



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

IN REPLY PLEASE
REFER TO OUR FILE

July 9, 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 Exceptions** 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

CDS/edc

cc: Parties of Record
Hon. Elizabeth Barnes
Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Wayne E. Gardner, Commissioner
James H. Cawley, Commissioner
Pamela A. Witmer, Commissioner
Chief Counsel Pankiw, Law Bureau
Director Cheryl Walker Davis, OSA

**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 EXCEPTIONS
OF THE
BUREAU OF INVESTIGATION
AND ENFORCEMENT**

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

Richard A. Kanaskie
Deputy Chief Prosecutor
PA Attorney I.D. No. 80409

Johnnie E. Simms
Chief Prosecutor
PA Attorney I.D. No. 33911

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Dated: July 9, 2012

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66 Pa.C.S. § 2807(e)(3.9).....4, 6, 11

I. INTRODUCTION

The Bureau of Investigation and Enforcement (“I&E”) respectfully submits these Reply Exceptions to the Exceptions filed on June 25, 2012, by (1) 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”]; (2) Dominion Retail, Inc. (“Dominion”); and (3) the Retail Energy Supply Association (“RESA”) to the Recommended Decision issued June 15, 2012, by presiding Administrative Law Judge Elizabeth H. Barnes (“ALJ” or “ALJ Barnes”). The Companies’ Exception No. 1 seeks to have the Commission not adopt the ALJ’s recommended rejection of the Companies’ proposed adder to the Price to Compare (“PTC”), styled as a “Market Adjustment Charge” (“MAC”). Companies Exceptions, pp. 6-18. RD, pp. 54-58.

Separate Exceptions filed by Dominion Retail Inc. (“Dominion Retail”) and Retail Energy Supply Association (“RESA”) are addressed in the second and third Reply Exceptions herein. The I&E reason for recommending Commission rejection of the respective Exceptions of each of these parties is the same, that they each support the imposition of an unauthorized MAC, although for different reasons and with different proposed modifications.

The I&E Main Brief was timely filed on May 2, 2012, and sets forth the argument, evidence and law supporting its recommendation to the Commission

that such requested imposition of any MAC type adder is unauthorized and in fact lawfully prohibited. On May 16, 2012, I&E filed its Reply Brief further addressing this important issue. The I&E Main and Reply Briefs quoted extensively from the three separately distributed I&E testimonies, Direct, Rebuttal and Surrebuttal that were admitted into the record at hearing.¹ I&E MB, pp. 7-17; I&E RB, pp. 2-16.

1 Those testimonies 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. The I&E Direct Testimony was most often referenced in the I&E Main Brief as it set forth the reasons and rationale for the opposition to the proposed MAC. The I&E 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 recommended that the proposed MAC be approved, but each attached certain respective modifications and/or conditions. The I&E Rebuttal Testimony also addressed the Commission's Final Order on March 2, 2012, regarding the Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan, at Docket No. I-2011-2237952. References to the I&E Surrebuttal Testimony were made in the I&E Reply Brief as that testimony responded to certain portions of Companies' witnesses rebuttal testimonies that sought to continue to support the imposition of a MAC.

II. REPLY EXCEPTIONS

A. **The Companies Exception To The ALJ's Recommended Denial of a Market Adjustment Clause ("MAC"), a Bypassable Charge Proposed by the Companies to be Added to the Default Service Rate, Should Be Denied and the ALJ's Decision Affirmed.**

**ALJ Recommended Decision, pp. 54-58
Companies Exceptions pp. 2-3, 6-18**

1. **The ALJ's Ruling**

The ALJ's recommendation to the Commission that the proposed Market Adjustment Clause ("MAC") be denied is based upon correct statutory interpretation and the application of sound regulatory principles and therefore should be affirmed. The ALJ correctly states that jurisdictional electric distribution companies ("EDCs") are not permitted to add a return component in fulfilling their statutorily required default service obligations. The Public Utility Code addresses an EDC's obligation to serve and requires that default service to its retail customers be provided at no greater rate than the cost of obtaining the necessary generation.

Specifically at pages 54-58 of the Recommended Decision, the ALJ addresses and rejects the Companies proposed MAC as part of its default service rate. RD, pp. 54-58. As noted by the ALJ, the Companies proposed MAC would be a bypassable charge to non-shopping Residential and Commercial Customers at

a rate of 5 mills (\$0.005) per kWh recovered as part of the Price to Compare.²

RD, pp. 54-58.

