

Brian J. Knipe  
717 237 4820  
brian.knipe@bipc.com

17 North Second Street,  
15th Floor  
Harrisburg, PA 17101-1503  
T 717 237 4820  
F 717 233 0852  
www.bipc.com

July 9, 2012

**VIA HAND DELIVERY**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

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SECRETARY'S OFFICE

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

Dear Secretary Chiavetta:

On behalf of FirstEnergy Solutions Corp., I have enclosed for filing an original and nine (9) copies of the *Replies of FirstEnergy Solutions Corp. to the Exceptions of Other Parties*. Copies have been served in accordance with the attached Certificate of Service.

Very truly yours,



Brian J. Knipe

For BUCHANAN INGERSOLL & ROONEY, P.C.

BJK/kra

Enclosures

cc: The Honorable Elizabeth H. Barnes (via e-mail and hand delivery, w/encls.)  
Cheryl Walker Davis, Director, Office of Special Assistants (via e-mail and hand delivery, w/encls. and Word copy on CD-Rom)  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**REPLIES OF FIRSTENERGY SOLUTIONS CORP.  
TO THE EXCEPTIONS OF OTHER PARTIES**

Amy M. Klodowski, ID No. 28068  
FirstEnergy Solutions Corp.  
800 Cabin Hill Drive  
Greensburg, PA 15601  
Telephone: (724) 838-6765  
Facsimile: (724) 830-7737  
[aklodow@firstenergycorp.com](mailto:aklodow@firstenergycorp.com)

Brian J. Knipe, ID No. 82854  
Buchanan Ingersoll & Rooney, P.C.  
17 North Second Street, 15th Floor  
Harrisburg, PA 17101-1503  
Telephone: (717) 237-4800  
Facsimile: (717) 233-0852  
[brian.knipe@bipc.com](mailto:brian.knipe@bipc.com)

Attorneys for  
FirstEnergy Solutions Corp.

Dated: July 9, 2012

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FirstEnergy Solutions Corp. ("FES"), by its attorneys, and in accordance with 52 Pa. Code § 5.535, submits these Replies to the Exceptions filed by the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), Dominion Retail, Inc. ("Dominion"), and the Retail Energy Supply Association ("RESA") to the Recommended Decision ("R.D.") of Administrative Law Judge Elizabeth H. Barnes issued June 15, 2012.

## I. INTRODUCTION

The Joint Petitioners, Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), Pennsylvania Power Company ("Penn Power") and West Penn Power Company ("West Penn") (collectively, the "Companies") filed default service programs ("DSPs") which include proposed Retail Opt-in Auctions ("Opt-In Programs") and Standard Offer Customer Referral Programs ("Referral Programs").

As FES explained in its briefs, the DSPs present a holistic approach to transitioning Pennsylvania to an optimal end-state of electricity default service. The record evidence demonstrates that:

- The DSPs include a prudent mix of contracts designed to ensure the least cost over time, are designed to ensure adequate and reliable service to customers, will maximize price stability for smaller customers, and will promote shopping within the parameters of the Pennsylvania Electricity Generation Customer Choice and Competition Act ("Choice Act"), as amended by Act 129 of 2008 ("Act 129"), 66 Pa. C.S. §§ 2801-2818.
- In addition to meeting the requirements and objectives of Act 129, the DSPs will facilitate the Commission's transition to an end-state model of default service beginning June 1, 2015.
- The Opt-In Programs and Referral Programs proposed by the Companies are a reasonable response to the Commission's *IWP Order*,<sup>1</sup> and to the extent they

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<sup>1</sup> *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (Final Order entered March 2, 2012) ("*IWP Order*").

deviate from the *IWP Order* guidelines, the deviations are justified by good cause, including EDC operational constraints, or supported by the evidence of record and supported substantially by the parties to these proceedings.

After reviewing the voluminous evidentiary record and briefs submitted by the parties, the R.D. generally agreed with the above conclusions. While FES filed four Exceptions to the R.D.,<sup>2</sup> the R.D. otherwise reflects a thorough analysis of the record and a reasonable interpretation of the applicable law.

The OCA, the OSBA, and RESA take exception to the R.D.'s recommendation to approve the Companies' proposed procurement plan. As explained below, the preponderance of the evidence supports the R.D. and recommends denial of these Exceptions. The Companies' proposed portfolio will provide a better platform for customers to compare market based offers to each electric distribution company's ("EDC") price-to-compare ("PTC") during Pennsylvania's transition to a new end-state default service. Also, the proposal of RESA is designed to result in more "market-response" and "market-reflective" default service pricing. While this approach was consistent with the former law of Pennsylvania, which employed a "prevailing market prices" standard, it does not reflect the current "least cost over time" standard of Act 129 which, the Commission has recognized, requires a greater measure of price stability.

These parties, as well as Dominion, also take exception to the R.D. with respect to certain aspects of the Opt-In Programs and the Referral Programs. As explained below, the R.D. is generally consistent with the Commission's guidance in the *IWP Order*, and the few deviations from the Commission's guidelines reflect a thorough evaluation of the evidentiary record, and are supported by the evidentiary record and have the substantial support of the parties.

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<sup>2</sup> FES's Exceptions relate to the issues of recovery of the costs of the Opt-In Programs and Referral Programs, deferral of the Referral Program until after the Opt-In Program term, and exclusion of CAP customers from the retail market enhancement program.

RESA's Exceptions in particular take the R.D. to task for "calamitous" recommendations that reject RESA's "compelling advocacy." RESA Exceptions at 3. FES respectfully disagrees with RESA's characterization of its case, which differed little from the claims RESA has made in informal proceedings. As explained below, when these claims were finally tested in formal on-the-record legal proceedings, they proved to be lacking in reliable, empirical evidence. Indeed, no RESA member has stood behind any of its positions; RESA's witnesses even testified that RESA does not even know the positions of any individual member on any issue in these proceedings.

Also, RESA's suggestion that these proceedings, as the first default service case to come before the Commission since its Retail Markets Investigation ("RMI") was launched, will have a lasting impact on the utility industry in Pennsylvania, is an exaggeration, since Pennsylvania is moving to a new end-state of default service starting June 1, 2015. What the Companies' DSPs can accomplish, however, is to provide a platform for as many small customers to move to default service as possible, using the Companies' intermediate competitive enhancements, while the Commission and Stakeholders collaborate on the new end-state of default service.

For the reasons explained herein and in the R.D., as well as in FES's Main and Reply Briefs, the Exceptions of the OCA, the OSBA, Dominion and RESA to which FES responds below should be denied.

