

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Joint Petition of Metropolitan Edison
Company, Pennsylvania Electric
Company, Pennsylvania Power Company
and West Penn Power Company For
Approval of Their Default Service
Programs**

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**Docket Nos. P-2011-2273650
P-2011-2273668
P-2011-2273669
P-2011-2273670**

**REPLY BRIEF OF
CONSTELLATION ENERGY COMMODITIES GROUP, INC.
AND CONSTELLATION NEWENERGY, INC.**

Divesh Gupta
(PA Bar # 307892)
Managing Counsel – Regulatory
Constellation Energy
100 Constellation Way, Suite 500C
Baltimore, MD 21202
410-470-3158

*Counsel for Constellation Intervenors:
Constellation Energy Commodities Group, Inc.
and Constellation NewEnergy, Inc.*

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1. *Act 129 of 2008*, 2008 Penn. Act 129 (enacted Oct. 15, 2008).
2. *Opinion and Order in Re: Petition of PPL Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period January 1, 2011 Through May 31, 2014*, Commission Docket No. P-2008-2060309 (entered June 30, 2009).
3. *Final Order in re: the Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Commission Docket No. I-2011-2237952 (entered Mar. 2, 2012).
4. *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, III FERC Stats. & Regs., Regs. Preambles ¶ 31,322 (2011).
5. *Order No. 7947*, Delaware Public Service Commission Docket No. 04-391 (issued Apr. 19, 2011).

REPLY BRIEF OF
CONSTELLATION ENERGY COMMODITIES GROUP, INC.
AND CONSTELLATION NEWENERGY, INC.

I. INTRODUCTION AND PROCEDURAL HISTORY

Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively, “Constellation”) hereby submit their Reply Brief for consideration by the Pennsylvania Public Utility Commission (“Commission”), with regard to the Default Service Implementation Programs filed by Metropolitan Edison Company (“Met-Ed”), Pennsylvania Electric Company (“Penelec”), Pennsylvania Power Company (“Penn Power”), and West Penn Power Company (“West Penn”) (collectively, “FirstEnergy-PA”) on November 17, 2011¹ (with supporting testimony from FirstEnergy-PA circulated on December 20, 2011 and supplemented on January 30, 2012²) in Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670, *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Default Service Programs* (the filing herein referred to as the “Default Service Plan” or “DSP”). In accordance with the procedural schedule established in the above-docketed

¹ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Default Service Programs*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (Nov. 17, 2011) (“Joint Petition”).

² *Direct Testimony of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (Dec. 20, 2011); *Errata to the Direct Testimony of Richard D’Angelo and Richard L. Schreder*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (Jan. 30, 2012) (collectively, the “FirstEnergy-PA Direct Testimony”).

proceeding, Constellation and other parties submitted their main briefs in this matter on May 2, 2012.³

This Reply Brief addresses certain limited arguments raised in the main briefs filed by the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”),⁴ the Office of Consumer Advocate (“OCA”),⁵ the Retail Energy Supply Association (“RESA”),⁶ and Dominion Retail, Inc. (“Dominion Retail”),⁷ as well as significant arguments raised by FirstEnergy-PA.⁸ Constellation has identified those issues pursuant to the headings and descriptors laid out in the Brief Outline.

As Constellation submits in more detail in its Main Brief, in order to meet the goals of *Act 129 of 2008* (“Act 129”),⁹ all electric distribution companies’ (“EDCs”) Default Service plans must be designed in such a way as to encourage the broadest participation by wholesale suppliers. FirstEnergy-PA’s DSP will be consistent with the Electric Choice Act and the requirements of Act 129, if revised to incorporate certain enhancements to aid in the development of customer choice and competition in the FirstEnergy-PA EDCs’ territories, and

³ See *Main Brief of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc.*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (filed May 2, 2012) (“Constellation Main Brief”).

⁴ See *Main Brief of the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (filed May 2, 2012) (“CAUSE-PA Main Brief”).

⁵ See *Main Brief of the Office of Consumer Advocate*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (filed May 2, 2012) (“OCA Main Brief”).

⁶ See *Main Brief of the Retail Energy Supply Association*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (filed May 2, 2012) (“RESA Main Brief”).

⁷ See *Main Brief of Dominion Retail, Inc.*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (filed May 2, 2012) (“Dominion Retail Main Brief”).

⁸ See *Initial Brief of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (filed May 2, 2012) (“FirstEnergy-PA Main Brief”).