The ALJ accurately summarized the positions of a number of the parties regarding the issue, noting that I&E, the Office of Consumer Advocate (“OCA”) and the Office of Small Business Advocate (“OSBA”) oppose the MAC, while the Retail Energy Supply Association (“RESA”) and Dominion Retail, Inc.

(“Dominion”) advocated modified versions of the proposed MAC. RD, p. 55.

The ALJ further characterized the reasons for the above identified parties opposition to the MAC proposal, specifically being that it is not permitted under 66 Pa.C.S § 2807(e)(3.9); that it represents a “return” that, allegedly, is not justified because the Companies cannot identify any “investment” to which the “return” relates; and the fact that it would not foster greater competition as any electric generation suppliers (“EGSs”) would simply raise their prices. RD, p. 55.

I&E submits that the ALJ properly relies upon those arguments and her own

2 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. The Companies Joint Petition describes the proposed MAC at Paragraph 38, pages 16 and 17, and states in full as follows:

38. The Companies propose a bypassable Market Adjustment Charge (“MAC”) for the residential and commercial customer classes at a rate of \$0.005 per kWh, which will be included in the PTC Rider. The MAC will be included in the weighted average cost and in the reconciliation calculation to reasonably compensate the Companies for the obligation and attendant risk of procuring electric power for customers who choose not to shop. The MAC will have the collateral benefit of enhancing competition by creating additional “headroom” beneath the price-to-compare for competitive offers.

observations and conclusions in determining that the Companies' MAC proposal should be rejected.

Of particular note, the ALJ has properly concluded, consistent with the I&E position, that the Commission for good reason has not allowed the addition of a return component to a default service rate as sought here by the Companies. The ALJ states that within the EDC's "obligations to serve" as set forth in 66 Pa.C.S. § 2807(e) of the Public Utility Code, is the requirement an EDC shall provide default service to its retail customers at no greater cost than the cost of obtaining the generation. RD, p. 56.

The ALJ's ruling is consistent with the I&E position in opposition to a MAC of any sort. In fact, in rendering her decision rejecting the MAC proposal, the ALJ quotes from the I&E Direct Testimony, as follows:

I am persuaded by the arguments of OCA, I&E and OSBA. I find the MAC qualifies as an impermissible return; it fails to qualify as a legitimate retail market enhancement tool; and is an inappropriate and unnecessary financial adder. Even the Companies' witness, Mr. Charles Fullem, acknowledged, "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 Stmt. No. 1, p. 3. Companies' Stmt. No. 7, p. 11.

RD, p. 56.

Also in the Recommended Decision, the ALJ states, correctly in I&E's view, that in addition to the other valid reasons for rejecting the ill-advised MAC proposal, the alleged "costs" that the Companies are seeking to recover through the MAC are unquantified in the record and the proposed MAC of 5 mills per kWh

lacks sufficient supporting and justifying calculations for that selected amount. RD, pp. 56-57. And for good measure, the ALJ concludes her discussion of the MAC issue by observing that the Companies have not proposed to waive their right to continue to avail themselves of the provided default service cost reconciliation process in exchange for having a MAC adder in the default service rate. RD, p. 58.

2. I&E's Stated Opposition to a MAC

On the question of any statutory authority for a MAC as it relates to 66 Pa.C.S. § 2807(e)(3.9), the I&E Reply Brief referenced the Surrebuttal Testimony of I&E Witness Granger at page 7, where he 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).” I&E RB, p. 5; I&E Stmt. 1-SR, p. 7.

During this proceeding, I&E presented all the reasons why such a proposed MAC should not be authorized. The I&E opposition to the proposed MAC was 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 states 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 references Companies Statement No. 7, wherein the Companies Witness Charles V. Fullem acknowledges 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, pp. 10-11; I&E Stmt. No. 1, p. 3. Companies Stmt. No. 7, p. 11.

I&E also presented the argument that the inclusion of an artificial “adder” to a default service rate is contrary to the entire notion of what the deregulation of electric generation service sought to achieve – a fair market, competitive price for electric generation to be paid by customers here in the Commonwealth. Both the Pennsylvania Legislature and this Commission have repeatedly and consistently acted to demonstrate their clear commitment to achieving that goal. I&E MB, pp. 10-11. I&E Stmt. No. 1-R, pp. 8-9.

As also referenced in 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 and make no reference to any such MAC or similar type proposal of any kind.³ I&E MB, pp. 10-11.