## II. REPLIES TO EXCEPTIONS

### A. DEFAULT SERVICE PROCUREMENT

#### 1. **The Companies' Proposed Use Of 24-Month Load Following Full Requirements Contracts For Residential And Commercial Default Supply Is Legal And Appropriate (OCA Exception 1, OSBA Exception 1, RESA Exception 1).**

The OCA, the OSBA and RESA take exception to the R.D.'s conclusion that the Companies' proposed default service procurement plans meet the requirements of the Choice Act, as amended by Act 129. The R.D. recognized the flaws and shortcomings in the Residential and Small commercial and industrial ("C&I") supply portfolios proposed by OCA, the OSBA and RESA and correctly adopted the Companies' position that the use of 24-month full requirements contracts best fulfills the requirements of Act 129 and serves the interests of small customers. Each party challenging this determination of the R.D. has ignored, overlooked or misapplied certain standards or considerations that support the appropriateness of the Companies' recommended small customer portfolio.

The Companies' portfolio consists primarily of 24-month full requirements contracts procured at two different times. It also includes a 10% component of spot market supplies and the continuation of previous block purchases for Met-Ed, Penelec and Penn Power, with all purchases ending on May 31, 2015, the Commission's preferred stop point for the next procurement period. The OCA's primary argument on this issue is that the R.D.'s recommendation lacks a proper "mix" of products. RESA argues that the R.D.'s recommended portfolio is insufficiently market reflective. The OSBA cites an alleged inconsistency between a Commission policy statement and the R.D.'s recommendation. The R.D. rejected all of these parties' positions, correctly discerning that these positions were inferior to the Companies'

procurement plan. As explained further below, the R.D.’s recommendation to approve the use of 24-month full requirements contracts for small customers should be adopted by the Commission.

**a. The OCA’s preferred procurement plan is inconsistent with Commission default service precedent and policy.**

The OCA incorrectly contends that the R.D. approved the Companies’ reliance on “one product” for all Residential default service needs, based upon the Commission’s recent decision in *Petition of Pike County Light & Power Company for Approval of its Default Service Implementation Plan*, Docket No. P-2011-2252042 (Final Order entered May 24, 2012) (“*Pike County*”). OCA Exceptions at 4. However, the Companies’ proposed mix of 90% fixed-price supply with 10% spot market supply over 24 months, combined with the continuation of long-term block purchases, is very different from the 100% spot market supply at issue in *Pike County*.

Indeed, the R.D. nowhere references *Pike County* in its rationale for finding a “prudent mix” of contracts. The R.D.’s references to *Pike County* are included in a separate, preceding Section III of the R.D., in which the R.D. recites general “Standards Applicable To Default Service.” R.D. at 6-13. Not all of the laws and Commission Orders referenced in Section III of the R.D. are cited and relied upon in the R.D.’s recommendation to approve the Companies’ proposed mix of default supply contracts for Residential customers. Consequently, the OCA’s arguments that the R.D. based its finding of a “prudent mix” on the recent *Pike County* decision are inapposite,<sup>3</sup> the Commission should decline the OCA’s invitation to test the limits of its recent *Pike County* ruling in these proceedings, and the OCA’s Exception 1 should be denied.

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<sup>3</sup> Even if the R.D. had reached its conclusion that the Companies had proposed a “prudent mix” of products with the understanding that the Companies’ portfolio included a single product, the R.D.’s conclusion would have been

The OCA's recommendation that the Companies procure "a broader mix of full requirements contracts of different lengths as well as block and spot purchases" would replace a substantial number of 24-month contracts in the Companies' proposal with 12-month contracts, with the one year contracts being replaced by two year contracts to create a laddering effect. OCA St. No. 1 at 25. As FES explained in its briefs, the OCA's arguments for staggered 24- and 12-month contracts amounts to quibbling over the length of short term contracts that should be in the small customer default service portfolio and does not acknowledge the flexibility to be afforded the default service provider in designing its own "prudent mix" of contracts. *Implementation of Act 129 of October 15, 2008; Default Service and Retail Electric Markets*, Docket No. L-2009-2095604 (Final Rulemaking Order entered October 4, 2011) ("Default Service Rulemaking Order"), slip op. at 38, 60. The OCA's procurement plan mix of short-term contracts lacks the rate certainty and stability of the Companies' proposal, and would require the Companies to incur greater administrative costs. The price stability of the Companies' proposed portfolio creates a defined product against which competitive suppliers develop a wide range of products, which is more appropriate for a default service plan that is intended to cover the transition to a new end-state of default service in which significantly more customers are served by EGSs. FES M.B. at 7, 8-9; FES R.B. at 5-10.

Accordingly, the OCA's interpretation of "prudent mix" is erroneous and its complex procurement plan is inappropriate for the instant default service plan and contains no advantages over the Companies' proposal.

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consistent with the Commission's recent *Default Service Rulemaking Order*, in which the Commission stated, "[w]e do reject the positions of those parties that 'prudent mix' be defined to always require a specific mix or percentage of types of contract components in each default service plan *or a minimum of two types of products.*" *Default Service Rulemaking Order*, slip op. at 60 (emphasis added).

**b. RESA’s proposed procurement plan is inconsistent with a proper interpretation of Act 129 and the record evidence.**

In its Exceptions, RESA recommends a mix of 12- and 24-month contracts for Residential customers, and of 12-month contracts for Small C&I customers.<sup>4</sup> RESA Exceptions at 4-5. Similar to the OCA, RESA is not recommending any new types of contracts recognized by Act 129 as part of a “prudent mix,” but merely quibbling over different lengths of short-term contracts.

RESA contends that the R.D. does not satisfy the statutory requirements because it recommends “the adoption of a procurement plan that is unlikely to result in default service rates that reflect market pricing at the time of delivery.” RESA Exceptions at 2. RESA argues that its preferred portfolio of short-term contracts is designed to make default service more “market responsive.” RESA Exceptions at 13. While RESA contends that market-responsive pricing is supported by, and is more consistent with, Act 129’s statutory requirements, RESA cannot point to any actual statutory requirement of Act 129 that supports its interpretation. As FES explained at length in its briefs, RESA’s arguments are based on the Competition Act’s former “prevailing market prices” standard, not Act 129’s present “least cost over time” standard. While the law in Pennsylvania has changed, RESA’s proposed mix of procurement contracts has not, and is still designed to meet the “prevailing market prices” standard. FES M.B. at 8-12; FES R.B. at 7-8.

