¹²⁶ RESA St. No. 2 at 30; Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 11-17.

¹²⁷ RESA St. No. 2 at 30.

¹²⁸ RESA St. No. 2 at 30; RESA Exhibit No. CHK-3 (FirstEnergy Response to OSBA, Set II, No. 8).

¹²⁹ RESA St. No. 1 at 22; RESA St. No. 2-R at 30.

¹³⁰ RESA St. No. 2-R at 32; RESA St. No. 2-SR at 29-30.

cost recovery it allows a utility, there is no basis for allowing a recovery for putative risks that do not ripen into actual costs.¹³¹ Such risks as there may be in providing default service are, under the current system, borne by ratepayers, not the utility, which should earn a return where it has deployed capital that can be said to be “at risk” in some meaningful sense.¹³² That is not the case here.¹³³ And, importantly, if a profit could be earned on default service, the EDCs would have a substantial incentive to maintain its default service market share¹³⁴ or to refrain from continuing to maintain existing pro-competitive policies, or to propose new ones.¹³⁵ Such an incentive would harm the competitive markets. So to avoid this harm, RESA has specifically recommended that none of the proceeds of the MAC be returned to FirstEnergy shareholders.¹³⁶

However, as discussed in the next section, this does not mean that FirstEnergy should be precluded from using the MAC to incent competition and to recover real costs that are incurred on behalf of their default service customers.¹³⁷ Therefore, the only way the Commission should consider implementing the MAC is if it is restructured as recommended by RESA.

3. RESA’s Proposed Modification

RESA recommends that the MAC be used to create a fund that would compensate FirstEnergy for costs it actually incurs in providing default service – but not for the alleged risks

¹³¹ RESA St. No. 2-SR at 29.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ RESA St. No. 2-R at 33.

¹³⁵ Tr. 202 (Fuller).

¹³⁶ RESA St. No. 2-R at 33.

¹³⁷ RESA St. No. 2 at 30, 31; RESA St. No. 2-R at 33.

of providing default service.¹³⁸ In other words, the revenue from the MAC should be designed to offset or cover the EDC's administrative and implementation costs of infrastructure and systems related to retail processes (e.g., data access) and programs (e.g., referral programs and auctions) as well as costs that it legitimately incurs to provide the service.¹³⁹ Specifically, RESA believes that the proceeds generated by the MAC should only be used to pay for: (1) the costs of implementing improvements to the market structure in the EDC's service territory, with a corresponding adjustment to the non-bypassable DSS rider; and, (2) costs related to any of the risks identified by FirstEnergy that actually materialize.¹⁴⁰ Any amounts collected over and above these should be returned to all distribution customers in the form of a credit.

RESA's modification to the MAC focuses on cost recovery and, therefore, has statutory authorization. Under the Competition Act, default service providers acquire electric energy through "competitive procurement processes" to serve default service customers and that default service providers "recover fully all reasonable costs."¹⁴¹ This means that the Companies are entitled to a default service rate that includes all the costs in providing default service.¹⁴²

Rather than an artificial price increase,¹⁴³ the MAC (as modified) would be an integral part of the EDC's recovery of the costs for providing default service.¹⁴⁴ The MAC (as modified)

¹³⁸ RESA St. No. 2-SR at 29.

¹³⁹ RESA St. No. 2 at 30; Met-Ed/Penelec/Penn Power/West Penn St. No. 6 at 26-27.

¹⁴⁰ RESA St. No. 2-R at 31-32.

¹⁴¹ 66 Pa. C.S. § 2807(e)(3.1).

¹⁴² RESA St. No. 2-R at 32.

¹⁴³ See CAUSE St. No. 1 at 37; OCA St. No. 1 at 38; I&E St. No. 1 at 5.

¹⁴⁴ RESA St. No. 2-SR at 30. Cf. OCA St. No. 1 at 38 where Mr. Kahal states that "there is no indication that [the MAC] is part of the market costs of default service."

would recover only costs that FirstEnergy actually incurs or that it avoids.¹⁴⁵ These costs are all related to FirstEnergy's role as the default service provider.¹⁴⁶ Hence, there is nothing artificial about the MAC adder.¹⁴⁷ All other dollars would be flowed back to ratepayers either to cover the costs of competitive enhancements, or as a credit, or both.¹⁴⁸

Simply put, the purpose of the MAC(as herein modified) would be to compensate FirstEnergy for the real costs and avoided costs that exist by virtue of the current market model whereby the EDC provides default service.¹⁴⁹ These are real costs faced by competitive suppliers, and the EDCs who are offering default service should address these costs and include them in their pricing of default service.¹⁵⁰ Recovery of these costs from all customers is appropriate as these programs benefit all customers.¹⁵¹ In the absence of a detailed allocation study of the costs of providing default service, the modified MAC is a reasonable mechanism for ensuring that costs that are attributable to the provision of default service are included in the default service rate rather than in distribution rates.¹⁵²

None of the modified MAC would be used for a return or profit component.¹⁵³ RESA agrees with the part of FirstEnergy's proposal that focuses on risks and costs that it has

¹⁴⁵ RESA St. No. 2-SR at 30.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ RESA St. No. 2 at 30-31; RESA St. No. 2-R at 31; RESA St. No. 2-SR at 2, 30, 31.

¹⁴⁹ RESA St. No. 2-R at 32.

¹⁵⁰ *Id.* at 34.

¹⁵¹ RESA St. No. 1 at 24.

¹⁵² RESA St. No. 2-R at 32.

¹⁵³ *Cf.* I&E St. No. 1 at 5 where Mr. Granger views the MAC as improperly adding a "return component (profit component)" to default service.

previously failed to recognize or assign to default service.¹⁵⁴ But, if such risks fail to materialize, the EDC should not keep the proceeds of the MAC as a de facto return on default service.¹⁵⁵ Any funds generated by the modified MAC which are not used to pay costs incurred by FirstEnergy or costs related to competitive enhancements (or both) should be returned as a credit each year to all distribution ratepayers on a pro rata basis via a non-bypassable credit.¹⁵⁶ This “flow back” of funds eliminates concerns of FirstEnergy using the modified MAC to create a slush fund.¹⁵⁷ With the annual flow back of excess funds, there would not be a transfer of wealth from default service customers to FirstEnergy shareholders.¹⁵⁸ So, the modified MAC is not only reasonable but consistent with the well-established public utility ratemaking principle that a utility may only recover for actual costs incurred.¹⁵⁹

Removal of the profit incentive is consistent with the Commission’s goals of enhancing the competitive market. Any MAC proposal must be structured so that no incentive exists for the EDC providing default service to maintain the present unacceptably high level of customers who have not switched to competitive supply.¹⁶⁰ As noted above, a profit adder would give FirstEnergy a substantial incentive to maintain its default service market share, or to try to hold onto the default service function.¹⁶¹ It is difficult enough now – when FirstEnergy ostensibly makes no profit on this service – to move residential and small commercial customers into the

¹⁵⁴ RESA St. No. 2 at 30.

¹⁵⁵ *Id.*

¹⁵⁶ RESA St. No. 2 at 30-31; RESA St. No. 2-R at 31; RESA St No. 2-SR at 2, 30, 31.

¹⁵⁷ RESA St. No. 2-SR at 30.

¹⁵⁸ *Id.* at 31.

¹⁵⁹ RESA St. No. 2 at 31.

¹⁶⁰ *Id.* at 30.

¹⁶¹ RESA St. No. 2-R at 33.

competitive market.¹⁶² Accordingly, RESA submits that it would be a huge mistake to give FirstEnergy a financial interest windfall in keeping customers on default service.¹⁶³ To avoid this disastrous result, the profit adder should be eliminated from the MAC – and that is exactly what RESA’s recommendation here would accomplish.

The existence of the MAC is not likely to influence EGS pricing. Some parties are likely to take the position that the existence of a MAC (in any form) will have this result – by inducing EGSs to raise price offers by some fraction of the MAC.¹⁶⁴ But, this position fails to give any consideration to fundamental competitive principles that operate in these markets. The reality in Pennsylvania today is that default service acts as a competitive offering relative to offers from EGSs.¹⁶⁵ The designation of the EDC’s default service rate as the “price to compare” reinforces this current reality as consumers are encouraged to use the default service rate as the benchmark by which to assess the prices offered by EGSs.¹⁶⁶ But, EGSs do more than compete against the PTC. EGSs would still be competing against each other.¹⁶⁷ They have incentives to lower their prices below not only the PTC but also their competitor’s prices.¹⁶⁸ So, in order for this position to have any validity, literally every EGS would have to agree – explicitly or implicitly – to price their product to retain some portion of the MAC adder.¹⁶⁹

¹⁶² RESA St. No. 2 at 30.

¹⁶³ *Id.* at 30.

¹⁶⁴ *See, e.g.*, OCA St. No. 1 at 40.

¹⁶⁵ RESA St. No. 2 at 34.

¹⁶⁶ *Id.*

¹⁶⁷ RESA St. No. 2-SR at 30.

¹⁶⁸ *Id.*

¹⁶⁹ RESA St. No. 2-R at 33.

There is no evidence to suggest that such behavior is even possible, let alone would actually occur.¹⁷⁰ In fact, there is evidence to the contrary. For example, in the PPL service territory in 2010, and in the service territories of Connecticut Light & Power and United Illuminating (also in Connecticut) through much of 2009, 2010 and 2011, a highly laddered approach to utility default service procurement resulted in substantial headroom for competitive suppliers versus the utility offering.¹⁷¹ Such examples are consistent with observations of RESA's witness, Mr. Kallaher. During these periods, Mr. Kallaher observed that retail prices tracked very closely the extant wholesale market pricing – rather than remaining some fixed amount below the utility price.¹⁷² His observations of the market led him to conclude that that presence of robust retail competition had exerted the expected discipline on retailer pricing in the presence of an over-market utility offering.¹⁷³ Such examples and observations directly counter the pure speculation that EGSs will collectively raise their prices to some degree if the PTC is increased in any way.

Simply put, RESA believes that the best approach would be for the costs of the auction and other retail market enhancements to be recovered either through the MAC, paid only by default service customers. If the MAC is not adopted, then the costs should be recovered or through a non-bypassable charge applied to all such as the DSS, which would be applied to all customers in the eligible class.¹⁷⁴

¹⁷⁰ RESA St. No. 2-R at 33; RESA St. No. 2-SR at 30.

¹⁷¹ RESA St. No. 2-SR at 30.

¹⁷² RESA St. No. 2-SR at 31.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 9-10.