3 The Commission’s Final Order at the *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, at Docket No. I-2011-2237952, has already considered and presumably rejected the Companies argument for a return component in the provision of default service by an EDC. I&E RB, p. 10-11. That Order was entered during the course of this proceeding on March 2, 2012. I&E MB, p. 3; I&E RB, p. 10-11 The present Companies default service

The I&E Main Brief also emphasized that this Commission has not allowed the addition of a return component to a default service rate as sought by the Companies. In fact, within the EDC's "obligations to serve" set forth in the Public Utility Code, it 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. *See*, 66 Pa.C.S. § 2807(e). It cannot be stated too often that the ALJ determined in the Recommended Decision that this obligation does not allow an EDC to add a profit margin to the price of their default service electric power. RD, pp. 56-58; I&E MB, p. 11; I&E Stmt. No. 1, p. 5.

3. I&E Response to Specific Argument in Companies Exception

In their Exception No. 1 addressing the MAC proposal, the Companies reiterate the arguments presented in their Main and Reply Briefs, in the first subsection at pages 6-12 entitled, "Overview of the Companies MAC Proposal." Companies Exceptions, pp. 6-12. Then, beginning at page 12, the Companies provide a subsection entitled, "The ALJ's Recommendation" and devote the next six (6) pages seeking to provide reasons for the Commission to overturn the ALJ's

program joint filing is the first to be considered since the Commission's Final Order. I&E MB, pp. 10-11. And interestingly, the Companies' own witness, at Companies Stmt. No. 7, p. 16, referenced that they submitted comments on June 3, 2011, at the *Intermediate Work Plan* docket contending that a return component is necessary and would enhance the competitive position of EGSs." I&E RB, pp. 10-11. As noted, that Order made no reference to any such MAC or similar type proposal of any kind. I&E MB, p. 10; I&E RB, pp. 10-11.

recommended denial of the MAC proposal and allowing its inclusion in the default service rate. Companies Exceptions, pp. 12-18.

At page 12 of the Companies Exception, they argue that “[J]ust like the return granted to EDCs in their role as distribution utilities, EDCs that function as default service providers must be allowed an increment - whether or not denominated a “return” - to recognize the opportunity costs they incur when they devote resources they could employ in another profitable endeavor to the provision of default service.” Companies Exceptions, p. 12. The ALJ’s rejection of the MAC clearly evidences her disagreement with the Companies’ contention that such an adder “must” be allowed. I&E concurs with the ALJ’s conclusion and supports its adoption by the Commission. RD, pp. 56-57.

And, in opposition to this particular Companies’ contention seeking to justify its proposal, I&E asserts that the opportunity for a jurisdictional utility to earn a return of, and on, its investment in plant in its base rates is a well-established principle of ratemaking and any attempt to include an artificial “adder” to a default service rate under the same rationale is contrary to the entire notion of what the deregulation of electric generation service sought to achieve – a fair market, competitive price for electric generation to be paid by customers here in the Commonwealth, rather than continuing electricity generation as a profit vehicle for an electric distribution company (“EDC”). Both the Pennsylvania Legislature and this Commission have repeatedly and consistently acted to demonstrate their

clear commitment to achieving that goal of a competitive marketplace for electric generation service without unnecessary and unproductive financial encumbrances. I&E MB, pp. 9-10. I&E Stmt. No. 1-R, pp. 8-9.

The Companies' attempted support for the imposition of a MAC as analogous to base rate recognition of the lost opportunity to invest their monies in other earning endeavors must fail, as the provision of default service is a statutorily imposed duty placed upon EDCs, with the express proviso that they are entitled to recover all proper expenditures, i.e. costs, and in the process be entitled to continue to seek to earn a profit from customers through the provision of their respective Commission-approved distribution services.

To reiterate, an EDC's "obligations to serve" set forth in 66 Pa.C.S. § 2807(e) of the Public Utility Code, requires that an EDC shall provide default service to its retail customers at no greater cost than the cost of obtaining the generation. The ALJ correctly makes this observation and, as noted above, points out that Pennsylvania has not allowed an EDC to add a return component to the price of their default service electric power. RD, p. 56; I&E MB, p. 11; I&E Stmt. No. 1, p. 5. *See also*: OCA MB, pp. 39-40.

I&E contends that that the ALJ has properly rejected the Companies' attempt to interject a proposed MAC into their default service rate as such an adder fails to qualify as "reasonable costs incurred." Given the present statutory

language in Section 2807(e)(3.9) and the definition of the word “incurred,”⁴ the MAC adder does not meet this “incurred” statutory requirement that would allow for its inclusion in the default service rate.⁵ I&E RB, pp. 6-7.