RESA argues that the R.D. has sacrificed promoting the competitive market for the sake of price stability, and criticizes the R.D. for allegedly elevating the Preamble of Act 129 over Act 129’s statutory requirements. RESA Exceptions at 5-8. Like the OCA, RESA cites from Section

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<sup>4</sup> This differs from RESA’s testimony, where its witness appeared to advocate the OSBA’s recommendation of 6-month contracts for Small C&I customers. RESA St. No. 1-R at 6.

III of the R.D. in support of its argument that the Preamble was the basis for the R.D.'s rejection of its proposal. However, the R.D.'s discussion and rejection of RESA's proposal cites not to the Preamble of Act 129, but to the Commission's interpretation of Act 129 in its Default Service Rulemaking Order.<sup>5</sup> See Default Service Rulemaking Order, slip op. at 39-40; R.D. at 22-24.

RESA also argues that the R.D. erred in viewing the default service provider as the only entity that can provide the price stability contemplated by Act 129, through the default service rate. RESA maintains that the competitive market can provide this price stability instead of default service, and that this would be the "epitome of the intent of the Competition Act." RESA Exceptions at 14. This argument incorrectly assumes that the General Assembly intended to set standards for competitive offers when Act 129 was enacted, rather than standards for the default service provider. There is no legal basis for extending Act 129's "least cost over time" requirement to offers on the competitive market, and RESA's argument should be rejected.

Further, RESA claims that 24-month contracts are more costly than 12-month contracts, but failed to put evidence in the record to support this claim. The Companies provided evidence disproving RESA's claim, and the R.D. ruled in their favor. In its Exceptions, RESA argues that the Companies' evidence is "meaningless" because there is no certainty in future electricity prices. RESA Exceptions at 8-9. However, the fact remains that the Companies' evidence shows that the risk premium in 24-month contracts that RESA believes exists is not demonstrated in the evidence of this case, while evidence rebutting RESA's position was indeed presented. R.D. at 24-25.

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<sup>5</sup> Based on the incorrect premise that the R.D. relied on the Preamble, RESA argues that the Commission's *Pike County* Order suggests that the R.D. relied too heavily on the Preamble in this case. RESA Exceptions at 7-8. Even if RESA were correct that the R.D. relied on the Preamble of Act 129, it suffices to say that the Commission's analysis of a "prudent mix" in *Pike County* was unique to that EDC and its 4,700 Residential and Small C&I customers, only 1,300 of which are on default service, and that the *Pike County* Order has no bearing on the Companies' case. *Pike County*, slip op. at 8.

RESA's proposed procurement plan is inconsistent with the spirit of Act 129 and its proposals find no support in the law or the evidence of record, and therefore was correctly rejected by the R.D.

**c. The OSBA's singular reliance on certain isolated elements of the Commission's Default Service Policy Statement fails to recognize other important considerations.**

The OSBA challenges the R.D.'s recommended procurement plan for Small C&I customers primarily for not adhering more strictly to the Commission's most recent Policy Statement on default service procurement. OSBA Exceptions at 4-5. The OSBA recommends a mix of one-year and 6-month contracts, including the laddering of contracts, for Small C&I customers. The OSBA also observes that Commission support for laddering of contracts within the 2013-2015 period was not addressed. OSBA Exceptions at 5.

As FES explained in its Main Brief, the OSBA's recommendations for more market-reflective and market-responsive pricing and less price stability, like RESA's recommendations, are appropriate for end-state default service beginning on June 1, 2015, but not the upcoming transition to end-state default service. FES M.B. at 9. Under these proposals, customers trying to compare the default service PTC to market based offers will have difficulty determining if market based offers provide better value than default service. The Companies' proposal will provide a relatively stable default service price which provides a better platform for price comparisons.

The OSBA based its recommendation on the Commission's former and updated default service Policy Statements. OSBA Exceptions at 4 n.5. However, the Commission, two months after updating its Default Service Policy Statement in October 2011, issued its directive that

these upcoming DSPs are an important step in the transition to a new end-state of default service beginning on June 1, 2015. FES R.B. at 5 (quoting *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952 (Final Order entered December 16, 2011) ("*Upcoming DSP Final Order*"), slip op. at 11). The OSBA's preference for laddering of contracts is based upon a Policy Statement that preceded this guidance, and would prolong the transition to the new end-state of default service.

As FES explained in its briefs, the Commission has emphasized that EDCs should be permitted the flexibility and latitude to design their own "prudent mix" of products to accomplish the goal of achieving the "least cost" standard in a manner that meets the need of their customers and service territories, to ensure price stability, and to maintain adequate and reliable service. Default Service Rulemaking Order, slip op. at 38, 60. Accordingly, the Commission should reject the attempts of the OCA, the OSBA and RESA to micromanage the Companies' procurement portfolio. See FES R.B. at 6-7. As explained above in response to the OCA's Exception No. 1, default service price certainty and stability through use of 24-month contracts brings certainty of savings for shopping customers which will facilitate shopping by providing a defined product against which competitive suppliers develop a wide range of products. FES R.B. at 5-6. This is an appropriate exercise of the Companies' discretion.

In sum, the OCA, the OSBA and RESA have not brought forward any arguments that cast doubt on the correctness of the R.D.'s recommendation that the Commission approve the use of 24-month contracts for Residential and Small C&I customers. The R.D. followed the law, Commission policy and the evidence of record in concluding the Companies' procurement plan for these customer groups should be approved.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, the OCA's Exception 1, the OSBA's Exception 1, and RESA's Exception 1 should be denied.

**2. The R.D. Appropriately Considered And Rejected The OCA's Arguments Regarding The Alleged Risks To Default Service Created By Opt-In Programs (OCA Exception 2).**

The OCA takes exception to the R.D.'s alleged failure to address the OCA's concerns about the alleged risks to customers of a procurement plan that relies on two-year full requirements contracts and retail Opt-In Programs that have only a one-year term. OCA Exceptions at 14. According to the OCA, unless the amount of load served under the Opt-In Programs is capped, the risk of customer migration created by the Companies' Opt-In Programs will cause full requirements suppliers to add risk premiums to default service bids, resulting in higher than necessary default service prices. OCA Exceptions at 14-15. The OCA offered what it characterizes as three inter-related solutions to this perceived problem:

1. A recommendation to cap customer participation in the Opt-In Programs at 20% rather than the 50% participation proposed by the Companies (and as approved by the R.D.);
2. A recommendation to modify the Companies' procurement plan for Residential customers to include a mix of two year full requirements contracts, one year full requirements contracts as well as block and spot procurements; and
3. A recommendation for a "hold back" of supply reserved for the Opt-In Programs, so that full requirements bidders would have assurance that the size of the tranches they are bidding on is fixed at the expected 50 MW.

