

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Default Service Programs</b>	: : : : : : : : : : :	<b>Docket Nos. P-2011-2273650 P-2011-2273668 P-2011-2273669 P-2011-2273670</b>
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**EXCEPTIONS OF  
CONSTELLATION ENERGY COMMODITIES GROUP, INC.  
AND CONSTELLATION NEWENERGY, INC.  
TO THE RECOMMENDED DECISION**

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**Filed: June 25, 2012**

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

<b>Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Default Service Programs</b>	:	
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AND CONSTELLATION NEWENERGY, INC.  
TO THE RECOMMENDED DECISION**

Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (collectively, “Constellation”) hereby submit their Exceptions to the Recommended Decision issued June 15, 2012 (“Recommended Decision”),<sup>1</sup> by the Honorable Administrative Law Judge (“ALJ”) Elizabeth H. Barnes, with regard to the Default Service Implementation Programs (“DSPs”) filed with the Pennsylvania Public Utility Commission (“Commission”) by Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, “FirstEnergy-PA”) on November 17, 2011<sup>2</sup> (with supporting testimony from FirstEnergy-PA circulated on December 20, 2011 and supplemented on January 30, 2012<sup>3</sup>).

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<sup>1</sup> *Recommended Decision in 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*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (issued June 15, 2012) (“Recommended Decision”).

<sup>2</sup> *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”).

<sup>3</sup> *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-

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Constellation presented in this proceeding evidence surrounding the Federal Energy Regulatory Commission's ("FERC") March 15, 2011 order ("Order No. 745") regarding demand response compensation in organized wholesale energy markets,<sup>4</sup> PJM Interconnection, L.L.C.'s ("PJM") July 22, 2011 Compliance Filing in response to Order No. 745 laying out revisions to its tariff and market rules for Economic Load Response ("ELR") resources,<sup>5</sup> the costs ("New ELR Charges") to load for compensation to such ELR resources,<sup>6</sup> and the reasons why such New ELR Charges should be appropriately recovered through FirstEnergy-PA's proposed Default Service Support ("DSS") Riders as newly-identified Non-Market Based ("NMB") Charges.<sup>7</sup>

Constellation has explained in detail that, as with all of the other NMB Charges, if Default Service suppliers and EGSs – rather than EDCs – are responsible for these unknown and unpredictable New ELR Charges that *may* occur, then, in order to account for such risk, such suppliers will need to factor a premium into their fixed prices for such *potential* Charges *regardless* of the frequency and extent to which such New ELR Charges *actually* occur. Prudent suppliers would have to consider the costs that they *could* incur for compensating ELR participants taking advantage of the new opportunity provided under Order No. 745.<sup>8</sup>

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2011-2273669, P-2011-2273670 (Dec. 20, 2011); *Errata to the Direct Testimony of Richard D'Angelo and Richard L. Schreader*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, P-2011-2273670 (Jan. 30, 2012) (collectively, the "FirstEnergy-PA Direct Testimony").

<sup>4</sup> *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, III FERC Stats. & Regs., Regs. Preambles ¶ 31,322 (2011) ("Order No. 745").

<sup>5</sup> *Order No. 745 Compliance Filing*, FERC Docket No. ER11-4106-000 (filed July 22, 2011) ("July 2011 Compliance Filing") (available at <http://www.pjm.com/~media/documents/ferc/2011-filings/20110722-er11-4106-000.ashx>) (*emph. added*).

<sup>6</sup> July 2011 Compliance Filing at p.22.

<sup>7</sup> See Constellation St. 1 at pp.22 (line 6) – 26 (line 9); see also Constellation St. 1-SR at pp.4 (line 17) – 7 (line 21).

<sup>8</sup> Constellation St. 1 at pp.24 (line 19) – 25 (line 2).

FirstEnergy-PA's DSPs – without Constellation's suggested clarification – will potentially raise the ultimate costs for Default Service supply and alternative EGS supply for consumers. Constellation's suggested clarification, in turn, would be more likely to result in more competitive Default Service supply costs and EGS prices for consumers. As FERC intended for New ELR Charges to be borne by loads in the various RTOs/ISOs,<sup>9</sup> it is appropriate that such customers bear any *actual* costs for the revised ELR program *directly*, rather than leaving Default Service bidders and EGSs responsible for trying to predict the success and impacts of a newly developed and implemented, significant PJM change.

Constellation argues herein that the ALJ's Recommended Decision errs in not ordering FirstEnergy-PA to include the New ELR Charges in its NMB Charges collected through the DSS Riders, because the Decision: (1) erroneously concludes that the New ELR Charges are market-based; (2) fails to acknowledge that the New ELR charges are unpredictable and unhedgeable in the same way as Generation Deactivation, Unaccounted for Energy ("UFE") and other NMB Charges; and (3) dismisses without explanation uncontroverted evidence in the record supporting the fact that New ELR Charges can be recovered on a non-bypassable, competitively-neutral basis, from both Default Service and EGS customers.