4. Conclusion to this I&E Reply Exception

For the reasons presented both here and in the I&E testimony and I&E Main and Reply Briefs, the Bureau of Investigation and Enforcement respectfully requests that the Commission deny the Companies’ Exception No. 1. The Commission can and should affirm the ALJ’s rejection of the proposed MAC as fully supported by the analysis presented in the Recommended Decision that adopts a number of the positions of the parties staunchly opposed to such an unauthorized adder to the default service rate.

4 *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. [Note: this definitional citation was presented in the I&E Reply Brief at page 6, footnote 7. The footnote also noted that 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].

5 The statutory phrase “reasonable cost incurred” is precisely the type of clear and unequivocal language that the Commission is regularly required to interpret and it’s clear meaning should be applied here to reject the Companies’ present attempt to improperly qualify a clear profit component into a “cost” component. I&E RB, p. 7.

B. The Dominion Retail Inc. Exception To The ALJ's Recommended Denial of Their Proposed Modification to the Companies' Proposed Market Adjustment Clause Should Be Denied and the ALJ's Decision Affirmed.

**ALJ Recommended Decision, pp. 57
Dominion Exceptions, pp. 6-7**

The ALJ correctly rejected the modifications to the MAC proposed by Dominion Retail Inc. ("Dominion"). As the ALJ's recommendation is supported by the instant evidentiary record, it should be affirmed by the Commission. As restated throughout these I&E Reply Exceptions, Section 2807(e) of the Public Utility Code, 66 Pa.C.S. § 2807(e) does not allow for a "return" as proposed by the MAC.

At page 57 of the Recommended Decision, the ALJ discusses and then justifiably rejects the Dominion proposal to retain the concept of a MAC with certain modifications recommended by Dominion. RD, p. 57. Dominion Exceptions, pp. 6-7.

Dominion proposed to double the amount of the MAC until 50% of customers switch from default service, while also allowing the flow back of monies to customers via a rider." Dominion Exceptions, p. 7; Dominion Stmt. No. 1, p. 10. Dominion Witness Butler also proposes a provision to make the MAC cancelable at any time if further customer switching from default service does not occur." Dominion Exceptions, p. 7; Dominion Stmt. No. 1, p. 10.

Also at page 7 of the Dominion Exception, they state that “[W]hile it certainly is true that the MAC charge concept is new in Pennsylvania, it should at least have been given consideration as a tool for getting customers into the competitive market. As such the RD erred in not giving it due consideration.” Dominion Exceptions, p. 7. I&E submits that this statement entirely misses the point as any institution of a return component in a default service rate such as a MAC is “new” in Pennsylvania only because it is not presently authorized and therefore none presently exists. Surely, any “consideration” of such a MAC must certainly take its legality into account as the first determining factor. A MAC not only lacks such statutory authority in Pennsylvania, but runs contrary to the clear prohibition of the identified statute.

When ruling on the Dominion proposal, the ALJ accurately states that “our Public Utility Code does not allow for a return recovery as depicted in the proposed MAC.” RD, pp. 57-58. The ALJ had previously specifically cited Section 2807(e) of the Public Utility Code, 66 Pa.C.S. § 2807(e) in the portion of the Recommended Decision addressing the Companies arguments. RD, pp. 56-57.

The ALJ’s determination is consistent with the I&E argument against the Dominion position and I&E advocates Commission adoption of the Recommended Decision’s disposition of the Dominion proposal, reiterating that it is the inclusion of a MAC in any form as part of the default service rate that I&E considers to be objectionable - as it represents a legally impermissible adder under the cited and

applicable Section 2807(e) of the Public Utility Code, 66 Pa.C.S. § 2807(e). I&E MB, pp. 11-16.

For the reasons presented both here and in the I&E testimony and Main and Reply Briefs, the Bureau of Investigation and Enforcement respectfully requests that the Commission deny the Dominion Exception and affirm the ALJ's rejection of their modifications to the proposed MAC.

C. The RESA Exception To The ALJ's Recommended Denial of Their Proposed Modifications to the Companies' Proposed Market Adjustment Clause Should Be Denied and the ALJ's Decision Affirmed.

**ALJ Recommended Decision, pp. 57
RESA Exceptions, pp. 18-22.**

The ALJ also correctly rejects the Retail Energy Supply Association ("RESA") proposal to retain the concept of a MAC with certain modifications recommended by RESA. RD, p. 57. RESA Exceptions, pp. 18-22. Yet again, the ALJ's recommendation is based upon correct statutory interpretation and the application of sound regulatory principles and therefore should be affirmed.