4. Dominion's Proposed Modification

RESA submits that its proposed modifications to the MAC should be accepted, and RESA takes no position on Dominion's proposed modification to the MAC.

D. Default Service Support Rider

1. Non-Market Based Transmission Charges

RESA supports the Companies' proposal regarding the NMB charges.

2. Generation Deactivation Charges

RESA supports Exelon's proposal on this issue.

3. Unaccounted-For Energy Costs

RESA takes no position 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*

RESA supports Constellation's proposal on this issue.

E. Solar Photovoltaic Requirements Charge Rider

RESA does not object to the Companies' proposal to include the carrying costs for banked SPAECs as part of the SPVRC rider.¹⁷⁵ But, RESA notes that, as the Commission's RMI process moves forward and alternative default service end-states are evaluated and possibly implemented, this issue will likely need to be revisited.¹⁷⁶

¹⁷⁵ RESA St. No. 1-R at 14.

¹⁷⁶ *Id.*

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

1. Summary and Overview of Each Party's Position

a. *The Companies*

FirstEnergy's proposal for an optional time-of-use ("TOU") rate differs by EDC. Because Met-Ed and Penelec have a legacy optional TOU rate available to residential customers which provides an off-peak and on-peak rate for distribution service, FirstEnergy does not propose any change for these EDCs.¹⁷⁷ For Penn Power and West Penn Power, FirstEnergy proposes to select a Commission certified EGS to serve customers who elect service under Residential TOU Default Service Riders. FirstEnergy proposes that the EGS will be selected through an auction process to be held annually, with the winning bidder to provide service to up to 15,000 customers that select the TOU Default Service Rider. The service will have a 12-month term and the bid proposal will solicit a 12-month fixed price, on-peak and off-peak product, with on-peak hours matching PJM on-peak hours. Only customers who have installed smart meters will be eligible for the service. During the proposed one-year term, those who choose this service will be free to switch to another EGS but will not be permitted to switch to regular, non-TOU default service. At the end of the term, the TOU customer will be handled as any other EGS customer.¹⁷⁸ FirstEnergy submits that its proposal enhances competition because it brings an EGS into the process of offering the Act 129 required TOU service and puts enrolled customers into the competitive market.¹⁷⁹

¹⁷⁷ Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 17.

¹⁷⁸ That is prior to the end of the term the customer will receive notices of their options pursuant to 52 Pa. Code § 54.5(g)(1). Under these rules, if the customer takes no action, he or she will stay with the EGS on a month-to-month rate with no early termination or cancellation charge.

¹⁷⁹ Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 19-23.

b. RESA

While RESA believes that the FirstEnergy's proposal to rely on the competitive market to comply with its Act 129-TOU rate obligation is reasonable, RESA has offers another reasonable approach that would more fully rely on market forces.¹⁸⁰ That proposal is explained below in Section III.F.3.

c. OCA

OCA agreed in principle that a TOU program could be developed on a competitive basis through EGS participation.¹⁸¹ But, OCA opposed the FirstEnergy's TOU proposal based on a claim that there are serious design defects with this program.¹⁸² OCA also opposed this program because FirstEnergy proposes to pass through the costs to distribution service customers.¹⁸³

2. The OCA's Position

OCA does not believe that sufficient justification exists for the program at this time,¹⁸⁴ and recommends that Companies' TOU be implemented only if each winning EGS is assigned responsibility for the implementation costs.¹⁸⁵ If, according to OCA, this is a barrier, then that may be an indication that TOU programs are simply not worthwhile and cost effective.¹⁸⁶ To reduce costs, OCA recommended that a sealed-bid RFP be used, as opposed to a descending

¹⁸⁰ RESA St. No. 2 at 8-11.

¹⁸¹ OCA St. No. 2 at 22.

¹⁸² *Id.* at 21-22.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 22.

¹⁸⁵ OCA St. No. 1 at 36.

¹⁸⁶ *Id.* at 36-37.

clock auction.¹⁸⁷ OCA recommended allowing TOU customers to return to default service during the TOU program.¹⁸⁸ As explained in the next section III.F.3, RESA opposes OCA’s recommendations.

3. RESA’s Proposal

The Competition Act, in what is referred to as “Act 129,” requires that the “default service provider shall submit to the Commission one or more proposed time-of-use rates and real-time price plans.”¹⁸⁹ RESA recommends that all four EDCs, as default service providers, could satisfy their legal obligation by certifying that one or more EGSs have agreed to offer a TOU rate to residential customers in their service territories. Each year, each EDC would survey EGSs and determine whether they are or intend to offer a time-differentiated rate and whether the EGS intends to offer the product for at least 12-months.¹⁹⁰ If the EDC finds one or more EGSs offering such rates, the EDC would post that information on a clearing house website (and refer customers to the information upon inquiry) and certify this information to the Commission.¹⁹¹ After the end of the year, the EDCs would submit a report on the number of EGSs actually providing the service.¹⁹² The statute also provides that the default service supplier should prepare a report (presumably to the Commission) detailing “the efficacy of the programs in affecting energy demand and consumption and the effect on wholesale market prices.”¹⁹³

¹⁸⁷ *Id.* at 37.

¹⁸⁸ OCA St. No. 2 at 23.

¹⁸⁹ 66 Pa. C.S. § 2807(f)(5).

¹⁹⁰ RESA St. No. 2 at 8.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ 66 Pa. C.S. § 2807(f)(5).

Rather than have the EDC compile these data and provide these opinions (which could require them to review competitively sensitive information), this data could be compiled and analyzed by either the Commission's staff or by a consultant hired by the EDCs.¹⁹⁴

RESA's proposal should be adopted. It would be less expensive and more market-oriented.¹⁹⁵ It would also be more efficient and customer-friendly than the one proposed by the Companies.¹⁹⁶ Time-differentiated products from EGSs are increasingly available to customers with smart or interval meters.¹⁹⁷ RESA believes the intent behind this section of the law was to ensure that such options are available to customers with smart meters to ensure that this substantial upgrade in infrastructure would be used and useful.¹⁹⁸ RESA notes that the TOU rate currently offered by Penn Power has no subscribers, meaning that the development and implementation costs for that product were essentially wasted.¹⁹⁹

This alternative approach also has an added benefit of promoting a market-based solution and encouraging the innovation and creativity that comes from robustly competitive markets.²⁰⁰ The Companies' "auction" approach, by necessity, requires a "one size fits all" approach which can lead to a plan that few or no customers may select. In comparison, RESA's alternative approach would allow EGSs to offer time-differentiated products based on their customer-driven view of what buyers want. One reason RESA consistently urges the Commission to use EGSs to

¹⁹⁴ RESA St. No. 2 at 9.

¹⁹⁵ RESA St. 2-SR at 31.

¹⁹⁶ RESA St. No. 2 at 9.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ RESA St. No. 1 at 9.

²⁰⁰ *Id.*

deliver those services that are already available on a competitive basis is that there is simply no reason to believe that the regulated utility will be as effective as EGSs in designating and delivering a products that customers really want.²⁰¹

For example, Direct Energy, offers a “Free Power Saturdays” product in the service territory of PPL where electric generation service on Saturdays is free (while the rate during the rest of the week is higher than the regular, non-time differentiated rate).²⁰² This rate plan has proven to be very popular, and there is an estimated 10% shift from on-peak electricity consumption by the projected consumer load on the rate which will reduce market costs in PPL by 1%.²⁰³ Smart Meter technology will allow EGSs to offer innovative products or even permit a customer to design his or her own rate (within parameters). Encouraging market development of time-differentiated rates, rather than creating another “EDC-default” product will spur rather than slow down innovation.²⁰⁴

As further support for RESA’s proposal, FirstEnergy is in the process of developing rate-ready EDC consolidated billing.²⁰⁵ Once complete, all EGSs would be able to offer a TOU rate using the same on-peak and off-peak periods.²⁰⁶ Different on-peak and off-peak periods can also be offered using bill-ready EDC consolidated billing.²⁰⁷ The development of these billing

²⁰¹ *Id.* at 10.

²⁰² *Id.*, *citing*, <http://residential.directenergy.com/EN/Energy/Pennsylvania/Pages/ELE/res-ele-default.aspx>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ RESA St. No. 1 at 10; Met-Ed/Penelec Penn Power/West Penn St. No. 7 at 21.

platforms creates incentive for EGSs to make these offerings which will enhance the likelihood of success if RESA's proposal is adopted.²⁰⁸

The statute does not prohibit this alternative approach. Under Act 129, electric default service providers "shall offer" time-of-use and real-time price plans to all customers with smart meter technology; and residential and commercial customers "may elect" to participate in such pricing plans.²⁰⁹ The process used in RESA's alternative approach is only marginally different than FirstEnergy's proposal that it select one EGS to provide the TOU service rate that the "default service provider" is required to submit to the Commission.²¹⁰ As FirstEnergy has impliedly recognized, the law does not require that the default service provider actually provide the rate; only submit TOU rates or pricing plans to the Commission for "approval."²¹¹ So, RESA's alternative proposal is consistent with the requirements of the law.

FirstEnergy has claimed that RESA's proposal is not sufficiently fleshed out and that there also appears not to be many EGSs currently offering time-of-use rates in the FirstEnergy service territories.²¹² RESA believes that given the apparent agreement that RESA's approach is less costly and more market friendly, adopting the concept and directing that the additional details be developed through a collaborative process is prudent. As to the lack of present time-of-use offers, RESA submits that this is more a reflection of the relative lack of activity in the FirstEnergy markets generally. Ideally, if the procurement process as modified by RESA is more

²⁰⁸ RESA St. No. 1 at 11.

²⁰⁹ 66 Pa. C.S. § 2807(f)(5).

²¹⁰ RESA St. No. 1 at 11.

²¹¹ *Id.* Certainly, RESA's proposal would only be accepted by the Commission upon a finding that it was consistent with applicable law. RESA St. No. 2-SR at 31.

²¹² Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 17.

market responsive and market reflective and the other retail market enhancements as proposed herein by RESA are adopted, the impact should be to stimulate more market entry resulting in a greater number of offers. But, as an added benefit of RESA's proposal, it is designed to address the situation of no such offers being available in the market at the time of the survey. If that is the situation, then FirstEnergy would revert to the "auction" approach as it proposes. There is little to lose, therefore, by adopting RESA's recommendation in this regard.