⁹ *Act 129 of 2008*, 2008 Penn. Act 129 (enacted Oct. 15, 2008) (“Act 129”).

several important improvements to FirstEnergy-PA's proposed forms of Supplier Master Agreement ("SMA"). With these limited changes, FirstEnergy-PA's DSP will be more likely to encourage the broadest participation by suppliers, is likely to more effectively meet the goals of Act 129, and will be in the public interest.

II. DEFAULT SERVICE PROCUREMENT AND IMPLEMENTATION PLANS

G. SUPPLIER MASTER AGREEMENTS

1. Credit Requirements

FirstEnergy-PA Misconstrues the Explicit Terms of the SMA in Order to Erroneously Support the Use of an Independent Credit Requirement

FirstEnergy-PA incorrectly argues in its main brief that the SMA's Independent Credit Requirement ("ICR"):

protects customers from the risk of "intra-month" exposure following a supplier's default and also protects customers from the costs of associated components of default service supply that are not covered by the SMA's "mark-to-market" credit provisions."¹⁰

As Constellation points out in its Main Brief, however, this misplaced assertion fails to recognize that the SMA's damages provisions *already* include separate language to allow for recovery for such "intra-month" exposure, if any, from a defaulting supplier.¹¹ SMA Section 5.3(a) states clearly that damages owed to FirstEnergy-PA by a defaulting wholesale supplier will include:

all Costs incurred by [FirstEnergy-PA] . . . in obtaining replacement services or in obtaining a replacement [Default Service supplier], which Costs exceed the amounts that would have been payable to the defaulting [Default Service supplier] under this Agreement.¹²

¹⁰ FirstEnergy-PA Main Brief at pp.31-32.

¹¹ See Constellation Main Brief at p.14.

¹² FirstEnergy-PA Direct Testimony at FirstEnergy-PA Ex. RLS-1, Section 5.3(a) (*emph. added*).

Moreover, the SMA *explicitly* explains that such “Costs” shall include all costs allocated by PJM (which would include non-energy components of Default Service supply, including any ancillary services costs), the costs of any Default Service supply purchased by FirstEnergy-PA to replace the defaulting supplier’s obligations, administrative and legal costs,¹³ as well as any financial hedging costs incurred by FirstEnergy-PA. In this way, *all* appropriate costs “that are not covered by the SMA’s ‘mark-to-market’ credit provisions” can nevertheless be considered for recovery by FirstEnergy-PA from a defaulting supplier.

Finally, FirstEnergy-PA seems to argue that because the ICR is used in New Jersey’s procurements for its equivalent of Default Service, it must be appropriate to include it in FirstEnergy-PA’s SMA.¹⁴ However, this argument ignores the unrefuted evidence in the record that at least *three* of the most recently used SMAs for larger utilities in Pennsylvania (i.e., PPL Electric, West Penn and PECO Electric Company), as well as all *four* of the large EDCs in Maryland, as well as the EDCs in the District of Columbia and Delaware, have removed or otherwise do not include an ICR.¹⁵

For all of these reasons, FirstEnergy-PA’s limited arguments against elimination of the ICR fail to pass muster. Mr. Fein is therefore correct in his assertion that “the ICR represents a less than optimal balance between the competing concerns of securing necessary credit protection while minimizing suppliers’ and, in turn, consumers’ costs.”¹⁶ Consequently, Constellation stands by the following Ordering Paragraph, as presented in its Main Brief:

¹³ See FirstEnergy-PA Direct Testimony at FirstEnergy-PA Ex. RLS-1, Section 5.3(a)(i)-(iv).

¹⁴ See FirstEnergy-PA Main Brief at p.32 (stating that “the ICR is used in the statewide procurements of default service supply in New Jersey and has not precluded Constellation from participating successfully in those procurements”).

¹⁵ See Constellation St. ISR at p.12 (lines 8-11).

¹⁶ Constellation St. 1-SR at p.12 (lines 3-5).

FirstEnergy-PA is ORDERED to remove the ICR from the SMA, as reflected in Constellation St. 1-SR, Exhibit 1-SR-1.

