

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**PETITION FOR REHEARING AND RECONSIDERATION OF CONSTELLATION
ENERGY COMMODITIES GROUP, INC., CONSTELLATION NEWENERGY, INC.,
EXELON GENERATION COMPANY, LLC, AND EXELON ENERGY COMPANY**

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I. INTRODUCTION

1. Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (“Constellation”), and Exelon Generation Company, LLC and Exelon Energy Company (“Exelon”) (collectively, “Constellation/Exelon”)¹ hereby submit to the Pennsylvania Public Utility Commission (“Commission”) this Petition for Rehearing and Reconsideration of the Commission’s August 16, 2012 *Opinion and Order* (“Order”) with regard to the Default Service Programs (“DSPs”) filed by Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company (collectively, “FirstEnergy-PA”) on November 17, 2011, in Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, and P-2011-2273670.

2. Constellation/Exelon specifically submits that one particular issue – FirstEnergy-PA’s plan to recover Generation Deactivation charges as non-market-based transmission service charges (“NMB Charges”) through FirstEnergy-PA’s Default Service Support Riders (“DSS Riders”) (“Generation Deactivation Cost Recovery Proposal”) – warrants further consideration and review of alternatives. While the Generation Deactivation Cost Recovery Proposal represents a small portion of the overall DSP, it addresses a significant issue, as further established by new evidence discussed herein, that will have important repercussions for customers, particularly those customers not included in the limited group of shopping industrial customers (“Shopping Industrials”) that were the only party to oppose the Generation Deactivation Cost Recovery Proposal.

¹ When this proceeding was initiated, the Constellation and Exelon entities were separate companies. On March 12, 2012, the parties consummated a merger and are now part of the same corporate family. Accordingly, though the entities have participated separately throughout this proceeding, for administrative efficiency, they now file a joint petition.

3. PJM Interconnection, L.L.C. (“PJM”) assesses Generation Deactivation charges in order to collect revenues to recover costs for compensating generation owners whose units would otherwise be voluntarily retired (shut down), but who agreed to operate for some period to preserve system reliability while necessary transmission reinforcements can be constructed.² Those generators are entitled to cost recovery approved by the Federal Energy Regulatory Commission (“FERC”) under Reliability Must Run agreements (a/k/a “RMR” charges).

4. Exelon’s testimony explains that Generation Deactivation charges “have the potential to be quite significant, but as they are unknown, suppliers cannot hedge them.”³

5. The Generation Deactivation Cost Recovery Proposal – or one of the alternatives presented herein – meanwhile, has the potential to both provide substantial benefits to those customers not included in the Shopping Industrials’ group, and avoid disruptive actions that could potentially threaten consumers’ confidence in competitive retail markets in Pennsylvania.⁴

6. In the Order, however, the Commission rejected the Generation Deactivation Cost Recovery Proposal, relying on the Shopping Industrials’ arguments that “collection of these charges through non-bypassable riders would interrupt long-term shopping contracts and may force contracts to be renegotiated,” and that the Proposal “would increase the likelihood of double cost collection by [FirstEnergy-PA] and [electric generation suppliers (“EGSs”)] while increasing the risk for customers.”⁵

7. Neither the Office of Consumer Advocate (“OCA”) nor the Office of Small Business Advocate (“OSBA”) – those consumer advocates charged with protecting the interests of

² See *Direct Testimony of William Berg* (“Exelon St. 1”) at 2:19 – 3:8.

³ Exelon St. 1 at 3:18-19.

⁴ See, e.g., Exelon St. 1 at 4:15-23.

⁵ Order at 81.

customers within FirstEnergy-PA's Residential and small Commercial classes – advocated against the Generation Deactivation Cost Recovery Proposal, though the OSBA supported a one-year transition period.⁶ In its testimony, OSBA in fact echoed the benefits of the Proposal to consumers.⁷

8. Good cause exists at this time for the Commission to revise its Order with respect to its decision regarding the Generation Deactivation Cost Recovery Proposal, in order to tailor the scope of the Commission's decision more narrowly to address the interests affected.

