



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

May 16, 2012

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
P.O. 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 Program

Docket No. P-2011-2273650

Dear Secretary Chiavetta:

Enclosed please find an original copy of the Bureau of Investigation and Enforcement's (I&E) **Reply Brief** in the above-captioned proceeding.

Copies are being served on all active parties of record. If you have any questions, please contact me at (717) 783-6151.

Sincerely,

Charles Daniel Shields
Senior Prosecutor
Investigation and Enforcement
PA Attorney I.D. No. 29363

Enclosure
CDS/edc

cc: Parties of Record
Hon. Elizabeth Barnes

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**REPLY BRIEF
OF THE BUREAU OF
INVESTIGATION AND ENFORCEMENT**

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Dated: May 16, 2012

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I. INTRODUCTION

On May 4, 2012, the Bureau of Investigation and Enforcement (“I&E”) filed its Main Brief containing its recommendations to the Pennsylvania Public Utility Commission (“Commission”) involving the Joint Petition for Approval of their Default Service Programs (“Joint Petition”) filed by Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”) and West Penn Power Company (“West Penn”) [collectively referred to as “Companies”]. In the Joint Petition, consolidated at the four dockets noted above, the Companies submitted a proposed program for the terms and conditions for each to provide default service as an electric distribution company (“EDC”) to their respective customers for the period June 1, 2013, to May 31, 2015. I&E has participated in the proceeding to investigate whether each component of the submitted program and any modifications proposed by other parties are in the public interest.

I&E now submits this Reply Brief in further support of its opposition to the proposed imposition of a Market Adjustment Charge (“MAC”) and to respond to the arguments on that issue raised in the Companies Main Brief.¹

1 As noted in a footnote in the I&E Main Brief, a second issue raised in the I&E testimony regarding the potential issue of the need to recover over/under collections in the rider related to Time-of-Use (“TOU”) service was subsequently resolved prior to briefing when the Companies demonstrated to I&E’s satisfaction that default service customers could not be adversely financially affected by the structured fixed rate. I&E MB, p. 2, fn. 1.

The I&E recommendation to the Commission is fully supported by the I&E Main Brief, this instant Reply Brief and the I&E testimony admitted into the record.² Commission adoption of the I&E position is further warranted given that the Companies have failed to meet their burden of proving that imposition of the proposed MAC is lawful and in the public interest.

II. DEFAULT SERVICE PROCUREMENT AND IMPLEMENTATION PLANS

No issues in the common brief outline heading addressed herein.

III. RATE DESIGN AND COST RECOVERY

No issues in Subsections A or B addressed in this I&E Reply Brief.

C. Market Adjustment Charge

1. Summary and Overview of Each Party's Position

2 As identified in the I&E Main Brief, the three separately distributed I&E testimonies, Direct, Rebuttal and Surrebuttal that were admitted into the record at hearing were produced and sponsored by I&E Witness Scott Granger, who is a full-time I&E expert holding the Commission title of Executive Policy Analyst. I&E Witness Granger's Direct Testimony was offered and admitted into the record as I&E Statement No. 1, his Rebuttal Testimony was admitted as I&E Statement No. 1-R and his Surrebuttal Testimony was admitted as I&E Statement No. 1-SR. I&E Witness Granger's Direct Testimony set forth the reasons and rationale for opposition to the proposed MAC. His Rebuttal Testimony responded to the respective direct testimonies of the Retail Energy Supply Association ("RESA") witness and the Dominion Retail Inc. ("Dominion Retail") witness, both of whom recommend that the proposed MAC be approved, but each attached certain respective modifications and/or conditions. The I&E Rebuttal Testimony also addressed the significance of the Commission's Final Order entered on March 2, 2012, regarding the *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, at Docket No. I-2011-2237952. The I&E Surrebuttal Testimony is referenced in the I&E Reply Brief and responds to Companies Witness Fullem's Rebuttal Testimony on the MAC proposal.