OCA Exceptions at 17. Contrary to the OCA's claim, the R.D. did in fact consider the interplay between the OCA's recommended Residential default service procurement plan and the Opt-In Programs, and considered and correctly rejected each of the proposed "solutions" offered by the OCA in response to its perceived problem. The OCA raised the claimed interplay between the

retail market enhancement programs and default service procurements in support of each of its recommendations.

The OCA addresses two of its three solutions elsewhere in its Exceptions. First, the R.D.'s rejection of the OCA's recommended 20% customer participation cap for the Opt-In Programs is the subject of OCA Exception 6, to which FES responds in Section II.B.6 below. R.D. at 101. Second, the R.D.'s rejection of the OCA's proposed procurement portfolio is the subject of OCA Exception 1, to which FES responds in Section II.A.1 above.

The R.D. also correctly rejected the OCA's third proposal, to "hold back" 20% of the tranches of the full requirements default service supply which the Companies seek to procure prior to June 1, 2012 until after the Opt-In Program's March 2013 auction. R.D. at 32. As the R.D. properly concluded, this proposal would create significant additional risk for customers by increasing the amount of block and spot supply in each Company's portfolio if the Opt-In Program is undersubscribed and current default service suppliers decline the opportunity to purchase additional tranches of supply. R.D. at 33.

Other parties provided substantial evidence in opposition to the OCA's recommendation. The Companies noted that (i) wholesale suppliers face numerous uncertainties and ongoing volumetric risk with respect to the load they will serve over the course of a supply contract and can wait to make the appropriate hedging decisions until after the Opt-In Program auction has occurred; (ii) the OCA's witness never explained why wholesale suppliers choosing to bid into the Companies' procurements with complete knowledge of the details of the upcoming Opt-In Auctions will not be able to consider fully the risks associated with the auctions and make the appropriate hedging decisions prior to delivery; and (iii) the premiums associated with full requirements contracts procured during other periods of uncertainty – including the end of rate

caps in the Companies' service territory – have been quite small. Met-Ed/Penelec/Penn Power/West Penn M.B. at 10. Consistent with this third point, FES, an experienced wholesale supplier that bids in default service auctions, submitted that the perceived risk underlying the OCA's proposal is exaggerated. FES R.B. at 13. RESA likewise pointed to the lack of any evidence of record that having more customers shopping through the Opt-In Programs will have a material effect on wholesale default service prices. RESA M.B. at 27-28.

The R.D. properly considered and rejected each of the OCA's recommendations responding to the perceived risks of the Opt-In Programs to default service suppliers. For the reasons explained in the R.D., FES's briefs and the arguments set forth above, the OCA's Exception 2 should be denied.

**3. The R.D. Correctly Approved The Companies' Proposal That The DSP Not Include Any New Procurements That Extend Beyond May 31, 2015 (OCA Exception 3).**

The OCA takes exception to the R.D.'s approval of the Companies' proposal to end all new purchases of default supply under the DSP on the same date, May 31, 2015. OCA Exceptions at 19-22. This position is unpersuasive because the Commission's guidance on this issue is for EDCs to avoid procuring supply beyond May 31, 2015. *Upcoming DSP Final Order*, slip op. at 19. That date is when the Commission intends to begin the end-state of default service. In other words, the "hard stop" the OCA rejects is precisely what the Commission requires, in order to avoid additional challenges implementing end-state default service starting June 1, 2015. As stated in FES's Reply Brief on this point, multiple laddered and layered procurements of short-term contracts of varying lengths are inappropriate and inconsistent with an abbreviated 2-year default service plan that bridges to end-state default service. FES R.B. at

5-6. The OCA's proposal will prolong the Commission's orderly transition to a new end-state default service product. See FES St. No. 1-S at 5.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, the OCA's Exception 3 should be denied.

**4. The R.D. Correctly Recommended Approval Of The Companies' Proposal To Procure All Default Supply Prior To The Start Of The Delivery Period (OCA Exception 4).**

The OCA takes exception to the R.D.'s recommended approval of the Companies' proposal to procure all default supply in two auctions, in November 2012 and January 2013. Instead, the OCA's recommendations would have the Companies conduct four (4) procurements, on November 2012, January 2013, November 2013 and the first quarter of 2014. OCA Exceptions at 22.

Under the Companies' proposal, procurements would be completed seven and five months prior to delivery. That is, all procurements would be completed prior to the start of the 24-month default service delivery period. This would maximize price stability during the default service plan. FES M.B. at 13-14. The OCA proposal requires the Companies to conduct procurements during the delivery period. The OCA's proposal would not allow for the price stability which is so important under Act 129. Also, while the OCA argued in briefs that holding procurements 2 months apart creates market timing risk, OCA M.B. at 21, the Commission's Default Service Regulations require the Commission to approve or disapprove competitive bid results, 52 Pa. Code § 54.188(d), and the new language in Section 54.188(d) provides for the Commission to institute an investigation into a DSP's default service plan and order remedies as

appropriate. *Default Service Rulemaking Order*, slip op. at 30. Therefore if undue risk is encountered, the Commission has a remedy available to counter that risk.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, the OCA's Exception 4 should be denied.

**5. The R.D. Appropriately Balanced Supplier Diversity And Achieving The Lowest Price In Recommending Adoption Of The Companies' Proposed Wholesale Load Caps (RESA Exception 2).**

RESA takes exception to the R.D.'s conclusion that the Companies' proposed load cap of 75% is reasonable. The Companies' proposal would continue the 75% load cap for Met-Ed, Penelec and Penn Power, and introduce, for the first time, a 75% load cap for West Penn Power. RESA, maintaining that the load cap should be lowered to 50%, argues that the legal analysis is properly framed as "whether a 50% or a 75% wholesale supplier load cap is necessary to achieve . . . [wholesale supplier] diversity." RESA contends that the R.D. erred in relying on the Commission's 2009 Order regarding the appropriate level of load cap for Met-Ed and Penelec, since "the four EDCs have more market power now than in 2009," and "[a]llowing one or a few suppliers to dominate the FirstEnergy wholesale auctions could result in controlling pricing such that other competitors are eventually driven out of this market." RESA Exceptions at 16-17 (citing *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of Their Default Service Programs*, Docket Nos. P-2009-2093053, P-2009-2093054 (Opinion and Order entered November 6, 2009) ("*Met-Ed/Penelec 2009 DSP Order*")). RESA also claims the R.D. incorrectly determined "that RESA's analysis 'is based upon conjecture'" and lacks sufficient evidentiary support. RESA Exceptions at 16-17.