9. There are three alternatives that preserve the benefits of the Generation Deactivation Cost Recovery Proposal for all customers other than the Shopping Industrials, while at the same time addressing the Shopping Industrials' specific concerns:

- (1) Allow a one-year transition period for Commercial and Industrial customers with EGS contracts under which they are receiving service on June 1, 2013, the first day of the DSP's term (herein referred to as "Existing EGS Contracts"), as proposed in the August 2, 2012 *Dissenting Statement of Commissioner Gardner* ("Gardner Dissent");⁸ ***or***
- (2) Carve Industrials with Existing EGS Contracts out and approve the Generation Deactivation Cost Recovery Proposal only for Residential and Commercial Classes, as well as for all other Industrial customers, whether taking default service or switching to an EGS after the start of the DSP term; ***or***

⁶ *See, e.g.*, OCA's Main Brief at 50 ("The OCA takes no position on this issue"); OSBA's Main Brief at 18 (supporting the notion that "transmission costs over which neither wholesale nor retail suppliers have control are better recovered by the EDC in DSSR rates"; recommending a one-year transition period).

⁷ *See, e.g.*, OSBA Reply Brief at 16.

⁸ *See Dissenting Statement of Commissioner Gardner*, Commission Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, and P-2011-2273670 (issued Aug. 2, 2012) ("Gardner Dissent").

- (3) Allow FirstEnergy-PA to collect Generation Deactivation charges *only for* default service customers, and *not for* shopping customers, via a structure such as that which FirstEnergy-PA currently utilizes under its Price to Compare Default Service Rate Riders (“PTC Riders”), pursuant to which FirstEnergy-PA’s EDCs collect other PJM charges, like Network Integration Transmission Service (“NITS”), Regional Transmission Expansion Plan (“RTEP”) and Expansion charges.

While the first of these proposals was raised by parties to this proceeding and was thus before the Commission prior to its Order and, in fact, supported by Commissioner Gardner, new evidence presented herein supports rehearing and review of whether the proposal represents an appropriate compromise. The two others represent new proposals not previously raised by parties or considered by the Commission, which support reconsideration of the Commission’s decision on the Generation Deactivation Cost Recovery Proposal for the reasons presented herein.

II. PROCEDURAL BACKGROUND

10. The record in this proceeding closed on **May 16, 2012**.

11. By Recommended Decision (“R.D.”) issued June 15, 2012, Administrative Law Judge (“ALJ”) Elizabeth H. Barnes approved among other items the Generation Deactivation Cost Recovery Proposal, under which FirstEnergy-PA would recover Generation Deactivation charges through its DSS Riders, on a non-bypassable basis.⁹

12. On June 25, 2012, parties filed exceptions to the R.D. In particular, the Shopping Industrials – made up of the Met-Ed Industrial Users Group, the Penelec Industrial Customer

⁹ R.D. at 70.

Alliance, the Penn Power Users Group, and the West Penn Power Industrial Intervenors – objected to the ALJ’s decision to approve the Generation Deactivation Cost Recovery Proposal.¹⁰

13. In its August 16, 2012 Order, the Commission adopted the Shopping Industrials’ Exception and rejected the ALJ’s recommendation to approve the Generation Deactivation Cost Recovery Proposal.¹¹ The Commission concluded that “collection of [Generation Deactivation] charges through non-bypassable riders would interrupt long-term shopping contracts and may force contracts to be renegotiated,” and that the Generation Deactivation Cost Recovery Proposal “would increase the likelihood of double cost collection by [FirstEnergy-PA] and EGSs while increasing the risk for customers.”¹²

14. The August 2, 2012 Gardner Dissent suggested a narrowly tailored resolution of the issue – namely, that for one year, shopping Commercial and Industrial customers be carved out from collection of Generation Deactivation charges, in order to allow Existing EGS Contracts a reasonable transition period and thereby mitigate concerns about double collection.¹³

III. STANDARD OF REVIEW

15. The Public Utility Code establishes a party’s right to seek relief following the issuance of the Commission’s decisions pursuant to Subsections 703(f) and (g) (relating to rehearings and the rescission and amendment of orders).¹⁴ Such requests for relief must be

¹⁰ Shopping Industrials’ Exception No. 5.