G. Reconciliation of Default Service Costs and Revenues

1. Summary and Overview of Each Party's Position

While under the current default service construct in Pennsylvania, reconciliation mechanisms only exacerbate the already problematic issue of default pricing not accurately reflecting underlying market conditions, RESA recognizes the default service providers statutory right to cost recovery and did not propose any modification to the Companies' proposed reconciliation of default service costs and revenues. As proposed, the Companies will be reconciling their default service rates on a quarterly basis.²¹³ They are proposing to modify the dates on which reconciliations are performed and are effective and to eliminate seasonal weighting factors.²¹⁴

2. The OCA's Proposal

OCA proposed reconciling the net balance of revenues minus costs using projected annual default service sales rather than projected quarterly sales.²¹⁵

²¹³ Met-Ed/Penelec/Penn Power/West Penn St. No. 1.

²¹⁴ Met-Ed/Penelec/Penn Power/West Penn St. No. 2.

²¹⁵ OCA St. No. 1 at 48.

3. The OSBA's Proposal

OSBA proposed that the E-Factor be excluded from the PTC which is paid only by default service customers.²¹⁶ RESA cannot support OSBA's proposal because it improperly assigns default service related costs – in this instance costs related to the reconciliation mechanisms – to customers who are no longer receiving default service from the Companies, contrary to the Commission's regulations and policy that all default service related costs must be reflected in the PTC.²¹⁷

The Competition Act is clear – all costs that can be associated with providing default service must be recognized and recovered in the default service rate which is paid by default service customers. The Competition Act expressly provides that all reasonable costs of providing default service in the post transition period shall be fully recovered by the default service provider.²¹⁸ It also requires that charges for generation, transmission and distribution be fully unbundled.²¹⁹ Consistent with these statutory requirements, the Commission's default service regulations require the default service rate to include the sum of all generation and transmission related default service costs.²²⁰ While the Competition Act expressly provides for the recovery of certain costs through non-bypassable charges on all customers, there is no such express authorization for the recovery of default service costs through non-bypassable,

²¹⁶ RESA St. No. 1-R at 7.

²¹⁷ RESA St. No. 1-R at 7-8; 52 Pa. Code §§ 54.187(d); 69.1808. OSBA's proposal, unlike the proposal currently under consideration for PPL Electric Utilities at Docket No. P-2011-2256365 proposes that new customers and returning customers be exempt from application of the reconciliation impact for twelve months. While this may address 66 Pa C.S. § 2807(e)(4)'s requirement that returning customers be treated exactly as new customers, it still does not address the other illegal, anti-competitive impacts of the proposal.

²¹⁸ 66 Pa. C.S. § 2807(e)(3.9).

²¹⁹ 66 Pa. C.S. § 2804(3); *Lloyd v. Pa. P.U.C.*, 904 A.2d at 1010, 1013-14 (Pa. Cmwlth. 2006).

²²⁰ 52 Pa. Code § 54.187(a).

distribution service type charges such as the suggestion offered here by OSBA.²²¹ The bottom line of all these requirements means that the Companies are legally required to ensure that default service customers pay all the costs of related to the provisioning of default service.²²²

With regard to the reconciliation solely attributable to default service, the Companies currently satisfy these legal requirements by imposing the reconciliation only on default service customers. OSBA's proposal to convert this bypassable charge to a non-bypassable charge to be paid by all customers completely changes the legality of the current mechanism to an illegal one.

In addition to illegally imposing the burden of the default service reconciliation cost on shopping customers, OSBA's proposed modification to require shopping customers to bear the impact of default service reconciliations is illegal because it will harm the competitive market. As the Commonwealth Court has observed, "distribution companies perform a default service referred to as 'provider of last resort' to retail customers who decline to shop for an electric generation supplier or who have returned to their distribution company."²²³ This default service is not provided to shopping customers and, therefore, all the costs of providing default service,

²²¹ 66 Pa. C.S. § 2804(9) ("Universal service and energy conservation policies, activities and services . . . shall be funded in each electric distribution territory by nonbypassable, competitively neutral cost-recovery mechanisms. . . .") (emphasis added); 66 Pa. C.S. §§ 2808(a), 2812(a)(2)(iii) (competitive transition costs ("CTC") and intangible transition costs ("ITC")). Default service in Pennsylvania today is provided by EDCs who have not undergone full cost unbundling. Therefore, some costs – such as system-wide uncollectible costs – may be appropriately socialized. This case, however, is not about system-wide costs but rather about costs directly related to the provision of default service.

²²² *Popowsky v. Pa. P.U.C.*, 869 A.2d 1144 (Pa. Cmwlth. 2005), *appeals denied* 895 A.2d 552 (Pa. 2006) (PUC interpretation that 66 Pa. C.S. § 1307(g) authorizes wastewater utility to establish distribution system improvement charge violates maxim *expressio unius est exclusio alterius* (inclusion of a specific matter in a statute implies the exclusion of other matters.); *Susquehanna Area Regional Airport Authority v. Pa. P.U.C.*, 911 A.2d 612 (Pa. Cmwlth. 2006), *appeals denied* 923 A.2d 412 (Pa. 2007) (PUC's position that it has implicit power to review contract excluded from PUC review under 66 Pa. C.S. § 508 "does violence to principle *expressio unius est exclusio alterius* . . . (inclusion of a specific matter in a statute implies the exclusion of other matters.)").

²²³ *Green Mountain Energy Co. v. Pa. P.U.C.*, 812 A.2d 740, 742 (Pa. Cmwlth. 2002) (emphasis added), *appeal denied* 833 A.2d 145 (Pa. 2003).

including the financial risk of any distorted pricing mechanisms, should be included in the default service rate. If all the costs of providing default service are not included in the default service rate, then the default service rate will not reflect the true costs of providing default service which will hinder the ability of a truly competitive market to develop.²²⁴

OSBA's proposed migration rider would have negative impacts on the competitive markets and create unnecessary confusion for customers. With OSBA's proposal, customers will have to consider whether and for what period of time they will be subject to the reconciliation adjustment after they make a shopping decision (or a decision to return to default service) and whether the reconciliation adjustment is a charge or a credit.²²⁵ During the ongoing RMI, the Commission and stakeholders have already identified significant customer confusion and misperceptions about retail choice.²²⁶ Now is not the time to introduce added confusion by creating a more complicated reconciliation rider for FirstEnergy.²²⁷

Further, OSBA's proposal would also permit the Companies – where they have failed to accurately calculate the default service costs – to impose those costs on their competitors' customers.²²⁸ In deriving prices to be charged to customers in any competitive enterprise, one has to account for more than simply supply or input costs.²²⁹ Rather, one has to account for many other factors, including cash flow management, general overhead expenses, expectations

²²⁴ RESA St. No. 1-R at 8.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 8-9.

²²⁹ *Id.* at 9.

about future market conditions, etc.²³⁰ In such a situation, if any one competitor failed to adequately reflect or account for certain costs in its price, then it would not have the opportunity to be made whole for this flawed pricing by charging the customers of its competitors.²³¹ This, however, is precisely what the implementation of OSBA’s recommendation would do for the FirstEnergy EDCs.²³² EGS customers who have chosen to leave FirstEnergy’s default service would be forced to continue to pay FirstEnergy for the reconciliation impacts directly attributable to the generation service provided by FirstEnergy even though they are now receiving – and paying for – generation service from an EGS.²³³ Any argument that the charge is designed to pay for prior period costs will ring quite hollow to those customers who are already paying for generation services from their EGS.²³⁴

RESA strongly opposes changing the reconciliation rider into a “migration”²³⁵ rider as proposed by OSBA because it would create additional price distortions, increase customer confusion and likely stymie retail market development in the Companies’ service territories.²³⁶

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

RESA takes no position on this issue.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ The fact that migration riders are utilized by natural gas distribution companies in Pennsylvania does not necessarily mean that they should be used in the electric industry. The gas industry which specifically permits the applicability of over or under collections regarding actual natural gas costs to be passed on to shopping customers when they leave the incumbent’s service. 66 Pa. C.S. § 1307(f)(6). There are no similar provisions for the electric industry.

²³⁶ RESA St. No. 1-R at 7.

IV. COMPETITIVE MARKET ENHANCEMENTS

A. Retail Opt-In Aggregation Program

1. Summary and Overview of Each Party's Position

The Commission has endorsed the concept of opt-in auctions as a means of encouraging default service customers to enter the competitive market. These customers, many times for irrational reasons,²³⁷ cling to default service and fail to participate in the competitive market, losing the opportunity to obtain the benefits of lower rates, signing bonuses, and, increasingly frequently, “value added” benefits such as (for example) airline miles, time-of-day rates or furnace tune-ups. To incent these customers to experience the competitive market, the Commission directed each EDC to include an opt-in auction proposal in its next default service plan consistent with the Commission’s guidance in the *Intermediate Work Plan Final Order*, unless evidence on the record requires a different program structure for that particular company.

The Companies revised their initially filed opt-in auction proposal in an attempt to conform to the Commission’s directives set forth in the *Intermediate Work Plan Final Order* which was entered after direct testimony in this case was filed. Specifically, the Companies now propose to require EGSs to offer a fixed price at least 5% less than each EDC’s PTC at the time of the auction.²³⁸ They also propose to adopt the Commission’s standard of a 50% supplier participation load cap and a 50% customer participation cap.²³⁹ Additionally, the Companies propose to require EGSs to offer a product that has a 12 month term (rather than a 24 month term). The Companies, however, failed to accept – without adequate explanation – the

²³⁷ RESA Ex. CHK-2.

²³⁸ Met-Ed/Penelec/West Penn Statement No. 7-R at 4.

²³⁹ *Id.*

Commission's directive that EGSs be required to include a \$50 bonus as part of their auction offering.

RESA identified a limited number of specific modifications to the guidance set forth in the *Intermediate Work Plan Final Order* which are justified because of the extremely low levels of shopping in the territories of the FirstEnergy Companies – levels that plainly require special efforts be made to make the opt-in auction as successful as possible. RESA's suggested modifications are designed to produce a more robust auction with greater EGS participation and greater potential savings to customers, because the stakes are higher in FirstEnergy than in other service territories, such as PPL, where shopping has been more robust.²⁴⁰ More specifically, RESA recommends that several key program elements be modified from the Commission's recommendations to ensure maximum success of the auction: (i) the auction should occur after the enrollment, not before; (ii) the costs of the auction should be recovered from the proposed MAC, if approved, or; alternatively, from the DSS; (iii) shopping customers should not be eligible to participate and that restriction should be included on the promotional material;²⁴¹ and (iv) small business customers with loads at or below 25kW should be eligible to participate. Additionally, because RESA is concerned that the net effect of FirstEnergy's proposals would make the opt-in auction less attractive to EGSs, which would result in a less robust auction and fewer benefits for customers, RESA urges the Commission to direct that a survey-type "test" of the enrollment process involving a small number of customers (100-200 customers for each method) be undertaken. This test would provide statistically valid results to EGSs, the EDCs and the Commission so that everyone involved will have a better idea of how the bidding process

²⁴⁰ RESA St. No. 2 at 13-14.