Those parties opposed to the MAC include I&E, the Office of Small Business Advocate (“OSBA”) and the Office of Consumer Advocate (“OCA”). Companies Main Brief, p. 46. I&E addressed the issue of the Companies MAC proposal at page 7-16 of the I&E Main Brief. I&E MB, pp. 7-16. To the extent that the arguments put forth by other parties in their respective briefs are consistent with, reinforce and/or augment the I&E opposition to the MAC proposal in any form, they are endorsed by I&E.³

2. Position of Parties Opposed – I&E Position

The Companies Main Brief numbers some 142 pages, with thirteen (13) pages devoted to arguing in favor of their proposed adder to the Price to Compare (“PTC”), styled as a “Market Adjustment Charge” (“MAC”). Companies MB, pp. 40-53. The Companies contend that such a bypassable charge imposed upon non-shopping Residential and Commercial Customers at \$0.005 per kWh that includes a profit component is lawful and justified. Companies MB, pp. 40-53.

For organizational purposes, the remainder of this section of the I&E Reply Brief has been further divided into subheadings in bold in order to specifically

3 The I&E opposition to the proposed MAC was initially presented in the Direct Testimony of I&E Witness Scott Granger at pages 3-6. I&E Stmt. No. 1, pp. 3-6. At page 3, Mr. Granger stated that, “First, the Companies seek to implement a Market Adjustment Charge (“MAC”) and the issue is whether the MAC qualifies as a retail market enhancement tool or is simply a profit component adder.” I&E Stmt. No. 1, p. 3. Also on page 3 of his Direct Testimony, Mr. Granger referenced Companies Statement No. 7, wherein the Companies Witness Charles V. Fullem acknowledged that “the MAC contains a return component that will be added to the weighted average cost of generation for default service customers in the residential and commercial classes and included in the reconciliation cost calculation.” I&E MB, p. 9. I&E Stmt. No. 1, p. 3. Companies Stmt. No. 7, p. 11.

address certain Companies arguments in their Main Brief supporting their MAC proposal.

- a. **The Companies citation to 66 Pa.C.S. § 2807(e)(3.9) and its accompanying erroneous interpretation of the relevant language provides no support for the proposed MAC.**

Among the Companies arguments attempting to support the imposition of a MAC is that its components all constitute “reasonable costs” to the provision of default service as defined by 66 Pa.C.S. § 2807(e)(3.9) and that they and any other electric distribution company (“EDC”) are entitled to add such a piece to the PTC under such statutory authorization. Companies MB, p. 40, 46-47.

I&E first notes that the initial specific reference by a Company witness to 66 Pa.C.S. § 2807(e)(3.9) as it relates to their MAC proposal was found not in the Direct Testimony of Companies Witness Fullem, but rather in his Rebuttal Testimony. Companies Stmt. 7 and Stmt. 7-R at p. 5-6.⁴ Presumably, Companies Witness Fullem was responding to the arguments in the respective direct testimonies of witnesses for a number of the parties to this proceeding who

4 In fact, the only Pennsylvania statutory reference in Companies Witness Fullem’s Direct Testimony regarding the MAC is at page 15 where he states that, [N]othing in Act 129 precludes an EDC (or other default supplier) from reflecting in the price-to-compare all the costs of providing default service.” Companies Stmt. 7, p. 15. After making this observation, Mr. Fullem then declares that the return component of the MAC is such a cost that should be included in the calculation of default service costs. Of course, once the Companies witness utilizes the circular reasoning that a profit component to the proposed MAC is an allowable cost, then the cost is thus allowable. Companies Stmt. 7, p. 15.

contend that the proposed MAC is contrary to the express requirement of this Section 2807(e)(3.9) of the Public Utility Code, 66 Pa.C.S. § 2807(e)(3.9).⁵

On the question of any statutory authority for a MAC as it relates to 66 Pa.C.S. § 2807(e)(3.9), I&E Witness Granger at page 7 of his Surrebuttal Testimony states that “Upon advice of counsel and my own expertise as a licensed attorney here in Pennsylvania, I disagree with Mr. Fullem’s legal interpretation and assert that such a proposed MAC does not constitute a reasonable cost allowable under the cited 66 Pa.C.S. § 2807(e)(3.9).”⁶ I&E Stmt. 1-SR, p. 7.