¹¹ Order at 81.

¹² *Id.*

¹³ *See, generally*, Gardner Dissent.

¹⁴ 66 Pa. C.S. § 703(f) and § 703(g).

consistent with Section 5.572 of the Commission’s regulations.¹⁵ The standards for granting a petition for rehearing were set forth in *Duick v. Pennsylvania Gas and Water Company*:¹⁶

A petition for rehearing . . . must properly seek the reopening of the record for the introduction of additional evidence of some sort. As grounds therefore it must allege newly discovered evidence, not discoverable through the exercise of due diligence prior to the close of the record.¹⁷

16. The standards for granting a petition for reconsideration were also set forth in *Duick*:

A petition for reconsideration . . . may properly raise any matters designed to convince the Commission that it should exercise its discretion under this code to rescind or amend a prior order in whole or in part.

In this regard we agree with the court in the Pennsylvania Railroad Company case, wherein it was stated that:

Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . what we expect to see raised in petitions for reconsideration are new and novel arguments, not previously heard or considerations which appear to have been overlooked by the Commission.¹⁸

17. Rehearing and reconsideration are appropriate in the instant proceeding under the *Duick* standards because both (1) additional evidence has come to light, which “newly discovered evidence” was “not discoverable . . . prior to the close of the record” on May 16, 2012, and (2) the proposals and arguments set forth below have “not [been] previously heard.”

¹⁵ 52 Pa. Code § 5.572.

¹⁶ 56 Pa. P.U.C. 553 (1982).

¹⁷ *Id.* at 559.

¹⁸ *Id.* at 559.

IV. BACKGROUND ON GENERATION DEACTIVATION CHARGES

A. Explanation of Generation Deactivation Charges.

18. FirstEnergy-PA proposed to recover NMB Charges through its DSS Riders. The NMB Charges consisted of charges PJM imposes for NITS, RTEP, and Expansion costs, as well as Generation Deactivation charges.¹⁹ Currently, for default service, these costs are embedded in certain of the FirstEnergy-PA PTC Riders.²⁰ EGSs serving shopping customers, as load-serving entities (“LSEs”), bear these costs.²¹ FirstEnergy-PA proposed to recover the associated costs on a competitively neutral basis from all shopping and non-shopping customers.²²

19. As described in the Order, Generation Deactivation charges are non-market-based, impossible to hedge, and are assessed by PJM to preserve system reliability.²³ The costs represent administratively determined, “surrogate” transmission charges that are temporarily in place until transmission system improvements come on line. The need for these administratively determined costs is outside the control of wholesale suppliers and EGSs because they are determined by PJM based on system reliability requirements after a generator announces an intention to retire, rather than being determined by the competitive market. The amount and allocation of these costs are initially determined by the PJM Tariff or by FERC in a litigated proceeding. Those amounts and allocations can change based on the actual time to complete transmission improvements, the amount of revenues the RMR unit receives in the market or future FERC decisions on any protests to the original cost estimate. These Generation

¹⁹ Order at 67, 78.

²⁰ *Id.* at 67, citing FirstEnergy-PA’ St. 7 at 10.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 78.