²⁴¹ RESA St. No. 2-SR at 16.

will work. Finally, RESA recommends that the Commission impose a “four winning EGS” minimum for the opt-in auction to insure diversity and add to the competitive activity in these markets.²⁴²

OCA and CAUSE also proposed changes to the Companies’ revised proposal regarding opt-in auctions. In every instance, however, these proposed changes fail to be supported by special circumstances unique to the FirstEnergy companies (or any factual evidence). Rather, they merely reflect these parties’ policy views for structuring the auction to limit the effects on default service in terms of customer loss. Consistent with the Commission’s directives, if the opt-in auction plan is going to diverge from the Commission’s recommendations, then the record must support compelling operational reasons to do so unique to the specific EDC.²⁴³ But, unlike RESA, OCA and CAUSE did not suggest any compelling or unique reason to adopt their modifications which diverge from the Commission’s recommendations. Therefore, these proposed changes should be rejected.

2. Customer Eligibility

a. *Small Commercial and Industrial*

RESA recommends that the Commission include small business customers (with peak annual demand of 25 kW and below) in the auction rather than waiting to see whether the residential auction is successful as suggested in the Intermediate Work Plan. Doing so would add to the potential value for EGSs and, in turn, provide added benefits to those customers.²⁴⁴ Because the very low shopping experience in the FirstEnergy territories combined with the

²⁴² This was an issue left to be decided in each case by the *Intermediate Work Plan Final Order* at 64.

²⁴³ RESA St. No. 2 at 13.

²⁴⁴ RESA St. No. 2-SR at 10.

structure of the auction calls into question whether the auctions are likely to be successful, the Commission should consider steps to enhance the chances that this effort will succeed. One way to do this is to expand the available base of customers to include those small business customers who are most like residential and who continue to receive default service in almost as great a number as residential customers.²⁴⁵

FirstEnergy opposes extending the opt-in auction to small business customers because those customers have widely-varying usage patterns, which would make it difficult to create homogeneous tranches for bidding purposes.²⁴⁶ This is wrong. The small commercial customers breakpoint is not new or novel; it is contained in the Commission's regulations and is utilized by the Commission for various reporting and consumer protection applications.²⁴⁷ Moreover, in RESA's experience, small business customers in this range exhibit many of the same characteristics as residential customers when it comes to their familiarity with competitive electricity markets and their usually unfounded concerns about the effects of switching away from the EDC. These characteristics make an opt-in auction appropriate, and not more difficult, for this customer segment.²⁴⁸

The details of the auction as applied to small business customers could be determined in a stakeholder process.²⁴⁹ But, additional study is not needed to conclude that small business

²⁴⁵ OSBA Cross Examination Exhibit No. 1 sets for the current shopping statistics in each of the EDCs for small commercial customers; *See also* RESA St. No. 2-R at 16; RESA St. No. 2-SR at 2-3.

²⁴⁶ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 19-20.

²⁴⁷ RESA St. No. 2 at 17.

²⁴⁸ RESA St. No. 2-SR at 18-20.

²⁴⁹ RESA St. No. 2-R at 13.

customers should be included in the auctions.²⁵⁰ There is absolutely no evidence that indicates that inclusion of non-residential customers in the auction would increase the shopping risk perceived by full requirements wholesale suppliers.²⁵¹ Moreover, this issue is not relevant.²⁵² The policy of the Commonwealth is to promote fully competitive markets, not to control shopping so that the default alternative – which is supposed to come into play only when customers fail to shop or cannot shop – will not be harmed.²⁵³ If the Commission wants to enhance the chances that its endorsed method of improving customer shopping – the opt-in auction – is actually going to have a positive effect, then it needs to adopt the recommended modifications offered by RESA here.

b. Shopping Customers

While FirstEnergy does not intend to market the opt-in auction to shopping customers, there remains the potential that shopping customers may become aware of the auction and try to participate in the auction and FirstEnergy claims that it cannot prevent shopping customers from participating in the opt-in auction program.²⁵⁴ Given the circumstances in FirstEnergy’s service territories, allowing existing shopping customers to participate in the opt-in auction is not appropriate. Competition is too meager and the market is too fragile. Permitting customers who have already decided to shop to nonetheless participate in the effort to encourage non-shopping customers to enter the competitive market could potentially result in competition taking a step

²⁵⁰ RESA St. No. 2-SR at 19.

²⁵¹ *Id.* at 19-20.

²⁵² To the extent this concern is valid, it could be mitigated by conducting the test of potential customer enrollment levels as recommended by RESA. RESA St. No. 2-SR at 20; RESA St. No. 2-R at 11-13.

²⁵³ RESA St. No. 2-SR at 20.

²⁵⁴ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 19.

back, rather than a step forward. Many EGSs that are already serving mass market customers have invested significant financial resources in attracting these customers. These EGSs should not face the risk of losing significant market share as a result of an opt-in auction program whose stated intent is to encourage default service customers to shop. It is not enough to simply limit education and marketing about the program to default service customers. The EDCs in developing messaging about the program, call center scripts and other materials and protocols, should inform customers that they are not eligible for the opt-in auction if they are already being served by an EGS. This limitation is also important from a customer perspective. Many EGSs impose early termination fees on customers who cancel their contract early. Limiting eligibility to non-shopping customers will eliminate the risk that existing shopping customers will be subject to such penalties from their existing supplier should they chose to enroll in the opt-in auction.²⁵⁵ Accordingly, only default service customers should be eligible for the FirstEnergy opt-in auctions.

FirstEnergy claimed that it cannot differentiate between shopping and non-shopping customers when a customer calls or sends back an enrollment card. In response, RESA suggests that an acceptable means of seeking to limit the auction would be by: (1) limiting education and marketing about the program to default service customers; and, (2) including in the enrollment form and in all marketing materials a specific statement that shopping customers are not eligible for the auction and that a shopping customer who attempts to participate may be subject to early termination fees or penalties from its current EGS. If, notwithstanding this clear messaging, a customer served by an EGS tries to participate in the opt-in auction (or, for that matter, the

²⁵⁵ RESA St. No. 2-R at 10-11.

standard offer referral program) FirstEnergy need not create a system to guarantee that the customer will not be enrolled. This approach strikes a reasonable balance between properly limiting the auction to default customers while not creating additional operational or customer relations difficulties for the FirstEnergy.²⁵⁶

3. Program Length

FirstEnergy initially proposed to require EGSs to offer a 24-month product to customers participating in the retail opt-in auction. Subsequently, in its *Intermediate Work Plan Final Order*, the Commission recommended a product term for a period of six billing cycles.²⁵⁷ In response, FirstEnergy modified its initial proposal and now proposes to require that EGSs offer 12 months of service through the opt-in auction.²⁵⁸ FirstEnergy appears to believe that a 12 month term is more reflective of conditions in its service territory.

Recognizing that the Commission recommended the use of six billing cycles in its Intermediate Work Plan, RESA can support FirstEnergy's revised proposal for a 12-month term based on the evidence presented in this proceeding.²⁵⁹ Specifically, FirstEnergy witness Mr. Fullem set forth compelling reasons for the divergence from the six billing cycle standard in that such a term would be too short to provide reasonable assurance that customers will be satisfied with the outcome of the opt-in program if they elect to participate.²⁶⁰ However, RESA continues to maintain that the opt-in aggregation term should not be longer than 12 months and agrees with

²⁵⁶ RESA St. No. 2-SR at 20-21.

²⁵⁷ *Intermediate Work Plan Final Order* at 50.

²⁵⁸ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 24-25; RESA St. No. 2-SR at 6.

²⁵⁹ RESA St. No. 2-SR at 7.

²⁶⁰ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 24-25.

the Commission that “a shorter term auction may entice more suppliers to participate in the program.”²⁶¹ No party has presented a compelling case a term that is greater than 12 months.

4. Timing of Solicitation and Auction

FirstEnergy proposed that the actual auction be conducted before the customer solicitation/enrollment.²⁶² RESA disagrees with this proposal. If the price-setting auction is *before the customer enrollment period, it will tend to decrease the number of EGSs that will participate in the auction.* This is because EGSs will likely choose not to participate because they will be at risk for incurring material transaction costs for no or minimal benefit. The lack of participation will negatively influence the robustness of the auction itself, which in turn will have a negative effect on the ultimate benefit of the auction to customers. Maximizing the value of the opt-in auction depends to a great extent on EGS perception of the auction as an opportunity for mass acquisition of customers at a reasonable cost versus other channels. Leaving the key variable in that calculation – the number of customers available for acquisition – unknown until after both the price has been set and EGSs have incurred costs to participate in the auction can only have a negative impact on those EGS perceptions. The chance of success for the opt-in auction would be greatly enhanced if customers were given an opportunity to enroll and then the auction was conducted.²⁶³

FirstEnergy opposed RESA’s proposal on the claim that it is unreasonable because customers will be asked to enroll without knowing the exact price at which service will be

²⁶¹ *Intermediate Work Plan Final Order* at 50.

²⁶² Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 26.

²⁶³ RESA St. No. 2-R at 7.

provided.²⁶⁴ But this "price disclosure" issue is not really a problem in reality. If enrollment occurred first, then the customer would know that he or she: 1) will be served by an EGS; 2) will receive a bonus of \$50; and, 3) will be charged a price that was at least 5% lower than the existing PTC. The auction will not likely yield a price that is sufficiently lower than the guaranteed 5% discount. In any event, the possibility of a materially divergent (but lower) price is outweighed by the negative impact on EGS participation if FirstEnergy's proposed auction/enrollment timing schedule is adopted. FirstEnergy presented no evidence that if the timing of the auction is modified as recommended by RESA, there would be a material risk of not having enough EGSs agreeing to participate. However, even if such risk were present, it could be easily mitigated by, for example, considering an additional auction.

FirstEnergy claimed that any potential adverse effects that might flow from bidders not knowing the number of customers in the aggregation group would be minimized by the use of a tranche-style auction and the customer participation cap being adopted by the Companies.²⁶⁵ Both of these tools will help to limit an EGS's upside exposure (maximum number of customers that it might be required to serve) but fail to address the downside risk that very few customers might decide to participate. This downside risk is why the auction parameters must be modified consistent with RESA's recommendations.