RESA's contentions are erroneous and must be rejected. Its singular focus on "supplier diversity" ignores the analysis developed by this Commission, which explained that load caps are part of the analysis of whether a DSP meets the "least cost over time" standard. *Met-Ed/Penelec 2009 DSP Order*, slip op. at 18. In that proceeding, the Commission explained that "[t]he level at which the load cap is set must balance supplier diversity and achieving the lowest price in the supply auctions." *Met-Ed/Penelec 2009 DSP Order*, slip op. at 16. Lowering the load cap to 50% would ensure higher cost suppliers will serve more of the load resulting in higher prices for customers. By omitting that implication from its consideration, RESA again disregards Act 129's requirement that that supplies constitute "the least cost to customers over time." 66 Pa. C.S. § 2807(e)(3.4)(ii).

Instead, the crux of RESA's Exceptions are vague, unsupported references to "market power." RESA offers no logical explanation of how related, regulated EDCs have "market power," or how any such "EDC market power" could let one or a few wholesale suppliers control pricing. Certainly, RESA never establishes any logical connection between the size of the load to be served with the diversity of suppliers that may be available to bid.

RESA's load cap arguments assume low wholesale supplier interest in participating in the Companies' auctions, but RESA has presented no evidence that 75% load caps have resulted in an inadequate number of participants in any of the Companies' auctions, or pointed to any indication of participants being driven away. To the extent RESA claims that its "Confidential Attachment A" to its Main Brief supports its arguments about what "could" happen by illustrating that the effect of the existing 75% load caps of Met-Ed, Penelec and Penn Power have been "negligible," see RESA Exceptions at 17 footnote 39, FES's **Confidential Attachment 1** submitted with its Reply Brief explains how RESA's argument in its Confidential

Attachment A severely mischaracterizes the import of the referenced discovery and demonstrates that the Companies' procurements have been competitive.

Instead of referencing facts supported by substantial evidence, RESA continues to resort to unsupported and potentially damaging insinuations. Specifically, RESA claims that its unsuccessful Motion to Compel the Companies to produce the percentages of load awarded to default service bidders in the Companies' prior auctions would have produced something that the Companies and FES believe must be "withheld from the Commission," RESA Exceptions at 18, something which must be remedied by reduced load caps. Incredibly, RESA again mischaracterizes the Companies' and FES's opposition to this discovery request for competitively sensitive information as opposition to providing the Commission with "more specific details about previous auctions to enable a comprehensive review" of this issue. RESA Exceptions at 17. As FES explained at length in its Reply Brief, RESA is well aware that the Commission already knows whether the Companies' affiliates dominated the procurement process and by what percentage of market power. To the extent RESA did not know, the ALJ removed all doubt by explicitly informing RESA in the Order denying RESA's Motion to Compel. FES R.B. at 16-17. FES submits that RESA is no longer entitled to the benefit of the doubt.

Notwithstanding RESA's professed ignorance, the Commission already has this competitively sensitive information, yet has not seen fit to shift direction with regard to load caps. The Commission did not address the issue of load caps in its *Upcoming DSP Final Order*, nor in its recent Default Service Rulemaking, where the Commission considered protections against the potential for supplier bankruptcy, and concluded that these concerns can be addressed through measures such as credit and collateral provisions and contingency plans. *Default Service Rulemaking Order*, slip op. at 71-72.

In addition, RESA's Exceptions ignore the other bases for the R.D.'s recommendation, including the facts that the Companies' proposal would implement a load cap on West Penn Power for the first time, that the Companies' proposal is consistent with the Commission's historic position on this issue, and that the proposed Supplier Master Agreement's creditworthiness and credit assurance provisions address the potential impacts of a wholesale supplier default. R.D. at 36. Indeed, RESA's Exceptions have abandoned its argument before the ALJ that lower load caps are required to limit the Companies' exposure to contract failure of any wholesale supplier, a wholly speculative argument that suffered from a lack of supporting evidence and analysis. See FES M.B. at 18-20; FES R.B. at 15.

In addition to the reasons mentioned above, FES in its briefs offered several additional reasons why RESA's recommendation to lower the Companies' proposed 75% load cap to 50% should be rejected. FES M.B. at 15-20. Competition, not artificial and administratively determined limitations, should determine the cost of default service and the selected suppliers. 66 Pa. C.S. § 2802(5). Accordingly, the R.D. was supported by the great preponderance of evidence, Commission precedent and the legal standard for default service procurement. Indeed, these factors weighed in favor of imposing no load cap on the Companies' default service procurement.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, RESA's Exception 2 should be denied, and the cap should be set no lower than the 75% proposed by the Companies and recommended by the R.D.

## **B. RETAIL OPT-IN AUCTION PROGRAM**

### **1. The R.D. Correctly Recommended Approval of the Companies' Proposed Use Of A Descending Clock Auction for the Opt-In Programs (OCA Exception 9; Dominion Exception 2).**

The OCA and Dominion take exception to the R.D.'s approval of the Companies' proposed descending clock auction ("DCA") format, contending that the Companies should be ordered to use a sealed-bid RFP instead. Both Dominion and the OCA cite RESA's testimony on this point, though it is notable that RESA did not address the issue in its Exceptions. In its Exceptions the OCA relies completely on the testimony of the Dominion witness in favor of the sealed bid RFP, the OCA stating its "primary objection" to the DCA "is the substantial costs to operate such a method." OCA Exceptions at 32. The OCA's reliance on Dominion's testimony is misplaced, since Dominion's witness offered no substantive support for the sealed bid RFP over the DCA, much less evidence quantifying the costs of a DCA. Dominion argues that its witness's bald assertions in favor of a sealed bid RFP, based on no evidence other than his "perspective," should prevail over the Companies' substantial and well-supported testimony in favor of using the DCA process.

As noted in the R.D., the parties that offered testimony supporting the sealed bid RFP "did not quantify the alleged savings they speculate might be achieved." R.D. at 115. The R.D. also notes that the Companies offered testimony contradicting that assertion. Nor, the R.D. goes on, do the opposing parties address the Companies' enumeration of several factors in favor of their use of the DCA for the Opt-In Program, including their previous successful use of the format, the DCA will ensure the lowest prices among the four companies, and the active, real-time "price discovery" of the DCA process will avoid possible disparities in prices among the Companies that could occur if a sealed bid RFP were used.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, The OCA's Exception 9 and Dominion's Exception 2 should be denied.