FirstEnergy-PA Relies on an Erroneously Narrow Reading of the Commission’s Decision in its June 2009 Order Regarding PPL Electric In Order to Avoid Aligning its Proposed SMA’s Unsecured Credit Thresholds with Those Utilized in West Penn’s Prior Procurements

FirstEnergy-PA’s arguments against aligning its proposed SMA’s Unsecured Credit Thresholds with those utilized in West Penn’s prior procurements hinges only on (1) an incorrect and narrow reading of the Commission’s Decision in its *Opinion and Order in Re: Petition of PPL Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period January 1, 2011 Through May 31, 2014* (“June 2009 Order”),¹⁷ and (2) the notion that, because MetEd, Penelec and Penn Power have had “successful procurements to date” using its proposed Thresholds, these Thresholds must be appropriate for continued use without improvement.¹⁸

First, FirstEnergy-PA suggests incorrectly that the June 2009 Order applies only to inclusion of industry standard “default termination payment provision[s]” and not to “supplier credit requirements,”¹⁹ though nothing in the Commission’s language suggests such a limitation. In fact, the Commission’s decision in the June 2009 Order should apply broadly to *any* SMA provisions that *enhance competition*, and not only to those that are industry standard, or those that deal with default termination payment provisions. As explained in Constellation’s Main

¹⁷ *Opinion and Order in Re: Petition of PPL Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period January 1, 2011 Through May 31, 2014*, Commission Docket No. P-2008-2060309 (entered June 30, 2009) (“June 2009 Order”).

¹⁸ See FirstEnergy-PA Main Brief at p.31.

¹⁹ FirstEnergy-PA Main Brief at p.31.

Brief,²⁰ in its June 2009 Order, the Commission affirmed that (a) “provisions that enhance competitive bidding provide tangible and current benefits to Pennsylvania electricity customers,”²¹ (b) “a DSP must include prudent steps necessary to obtain ‘least cost generation supply contracts,’”²² and (c) provisions of a DSP “must be structured so as to encourage greater competition.”²³

In the same way that it is true that the prior procurements for MetEd, Penelec, and Penn Power have included lower Thresholds, it is also true that West Penn currently uses, and the Commission approved, the use of West Penn’s higher Thresholds. More importantly, no evidence in the record exists to refute that West Penn’s Thresholds “will be more attractive to potential bidders” such as Constellation.²⁴

In this way, as explained in Constellation’s Main Brief, in order to be consistent with the Commission’s June 2009 Order, because the thresholds in the West Penn SMA will be more attractive to potential bidders, Constellation continues to support the following Ordering Paragraph:

FirstEnergy-PA is ORDERED to adopt the Unsecured Credit Thresholds used in West Penn’s current form of SMA, as reflected in Constellation St. 1-SR, Exhibit 1-SR-1.

²⁰ See Constellation Main Brief at p.9.

²¹ June 2009 Order at p.29.

²² June 2009 Order at p.30.

²³ June 2009 Order at p.30.

²⁴ Constellation St. 1-SR at p.10 (line 19).

2. Monthly Versus Weekly Settlements

Weekly Settlement Periods Will Encourage Competition for the Benefit Of FirstEnergy-PA's Default Service Customers

FirstEnergy-PA bases its arguments against weekly settlement periods on the incorrect premises that (1) weekly settlements are not “industry standard,” (2) the New Jersey Board of Public Utilities (“NJBPU”) has rejected weekly settlements in the past, (3) Constellation has submitted successful bids in New Jersey’s procurements which do not have weekly settlements, and (4) weekly settlements will shift costs from Default Service suppliers to consumers.²⁵

With respect to the first of these arguments, Constellation reiterates that provisions need not be “industry standard” in order to merit inclusion in a form of SMA. As explained in more detail above, the Commission in the June 2009 Order ruled that “provisions that *enhance competitive bidding* provide tangible and current benefits to Pennsylvania electricity customers.”²⁶ Nevertheless, evidence in the record supports the notion that weekly settlements are indeed industry standard, or at the very least, increasingly industry standard, as the entire PJM market (representing the industry market in which FirstEnergy-PA resides) is now based on weekly settlements, and as West Penn and *six* other EDCs in Delaware, the District of Columbia and Maryland (including FirstEnergy-PA’s Maryland affiliate) have appropriately been providing for weekly settlements.²⁷

FirstEnergy-PA’s second argument meanwhile fails to take into account that the NJBPU does not have to adhere to the Pennsylvania-specific requirements of Act 129 and the Commission’s June 2009 Order, which provide for unique standards for considering and

²⁵ See FirstEnergy-PA Main Brief at p.32.

²⁶ June 2009 Order at p.29 (*emph. Added*).