OCA argued that requiring enrollment before customers know the prices they will pay could be confusing and may discourage customer participation.²⁶⁶ OCA opined that this process would transform the opt-in auction into an opt-out auction by requiring customers to take

²⁶⁴ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 26-27.

²⁶⁵ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 27; RESA St. No. 2-SR at 18-21.

²⁶⁶ OCA St. No. 1-R at 3, 11.

affirmative action to de-enroll after receiving the actual price and terms.²⁶⁷ These claims are illogical on their face and create issues where none exist. As explained above giving customers the opportunity to participate in a program in which they are guaranteed a \$50 bonus and a generation rate that is at least 5% lower than the PTC at that time creates no harm or confusion among customers, and no evidence (beyond the opinion of the OCA witness) to the contrary exists in this record.²⁶⁸

Based on the evidence that is in the record, the Commission should adopt RESA's proposal to reverse the auction/enrollment sequence for the FirstEnergy Companies because the amount of residential shopping in several of the EDC's service territories is so anemic that the concern about a lack of customer participation will be present for EGSs considering whether or not to participate in the auction. The weight given by EGSs of this concern is likely to result in fewer of them deciding to participate in the auction which will render moot all of the Commission's efforts to implement the auction in the first place.

5. Timing for Providing Full Terms and Conditions to Customers

RESA recommends that the explanatory materials and communications provided to consumers as part of the enrollment should contain, in summary fashion, a statement of the material terms of the service the customer would receive upon sending the enrollment card back to the EGS; i.e., term, price (or at least less than 5%), bonus, length of time customer must stay on service to get bonus; notices customer will get before the end of the term, that there are no

²⁶⁷ OCA St. No. 2-R at 7.

²⁶⁸ RESA St. No. 2-SR at 18-21. The OCA witness, Barbara Alexander, is an attorney who testifies frequently for consumer and senior citizen groups. *See* OCA St. 2 (Alexander) at 1-4; Exhibit BA-1. None of her opinions were supported by any empirical data of any kind. Moreover, unlike the EGS witnesses, she has no marketing or real world experience with electric markets. *Id.*

switching fees or penalties and what happens if the customer takes no action prior to the end of term. No other formal documents or communications should be required; although, after the customer enrolls, the EGS would send a disclosure statement to the customer, just as it currently does to enroll new customers consistent with the Commission's regulations.

FirstEnergy has proposed that, rather than employing its standard disclosure agreement, each EGS participating in the opt-in auction would be required to use a disclosure agreement drafted by FirstEnergy.²⁶⁹ RESA opposes requiring EGSs to utilize the "Opt-In Aggregation Agreement" drafted by FirstEnergy, as the basis for the contractual relationship between the EGS and the customer. The FirstEnergy EDCs are not as familiar with nor are they required to utilize disclosure statements as all EGSs are required to do in Pennsylvania when enrolling new customers. Unlike the EDCs, the Commission's regulatory requirements mean that each EGS has developed its own disclosure statement that it uses in Pennsylvania. In fact, any EGS seeking to receive a license to operate in Pennsylvania is required as a part of the application process to submit a proposed form for its disclosure statement. None of the EDCs have similar requirements and incorporating various terms used by EDCs into contracts utilized in the competitive markets is likely to introduce unnecessary ambiguity and confusion.²⁷⁰

The use of the disclosure statement by a successful EGS bidder in the opt-in auction should not be handled any differently despite the recommendation of FirstEnergy to the contrary. Thus, when an EGS is a successful bidder in the auction, it would then be required to provide the customer a disclosure statement. That disclosure statement would be required to have material terms and conditions as established by the Commission. Commission review of the disclosure

²⁶⁹ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 35-36; Ex. CVF-4.

²⁷⁰ RESA St. No. 2-R at 10-12.

statement to assure compliance with all material terms would be reasonable. FirstEnergy, however, should not be in a lead role in this process but instead work cooperatively with the Commission and the participating EGSs. Using a Commission-reviewed disclosure statement for each participating EGS has an added benefit in that the form that will be used by the EGSs after the opt-in auction term is completed is likely to be substantially similar (albeit with different pricing terms).

6. Customer Participation Cap

a. Summary and Overview of Each Party's Position

FirstEnergy initially proposed that there be no limit to the number of default service customers that could opt into the aggregation pool. Based on the Commission's recommendation in its *Intermediate Work Plan Tentative Order* to implement a default customer participation limit of 50%, FirstEnergy revised its initial proposal and now proposes to utilize the 50% default customer participation limit.

b. The Companies' Proposal (50%)

FirstEnergy proposes to limit customer participation to 50% of each EDC's default service customer base as of the date of the auction.²⁷¹

c. The OCA's Proposal (20%)

Without presenting any compelling or unique reasons for departing from the standard in the *Intermediate Work Plan Final Order*, OCA has proposed a 20% customer participation cap

²⁷¹ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 4.

for the retail opt-in auction.²⁷² For the reasons set forth above in section II.B.6, OCA's recommendation should be rejected.

d. RESA's Proposal (50%)

RESA supports FirstEnergy's proposed modification to 50% from its original proposal since it is consistent with the Commission's *Intermediate Work Plan Final Order*.²⁷³

7. Supplier Participation Load Cap

a. Summary and Overview of Each Party's Position

In its *Intermediate Work Plan Final Order*, the Commission concluded that a supplier participation cap of 50% of the participating customer accounts for each EDC service territory within the Retail Opt-in Auctions is appropriate to ensure that a diverse array of EGSs are able to participate in the auction while also providing value to customers.²⁷⁴ The Commission also directed that the issue of whether a minimum number of bidders should be established should be determined in each default service proceeding.²⁷⁵ While FirstEnergy proposes to implement a supplier load cap of 50%, it does not address the issue of whether a minimum number of bidders should be required.

FES opposed load caps and wrongly believes that supplier load caps interfere with the natural operation of competitive market forces, and lead to increased prices for customers. FES believes that the best deal for customers is to allow a single bidder to supply 100% of the load if they offer the lowest price. FES has not provided any substantial evidence or justification

²⁷² OCA St. No. 1 at 24-25; OCA St. No. 2 at 11.

²⁷³ RESA St. No. 2-SR at 6-7.

²⁷⁴ *Intermediate Work Plan Final Order*, at 63-64.

²⁷⁵ *Id.* at 64.

specific to the FirstEnergy EDCs to support this deviation from the Commission's *Intermediate Work Plan Final Order*.²⁷⁶ Nor has FES shown any operational constraints that would support implementing something different from the Commission's recommendation. Moreover, FES ignores the fact that the opt-in auctions have dual goals: (1) to move customers into the competitive market; and, (2) to jump start competition.²⁷⁷ Having a single supplier may be good for that existing supplier but it will not create the diverse competitive market the Commission is seeking and will not present an accurate picture of the diversity of suppliers that are possible in a truly competitive retail market.

b. The Companies' Proposal (50%)

First Energy's revised proposal recommends implementing a 50% supplier participation load cap but does not make any recommendations regarding a minimum number of bidders.²⁷⁸

c. Dominion Retail's Proposal

Dominion believes the supplier load cap should be lower than 50%.²⁷⁹

d. RESA's Proposal

As explained above in section IV.A.7.a, RESA supports a 50% supplier participation load cap. RESA also proposes that a minimum number of four bidders should be required for each auction.

In the *Intermediate Work Plan Final Order*, the Commission specifically directed that the issue of minimum number of bidders be determined in each default service proceeding.²⁸⁰ The

²⁷⁶ RESA St. No. 2-SR at 15-16.

²⁷⁷ *Id.* at 16.

²⁷⁸ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 30-31.

²⁷⁹ Dominion Retail St. No. SR-1 at 4.

50% supplier load cap means that the opt in market will not be dominated by just one supplier; but diversity in EGS participation should go farther and also require at least four winners. This may help EGSs that otherwise might not be able to participate in the market to do so. Having a critical mass of customers in a service territory for an EGS is the first step towards real and sustainable competition.²⁸¹ RESA does recognize that flexibility may be appropriate and, therefore, the Commission should have the flexibility to waive or alter this requirement if there are compelling reasons to do so.

8. Composition of Product Offer

a. *Discount from PTC*

Initially, FirstEnergy opposed requiring the EGSs to offer any discount from the PTC as a condition of participating in the retail opt-in auction on a belief that it was a loss leader. After the Commission's *Intermediate Final Work Plan Order*, however, FirstEnergy revised its proposal and now supporting having the auction product be for a fixed price at least 5% below the PTC on the day of the auction. RESA supports this price term.²⁸²

b. *"Bonus" Payments*

FirstEnergy opposes requiring any bonus payments to customers participating in the opt-in auction even though the Commission's guidance in the *Intermediate Work Plan Final Order*, is that a \$50 bonus payment should be required. RESA does not support FirstEnergy's refusal to require a bonus payment and recommends that a \$50 bonus payment be required.

²⁸⁰ *Intermediate Work Plan Final Order* at 64.

²⁸¹ RESA St. No. 2-R at 15.

²⁸² RESA St. No. 2-SR at 6, 8-10.

Offering a bonus is crucial if the opt-in auction is to have any chance of success. As set forth in potential customer focus groups research, customers generally very much like the notion of receiving an upfront “signing bonus” as an inducement for participating in the opt-in auction.²⁸³ RESA originally recommended that the bonus should be established at a level of \$100 or more on the basis that it likely would take a bonus of that level to ensure that customers would conclude that the auction was a good idea. This was the case regardless of where the auction price might end up by the end of the term, keeping in mind that the customer is free at any time to go to another EGS or back to default service. The Intermediate Work Plan recommended a bonus of \$50 for residential customers. While RESA would have had more confidence with a larger bonus, the Commission’s determination on this should be followed and FirstEnergy has not presented any compelling evidence supporting a different result here.²⁸⁴

Rather, FirstEnergy insists that a bonus is inadvisable. On behalf of FirstEnergy, Mr. Fullem presented two main reasons for this, both of which were shown to be without merit. First, Mr. Fullem claimed that a bonus was inappropriate because EGSs had already made offers in its service territory that contained bonuses.²⁸⁵ But this is very close to a non sequitur. Simply because bonuses of this level have already been offered does not in any way reduce the justification for including a bonus for this offer. Moreover, EGSs have and will continue to offer

²⁸³ RESA St. No. 2 at 21; RESA Ex. CHK-2 at 10; Tr. 223-236 (Kallaher).

²⁸⁴ If small commercial customers are permitted to participate, the bonus for these customers would likely have to be bigger. RESA recommends at least a \$100 bonus for small commercial customers.