**2. The R.D. Correctly Found That The EGS Opt-In Auction Should Precede Customer Enrollment (Dominion Exception 3; RESA Exception 10).**

Dominion and RESA except to the R.D.'s recommendation that the EGS retail opt-in auction should occur before customer enrollment in the program takes place. RESA put forth this same argument in the RMI, and the Commission considered RESA's argument and rejected it in the *IWP Order*. *IWP Order* at 54-56. The R.D. considered the evidence of record, and correctly decided this issue in favor of the Companies' holding the auction first, then soliciting customer enrollment after the auction price has been established. The argument that customers will have sufficient information to determine whether or not to participate in the Opt-In Program before the auction takes place was addressed in FES' Main Brief and Reply Brief in this proceeding. FES M.B. at 27-29; FES R.B. at 23-24. FES agrees with the R.D.'s finding that customers cannot reasonably be expected to shop without knowing the price and terms of the product, and that EGSs routinely offer products without knowing the number of customers who will accept the offer. R.D. at 98. As between EGSs and non-shopping residential customers, it is obvious that EGSs are the more sophisticated market participants. Residential customers who have already shown reluctance to shop should be given as much information as possible before they are asked to participate in this Commission-sponsored program. The only way customers will have all the information they need is if the EGS auction is held first, thus establishing the price customers will pay if they participate in the program.

Finally, customers should not be solicited to participate in the Opt-In Program until it is certain they will have a place in the program. If customers are solicited first, but then the auction

fails to fully subscribe, some customers will not be permitted to participate. As the Commission found in the *IWP Order*, this will result in customer confusion and dissatisfaction with the shopping experience. *IWP Order* at 54.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, Dominion's Exception 3 and RESA's Exception 10 should be denied.

**3. The R.D. Correctly Rejected RESA's Proposed "Test Program" Prior To The Opt-In Auction (RESA Exception 10).**

RESA takes exception to the R.D.'s rejection of its proposed "test program," a proposal it made in the RMI and that the Commission declined to adopt in the *IWP Order*. RESA calls its proposal a "test" program to take place before the Companies' first wholesale procurement and before the retail opt-in auction takes place, but this "test" program is clearly an attempt to resurrect the "pilot" program RESA proposed in the RMI and the Commission rejected. *IWP Order* at 45-48. FES addressed this proposal in its Main Brief and Reply Brief in this proceeding. FES M.B. at 40-41; FES R.B. at 30-31. Whether RESA calls its proposal a "pilot" or a "test" program, its proposal has been appropriately rejected by the Commission in the RMI and again by the R.D.

For the reasons explained in the *IWP Order*, the R.D., FES's briefs and the arguments set forth above, RESA's Exception 10 should be denied.

**4. The R.D. Correctly Rejected RESA's Proposal for a Minimum of Four Winning Bidders in the Opt-In Auction (RESA Exception 11).**

RESA takes exception to the R.D.'s rejection of RESA's recommendation that the Opt-In Programs require a minimum of four (4) winning bidders. FES addressed this issue in its Main

Brief and Reply Brief in this proceeding. FES M.B. at 34; FES R.B. at 27-29. FES disputes RESA's reading of the *IWP Order* as it pertains to this proposal. RESA and Dominion both urged the Commission in the RMI proceeding to include this element in its guidelines for EDCs' Opt-In Program proposals, but the Commission declined to do so, and stated the following:

The EDCs may consider such a requirement within the parameters of their proposed Retail Opt-in Auctions.

*IWP Order* at 64 (emphasis added). Contrary to RESA's assertion, the above language cannot reasonably be interpreted to mean that the Commission "specifically directed that the issue of minimum number of bidders be determined in each default service proceeding." RESA Exceptions at 35. A logical reading of the cited language is that the Commission left the determination whether to include the "minimum number of winning bidders" requirement to the EDCs' discretion in designing the opt-in programs included in their default service plan filings. Notably, Dominion did not continue its support for the proposal in this proceeding, calling the Companies' proposal to implement a 50% supplier cap "adequate protection." Dominion M.B. at 20.

That is not to say parties in any proceeding cannot advocate different outcomes from those proposed by the EDC or recommended in the *IWP Order*. Indeed, many parties to this proceeding, including FES, are doing so. However, the *IWP Order* clearly is not as favorable to the "minimum number of winning bidders" requirement as RESA suggests, and in order for its proposal to be adopted, RESA has to have shown good cause and substantial evidence in support thereof. It has not done so.

RESA's justification for this requirement, that it will attract EGSs to the market that might otherwise not participate, and that those EGSs will obtain a "critical mass" of customers thus enabling them to stay in that market, is not supported by substantial evidence. In fact,

RESA witness Kallaher seemed to back away from this argument on cross-examination, when he acknowledged that even with a minimum number of winning bidders requirement a winning bidder could still obtain such a small number of customers that it would not meet his “critical mass” standard. Tr. 245. Therefore, the lack of supporting evidence combined with the above-noted lack of any retail suppliers’ support of the proposal requires that it be rejected.

For the reasons explained in the R.D., FES’s briefs and the arguments set forth above, RESA’s Exception 11 should be denied.

**5. The R.D. Correctly Found That A Bonus Payment Is Not Required In The Companies’ Opt-In Auction Product (RESA Exception 12).**

RESA takes exception to the R.D.’s rejection of a bonus payment requirement for the Opt-In Programs. FES addressed the bonus payment issue at length in its Main Brief and Reply Brief in this proceeding. FES M.B. at 35-40; FES R.B. at 29-30. The Companies presented substantial evidence explaining why the inclusion of a bonus payment is not appropriate for customer in their territories. Met-Ed/Penelec/Penn Power/West Penn St. No. 7-R at 32-33.

In its Exceptions, RESA cites “potential customer focus groups” as “substantial evidence” in support of its argument that a bonus payment “is necessary if the auction has any hope of being successful.” RESA Exceptions at 36. On the contrary, RESA’s “focus group” evidence was pure hearsay, uncorroborated by any competent evidence, and therefore insufficient to support a finding of fact under Pennsylvania law. See *Walker v. Unemployment Comp. Bd.*, 367 A.2d 366 (Pa. Cmwlth. 1976). As FES explained at length in its Main Brief, RESA’s witness who testified in support of bonus payments did not participate in or conduct the focus groups. Rather, the witness’s testimony was entirely dependent upon a consulting firm’s slide presentation summarizing the statements of unidentified, out-of-court individuals who

conducted the focus groups, and who in turn were summarizing the alleged responses of 47 other unidentified, out-of-court individuals. See FES M.B. at 36-40. While the quality of such evidence may have been adequate for an informal RMI *en banc* hearing, when tested in a formal, on-the-record adjudication it proved to be lacking and should be given no evidentiary weight whatsoever. Accordingly, RESA's recommendation of a bonus payment should be rejected, and the R.D.'s conclusion should be affirmed.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, RESA's Exception 12 should be denied.