At page 22 of their Exceptions, RESA reiterates their recommendations to allow the Companies to include a MAC, but to use the proceeds to pay for the costs of implementing improvements to the market structure in the EDC's service territory; pay for the costs related to any of the risks identified by FirstEnergy that actually materialize; and to have any amounts collected over and above these

should be returned to all distribution customers in the form of a credit. RESA Exceptions, p. 22.

The ALJ states that she is "... not persuaded by RESA to recommend a modified MAC be made part of the DSPs" and that the RESA proposal "... appears to be inequitable on the surface." RD, p. 57. The ALJ's determination is consistent with the I&E argument against both the RESA (and Dominion) position and I&E advocates Commission adoption of the Recommended Decision's disposition of the RESA proposal, asserting again that the MAC itself, regardless of the disposition of some of the proceeds to purposes other than profits to the Companies, is a legally impermissible adder under the applicable Section 2807(e) of the Public Utility Code, 66 Pa.C.S. § 2807(e). I&E MB, pp. 11-16.

For the reasons presented both here and in the I&E testimony and Main and Reply Briefs, the Bureau of Investigation and Enforcement respectfully requests that the Commission deny the RESA Exception and affirm the ALJ's rejection of their modifications to the proposed MAC.

III. CONCLUSION

For the reasons stated herein and in the I&E Main and Reply Briefs, the Bureau of Investigation and Enforcement requests that the Commission deny the FirstEnergy Companies' Exception, and also deny the respective Dominion Retail, Inc. and Retail Energy Supply Association Exceptions, and issue a Final Order that includes the adoption of the ALJ's recommended disallowance of a proposed imposition of a Market Adjustment Clause.

Respectfully submitted,



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

Richard A. Kanaskie
Deputy Chief Prosecutor
PA Attorney I.D. No. 80409

Johnnie E. Simms
Chief Prosecutor
PA. Attorney I.D. No. 33911

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976

Dated: July 9, 2012

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 Exceptions** dated July 9, 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):

Thomas P. Gadsden, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103-2921

Brian J. Knipe, Esquire
Buchanan Ingersoll & Rooney PC
17 North Second St, 15th Floor
Harrisburg, PA 17101-1503

Darryl Lawrence, Esquire
Aron J. Beatty, Esquire
Office of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923

Charis Mincavage, Esquire
Susan E. Bruce, Esquire
McNees Wallace & Nurick LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108

Daniel G. Asmus, Esquire
Sharon E. Webb, Esquire
Office of Small Business Advocate
300 North Second Street
Suite 1102
Harrisburg, PA 17101

Thomas T. Niesen, Esquire
Charles E. Thomas, Esquire
Thomas, Long, Niesen & Kennard
212 Locust Street
Suite 500
P.O. Box 9500
Harrisburg, PA 17108

Daniel Clearfield, Esquire
Deanne M. O'Dell, Esquire
Eckert Seamans Cherin & Mellot LLC
213 Market Street 8th Floor
P.O. Box 1248
Harrisburg, PA 17108-1248

Bradley A. Bingaman, Esquire
Tori L. Geisler, Esquire
FirstEnergy Service Company
2800 Pottsville Pike
P.O. Box 16001
Reading, PA 19612-6001

Patrick M. Cicero, Esquire
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101-1414

Benjamin L. Willey, Esquire
Law Offices of Benjamin L. Willey
7272 Wisconsin Avenue
Suite 300
Bethesda, MD 20814

Michael A. Gruin, Esquire
Stevens & Lee
17 North Second Street
16th Floor
Harrisburg, PA 17101

Todd S. Stewart, Esquire
Hawke Mckeon & Sniscak LLP
100 North Tenth Street
Harrisburg, PA 17101

Jeanne J. Dworetzsky
Assistant General Counsel
Exelon Business Services Company
2301 Market Street/ S23-1
P.O. Box 8699
Philadelphia, PA 19101

Thomas J. Sniscak, Esquire
William E. Lehman, Esquire
Hawke McKeon & Sniscak LLP
100 North Tenth Street
P.O. Box 1778
Harrisburg, PA 17101-1778

Divesh Gupta, Esquire
Constellation energy
100 Constellation Way
Suite 500c
Baltimore, MD 21202

Trevor D. Stiles, Esquire
Foley & Lardner LLP
777 E. Wisconsin Avenue
Milwaukee, WI 53202



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