Deactivation charges are potentially significant in size, and cannot be predicted because they are not market risks, such as commodity price risk and basis risk, for which EGSs and wholesale suppliers are appropriately tasked with managing.²⁴

20. More specifically, with respect to the purpose of Generation Deactivation charges, Exelon explained that:

If a generator in PJM wants to deactivate a unit, it must provide PJM with notice of that intent at least ninety days prior to the unit's proposed deactivation date. PJM then studies the transmission system to determine whether the proposed deactivation could adversely affect system reliability. PJM notifies the generation owner of: (1) any specific reliability concerns; and (2) the estimated period to construct required transmission upgrades. Although the generation owner retains the right to deactivate the unit even if PJM identifies reliability issues, to maintain system reliability, the generation owner may elect to continue to operate the unit past its planned deactivation date pending the completion of necessary transmission upgrades. A generation owner who chooses to continue to operate the unit pending completion of transmission upgrades beyond the requested deactivation date will recover its costs. PJM collects revenues for such generators by imposing a Generation Deactivation charge on certain entities.²⁵

21. With respect to the potential magnitude of such charges, Exelon presented previously that:

Development of abundant domestic natural gas resources and substantial advances in its extraction have pushed market prices to near record lows. These developments, together with pending environmental regulations, will likely drive the retirement of older, inefficient generating units. PJM is currently studying the potential reliability impact of over 8,000 MW²⁶ of announced deactivations. Suppliers, however, cannot assess which, if any, of those units PJM will ask to continue to operate beyond their planned deactivation dates, nor how many other units will be in a similar position

²⁴ Exelon St. 1 at 3-5.

²⁵ Exelon St. 1 at 2:19 – 3:8.

²⁶ As discussed later in this pleading, PJM's latest figures include more than 14,000 MW, rather than 8,000.

in the future. Suppliers simply have no way to know the extent of any anticipated Generation Deactivation charges.²⁷

22. The uncertainty with respect to Generation Deactivation charges results in the addition of risk premiums, which in turn drive up market prices, to the detriment of all parties.²⁸ Recovering the Generation Deactivation charges from all customers on a non-bypassable basis would reduce these risks and make these costs transparent to consumers.²⁹

23. As Exelon's witness explained with respect to the Generation Deactivation Cost Recovery Proposal:

Because default service suppliers cannot hedge these potentially significant costs, they must include a premium in their bids to cover the future uncertainty of those costs. Likewise, depending on the terms of their contracts with their customers, [EGSs] may need to do the same. These unknown, but potentially large costs lack transparency and can cause customers to pay significantly more than required by the actual Generation Deactivation charges. That these costs are unknown, unknowable, and cannot be hedged drives up market prices, to the detriment of all parties. Recovering the Generation Deactivation charges through the DSS Rider reduces these risks and makes these costs transparent to consumers.³⁰

24. For these reasons, Exelon proposed in direct testimony that these charges be collected from all customers through the DSS Rider.³¹

25. FirstEnergy-PA supported this proposal in its rebuttal testimony and noted that there are "several good reasons why generation deactivation charges should be collected through the DSS Riders," and that "it makes sense to include generation deactivation charges in the NMB

²⁷ Exelon St. 1 at 4:2-10.

²⁸ Exelon St. 1 at 3.

²⁹ *Id.*

³⁰ Exelon St. 1 at 4:15-23.

³¹ *Id.* at 4, 7.

Service Transmission Charges proposed by [FirstEnergy-PA].”³² FirstEnergy-PA’s reasons to support the Generation Deactivation Cost Recovery Proposal included the fact that Generation Deactivation charges are similar in concept to other NMB Charges inasmuch as they are allocated by PJM on a demand basis, are non-market-based and impossible to hedge, and are assessed by PJM to preserve system reliability.³³ FirstEnergy-PA proposed revised tariff sheets (REV-22 through REV-26) to include Generation Deactivation charges as a component of NMB Charges in the competitively neutral, non-bypassable DSS Riders.³⁴

26. Some Existing EGS Contracts may potentially allow EGSs to have the contractual option to pass through unknown costs like Generation Deactivation charges.³⁵ Although this may be true in some cases, use of these types of contractual measures can be disruptive to the EGS-consumer relationship; these relationships are critical to a successful competitive retail market in Pennsylvania. Use of these contractual measures moreover carries monetary and reputational risk that could potentially drive suppliers out of the Pennsylvania market, in favor of dedicating resources to other jurisdictions in which EGSs would not face the need to invoke such provisions (such as Ohio, where such costs are collected by the EDCs on a non-bypassable basis). In addition, invoking these types of contractual measures can damage customers’ confidence in the shopping compact that exists between them and their EGSs, potentially resulting in returns to default service; this is in stark contrast to the stated goals of this Commission’s policy to promote retail shopping in Pennsylvania.