**6. The R.D. Correctly Rejected The OCA's Proposed 20% Cap On Customer Participation In The Opt-In Programs (OCA Exception 6).**

The OCA takes exception to the R.D.'s rejection of its proposed 20% cap on customer participation in the Opt-In Programs. FES addressed this issue in its Main Brief and Reply Brief in this proceeding. FES M.B. at 30; FES R.B. at 25-26. The OCA's primary concern on this issue is that it thinks a customer participation cap higher than 20% will adversely affect traditional default service procurements. FES, an experienced wholesale supplier, submits that these impacts are overstated, and contended that traditional default service is precisely what the Commission intends to move customers away from through its endorsement of the retail market enhancements in the RMI, including retail opt-in auctions such as the Companies' Opt-In Programs. FES M.B. at 25-26; FES R.B. at 30.

As the R.D. properly recognized, the OCA proposed the same lower customer participation cap in the RMI proceeding. While FES continues to oppose any customer or supplier caps in retail enhancement programs, it recognizes that the Commission determined otherwise in the *IWP Order*. However, the Commission endorsed a higher customer cap and

rejected the OCA's arguments for a lower cap in the *IWP Order*, reasoning that a lower cap could lead to the rejection of customers wishing to participate in the program. The Commission determined that the 50% customer cap provides both a large customer participation pool, while providing some certainty to those retail suppliers opting to participate in the program. *IWP Order* at 59. FES respectfully submits that the Commission should affirm the R.D.'s rejection of the OCA's proposal.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, the OCA's Exception 6 should be denied.

### **C. STANDARD OFFER CUSTOMER REFERRAL PROGRAM**

#### **1. The Companies' Proposed 12-Month Standard Offer At A 7% Discount Off The PTC At The Time Of Enrollment Is Legal and Appropriate (OCA Exception 10; RESA Exception 16).**

The OCA and RESA take exception to the R.D.'s approval of the Companies' proposed Standard Offer term (i.e., 12 months) and product (i.e., 7% discount from the PTC at the time of enrollment, available for the full term of the Standard Offer). FES believes the R.D. correctly resolved these issues. See FES M.B. at 49-54; FES R.B. at 34-38; see also Met-Ed/Penelec/Penn Power/West Penn M.B. at 126.

In approving these terms of the Referral Program, the R.D. explicitly rejected RESA witness Kallaher's request that the discount last only 4 months, even if the term of the contract for the Standard Offer Program is 12 months. R.D. at 123-124. RESA challenges the R.D.'s explicit rejection of its proposal. RESA Exceptions at 42. In rejecting RESA's short term discount, the R.D. followed the Commission's guidance in the *IWP Order* that the standard offer

(i) should be for a minimum of four months but could go up to a year, and (ii) the standard offer and term should be uniform. R.D. at 124.

In its Exceptions, the OCA points out that the R.D. did not address the OCA's concern that if the Standard Offer Program pricing was to be set as a percentage off the PTC in effect at the time of the offer, then the contract for the program should be limited to four months in order to ameliorate the possibility that customers would pay a price during the contract term that is *higher* than the PTC. OCA Exceptions at 33. While not expressly addressing the OCA's position, the R.D. indirectly rejected it by adopting the Companies' position.

FES fully supports the R.D. findings on and analysis of the term of the Standard Offer Referral Program and the length of the applicable discount. Neither the OCA nor RESA offers anything new in their Exceptions that would justify a conclusion contrary to what the R.D. found based on the full evidentiary record in these proceedings. While FES has maintained throughout these proceedings that the term of the Standard Offer should be longer, i.e., between 12-24 months, to provide customers with stability and security, FES St. No. 1-R at 18, FES acknowledges that a 12-month product is consistent with the Commission's *IWP Order*. The OCA's recommendation ignores the fact that the customer may terminate the Referral Program contract with the EGS at any time without incurring a termination penalty or fee.

FES has also urged the rejection of RESA's proposal that the 7% discount end after only 4 months, so that the program more closely resembles the "New York" style program which has a 3-month introductory term. RESA St. No. 2-S at 22-25. As the R.D. recognizes, RESA's 4-month discount recommendation lacks any support in the *IWP Order*. In the *IWP Order*, the Commission very specifically set forth guidelines for the Standard Offer Customer Referral Program, including that:

- The standard offer should be provided for a minimum of four months, but should not exceed 1 year. The standard offer and its term should be uniform within an EDC's service territory.

*IWP Order* at 31. This language confirms the Commission's view that the standard offer discount should *not* diverge from the standard offer term (i.e., 12 months). See FES M.B. at 50-52; FES R.B. at 35-37.

For the reasons explained in the R.D., FES's briefs and the arguments set forth above, the OCA's Exception 10 and RESA's Exception 16 should be denied.

**2. The R.D. Correctly Rejected The OCA's Recommendation To Return Customers To Default Service At The Conclusion Of The Standard Offer Absent Affirmative Customer Action (OCA Exception 12).**

The OCA notes in its Exceptions that the R.D. does not address what happens to customers who do not respond to the end-of-term notices in connection with the Standard Offer Customer Referral Program. OCA Exceptions at 35. Because customers who participate in the Referral Program originally contacted the Companies for an entirely different reason, the OCA believes that customers who do not respond to the end-of-term notices should be returned to default service as a means of providing them heightened protection. OCA Exceptions at 36; OCA St. No. 2-R at 10.

In contrast to the OCA, the Companies proposed that customers be informed of their options at the end of the Customer Referral Program in accordance with the Commission's regulations at 52 Pa. Code § 54.5(g)(1) and if a customer fails to make an affirmative selection the customer remain with the EGS with the price set by the EGS. The Companies' approach is consistent with the *IWP Order's* guidance which suggested that, at the conclusion of the standard offer period, absent affirmative customer action to enter a new contract with the EGS, the

customer's enrollment with a different EGS or the customer's return to default service, the customer *will remain with the EGS* on a month-to-month basis, and shall not be subject to any termination penalty or fee. *IWP Order* at 31-32.