The OCA Main Brief at pages 39-40 references I&E Witness Granger’s Direct Testimony and quotes his stated position that, “the EDC’s ‘obligations to serve’ set forth in the Public Utility Code, states that the EDC shall provide the default service electric power to the retail customers at no greater cost than the cost of obtaining the generation.” I&E Stmt. No. 1, p. 5. OCA MB, pp. 39-40. The OCA Main Brief at page 39 also successfully refutes the Companies tenuous legal argument that a MAC is permitted by Section 2807(e)(3.9), where they properly include consideration of the word “incurred” as part of the determination of “reasonable costs, citing this statutory section that provides as follows:

5 A review of each party’s brief that addresses the MAC proposal should disclose that the applicability of 66 Pa.C.S. § 2807(e)(3.9) is not in question as each party addressing the issue focuses primarily upon the interpretation of the language of that section when arguing whether or not such an adder as a MAC is permissible.

6 In addition to advancing the legal argument in opposition to the proposed MAC, the I&E Main Brief primarily referenced the Direct and Rebuttal Testimonies of its Witness Scott Granger and stated that his Surrebuttal Testimony would be referenced in this I&E Reply Brief. I&E MB, p. 5, fn. 2.

The default service provider shall have the right to recover on a full and current basis, pursuant to a reconcilable automatic adjustment clause under section 1307 (relating to sliding scale of rates; adjustments), all reasonable costs incurred under this section and a commission-approved competitive procurement plan.

66 Pa.C.S. § 2807(e)(3.9), Underlining emphasis added.

This appropriate and necessary inclusion of the term “incurred” identifies that the statute contemplated recovery of specific and precise expenditures rather than simply nebulous and vaguely quantified “costs.”⁷

The Companies in their Main Brief seek to divert the Commission’s attention from the clearly defined “reasonable costs incurred” requirement by advancing the proposition that the parties opposed to the MAC are narrowly and unduly mired in standard utility ratemaking concepts, such as cost of service models, that “... are not applicable to pricing default service, which represents only one of many options that customers can choose in the market for competitive electric service.” Companies MB, p. 47.

In response to the Companies, I&E would point out that the issue before the Commission regarding the appropriate level of EDC recovery for providing default service is not to be approached as a matter of some arbitrary method of

⁷ *West's Encyclopedia of American Law, edition 2* defines “incurred” as, “[To] become subject to and liable for; to have liabilities imposed by act or operation of law.” The *Encyclopedia* goes on to provide an example, stating “Expenses are incurred, for example, when the legal obligation to pay them arises.” Such a definition clearly implies a degree of readily identifiable specificity regarding such liabilities or obligations. The OCA Main Brief at page 39 also cites to Pennsylvania appellate decisions interpreting the plain meaning to exclude hypothetical and illusory “costs” not actually incurred. OCA MB, p. 39.

“pricing” default service, but rather as an identification of the cost components that are authorized by statute to be recovered by an EDC providing default service, i.e. “reasonable costs incurred.” This is the type of clear and unequivocal language that the Commission is regularly required to interpret and it’s clear meaning should be applied here.⁸ Given the present statutory language of Section 2807(e)(3.9) and the commonly understood meaning of the word “incurred,” whether the interpretation is based upon a mindset accustomed to utilizing utility ratemaking concepts *or* one familiar with applying the standard rules of statutory construction, the unformulated “costs” claimed by the Company are overly vague cannot and do not meet the precise “incurred” statutory requirement that would allow for the inclusion of a MAC adder.

b. The Companies arguments for the necessity of a MAC to enhance competition are unpersuasive.