²⁷ See Constellation St. 1-SR at p.14 (lines 6-10).

adopting improvements to SMAs and Default Service procurements, more generally. In addition, with respect to FirstEnergy-PA's third argument, it should be noted that because Constellation participated in New Jersey's past procurements, despite a lack of weekly payments, it does not follow that New Jersey's procurements would not be more attractive to bidders if their contracts included weekly settlements language in order to assure consistency with PJM's processes. Moreover, this belies the fact that Constellation has also participated in procurements that *include* weekly settlements language.²⁸

Next, in response to FirstEnergy-PA's fourth argument, it is worth noting again that the Commission has stated clearly that "provisions that enhance competitive bidding provide *tangible and current benefits* to Pennsylvania electricity customers."²⁹ The Commission recognizes that increased competition will lead to benefits for consumers. Thus, even if costs are shifted, by encouraging greater competition for the right to enter into SMAs which appropriately include weekly settlements, customers will receive the benefits of more competitive pricing for Default Service.

Finally, it should be noted again that in its main brief, FirstEnergy-PA does not make mention, let alone refute, Constellation's alternative proposal, which would provide for weekly payments, at the very least, in the event that an EDC is downgraded.³⁰

For all of these reasons, Constellation maintains its support for the following Ordering Paragraph:

²⁸ See, e.g., *Order No. 7947*, Delaware Public Service Commission ("DE PSC") Docket No. 04-391 (issued Apr. 19, 2011) (indicating that the Final Report of the DE PSC's consultant is accepted, which report identified Constellation Energy Commodities Group, Inc. as one of several winning suppliers in that state's default service procurement in 2010).

²⁹ June 2009 Order at p.29 (*emph. Added*).

³⁰ See Constellation St. 1-SR at pp.13 (line 21) – 14 (line 4).

FirstEnergy-PA is ORDERED to adopt weekly settlements language, as reflected in Constellation St. 1-SR, Exhibit 1-SR-1.

In the alternative, if it is deemed more appropriate to adopt weekly settlements only in the event of an EDC downgrade, Constellation continues to support the following Ordering Paragraph:

FirstEnergy-PA is ORDERED to adopt language such as that used in Section 14.8 of West Penn's current form of SMA, referring to "Accelerated Payments."

III. RATE DESIGN AND COST RECOVERY

D. DEFAULT SERVICE SUPPORT RIDER

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

FirstEnergy-PA Makes Erroneous Arguments Against Collecting New ELR Charges that Are Unsupported by Facts in the Record

FirstEnergy-PA argues against Constellation's proposal to include New ELR Charges in FirstEnergy-PA's proposed Default Service Support ("DSS") Riders as newly-identified NMB Charges, with untrue and unsupported assertions that (1) the New ELR Charges are market-based, and (2) transferring responsibility for the New ELR Charges can only be accomplished for Default Service suppliers and not for EGSs.³¹

First, with respect to FirstEnergy-PA's incorrect argument that New ELR Charges are market-based and therefore not appropriate for recovery in the DSS Riders, as Constellation explains in its Main Brief, evidence in the record suggests otherwise. As Mr. Fein explains in his testimony, FirstEnergy-PA misunderstands the New ELR Charges entirely, as the EDC confuses

³¹ See FirstEnergy-PA Main Brief at pp.70-71.

“ELR charges” with “compensation for demand response resources.”³² To be clear, the New ELR Charges *are not* the compensation paid out to ELR resources (i.e., “demand response resources,” as FirstEnergy-PA refers to them); rather, the New ELR Charges are the *charges* that PJM places on *load* in order to make the pool whole for the *payments* that PJM makes to ELR resources.³³ As Mr. Fein describes in his testimony, “PJM has proposed two entirely different constructs to calculate *payments to ELR resources* and *charges to load to recover those costs* (i.e., the New ELR Charges).”³⁴ Whereas the “**payments to ELR resources**” are market-based (as they are compensated at the PJM locational marginal price),³⁵ the “**charges to load**” (i.e., the New ELR Charges) are *not* market-based, and are instead set through an *administratively-determined* calculation that spreads the costs “on a region-wide basis (rather than on a locational basis)”³⁶ In this way, the New ELR Charges that are set through this process will in fact be difficult for potential Default Service suppliers and EGSs to predict and manage in much the same way as “generation deactivation charges and UFE costs.”³⁷

Next, with respect to FirstEnergy-PA’s argument that the transfer of responsibility for New ELR Charges can only be achieved for wholesale Default Service suppliers, and not EGSs, as explained in the Constellation Main Brief, FirstEnergy-PA cannot point to any evidence to support such an argument. Mr. Fein explains that FirstEnergy-PA’s argument’s shortcoming “may be due, in part, to [FirstEnergy-PA’s confusion] regarding the difference between ELR

³² FirstEnergy-PA St. 2-R at p.23 (lines 8-9).