²⁸⁵ Met-Ed/Penelec/Pen Power/West Penn St. No. 7-R at 31-34.

signing bonuses in all the service territories; the Commission presumably was aware of this and, nonetheless, directed that a \$50 bonus be part of the opt-in product.²⁸⁶

FirstEnergy's second basis for claiming that a bonus should not be included in the opt-in auction was an "analysis" performed by Mr. Fullem that allegedly indicated that if an EGS were required to pay a bonus of \$50 it would attempt to recover its "lost profit" in high rates after the end of the opt in auction product term.²⁸⁷ But this "analysis" is filled with flaws and incorrect assumptions, chief among them that EGSs would incur the same costs to acquire a customer through the opt-in auction as they do when they acquires one through normal marketing channels.²⁸⁸ RESA witness Kallaher explained that, in fact, one of the attractive features of the opt in auction to retail suppliers will be that they will not have to expend the same amount to acquire an opt-in customer. Therefore, the EGS should be able to not only offer a rate at least 5% below the shopping credit for the 6 or 12 month term, but also remit the bonus – without having to try to impose non-market based price hikes on the customer in subsequent periods. Of course, the failsafe that Mr. Fullem appeared to have overlooked is that an opt-in customer will be free to switch to another EGS or to default service without penalty of any kind. He or she will be able to do this not only at the end of the opt-in term but even after three months, and still receive the signing bonus. Accordingly, these contentions hardly justify ignoring the PUC's directive on signing bonuses.

²⁸⁶ See, TR. at 185(Fullem).

²⁸⁷ Met-Ed/Penelec/Pen Power/West Penn St. No. 7-R at 31-34; Ex. CVF-8.

²⁸⁸ RESA St. 2-SR at 9.

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

RESA opposes FirstEnergy's proposal that each EGS participating in the auction enter into an agreement with FirstEnergy setting forth alleged terms for serving customers in the opt-in auction. RESA notes that the relationship between an EGS and an EDC is already governed by existing agreements such as the supplier tariff and the billing services agreement. Any additional agreements may conflict with or dilute the clarity of the agreements under which EGSs and EDCs are currently doing business. RESA also views this proposal as an unnecessary intrusion into the competitive market by an entity (the EDCs) that has no business dictating terms and conditions for retail generation service, especially considering that it has an affiliated EGS that may well participate in the auction process. In fact, the agreement that FirstEnergy itself proposed contained terms that were inconsistent with the terms and conditions of its own plan.²⁸⁹

To the extent either the opt-in auctions or either of the referral programs would require additional terms and conditions governing the relationship between a participating EGS and an EDC, RESA would strongly support a Commission staff-led effort to craft such supplemental language on a collaborative basis, perhaps using an existing vehicle such as the ongoing OCMO or RMI processes to do so.²⁹⁰ EGSs should not be required to sign a special agreement with the EDC just to provide retail service to customers.

²⁸⁹ RESA St. No. 1-SR at 12.

²⁹⁰ RESA St. No. 2-SR at 10-12.

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

RESA recommends that the Commission direct a testing of the various methods of customer enrollment for the auction in a manner that will both inform the Commission's decision as to which methods are most effective and provide quantitative insight into likely levels of eventual customer enrollment in the auctions. The testing would materially improve the performance of the auction, while also providing wholesale suppliers with valuable information regarding likely auction participation. The test would proceed as follows:

- The Commission would form a task force to design and implement the test. Because the test would be narrowly aimed at marketing channels for the opt-in auction, membership on the task force would be heavily weighted in favor of expertise in marketing and consumer research.
- The task force would identify all reasonable channels for possible customer enrollment in the auction, and then choose the most promising (up to a maximum number) for inclusion in the test. To accomplish the desired result, the test would need to be conducted in advance of the first wholesale solicitation for default supply.
- The test itself would be accomplished by using the selected channels to solicit a statistically-significant subset of the customers in one or more EDC service territories to discover what percentage of those customers actually respond to the solicitation through the channel being tested.
- Customers returning the postcard in this example would actually receive the promised service, which would be provided by an EGS or multiple EGSs chosen through a process designed by the task force.²⁹¹

²⁹¹ RESA St. No. 2-R at 11-13.

FirstEnergy opposed RESA's proposal, claiming that there simply is not time to conduct the test and that it would not test all the relevant variables, including what customers might do at the end of the opt-in auction term.²⁹² These claims simply do not hold up under scrutiny.

First, the test is the equivalent of a survey. Generally a statistically significant survey population for FirstEnergy Companies default service residential customers (which currently number roughly 1.4 million customers) would be no more than a few hundred for each test run. As the Commission can attest, preparing and implementing a survey of a few hundred customer takes several weeks at most. Moreover, the only issue that needs to be "tested" is the number of customers that will respond to a joint EGS/EDC offer, with the terms and conditions as established by the Commission. There is no need to ask customers what they might do at the end of the term, as the end of term rules (as the Commission has established them), are no different than those applicable to any other competitive offer. It is only the response to the unique "dual sponsorship" and the fact that the offer will come in an EDC mailing that needs to be tested.

The most important reason for conducting the test is that, as presently structured, EGSs will have very little basis on which to predict the level of customer participation they can expect.²⁹³ Without some reasonable projection of this, many EGSs may decide that the risks of gearing up for and participating in the auction simply are not worth the effort of participation, if the resulting level of customers the EGS will be able to serve is small. The test is a simple and

²⁹² Met-Ed/Penelec/Penn Power/West Penn St. No. 7-SR at 2-3.

²⁹³ RESA St. No. 2-R at 11-13.

easy way to address this problem without incurring the time and expense of a full-scale pilot, which the Commission has already declined to recommend.²⁹⁴

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

As the Commission already concluded, customers should be adequately informed about the program term and what will happen upon expiration at the time they make their choice to participate. Consistent with the Commission’s renewal guidelines, only two additional notices should be provided.²⁹⁵ Customers should not be “automatically” transferred back to default service at the end of the aggregation term as such a result would completely undermine the entire program and, in fact, the Commission has already rejected this approach.²⁹⁶

RESA does not support requiring multiple separate notifications about what happens at the end of the initial term as such mailings are unnecessarily expensive and onerous. Such mailings are likely only to confuse customers, especially where two essentially identical notices would be sent within at most a 15 day period.²⁹⁷ OCA’s position is also not consistent with moving customers into the competitive market – which is the main goal of the program – and the *Intermediate Work Plan Final Order*.

²⁹⁴ *Intermediate Work Plan Final Order* at 47-48. The test is not the same as the pilot. See, Tr. 248-251 (Kallaher).

²⁹⁵ RESA St. No. 2-R at 20; *Intermediate Work Plan Final Order* at 73.

²⁹⁶ *Petition for Pike County Light & Power Company for Expedited Approval of Its Default Service Implementation Plan*, Docket No. P-2008-2044561, Opinion and Order entered July 26, 2010.

²⁹⁷ RESA St. No. 2-R at 20.

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

While either method could be utilized, RESA submits that the auction should be conducted using a sealed bid. A descending clock is unnecessarily costly and more complicated and involves transactions between two sophisticated business entities.²⁹⁸ Moreover, unlike the wholesale supply auctions, where descending clock auctions are appropriate, the prices arrived at in the opt in auction will apply directly to the customer. Therefore, customers may well seek out explanations of how the price was determined and a sealed bid is much easier to explain than a descending clock process.²⁹⁹

12. Recovery of Costs

a. All customers versus EGSs

RESA's position is that the costs of the retail opt-in auction should be recovered from the proceeds of the MAC as modified by RESA or, if the MAC is not approved, from a non-bypassable charge on all distribution customers, like the DSS. This is appropriate based on the circumstances present in the service territories of the FirstEnergy EDCs.³⁰⁰ The very low levels of residential shopping create particular difficulties for EGSs to have any sense about the number of customers who will actually participate in the competitive enhancements. Having participating EGSs pay for this program, when they have very limited ability to judge whether the program will be successful, could operate as a significant disincentive to their participation. Moreover, because the retail market enhancements programs are best seen as fundamental

²⁹⁸ RESA St. No. 2 at 23.

²⁹⁹ *Id.*

³⁰⁰ RESA St. No. 2-R at 9-10.

elements of retail market design (intended to put competitive supply on an equal footing with utility default service), recovering the costs as recommended by RESA is reasonable.³⁰¹

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

RESA believes that the costs of the auction and other retail market enhancements should be recovered either through the MAC, paid only by default service customers, or through a non-bypassable charge applied to all.³⁰² Recovery through the MAC is explained in greater detail above in Section III.C.3.

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

If the costs of the auction and other retail market enhancements are not recovered through the MAC, they should be recovered through a non-bypassable charge applied to all.³⁰³ The justification for a non-bypassable charge is the same as the justification for recovery through the MAC, which is discussed in greater detail above in Section III.C.3.

The suggestion by some parties that the discount through which the EDCs purchase accounts receivables from the EGS in the purchase of receivables (“POR”) program should be adjusted to pay for the costs of the opt-in auctions (or other retail enhancements) must be rejected. From the perspective of traditional rate-making, these programs have nothing to do with the costs that are intended to be recovered through the POR discount, which should reflect the uncollectible rate on supplier charges billed through utility consolidated billing.³⁰⁴ There is also no evidence that these programs would favor EGSs in proportion to the volumes they bill

³⁰¹ RESA St. No. 2-SR at 27-28.

³⁰² RESA St. No. 2-R at 9-10.

³⁰³ *Id.* at 9-10. RESA’s proposal is intended to be consistent with FirstEnergy’s primary proposal with regard to cost recovery.

³⁰⁴ RESA St. No. 2-R at 17.

through utility consolidated billing, though that is how the proposed mechanism would assess those costs.³⁰⁵

B. Standard Offer Customer Referral Program

1. Summary and Overview of Each Party's Position

The Commission directed EDCs to include a customer referral program in their default service plans, reasoning that such plans could provide an immediate and material improvement in customer shopping, and that they had been successful in other jurisdictions, notably New York.³⁰⁶ FirstEnergy revised its proposal to offer a product that provides 7% off each EDC's then existing PTC at the time of the customer enrollment, to provide a service term of twelve months, and to allow each participating customer to select its EGS or have one randomly assigned.³⁰⁷

With the exception of the service term, each of these changes are consistent with the *Intermediate Work Plan Final Order* and is supported by RESA.³⁰⁸ RESA supports a standard offer referral program with the following elements:

- The program should be modeled closely after the New York customer referral programs. Many Pennsylvania EGSs, including RESA members, participate in this program and it is widely viewed as a successful way to introduce customers to the concept of receiving service from an EGS.
- Value-added products through the customer referral program: RESA recommends that only a standard introductory rate product

³⁰⁵ RESA St. No. 2-R at 17.