## **II. ARGUMENT**

### **A. THE ALJ'S RECOMMENDED DECISION ERRS IN NOT ORDERING FIRSTENERGY-PA TO INCLUDE THE NEW ELR CHARGES IN ITS NMB CHARGES COLLECTED THROUGH THE DSS RIDERS.**

#### **1. The ALJ Erroneously Concludes that the New ELR Charges Are Market-Based.**

The ALJ's decision to deny including the New ELR Charges in FirstEnergy-PA's proposed DSS Riders relies primarily on the false conclusion that the New ELR Charges are

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<sup>9</sup> See, e.g., Order No. 745 at ¶¶ 5, 99-102.

“market-based” and therefore are not like the Generation Deactivation and UFE charges that the ALJ approved for inclusion in the NMB Charges collected through the DSS Riders.<sup>10</sup> Though Constellation provided explanations and evidence to the contrary – i.e., evidence that clearly supported the fact that the New ELR Charges are, in fact, *not* market based – the ALJ seemed to accept FirstEnergy-PA’s misinformed statements that were based on its confusion of the difference between “ELR charges” and “compensation for demand response resources.”<sup>11</sup> As explained in Constellation’s Main Brief:

To be clear, the New ELR Charges (i.e., “ELR charges,” as Mr. Valdes calls them) ***are not*** the compensation paid out to ELR Resources (i.e., “demand response resources,” as Mr. Valdes calls 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.<sup>12</sup> 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***).”<sup>13</sup> Mr. Valdes is correct to some extent, in that the ELR ***resources*** – i.e., those curtailing entities that participate in PJM’s ELR program – are “***compensated*** at the locational marginal price (“LMP”) when LMP is at or above a net benefit threshold price,”<sup>14</sup> as LMP generally is a market-based construct. However, the New ELR Charges to load that are meant to recover costs of such payments to ELR resources are set through an ***administratively-***determined calculation that spreads the costs “on a region-wide basis (rather than on a locational basis) . . . .”<sup>15</sup> Therefore, the New ELR Charges that are set through this process will 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.”<sup>16,17</sup>

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<sup>10</sup> See Recommended Decision at p.73 (stating that “The basis for the Companies’ proposal for NMB transmission charges and their acceptance of similar treatment for Generation Deactivation and UFE costs is that those costs are not market-based and cannot be hedged. Because the same is not true for ELR charges, they should remain the responsibility of generation suppliers”).

<sup>11</sup> FirstEnergy-PA St. 2-R at p.23 (lines 8-9).

<sup>12</sup> See Constellation St. 1-SR at p.5 (lines 8-13).

<sup>13</sup> Constellation St. 1-SR at p.5 (lines 13-15).

<sup>14</sup> FirstEnergy-PA St. 2-R at p.23 (lines 8-9) (*emph. added*).

<sup>15</sup> July 2011 Compliance Filing at p.22.

<sup>16</sup> FirstEnergy-PA St. 2-R at p.23 (lines 13-14).

As Constellation explains in its Main Brief, then, while the payments made to ELR resources are market-based, the New ELR Charges that are placed on market participants in order to distribute more broadly the obligation to compensate those ELR resources *are not market-based*, and are unpredictable and unhedgeable. FirstEnergy-PA seems to argue, and the ALJ seems to accept, that if the New ELR Charges are meant to fund the costs for a program under which the resources are paid based on a market price (LMP), then the New ELR Charges must be “market-based.” This faulty argument, however, ignores the fact that the New ELR Charges *are not themselves* priced at a predictable and/or hedgeable market index, but rather set through an administratively-determined formula that allocates charges across a broader region than only the location’s price (LMP) at which a resource is paid.

**2. The ALJ’s Decision Fails to Acknowledge that the New ELR Charges Are Unpredictable and Unhedgeable in the Same Way as Generation Deactivation, UFE and Other NMB Charges.**

The ALJ’s decision fails to consider FirstEnergy-PA’s own stated reasoning behind introduction of NMB Charges for recovery through the DSS Riders. While “NMB Charges” is FirstEnergy-PA’s shorthand name for “Non-Market Based” Charges, the arguments that FirstEnergy-PA originally utilizes to support its reasoning for recovering such charges through the DSS Riders state nothing about whether the charges are “market-based” or not. Instead, FirstEnergy-PA initial explanation for its proposal to recover NMB Charges through the DSS Riders points out that Default Service suppliers and EGSs have identified that certain PJM market charges are unpredictable and difficult to hedge, and therefore leave such suppliers in a position to have to include risk premiums in their prices for customers, which could otherwise be