³³ See Constellation St. 1-SR at p.5 (lines 8-13).

³⁴ Constellation St. 1-SR at p.5 (lines 13-15).

³⁵ FirstEnergy-PA St. 2-R at p.23 (lines 8-9) (*emph. added*).

³⁶ July 2011 Compliance Filing at p.22.

³⁷ FirstEnergy-PA St. 2-R at p.23 (lines 13-14).

payments to demand response resources, and the *charges* to load to recover the amounts paid out through PJM’s new ELR program.”³⁸

Absent any evidence presented to the contrary, no reason exists to deny Constellation’s proposal, and so Constellation continues to support the following Ordering Paragraph:

FirstEnergy-PA is ORDERED to include the New ELR Charges (ID# 1242 – Day-Ahead Load Response Charge Allocation, and line item ID# 1243 – Real-Time Load Response Charge Allocation) in its NMB Charges collected through the DSS Riders.

IV. COMPETITIVE MARKET ENHANCEMENTS

B. STANDARD OFFER CUSTOMER REFERRAL PROGRAM

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

CAUSE-PA,³⁹ Dominion Retail,⁴⁰ FirstEnergy-PA,⁴¹ OCA⁴² and RESA⁴³ for similar reasons all oppose Constellation’s proposal to require customers to “opt-in” in order to be eligible to participate in FirstEnergy-PA’s proposed Standard Offer Customer Referral Program. These parties generally argue that Constellation’s proposal will cause confusion, is unnecessary, and/or will add costs to FirstEnergy-PA’s Referral Program. Dominion Retail goes so far as to state that the proposal is “nonsensical” and “silly.” However, none of these parties has addressed the fact that Constellation’s proposal is based specifically on the Commission’s *explicit* directive in its *Final Order in re: the Investigation of Pennsylvania’s Retail Electricity Market:*

³⁸ Constellation St. 1-SR at p.6 (lines 11-14).

³⁹ See CAUSE-PA Main Brief at p.30.

⁴⁰ See Dominion Retail Main Brief at p.27.

⁴¹ See FirstEnergy-PA Main Brief at pp.128-129.

⁴² See OCA Main Brief at p.96.

⁴³ See RESA Main Brief at pp.84-85.

Intermediate Work Plan, in which the Commission orders that “[t]he Standard Offer Customer Referral Program should be voluntary, i.e., ‘opt-in,’ for customers and participating EGSs.”⁴⁴ Constellation through its proposal is merely reiterating the Commission’s decision that a customer should not have to receive referral offers through the Referral Program, unless the customer indicated that she had a desire to do so. Absent an explanation and good reasoning as to why the Commission’s explicit language and decision does not apply, Constellation maintains its support for the following Ordering Paragraph:

FirstEnergy-PA is ORDERED to revise its Customer Referral Program to include an opt-in process whereby customers must “opt-in” to receive offer communications under the Program.

VI. CONCLUSION

As explained and supported through great detail in Constellation’s Main Brief, Constellation’s proposed improvements to FirstEnergy-PA’s DSP design are supported by substantial evidence in the record before the Commission. Constellation is confident that the FirstEnergy-PA DSP, with Constellation’s limited changes, will encourage more competitive procurements for FirstEnergy-PA’s DSP, more appropriate competitive options from EGSs and, in turn, will better assure that FirstEnergy-PA’s customers are able to receive benefits from the least costs for generation supply contracts, whether remaining on Default Service supply from FirstEnergy-PA or taking competitive service from an EGS.

⁴⁴ *Final Order in re: the Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan*, Commission Docket No. I-2011-2237952 (entered Mar. 2, 2012) at p.20.

Respectfully Submitted,



Divesh Gupta
Constellation Energy
100 Constellation Way, Suite 500C
Baltimore, MD 21202
410-470-3158

*On Behalf of Intervenors Constellation Energy
Commodities Group, Inc. and Constellation
NewEnergy, Inc.*

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