³⁰⁶ *Intermediate Work Plan Final Order* at 20-33.

³⁰⁷ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 3-4.

³⁰⁸ RESA agrees with the revision of the "product" that will be offered via the Standard Offer and the random assignment if the customer does not choose an EGS (though "assignment among participating EGSs on a rotating basis" would be a more accurate characterization of RESA's view). RESA St. No. 2-SR at 22.

be implemented under a customer referral program at this time. However, after one year of experience with the program, RESA recommends that the Commission and stakeholders consider developing a second, value added product (such as a green product, dynamic pricing product, or other standardized value-added offering) that could be offered through the referral program .

- All properly licensed EGSs should be permitted to participate.
- Customers should be permitted to select an EGS by name or, in the absence of a preferred choice, would be assigned to a participating supplier on a rotating basis.
- Customer class eligibility would include residential and small business customers.
- Only default service customers would be eligible, and customers could participate in the program only once (that is, they cannot go back and forth between default service and the referral program, essentially gaining a near-permanent seven percent discount).
- Similar to the New York programs, at the end of the introductory period, customers would move to a month-to-month product with the EGS with no early termination fees.
- The EGS would be responsible for handling the enrollment and providing the terms and conditions to the customer. For example, when the customer agrees to participate in the program during a conversation with the EDC's CSR, the EDC would record the customer's name, account number and other relevant information and would transmit this information to the EGS (via EDI preferably, but could also be a manual report generation process if easier to implement). EGS generates EDI 814 enrollment transaction and delivers the required disclosure statement to the customer.
- EGSs would be free to participate in either the residential or the small business referral programs, or could decide to participate in both programs. EGSs should also be free to exit the program (and not take any new customers) at any time.³⁰⁹

³⁰⁹ RESA St. No. 2 at 27-29.

FirstEnergy’s proposal to have the “standard offer,” 7% discount last for 12 months is a misreading of the *Intermediate Work Plan Final Order*. Since the Commission intended to institute a Referral Program similar to that which has been instituted in New York, RESA submits that while the “Standard Offer” term could be as long as 12 months, the 7% mandated discount from the EDC’s Price to Compare would only be available for four months.³¹⁰ After the four month discount period, the price should revert to a fixed price that is disclosed to the customer in a mailing from the EGS serving the customer shortly after enrollment.³¹¹ FirstEnergy’s proposal to require participating EGSs to provide a 7% discount for an entire year is not practicable, will likely severely limit the ability of EGSs to participate,³¹² and should be rejected.

2. Customer Eligibility³¹³

Because competition in the FirstEnergy Companies’ service territories is so low, RESA recommends that the Commission should diverge from the *Intermediate Work Plan* and direct that small business customers should also be subject to the Standard Offer Referral Program. The shopping statistics present the kind of “special and unique” circumstances that should justify a divergence from the *Intermediate Work Plan Final Order*.³¹⁴

As set forth in the record, small business customers in the lower end of the commercial range (at or below 25 kW peak annual demand) exhibit many of the same characteristics as

³¹⁰ RESA St. No. 2-SR at 22.

³¹¹ *Id.*

³¹² *Id.*

³¹³ Eligibility of CAP Customers for both the Retail Opt-In Aggregation Program and the Standard Offer Customer Referral Program is a separate section, below.

³¹⁴ RESA St. No. 2-SR at 27.

residential customers when it comes to their familiarity with competitive electricity markets and possible unfounded concerns about the effects of switching away from the EDC. These characteristics make a referral program appropriate for this customer segment as well. It should also be administratively easy to include them since the EDC already must take steps to identify the customer's load characteristics in order to place them on the correct rate schedule.³¹⁵

OCA's position is that the referral program should be affirmatively offered to new customers and those who specifically inquire about customer choice, but other calls to the EDC should not trigger a requirement to explain or offer the referral program.³¹⁶ This is inconsistent with the specific directives in the *Intermediate Work Plan Final Order* (without any professed basis other than that OCA disagrees with the Commission's decision). Moreover, this would be an unnecessary restriction as the Commission has determined that, for billing inquiries, any Standard Offer referral should only occur after the billing inquiry or complaint is resolved. The Commission has also exempted "emergency" calls.³¹⁷

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

FirstEnergy revised its initial proposal and now supports offering a product that provides 7% off each EDC's PTC at the time of the customer enrollment, to provide a service term of twelve months, and to allow each participating customer to select its EGS or have one randomly assigned.³¹⁸

³¹⁵ RESA St. No. 2-R at 26.

³¹⁶ OCA St. No. 2 R at 10-11, 13.

³¹⁷ RESA St. No. 2-SR at 27.

³¹⁸ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 3-4.

RESA agrees with the revision of the “product” that will be offered via the Standard Offer and the random assignment if the customer does not choose an EGS. (RESA prefers an “assignment among participating EGSs on a rotating basis.”) These changes are consistent with the *Intermediate Work Plan Final Order*. But FirstEnergy’s proposal to have the “standard offer,” 7% discount last for 12 months is, in RESA’s view, a misreading of the Order. The Commission intended to institute a Referral Program similar to that which has been instituted in New York.³¹⁹ While the “Standard Offer” term could be as long as 12 months, the 7% mandated discount from the EDC’s PTC should only be available for four months. After the four month discount period, the price should revert to a price that is disclosed to the customer in a mailing from the EGS serving the customer shortly after enrollment. FirstEnergy’s proposal to require participating EGSs to provide a 7% discount for an entire year in any event is not practicable and will likely severely limit the ability of EGSs to participate.

An introductory rate for four months will attract maximum participation by EGSs, giving customers more choices and more opportunity to be exposed to different types of EGS products and services after the 7% off PTC price expires. Introductory prices are very common in other markets, such as telephone cell, and, cable service.³²⁰ Customers are well aware that the price they will receive after the discount period is over will reflect “regular” prices. No one expects to receive an introductory discount forever .

³¹⁹ RESA St. No. 2-SR at 22.

³²⁰ RESA St. No. 2 at 29.

4. **Recovery of Costs**

a. *All Customers versus EGSs*

RESA does not support assigning the costs of the program to "participating EGSs."³²¹ EGSs might not choose to participate, considering the relative paucity of shopping in the FirstEnergy service territories, a fact that, in RESA's opinion, justifies expanding the customers eligible to be partake of this competition enhancing program. However, if EGSs must bear the costs, the costs are relatively high, and there is no way of gauging the extent of customer participation, then there is serious potential that EGSs will simply forgo the opportunity. There is also the possibility of a free rider problem, depending on the exact mechanism for assessing costs against participating EGSs. Front-loading cost recovery on competitive suppliers creates an incentive for a supplier to stay out of that particular part of the market until the costs are paid. This not only raises fairness issues among EGSs but also tends to decrease the total value brought to retail customers by having a robust retail market with many sellers. Like the opt-in auction, the customer referral program is designed to encourage default service customers to explore competitive market alternatives. Accordingly, RESA believes that it is appropriate to allocate the costs of the program to default service customers and this can be accomplished by utilizing the funding made available through the MAC. Alternatively, the costs should be recovered from all customers since all customers have the potential to benefit from the program.

The Standard Offer program is really a "second best" substitute to take account of the fact that, today, EGSs cannot effectively market to customers before they arrange for distribution service, because all new customers must initially become default service customers, at least for

³²¹ RESA St. No. 2-R at 24-26.

one billing cycle. The costs of modifying EDC systems to permit new and moving customers immediately to take competitive generation service would plainly be a cost that would be recovered from all customers, since it obviously benefits all customers and corrects a fundamental inequity in the existing market structure. Similarly, it would be appropriate for the costs of this program – designed to, in part, address this fundamental inequity – to also be borne by all customers if the MAC funding mechanism is not approved.³²²

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

The costs of the program should be allocated to default service customers by utilizing the funding made available through the MAC. Recovery of costs through the MAC is discussed in greater detail above in Section III.C.3.

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

If the costs of the auction and other retail market enhancements are not recovered through the MAC, they should be recovered through a non-bypassable charge applied to all.³²³ The justification for a non-bypassable charge is the same as the justification for recovery through the MAC, which is discussed above and in Section III.C.3. And, as noted above in Section IV.A.12.c, using the POR discount to pay for the costs of the opt-in auctions (or other retail enhancements) must be rejected.

5. Constellation’s Proposal to Require Customers to “Opt-In” in Order to Be Eligible to Participate

RESA submits that this proposal is moot. In response to FirstEnergy’s original customer referral program, Constellation suggested that customers should have to “opt in” to the customer

³²² RESA St. No. 2-R at 24-26.

³²³ RESA St. No. 2-R at 27.

referral program prior to the start of that program.³²⁴ This suggestion was made prior to the issuance of the *Intermediate Work Plan Final Order*. FirstEnergy changed its customer referral program to correspond to the *Intermediate Work Plan Final Order*. But, Constellation did not continue to suggest that customers need to “opt-in” to the customer referral program (as revised) by FirstEnergy.³²⁵

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

OCA opposed the standard offer referral program and urged that it be delayed until at least after the opt-in auctions.³²⁶ According to OCA, if and when the referral program is implemented it should contain various provisions, some of which are reflected in the Commission's referral program proposals for the Intermediate Work Plan and some of which were outright rejected.³²⁷

The Commission has made clear that the Standard Offer program should go forward at the same time as the opt-in auction, and that customers should be subject to the same notice and contract extension rules that apply today for residential customers. OCA has not presented any special circumstances affecting the Companies; nor any particular justifiable basis to support its demands. OCA’s suggestions also do not comport with the Commission's directives and, for all these reasons, they should be rejected.³²⁸

³²⁴ Constellation Statement No. 1 at 33.

³²⁵ See Constellation Statement No. 1-SR.

³²⁶ OCA St. No. 2 at 13.

³²⁷ A summary of the OCA recommendations and whether they were accepted or rejected by the Commission has been provided by RESA in Mr. Kallaher’s Rebuttal Testimony. RESA St. No. 2 at 26; RESA St. No. 2-R at 27-28.

³²⁸ RESA St. No. 2 at 28.