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<sup>17</sup> Constellation Main Brief at pp.20-21 (*emph. added*).

avoided if only *actual* charges incurred were placed on customers. To be sure, in introducing the NMB Charges, FirstEnergy-PA witness Charles V. Fullem explains:

Over the last several years, default suppliers and EGSs have told [FirstEnergy-PA] that it is very difficult for [Default Service suppliers] to financially hedge NMB charges because of how those charges are calculated and imposed. Additionally, default suppliers and EGSs made it clear that they would prefer not to procure these services and, in that way, avoid including the corresponding costs in the wholesale and retail prices, respectively, that they charge. By having [FirstEnergy-PA] provide NMB services and recover the costs from all customers through a rider that imposes a reconcilable, non-bypassable charge, competitive neutrality can be maintained and all customers should benefit.<sup>18</sup>

He goes on to state that having FirstEnergy-PA take responsibility for certain of these charges in the past, at least with respect to Default Service suppliers:

has lowered the risk profile for default suppliers that bid in [FirstEnergy-PA's] supply auctions because, given the difficulty with financially hedging such costs, default suppliers would need to include in their prices a premium for the future uncertainty of those costs.<sup>19</sup>

While FirstEnergy-PA has taken issue (incorrectly) as to whether the New ELR Charges are not “market-based,” no party to this proceeding – including FirstEnergy-PA – has submitted testimony or other evidence suggesting that the New ELR Charges *are not* unhedgeable or unpredictable in the same way as other NMB Charges, in order to controvert Constellation’s expert witness testimony stating that the NMB Charges are, in fact, “unknown and unpredictable [charges] that *may* occur,” and for which “in order to account for such risk . . . suppliers will need to factor a premium” into their prices, “*regardless* of the frequency and extent to which such New ELR Charges *actually* occur.”<sup>20</sup>

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<sup>18</sup> FirstEnergy-PA Direct Testimony, Statement No. 7, at p.9 (lines 11-19).

<sup>19</sup> FirstEnergy-PA Direct Testimony, Statement No. 7, at p.10 (lines 8-11).

<sup>20</sup> Constellation Main Brief at pp.18-19 (citing to testimony of Constellation witness David I. Fein).

In this way, regardless of whether the New ELR Charges are “market-based” – which the evidence suggests they are not – the New ELR Charges are appropriate to recover through the non-bypassable DSS Riders for the same underlying reasons as the other charges that FirstEnergy-PA has agreed, and the ALJ has ordered, to include in the list of NMB Charges – namely, that such charges are unpredictable and unhedgeable.

**3. The ALJ’s Decision Dismisses Without Explanation Uncontroverted Evidence in the Record Supporting the Fact that New ELR Charges Can Be Recovered on a Non-Bypassable, Competitively-Neutral Basis, from both Default Service and EGS Customers.**

Without explanation including, but not limited to, identification and weighing of clear evidence in the record to the contrary, the ALJ’s decision errs by accepting that “transferring responsibility for [the New ELR Charges] to the EDC can only be accomplished for default service generation suppliers,” and that “EGSs would have to retain responsibility for ELR charges.”<sup>21</sup> The ALJ’s decision fails to identify and recognize that Constellation previously explained how the New ELR Charges could be collected from *all* customers – whether taking Default Service, or taking competitive supply service from an EGS – through a simple identification of such charges. As Constellation’s witness explains:

[there exists] no reason why FirstEnergy-PA could not simply add PJM bill line item **ID# 1242 – Day-Ahead Load Response Charge Allocation**, and line item **ID# 1243 – Real-Time Load Response Charge Allocation** (together representing the New ELR Charges) to its list of line item NMB Charges that are collected through the DSS Riders.<sup>22</sup>

No party submitted evidence in the record rejecting the notion that this simple change cannot be accomplished. Therefore, these charges can be recovered easily on a non-bypassable basis, through the NMB Charges included in the DSS Riders.

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<sup>21</sup> Recommended Decision at p.73.

<sup>22</sup> Constellation St. ISR at p.6 (lines 14-19).

### **III. CONCLUSION AND REQUESTED RELIEF**

Constellation is confident that its proposal to include the New ELR Charges in the NMB Charges collected through the DSS Riders is supported by substantial evidence in the record, will be competitively neutral, and will lead to more competitive costs for Default Service supply and alternative EGS supply for consumers. For purposes of this proceeding, Constellation specifically asks that the Commission revise the Recommended Decision and enter an Order that:

1. Overturns the ALJ's ruling that "Constellation's request that [the New ELR Charges] be collected through the non-bypassable DSS Riders is rejected";<sup>23</sup> and
2. Requires that, FirstEnergy-PA include the New ELR Charges (PJM line item 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.

Respectfully Submitted,



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June 25, 2012

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<sup>23</sup> Recommended Decision at p.74.