³² FirstEnergy-PA’ St. 2-R at 21.

³³ *Id.*

³⁴ *Id.*

³⁵ *See e.g.*, FirstEnergy-PA St. 2-R at 9-10 (explaining that some contracts may allow for pass throughs of certain new costs such as new transmission costs).

V. PETITION FOR REHEARING AND RECONSIDERATION

A. Rehearing Alternative 1: Based on Newly Available Evidence, the Commission Should Reverse its Decision Regarding the Generation Deactivation Cost Recovery Proposal, and Adopt Commissioner Gardner's Proposal for a One-Year Transition Period for Commercial and Industrial Customers with Existing EGS Contracts.

27. New evidence has come to light in July and August of this year, after the close of the record in this proceeding in May and, in fact, after the ALJ's R.D., which emphasizes both the reality of the existence, the unpredictable nature, and the magnitude of Generation Deactivation charges. It is clear from the new evidence that Generation Deactivation charges are essential to the reliability of the electric grid for all end-use customers in the effected zones in PJM and, therefore, are appropriate to recover from all customers on a non-bypassable basis.

28. First whereas, in direct testimony, Exelon submitted that "PJM is currently studying the potential reliability impact of over 8,000 MW of announced deactivations,"³⁶ PJM's deactivation queue, as posted on *August 28 2012*, now indicates that PJM has **over 14,000 MW** of announced deactivations that it is in the process of reviewing.³⁷ It must be considered that it is not known how many more MW of generation will be added to this list, and exactly how many of these units may continue to operate until appropriate transmission or other reliability upgrades come on-line, potentially resulting in the need for new Generation Deactivation charges to compensate such units in the interim.

29. Next, very recent new evidence shows that several units in PJM have in fact filed for RMR recovery, the costs for which will be recovered in Generation Deactivation charges. For

³⁶ Exelon St. 1 at 4:2-10.

³⁷ See *FUTURE DEACTIVATIONS (as of August 27, 2012)*, PJM Interconnection, L.L.C. (posted Aug. 28, 2012) (avail. at: [http://www.pjm.com/planning/generation-retirements/~media/planning/gen-retire/pending-deactivation-requests.ashx](http://www.pjm.com/planning/generation-retirements/~/media/planning/gen-retire/pending-deactivation-requests.ashx)).

instance, GenOn Power Midwest, LP (“GenOn”) on July 30, 2012 received approval from FERC for RMR payments for two units totaling over \$22-million (subject to adjustments based on ongoing litigation), which will be recovered through Generation Deactivation charges in the Duquesne Light Company and former Allegheny Power territories.³⁸ In addition, on July 10, 2012, FirstEnergy Generation Corporation (“FirstEnergy Genco”) filed for RMR recovery for six units of more than 1,700 MW capacity, for over \$170-million (less any capacity and/or energy market revenues, and subject to potential litigation), for recovery in the American Transmission System, Inc. (or “ATSI”) zone, part of which is in the PennElec (FirstEnergy-PA) zone in Pennsylvania.³⁹

30. Finally, recent developments in Ohio and New York suggest that recovery of Generation Deactivation charges on a non-bypassable basis is appropriate, as these charges are related to system reliability for the benefit of all end-use customers. For instance, in Ohio, the Public Utilities Commission of Ohio (“Ohio PUC”) on July 18, 2012 entered an order involving FirstEnergy Corp.’s three Ohio EDCs (“FirstEnergy-Ohio”), pursuant to which these EDCs will be responsible for Generation Deactivation charges – as well as other NMB Charges – on behalf of all distribution customers, and will collect for such charges on a non-bypassable basis.⁴⁰ Similarly, at the New York State Public Service Commission (“NYSPSC”), Niagara Mohawk Power Corporation d/b/a National Grid (“National Grid”) on July 20, 2012 filed for recovery of

³⁸ See *Order Accepting and Suspending Tariff Filing, Subject to Refund and Establishing Hearing and Settlement Procedures*, FERC Docket No. ER12-1901-000 (issued July 30, 2012).