At pages 45-46 of their Main Brief, the Companies try another approach seeking to justify the imposition of a MAC in the PTC by touting its use as a competitive market enhancement. However, when claimed “costs” for an EDC to provide default service that lack definitive and readily identifiable quantification are added to the PTC, the stage is likely set for the establishment of an arbitrarily

⁸ Notably, the Companies references in their Main Brief to other jurisdictions where such a profit adder was allowed for an EDC providing default service did not include a apples-to-apples comparison of the relevant statutory language in such jurisdictions or how they compared to this strict Commonwealth statutory standard. Companies MB, pp. 43-44. In fact, the Companies admitted at page 44 of their Main Brief that “... each state operates under a different statutory standard.” Companies MB, p. 44.

high rate solely for the purpose of maximizing competition and the entire purpose of decoupling electric generation to reduce the out-of-pocket payments from customers is lost in the process.

Of particular note though, the Companies stated interest in contributing to “robust competition in the retail electricity market” by increasing the PTC by the amount of their proposed MAC seems disingenuous given their recommended rejection of the proposal of Retail Energy Supply Association (“RESA”) Witness Christopher H. Kallaher. Companies MB, p. 52. In his testimonies, RESA Witness Kallaher supports imposition of a MAC, but his recommendation is opposed by the Companies as it would result in not all the proceeds collected under the MAC being retained by the Companies. RESA Stmt. 2, p. 31.⁹

Undoubtedly, all the benefits to the enhancement of retail electric generation competition that the Companies allude to in supporting the imposition of a MAC

⁹ RESA Witness Kallaher addresses the Companies’ proposed MAC at pages 29-31 of his Direct Testimony, observing at page 30 that “First Energy proposes to collect the MAC proceeds and (apparently) keep them as profit for the distribution utility.” RESA Stmt. 2, p. 30, lines 6-7, and in total at pp. 29-31. While characterizing the adder as “reasonable and appropriate” at page 30 of his Direct Testimony, Mr. Kallaher recommends that the proceeds of the MAC be used to pay: (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 Companies Witness Reitzes that actually materialize. RESA Stmt. 2, p. 31. He further recommends that any remaining funds left over after the use of his method of allocating all MAC proceeds would be returned as a credit each year to all distribution ratepayers on a pro rata basis via a non-bypassable credit. As further support for his proposal, Mr. Kallaher observes that it would remove any incentive for the Companies to retain customers on default service. I&E MB, pp. 11-14. RESA Stmt. 2, p. 31.

would similarly exist under the RESA proposal.¹⁰ And, if enhanced competition is indeed the goal, then RESA Witness Kallaher's proposal to exclude a Company-recommended "reasonable return" component from the MAC and flow back to distribution ratepayers any remaining funds left over after his recommended method of allocating all MAC proceeds is laudable as it would, as he notes, remove any incentive for the Companies to retain customers on default service to enhance profits. RESA Stmt. 2, p. 31.

Taken to its logical conclusion, were the Commission to allow the FirstEnergy Companies or any other EDC to include a MAC with a built-in profit component in their default service rate, it would more than likely enhance the incentive for an EDC to maximize profits by having as many distribution customers as possible take default service, hardly the scenario envisioned by the Legislature when enacting the Electricity Generation Customer Choice and Competition Act.¹¹

10 To reiterate, I&E opposes the concept of a MAC in any form. I&E MB, pp. 7-16.

11 Granted, a PTC level that would include a MAC would be higher and presumably less competitive, but the EDC's incentive to retain customers may dampen the degree of an EDC's contributions or active efforts to having customers switch over to an alternative generation supplier, despite the Commission's best efforts to have them do so. As a worst case scenario, electric service here in Pennsylvania may begin to again approach the existence of vertically integrated electric utilities, with the only difference being that the generation is procured from a different entity but provided almost exclusively by the distribution company while again earning a profit on the generation component of their service to customers.

- c. **The Commission’s Investigation has already considered and rejected the Companies argument for a return component in the provision of default service by an EDC.**

As referenced at page 3 of the I&E Main Brief, the Commission’s Final Order entitled *Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan*, at Docket No. I-2011-2237952, was entered during the course of this proceeding on March 2, 2012. I&E MB, p. 3. The present Companies default service program Joint Petition is the first to be considered since the Commission’s Final Order.¹² I&E MB, pp. 10-11. As noted in the I&E Main Brief, that Order made no reference to any such MAC or similar type proposal of any kind.