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

FirstEnergy initially proposed a "new/mover" referral program that followed its view of the Commission's directives. As described by Mr. Fullem, applicants for new service and customers changing service .residential and small commercial customers that call an EDC to initiate service or to move service within an EDC's service territory would be provided information about the competitive marketplace so that they would not harbor the erroneous assumption that EDC-provided default service is their first (or only) option for generation supply. If such a customer knows which EGS he or she wants to select, then the EDC should have processes in place to transfer the caller to his or her chosen EGS. If a customer does not select a specific EGS, he or she should be referred to www.PAPowerSwitch.com.³²⁹ In response to RESA's position that a "New/Mover" program as offered by FirstEnergy was unlikely to be worth the cost and effort, FirstEnergy revised its position and proposed to dispense with this effort.³³⁰

For the most part, FirstEnergy's proposed "new/mover" customer referral program, as described by the Companies, is too complicated and, most importantly, are not likely to result in achieving the two main goals of the program – to encourage customers to participate in the competitive market and to begin the process of putting competitive supply on a level playing field with default service. Ten to fifteen percent of the market establishes new service or service after a move each year so this is not an unimportant area of concern. However, the Commission's recommendation (apparently adopted by FirstEnergy) is that customers unfamiliar

³²⁹ Met-Ed/Penelec/Penn Power/West Penn St. No. 7 at 28-29.

³³⁰ Met-Ed/Penelec/Penn Power/West Penn St. No. 7-SR at 11-12.

with choice be directed to its PowerSwitch website and only those customers who already know which EGS they want to select will be "hot transferred" to the EGS. This requires the customer to end the call with the service representative, go to the internet, navigate to the Commission's choice website and then study the offers listed to determine whether or not the customer should switch. By designing this program in this way, the core purpose of any customer referral program – to give the customer a one-stop shopping experience whereby he or she can learn about choice and make an easy and convenient decision at the time to switch to an EGS or choose an EGS at service initiation – is not being fulfilled. Accordingly, RESA continues to believe that, rather than implement the full scale "New/Mover" program as outlined by the Commission, a "standard offer" customer referral program should be implemented as soon as possible.³³¹

Whether or not the "new/mover" process does go forward for FirstEnergy, and in the spirit of the Intermediate Work Plan, RESA submits that the Companies should implement a procedure whereby an applicant or moving customer that already knows the EGS to which he or she wishes to subscribe should be enrolled with that EGS by the EDC. This would be a simpler process than "hot transferring" the customer to the EGS, who would thereupon enroll the customer and then send the information back to the EDC. The details and timelines of this process should be established in a workshop initiated immediately after the end of this case, with the goal of implementing this process as soon as possible.

³³¹ RESA St. No. 2-R at 21-23.

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

1. CAUSE-PA's Proposal

CAUSE believes that the opt-in auctions must be structured to assure that low-income customers that are on customer assistance programs will not pay more than they would if they were to remain on default service.

The opt-in auctions will not change how the Customer Assistance Programs (“CAP”) subsidies are calculated for low-income customers. Met-Ed, Penelec and Penn Power will continue to ask low-income customers to pay a percentage of their total consumption bill and West Penn Power will continue to ask low-income customers to pay a percentage of their income. These calculations will not change under the opt-in auction. But, the low-income customers will benefit from participation in the opt-in auction because they will receive the \$50 bonus. In addition, the guaranteed percentage off will work to lower their total consumption bill for these households, which will benefit the customers who pay for these programs.³³²

The CAP customers will retain their current benefits. By design, these households always pay less than their total consumption bill. When the default service rates change, these households are being asked to pay the same percentage of their total consumption bill. This will not change in the opt-in auction - they will still be asked to pay the same percentage of their total consumption bill. So, it cannot be said that low-income customers in the opt-in auction would lose any benefits or see reduced benefits in any way.³³³

³³² RESA St. No. 2-R at 15.

³³³ *Id.*

Low income customers who participate in the opt-in auctions should not be forced to return to default service at the conclusion of the auction term. The general rule, as directed by the Commission, is that participants in the opt-in auctions will receive a standard “end of term” notice, and customers who do nothing will continue with the serving EGS on a month-to-month basis. There is no compelling reason to diverge from that general rule. Low-income customers have a choice of suppliers - both now, during and after the opt-in auction. A customer participating in the opt-in auction may switch back to default service or to another supplier at any time without penalty.³³⁴

All of the costs of the opt-in auction should not be paid by participating EGSs by way of a discount on the purchase of the receivables by the EDCs. The costs of the opt-in auction should be recovered through the MAC or, alternatively, a non-bypassable charge that all FirstEnergy distribution customers would pay. Moreover, using the POR discount to pay for the costs of the opt-in auctions (or other retail enhancements) is inappropriate from the perspective of traditional rate-making. These programs have nothing to do with the costs that are intended to be recovered through the POR discount, which should reflect the uncollectible rate on supplier charges billed through utility consolidated billing. There is also no evidence that these programs would favor EGSs in proportion to the volumes they bill through utility consolidated billing, though that is how the proposed mechanism would assess those costs. RESA strongly recommends the more equitable approach, using the MAC or a non-bypassable charge assessed

³³⁴ RESA St. No. 2-R at 16.

to all customers to pay for these market features, which are intended primarily to benefit customers who have not yet shopped.³³⁵

2. The OCA's Proposal

OCA opines that it is unreasonable to allow CAP customers to participate in the opt-in auction unless they will benefit in the form of lower bills compared to the PTC during the entire auction term.³³⁶ OCA notes that this is a concern for all potential enrollees in this program, but it is of “vital importance” for customers who, by definition, are unable to afford their bills for essential electricity service.³³⁷ This concern is misplaced because, as discussed above in Section IV.B.1, the discount should only continue for 4 months.

OCA does not believe that CAP customers will find value in participating in this program that go beyond the price for service.³³⁸ Contrary to OCA's paternalistic approach, the Commission has indicated that CAP customers should be eligible to participate in the auctions as long as are not “subject to harm, i.e., loss of benefits.”³³⁹ RESA believes that CAP customers could participate by making the CAP benefit they receive portable.³⁴⁰ It should be relatively easy to insure that CAP customers would not be “subject to harm” if they are deemed eligible to participate in the auction.³⁴¹ Here, a CAP customer would stand to receive a \$50 bonus for participating but would continue to receive the subsidy the programs of the individual

³³⁵ *Id.* at 17.

³³⁶ OCA St. No. 2 at 12.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Intermediate Work Plan Final Order* at 43.

³⁴⁰ RESA St. No. 2-R at 14.

³⁴¹ *Id.*

FirstEnergy Companies.³⁴² Because they will not be subject to the loss of benefits and will be given the same terms as other participants in the auctions, the final order here should direct that CAP customers should be able to participate.³⁴³ Additionally, RESA would recommend that a special task force be created immediately to work exclusively on bringing the CAP customers into the program.³⁴⁴

V. OPERATIONAL ISSUES

A. System “Enhancements” Proposed by Constellation

RESA supports implementation of the system enhancements proposed by Constellation.

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

Delays are inherent in the current processes used by FirstEnergy.³⁴⁵ Such delays inhibit the ability of the EGS to offer a current price and may result in missed opportunities to obtain customers.³⁴⁶ To eliminate these delays, RESA recommends that the Companies investigate implementing a secure, web-based system that will provide electronic access to key customer usage and account data that can be accessed on demand via a secure, supplier website.³⁴⁷

A secure supplier website would allow current information to be presented without delay by an EGS authorized by the customer, subject to appropriate limitations reflecting legally

³⁴² RESA St. No. 2-R at 14.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ RESA St. No. 1 at 32.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

mandated customer privacy issues.³⁴⁸ An example of how this is done is the website available to licensed EGSs by PECO.³⁴⁹ The “PECO Presentment Customer Usage” site is available via the internet to all customers and a customer’s agent with a valid letter of authorization or comparable document authorizing access to the information.³⁵⁰ With appropriate authorization, an EGS or a customer can enter a customer’s account number and immediately gain, on demand, relevant information about that customer that is needed to price an offer.³⁵¹

The availability of such a powerful web-based tool enables an EGS to offer potential customers a “one stop” shopping website where a price can be immediately offered and accepted.³⁵² This becomes possible because the customer enters relevant information at the EGS’s website which is then matched with the utility’s usage data from the utility’s website, and an instant, custom price for that particular account can be displayed.³⁵³ Remaining on the EGS website with the price offer, the customer can then sign a contract and enroll with the EGS for service.³⁵⁴ Such customer conveniences make shopping a positive experience for the consumer and can be an effective way to encourage customers to shop.³⁵⁵ In addition, the immediate availability of relevant customer information can be used to notify the customer that he or she may not be eligible, for whatever reason, for an EGS’s offer and can be immediately referred to

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 33.

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

the Commission’s PowerSwitch website for information about other alternative suppliers.³⁵⁶ The more immediate, accurate and up-to-date the information, the better the price that can be offered to the customer and the less likelihood for errors because the customer can immediately sign up via the EGS website.³⁵⁷

This operational improvement would benefit customers and provide further incentive for EGSs to enter the market creating a win-win situation.³⁵⁸ In response, FirstEnergy recommended that this issue be “left to one of the working groups in the Commission’s Retail Markets Investigation.”³⁵⁹ That response is not justified in these circumstances. RESA has identified very specific delays that continue to occur for FirstEnergy.³⁶⁰ These problems can and should be addressed as soon as possible.³⁶¹ Pushing these issues into a statewide stakeholder group is not an efficient or reasonable way to resolve RESA’s concerns or to improve the competitive markets.³⁶²

VI. AFFILIATED INTEREST APPROVAL

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

RESA takes no position on this issue.

³⁵⁶

Id.

³⁵⁷

Id. Such data is currently provided by PECO to its customers and EGSs, and is currently provided by FirstEnergy on a less immediately available basis via a web EDI flat file. RESA

³⁵⁸

Id.

³⁵⁹

Met-Ed/Penelec/Penn Power/West Penn St. No. 2-R at 29.

³⁶⁰

RESA St No. 2 at 32. RESA St. No. 2-SR at 32.

³⁶¹

RESA St. No. 2-SR at 32.

³⁶²

Id.

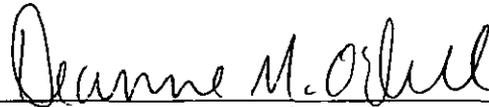
VII. OTHER ISSUES

Not applicable.

VIII. CONCLUSION

RESA respectfully requests that the Administrative Law Judge issue a Recommended Decision consistent with RESA's positions and recommendations in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Main Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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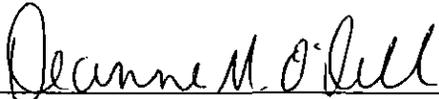
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