³⁹ See *Five Letters Re: Informational Filing regarding Deactivation Avoidable Cost (DAC) Rate under Section 116 of the PJM Interconnection, L.L.C.’s Open Access Transmission Tariff*, FERC Docket No. ER10-2710-0000 (filed July 10, 2012).

⁴⁰ See generally, *Opinion and Order in the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Ohio PUC Case No. 12-1230-EL-SSO (issued July 18, 2012).

costs related to RMR payments to be made to NRG Energy, Inc., on a non-bypassable basis.⁴¹ While on August 16, 2012, the NYSPSC deferred a ruling on the amount of such cost recovery and the exact methodology for recovery, it acknowledged that RMR costs should be recovered from retail customers.⁴²

31. The new evidence regarding the magnitude of MWs that are currently being reviewed by PJM, as well as the evidence indicating examples of actual Generation Deactivation charges that will be borne by customers in Pennsylvania, including FirstEnergy-PA, bolsters the significance of the issue at hand, and underscores the need for the Commission to consider an equitable result that will not undermine competitive markets and drive up the costs of both default service and EGS offers unnecessarily. As Exelon has pointed out, these charges cannot be predicted months, let alone years, in advance and, as is the case for the GenOn and FirstEnergy Genco situations, can change even after the costs are announced, due to refunds and other adjustments in litigation, offsets that may be included in a RMR contract, and changes to the duration of the RMR as determined by PJM (no notice required). Not only are these charges unpredictable, but they are also unhedgeable in the marketplace. Wholesale bidders in FirstEnergy-PA's DSP and EGSs making fixed-price offers in the FirstEnergy-PA territory will have to include risk premiums in their prices to customers to account for the possibility that generation units *might* seek retirement and, in turn, that Generation Deactivation charges *might* be assessed; consumers, in this way, will pay for the costs of Generation Deactivation *regardless* of whether such costs actually occur during the term of the wholesale or retail supplier's contract

⁴¹ See, generally, *Filing in re: Petition of Dunkirk Power LLC and NRG Energy Inc. for Waiver of Generator Retirement Requirements—Proposed Term Sheet Agreement for Procurement of Reliability Support Services (“RSS”) and Tariff Amendment for Recovery of RSS Costs*, NYSPSC Case No. 12-E-0136 (filed July 20, 2012).

⁴² See *Order Deciding Reliability Issues and Addressing Cost Allocation and Recovery*, NYSPSC Case No. 12-E-0136 (effective Aug. 16, 2012) at p.25 (discussing how it is appropriate for National Grid to recover RMR costs from both its retail and wholesale customers).

and without the oversight of the Commission. These types of premiums become even more likely and more prominent as wholesale suppliers and EGSs see more potential for additional deactivations, as suggested by the new evidence presented herein. Rather than subjecting consumers to unnecessary premiums to account for this unhedgeable risk, then, it would be more appropriate to have FirstEnergy-PA collect the costs (and remit refunds) for any Generation Deactivation charges/refunds that *actually* are assessed by PJM in the FirstEnergy-PA territory.

32. This is exactly the path that the Ohio PUC has adopted and implemented,⁴³ and that the NYSPSC is headed towards, as revealed in their orders in July and August, respectively. By taking this approach, for instance, retail customers in the FirstEnergy-Ohio territory will not only get the benefit of not having to pay for Generation Deactivation charges that do not in fact exist, but will benefit by being able to more transparently compare EGS generation offers to default service (or “standard service offer” as it is called in Ohio) generation rates.