Interestingly, the Companies Main Brief makes no reference to the fact that its own witness, Mr. Fullem points out in his Direct Testimony that “[I]n comments (p.7) submitted on June 3, 2011 in the Commission’s Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan, at Docket No. I-2011-2237952, the Companies explained that a return component is necessary and would enhance the competitive position of EGSs:” Companies Stmt. No. 7, p. 16. Companies Witness Fullem goes on to cite specifically the language from pages 7

12 As explained by I&E Witness Granger, the Order represents the Commission’s issuance of a final intermediate work plan to establish various recommendations and proposals to seek to improve competition in the retail electricity market. The work plan is based on a set of recommendations that the Commission received from its Office of Competitive Market Oversight (“OCMO”). The Order is particularly important and relevant to this proceeding as it is designed “... to provide guidance on those issues, tasks and goals that can be resolved and implemented prior to the expiration of the EDCs’ next round of default service plans” Order, at “Conclusion,” p. 103. I&E Stmt. No. 1-R, p. 9.

and 12 of the FirstEnergy Companies' comments to the Commission arguing for a return component at that Investigation docket. Companies Stmt. No. 7, pp. 16-17.

Given his complete citations to the Companies comments to the Commission in his Direct Testimony, it is likely that Companies Witness Fullem sought to demonstrate that the Companies were not making the argument to the Commission for the first time in the instant Joint Petition proceeding, but given the omission of any such MAC scheme in the Commission's Final Order entered March 2, 2012, it may be that the Companies subsequently determined when producing their Main Brief that such reference to their previously submitted and apparently rejected comments to the Commission need not be referenced.

- d. The Companies argument misconstrues the purpose of 52 Pa. Code § 54.183(c) and offers no support for the imposition of a profit component to a MAC.**

It is important to reemphasize that this Commission has not allowed the addition of a return component to a default service rate as sought by the Companies. In fact, an EDC's "obligations to serve" set forth in the Public Utility Code, 66 Pa.C.S. § 2807(e) requires that it provide the default service electric power to the retail customers at no greater cost than the cost of obtaining the generation. As stated by I&E Witness Granger, this obligation is generally recognized as not allowing the EDCs to add a profit margin to the price of their default service electric power. I&E Stmt. No. 1, p. 5. I&E MB, p. 11.

Despite this historical approach by this Commission, the Companies in their Main Brief endeavor to construct yet another argument seeking to justify the imposition of a MAC, where they advance the erroneous proposition that, “[M]oreover, the Commission’s assertion of authority under 52 Pa. Code § 54.183(c) to reassign the default service obligation to a default service provider other than an EDC implicitly acknowledges that some mechanism should exist to compensate a default service provider for the risks it assumes and the value it creates. Otherwise, it is impossible to envision why any alternative default service provider would be interested or willing to assume the responsibility now exercised by EDCs” Companies MB, p. 40.

In response, I&E would point out that a full reading of the 52 Pa. Code § 54.183, in addition to subsection “(c)” referenced by the Companies, provides a necessarily full understanding of its intent and purpose, where it provides in full:

§ 54.183. Default service provider.

- (a) The DSP shall be the incumbent EDC in each certificated service territory, except as provided for under subsection (b).
- (b) The DSP may be changed by one of the following processes:
 - (1) An EDC may petition the Commission to be relieved of the default service obligation.
 - (2) An EGS may petition the Commission to be assigned the default service role for a particular EDC service territory.
 - (3) The Commission may propose through its own motion that an EDC be relieved of the default service obligation.
- (c) The **Commission may reassign the default service obligation** for the entire service territory, or for specific customer classes, to one or more alternative **DSPs when it finds it to be necessary for the accommodation, safety and convenience of the public**. A finding would include an evaluation of the incumbent EDC’s operational and financial fitness to serve retail customers, and its ability to provide default service under reasonable rates and conditions. In

these circumstances, the Commission will announce, through an order, a competitive process to determine the alternative DSP.