The OCA's vague concerns about protecting customers participating in the Customer Referral Program after they have ignored end-of-term notices describing their options does not rise to the level of "good cause" sufficient to justify departing from the Commission's clear guidance on this issue in the *IWP Order*.

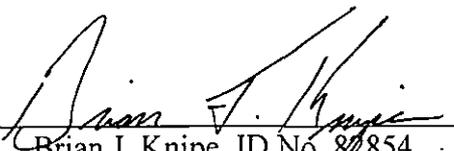
For the reasons explained in the R.D., FES's briefs and the arguments set forth above, the OCA's Exception 12 should be denied.

### III. CONCLUSION

For the foregoing reasons, the portions of the Recommended Decision of Administrative Law Elizabeth H. Barnes discussed in these Replies to Exceptions should be adopted without modification. The Exceptions of the Office of Consumer Advocate, the Office of Small Business Advocate, Dominion Retail, Inc. and the Retail Energy Supply Association to which FirstEnergy Solutions Corp. responds in these Replies to Exceptions should be denied.

Respectfully submitted,

Amy M. Klodowski, ID No. 28068  
FirstEnergy Solutions Corp.  
800 Cabin Hill Drive  
Greensburg, PA 15601  
Telephone: (724) 838-6765  
Facsimile: (724) 830-7737  
[aklodow@firstenergycorp.com](mailto:aklodow@firstenergycorp.com)

By:   
Brian J. Knipe, ID No. 82854  
Buchanan Ingersoll & Rooney, P.C.  
17 North Second Street, 15th Floor  
Harrisburg, PA 17101-1503  
Telephone: (717) 237-4820  
Facsimile: (717) 233-0852  
[brian.knipe@bipc.com](mailto:brian.knipe@bipc.com)

Dated: July 9, 2012

Attorneys for FirstEnergy Solutions Corp.

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

**Via Email and First-Class U.S. Mail**

Charles Daniel Shields, Esquire  
PA PUC Bureau of Investigation and  
Enforcement  
PO Box 3265  
Harrisburg, PA 17105  
[chshields@pa.gov](mailto:chshields@pa.gov)

Aaron Beatty, Esquire  
Darryl Lawrence, Esquire  
Office of Consumer Advocate  
5th Floor Forum Place  
555 Walnut Street  
Harrisburg, PA 17101-1923  
[abeatty@pa.gov](mailto:abeatty@pa.gov)  
[dlawrence@pa.gov](mailto:dlawrence@pa.gov)

Daniel G. Asmus, Esquire  
Office of Small Business Advocate  
Suite 1102 Commerce Building  
300 North Second Street  
Harrisburg, PA 17101  
[dasmus@pa.gov](mailto:dasmus@pa.gov)

Thomas P. Gadsden, Esquire  
Morgan Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103-2921  
[tgadsden@morganlewis.com](mailto:tgadsden@morganlewis.com)

Daniel Clearfield, Esquire  
Deanne M. O'Dell, Esquire  
Eckert Seamans Cherin & Mellot Llc  
213 Market Street, 8th Floor  
PO Box 1248  
Harrisburg, PA 17108-1248  
[dclearfield@eckertseamans.com](mailto:dclearfield@eckertseamans.com)  
[dodell@eckertseamans.com](mailto:dodell@eckertseamans.com)

Charis Mincavage, Esquire  
Susan E. Bruce, Esquire  
McNees Wallace & Nurick  
100 Pine Street  
PO Box 1166  
Harrisburg, PA 17108  
[cmincavage@mwn.com](mailto:cmincavage@mwn.com)  
[sbruce@mwn.com](mailto:sbruce@mwn.com)

PA PUC  
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Charles E. Thomas, III, Esquire  
Thomas T. Niesen, Esquire  
Thomas Long Niesen & Kennard  
212 Locust Street  
Suite 500  
PO Box 9500  
Harrisburg, PA 17108  
[cet3@thomaslonglaw.com](mailto:cet3@thomaslonglaw.com)  
[tniesen@thomaslonglaw.com](mailto:tniesen@thomaslonglaw.com)

Patrick M. Cicero, Esquire  
Pennsylvania Utility Law Project  
118 Locust Street  
Harrisburg, PA 17101-1414  
[pciceropulp@palegalaid.net](mailto:pciceropulp@palegalaid.net)

Michael A. Gruin, Esquire  
Stevens & Lee  
17 North Second Street  
16<sup>th</sup> Floor  
Harrisburg, PA 17101  
[mag@stevenslee.com](mailto:mag@stevenslee.com)

Trevor D. Stiles, Esquire  
Foley & Lardner LLP  
777 East Wisconsin Ave  
Milwaukee, WI 53202  
[tstiles@foley.com](mailto:tstiles@foley.com)

Thomas J. Sniscak, Esquire  
Hawke McKeon & Sniscak LLP  
100 North 10<sup>th</sup> Street  
P O Box 1778  
Harrisburg, PA 17105-1778  
[tjsniscak@hmslegal.com](mailto:tjsniscak@hmslegal.com)

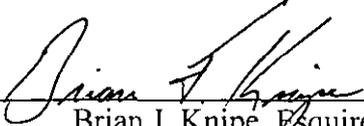
Dated this 9th day of July, 2012.

Bradley A. Bingaman, Esquire  
Tori L. Geisler, Esquire  
FirstEnergy Service Company  
2800 Pottsville Pike  
PO Box 16001  
Reading, PA 19612-6001  
[bbingaman@firstenergy.com](mailto:bbingaman@firstenergy.com)  
[tgeisler@firstenergy.com](mailto:tgeisler@firstenergy.com)

Benjamin L. Willey, Esquire  
Law Offices of Benjamin L. Willey  
7272 Wisconsin Avenue  
Suite 300  
Bethesda, MD 20814  
[blw@bwilleylaw.com](mailto:blw@bwilleylaw.com)

Todd S. Stewart, Esquire  
Hawke McKeon & Sniscak LLP  
100 North Tenth Street  
Harrisburg, PA 17101  
[tsstewart@hmslegal.com](mailto:tsstewart@hmslegal.com)

Divesh Gupta, Esquire  
Managing Counsel – Regulatory  
Constellation Energy  
100 Constellation Way  
Suite 500  
Baltimore, MD 21202  
[divesh.gupta@constellation.com](mailto:divesh.gupta@constellation.com)

  
\_\_\_\_\_  
Brian J. Knipe, Esquire

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PA 1 UC  
SECRETARY'S BUREAU