33. To the extent that the Commission remains concerned about the issues raised by the Shopping Industrials regarding the need for renegotiating existing contracts and the risk of double-counting, the Commission can mitigate these concerns by adopting a one-year transition period for Commercial and Industrial customers with Existing EGS Contracts, as recommended by Commissioner Gardner. This transition proposal will provide an equitable result, balancing the existing and new evidence emphasizing the significance of the issue and appropriate solutions, as well as the implementation concerns raised by the Shopping Industrials. This approach is consistent with that proposed by OSBA.

⁴³ Generation Deactivation charges are currently collected and billed through non-bypassable charges for all customers in Ohio service territories for Duke Energy-Ohio and AEP-OH.

34. Recall that OSBA argued that because the collection of NMB Charges such as Generation Deactivation charges on a non-bypassable basis provides benefits to suppliers and customers, the Commission should approve such a proposal, but with a one-year transition period, rather than “throwing the baby out with the bathwater and rejecting the proposal entirely.”⁴⁴ Similarly, Dominion Retail, Inc. (“Dominion Retail”) supported the concept of a notice period as a means of remedying these concerns.⁴⁵ To the extent that the Commission remains concerned based on OSBA’s testimony, it can adopt the one-year transition period proposed by OSBA, and supported by Commissioner Gardner, for Commercial and Industrial customers with Existing EGS Contracts. The OCA did not express a double-counting or other concern with respect to the Generation Deactivation Cost Recovery Proposal, presumably because small customers tend to be on shorter-term contracts, most of which will have expired between the time that the Commission makes a final determination regarding this issue in the DSP, and the time the DSP’s term begins.

35. Constellation/Exelon agrees with OSBA that all of the benefits of lower generation pricing that would be achieved by removing risks of real and unknowable Generation Deactivation charges from default service and EGS pricing assumptions should not be thrown out. Rather, the Commission should narrowly tailor its Order along the lines suggested herein.

36. In addition, while the Shopping Industrials did not provide details regarding a transition plan, they suggested that FirstEnergy-PA should have such a plan in place if they were to proceed with such non-bypassable charges.⁴⁶

⁴⁴ OSBA Reply Brief at 16.

⁴⁵ See Dominion Retail St. 1 at 11.

⁴⁶ See Order at 70.

B. Reconsideration Alternative 2: The Commission Should Carve Out Industrial Customers with Existing EGS Contracts, and Allow FirstEnergy-PA to Collect Generation Deactivation Charges from Residential and Commercial Customers, Whether Shopping or Taking Default Service, as Well as All Other Industrial Customers, Whether on Default Service or Switching to an EGS After the Start of the DSP's Term.

37. In its Order, the Commission rejected the inclusion of Generation Deactivation charges within the DSS Rider, citing concerns espoused by the Shopping Industrials that “collection of these charges through non-bypassable riders would interrupt long-term shopping contracts and may force contracts to be renegotiated,” and that the Generation Deactivation Cost Recovery Proposal “would increase the likelihood of double cost collection by [FirstEnergy-PA] and EGSs while increasing the risk for customers.”⁴⁷

38. As an alternative to rehearing, Constellation/Exelon seeks reconsideration of the Commission’s decision, but not as its concerns apply to Industrials with Existing EGS Contracts. Constellation/Exelon submits that the Shopping Industrials’ concerns do not apply to customers outside of that limited group of Industrial customers with Existing EGS Contracts. First, though the Shopping Industrials argued that immediate implementation of the DSS Rider without a transition period might interrupt long-term shopping contracts entered into by Industrial customers, forcing them to renegotiate contracts and potentially causing shopping Industrials to be charged twice for certain charges, these concerns would *not* apply to customers *without* existing contracts (i.e., default service customers and customers that choose an EGS after the start of the DSP’s term). Second, as noted above, because most residential contracts with EGSs tend to be shorter term in nature, the Shopping Industrials’ concerns do not apply to shopping Residential customers. Third, though the Shopping Industrials stated that the proposal would

⁴⁷ *Id.*

result in increased risks to customers, they fail to reconcile that, if suppliers assume the risk of Generation Deactivation charges, they will charge premiums to consumers *regardless* of whether such charges actually occur, in order to account for their otherwise unhedgeable and unpredictable risk.