(d) When the Commission finds that an EDC should be relieved of the default service obligation, the competitive process for the replacement of the default service provider shall be as follows:

(1) An entity that wishes to be considered for the role of the alternative DSP shall file a petition under 66 Pa.C.S. § 2807(e)(3) (relating to duties of electric distribution companies).

(2) Petitioners shall demonstrate their operational and financial fitness to serve and their ability to comply with Commission regulations, orders and applicable laws pertaining to public utility service.

(3) If no petitioner can meet this standard, the incumbent EDC shall be required to continue the provision of default service.

(4) If one or more petitioners meets the standard provided in paragraph (2), **the Commission will approve the DSP best able to fulfill the obligation in a safe, cost-effective and efficient manner**, consistent with 66 Pa.C.S. § § 1103 and 1501 (relating to procedure to obtain certificates of public convenience; and character of service and facilities) and 2807(e).

(5) A petitioner approved to act as an alternative DSP shall comply with applicable provisions of the code, regulations and conditions imposed in approving the petition to act as an alternative DSP.

52 Pa. Code § 54.183. Selective text bolding added.

Viewing this regulation in its entirety, it can be readily observed that the Commission was exercising foresight by establishing contingency plans in the event an EDC, for whatever reason, was unable to demonstrate their operational and financial fitness to serve and their ability to comply with Commission regulations, orders and applicable laws pertaining to public utility service and that an alternative entity or entities needed to be found that could meet those requirements under 52 Pa. Code § 54.183(d)(2). This interpretation is supported by the very language of the Companies' cited 52 Pa. Code § 54.183(c) that clearly anticipates that there is a question regarding the incumbent EDC's operational and financial fitness to serve retail customers, and its ability to provide default service

under reasonable rates and conditions. This interpretation is particularly accurate given that the last sentence of the above-cited 52 Pa. Code § 54.183(c) provides that, “[I]n these circumstances, the Commission will announce, through an order, a competitive process to determine the alternative DSP.” [Emphasis Added] By definition then, the “competitive process” would not include the EDC deemed to be inadequately providing default service. 52 Pa. Code § 54.183(c).

It could not be clearer that this section contemplates a particular set of circumstances beyond the normal operation of default service provided by an EDC. This plausible interpretation of the purpose of the regulation lays waste to the Companies contention that, “it is virtually inconceivable that any entity considered a valid candidate for that role would willingly undertake the obligation of serving as a default service provider without being compensated for shouldering the attendant risks.” Companies MB, p. 44.

The Companies argument fails for at least two reasons. First, the Commission is ultimately responsible to ensure that customers receive available electricity, and absent the existing EDC’s ability to competently do so, would be ordering a “competitive process” not to have EGSs necessarily compete with the EDC’s existing PTC but rather to compete among themselves to secure the necessary and available electricity for customers at that point in time because the EDC was incapable of providing the service.

Second, the aforecited statutory subsection 66 Pa.C.S. § 2807(e)(3.9), that limits the recoupment of DSP expenditures to “reasonable costs incurred” is part

of the full statutory section 66 Pa.C.S. § 2807 entitled “Duties of electric distribution companies.” Notably, it is not entitled “Duties of entities necessarily replacing an EDC as default service provider by order of the Commission in certain circumstances.” As such, the Companies have misconstrued the scope and purpose of 52 Pa. Code § 54.183 and its assertion at page 45 of their Main Brief that, [I]ndeed, neither the Commission’s regulations nor the Public Utility Code distinguishes between EDC and non-EDC default service providers in this regard,” is incorrect as both the statutes and regulation discussed here do precisely that. Companies MB, p. 45.

To reiterate, the Commission has acted with foresight in the promulgation of 52 Pa. Code § 54.183 rather than waiting until some EDC for some reason cannot provide default service and then attempting to establish a process to have another entity or entities secure and provide the necessary generation for distribution customers taking default service. For in the circumstance where the Commission must invoke 52 Pa. Code § 54.183, any entity or entities essentially rescuing customers by securing and providing electric generation services (because the EDC cannot or could not) would necessarily need to have some profit component to their competitive default service rate offer, since they lack the financial entitlement afforded an EDC granted a certificated service territory to provide for-profit distribution services to customers.¹³ It is in such extraordinary

¹³ One of the likely reasons the Legislature left the provision of default service to the EDCs in the first place.

circumstances replacing an EDC that another entity or entities would have to include a profit piece to their default rate competitive bid and not when they were seeking to replace an EDC that was properly performing its statutorily mandated function of providing default service – which is the case here.

Thus, the Companies argument that the Commission’s promulgation of 52 Pa. Code § 54.183 somehow constitutes tacit recognition that an EDC may need to have a profit component built into the PTC in the normal course of providing default service is incorrect. The Company has misunderstood and misapplied the purpose of 52 Pa. Code § 54.183 and their citation to this regulation and their related erroneous contentions have no bearing upon the Commission’s consideration of the legitimacy or illegitimacy of imposing a MAC as part of an EDC’s normally functioning default service and the accompanying cost-based rate.

IV. COMPETITIVE MARKET ENHANCEMENTS

No issues in the common brief outline heading addressed herein.

V. OPERATIONAL ISSUES

No issues in the common brief outline heading addressed herein.

VI. AFFILIATED INTEREST APPROVAL

No issues in the common brief outline heading addressed herein.

VII. OTHER ISSUES (If any)

No issues in the common brief outline heading addressed herein.

VIII. CONCLUSION

For the reasons set forth in this I&E Reply Brief, as well as those presented in the I&E Main Brief and I&E submitted testimony, the Bureau of Investigation and Enforcement hereby respectfully recommends that the ALJ and the Commission clearly and definitively reject the proposed imposition of any Market Adjustment Charge (“MAC”)¹⁴ as part of the FirstEnergy Companies’ authorized default service rate for their failure to meet their burden of proving that such a proposed MAC is just and reasonable and in the public interest.¹⁵

This I&E position is sound and reasonable, particularly given that no such adder scheme is anywhere authorized, referenced or even implied in Section 2807(e)(3.9) of the Public Utility Code, 66 Pa.C.S. § 2807(e)(3.9), governing EDCs’ default service programs and, in fact, runs directly contrary to its clearly defined requirement for cost recovery.

If for whatever reason the imposition of a MAC were allowed as proposed, the record reflects that the resultant profits to the four FirstEnergy EDCs would likely be substantial. I&E asserts that the inclusion of any such MAC would be contrary to the express purpose of the Electricity Generation Customer Choice and

14 As noted in the I&E Main Brief, the advantage of a Commission Order that provides such clear and distinct reasons for rejecting such a MAC adder would also serve to discourage other EDCs from proposing any similar type component in their subsequent default service filing(s). I&E MB, p. 8, fn. 5.

15 Such Commission rejection of the MAC is also fully supported by the thorough and well-reasoned opposition presented by both the Office of Small Business Advocate and Office of Consumer Advocate.

Competition Act to secure for customers the least costly generated electricity through competitive processes.¹⁶

In conclusion then, I&E recommends that the ALJ and the Commission reject any proposed MAC as it represents an unauthorized and inappropriate adder to the default service rate to be set for the FirstEnergy Companies as a result of this proceeding.

Respectfully submitted,



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Harrisburg, PA 17105-3265

Dated: May 16, 2012

¹⁶ As stated by the Legislature in Paragraph 5 of its “Declaration of Policy” when enacting the Electricity Generation Customer Choice and Competition Act, “Competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.” 66 Pa.C.S. § 2802(5).

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Joint Petition of Metropolitan Edison :
Company, Pennsylvania Electric :
Company, Pennsylvania Power Company :
and West Penn Power Company for : Docket No. P-2011-2273650
Approval of Their Default Service :
Program :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Reply Brief** dated May 16, 2012, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

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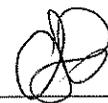
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