39. Thus, as the Shopping Industrials concerns can be narrowly and fully addressed, the Commission should carve out from the Generation Deactivation Cost Recovery Proposal those Industrial customers with Existing EGS Contracts, and allow FirstEnergy-PA to collect Generation Deactivation charges from all other customers. In the event that the Commission deems it necessary, it could couple Constellation/Exelon's second alternative proposal with OSBA's proposed one-year transition period for Commercial customers with Existing EGS Contracts.

C. Reconsideration Alternative 3: The Commission Should Allow FirstEnergy-PA to collect Generation Deactivation Charges Only for Default Service Customers, and Not for Shopping Customers.

40. If the Commission denies Constellation/Exelon's first alternative for rehearing and second alternative for reconsideration, the Commission should instead grant reconsideration to allow FirstEnergy-PA to collect Generation Deactivation charges *only for* default service customers, and *not for* shopping customers, via a structure such as that which certain FirstEnergy-PA EDCs currently utilize under their PTC Riders to collect other PJM charges like NITS, RTEP and Expansion costs.

41. This final alternative provides more limited benefits for competitive markets and consumers alike. As outlined in testimony and briefing in this proceeding, Generation Deactivation charges are not market risks that can be predicted or hedged.⁴⁸ Wholesale default

⁴⁸ FirstEnergy-PA' St. 7 at 9.

service suppliers (“DS Suppliers”) appropriately bear the responsibility to manage true market risks, such as commodity price risk and basis risk.⁴⁹ Generation Deactivation charges, however, are unknown charges at the time of the default service procurements that are administratively assessed to address reliability concerns.⁵⁰ As these charges help ensure reliability for all system users, while the best approach is to have these costs passed through and recovered directly from all customers, it would nevertheless be appropriate for the Commission to approve collection of these charges by the EDC from default service customers.⁵¹

42. While some parties have addressed allocation of Generation Deactivation charges for shopping customers no party has presented testimony regarding the assignment of Generation Deactivation charges for default service customers only.

43. As explained above, because DS Suppliers cannot hedge these potentially significant costs, they must include a premium in their bids to cover the future uncertainty of those costs.⁵² These unknown but potentially large costs lack transparency and can cause customers to pay significantly more than required by the actual Generation Deactivation charges.⁵³ Having FirstEnergy-PA recover Generation Deactivation charges on behalf of, at the very least, all default service customers reduces these risks and makes these costs — when and if they occur — transparent to default service consumers.

44. Accordingly, if the Commission does not accept Constellation/Exelon’s first or second alternatives, it should instead modify its Order to make clear that FirstEnergy-PA can

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

collect Generation Deactivation charges from default service customers, but not from shopping customers.

VI. CONCLUSION

45. Constellation/Exelon requests that the Commission reconsider its Order and either:

- (1) Allow a one-year transition period for Commercial and Industrial customers with Existing EGS Contracts, as proposed in the Gardner Dissent; *or*
- (2) Limit its Order to apply its decision to deny the Generation Deactivation Cost Recovery Proposal only to Industrial customers with Existing EGS Contracts, and approve the Generation Deactivation Cost Recovery Proposal for FirstEnergy-PA's Residential and Commercial classes, as well as for all other Industrial customers, whether taking default service or switching to an EGS after the start of the DSP term; *or*
- (3) Allow FirstEnergy-PA to collect Generation Deactivation charges *only for* default service customers, and *not for* shopping customers.

Dated: August 31, 2012

Respectfully submitted,

CONSTELLATION ENERGY COMMODITIES
GROUP, INC., CONSTELLATION NEWENERGY,
INC., EXELON GENERATION COMPANY, LLC
AND EXELON ENERGY COMPANY

By:  _____

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