**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

 Public Meeting held September 27, 2012

Commissioners Present:

Robert F. Powelson, Chairman, Joint Statement

John F. Coleman, Jr., Vice Chairman

Wayne E. Gardner

James H. Cawley

Pamela A. Witmer, Joint Statement

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| 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-2011-2273650P-2011-2273668P-2011-2273669P-2011-2273670 |

**OPINION AND ORDER**

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**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are: (1) the Petition for Reconsideration and/or Clarification filed by the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE); (2) the Petition for Rehearing and Reconsideration of Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., Exelon Generation Company, LLC, and Exelon Energy Company (Constellation/Exelon); (3) the Petition for Clarification of Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), Pennsylvania Power Company (Penn Power) and West Penn Power Company (West Penn) (collectively Companies); (4) the Petition for Clarification filed by the Office of Consumer Advocate (OCA); (5) the Petition for Reconsideration filed by the Office of Small Business Advocate (OSBA); and (6) the Petition for Reconsideration filed by the Retail Energy Supply Association (RESA) (collectively Petitions). By these Petitions, all filed on August 31, 2012, the Parties seek clarification, reconsideration and/or rehearing of our Opinion and Order entered on August 16, 2012, in the above docketed proceedings (*August 2012 Order*). On September 10, 2012, Answers to the Petitions were filed by the Companies; Met-Ed Industrial Users Group, Penelec Industrial Customer Alliance, Penn Power Users Group, and West Penn Power Industrial Intervenors (collectively, Industrials);1 the OCA; RESA; and Washington Gas Energy Services, Inc. (WGES) (collectively Answers).

# Brief History of the Proceeding[[1]](#footnote-1)

Following the transition to a competitive market for electric generation in Pennsylvania, the Companies retained the obligation to serve as the default service providers for their retail customers pursuant to 66 Pa. C.S. § 2807(e)(3.1). Accordingly, each of the Companies filed plans to fulfill their default service obligations which were approved by the Commission. The Companies currently provide default service under Commission-approved default service plans (DSPs) that will expire on May 31, 2013.

On November 17, 2011, the Companies filed a Joint Petition (Joint Petition) requesting that the Commission approve their DSPs for the period from June 1, 2013, to May 31, 2015 (DSP II). Following extensive discovery, evidentiary hearings and the submission of briefs, the Commission issued the Recommended Decision of Administrative Law Judge (ALJ) Elizabeth H. Barnes on June 15, 2012. After consideration of Exceptions to the Recommended Decision and corresponding Reply Exceptions, the Commission issued the *August 2012 Order*.

On September 6, 2012, the Companies filed a Revised Default Service Plan (Revised DSP II) which the Companies aver reflects all of the changes directed by the Commission in the *August 2012 Order.[[2]](#footnote-2)* Revised DSP II at 2. Comments on the Revised DSP II have been filed.

As noted, *supra*, the Parties filed the Petitions for clarification, reconsideration and/or rehearing on August 31, 2012, and the corresponding Answers on September 10, 2012. At our Public Meeting held September 13, 2012, the Commission acted to grant the Petitions, pending further review of and consideration on the merits of the Petitions.

# Discussion

Initially, we note that any issue, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); also *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

## Standard for Review

The Petitions were filed pursuant to 52 Pa. Code § 5.572, Petitions for Relief. In addition to petitions for reconsideration, this regulation encompasses, *inter alia*, petitions for rehearing, reargument, and clarification. As with petitions for reconsideration, such petitions are decided by the application of the standards set forth in *Duick v. Pennsylvania Gas and Water Co.*, Docket No. C-R0597001 *et al.*, 56 Pa. P.U.C. 553, 559 (1982). Under the standards set forth in *Duick*, a petition for reconsideration may properly raise any matter designed to convince this Commission that we should exercise our discretion to amend or rescind a prior Order, in whole or in part. Such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations that appear to have been overlooked or not addressed by the Commission. *Duick* at 559. It has also been held that, because a grant of relief on such petitions may result in the disturbance of final orders, they should be granted judiciously and only under appropriate circumstances. *West Penn Power v. Pa. PUC*, 659 A.2d 1055 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, No. 576 W.D., Allocatur Docket (April 9, 1996); *City of Pittsburgh v. PennDOT*, 490 Pa. 264, 416 A.2d 461 (1980).

## Issues Raised in the Petitions

### Inclusion of Generation Deactivation Charges in the Default Service Support Rider

As part of its DSP II submission, the Companies proposed to include non-market based (NMB) transmission charges for both shopping and non-shopping customers in the non-bypassable Default Service Support (DSS) Rider. Ex-Gen[[3]](#footnote-3) witness, William Berg, recommended that the Companies revise their DSP II proposal to also include generation deactivation charges imposed by PJM through the Companies’ respective DSS Riders. Ex-Gen St. 1 at 2. As explained by the Companies, generation deactivation charges compensate generation owners for the continued operation of one or more generating units beyond their planned deactivation date pending the completion of transmission upgrades that PJM determines are necessary to sustain system reliability. Companies St. 2-R at 21. Mr. Berg submitted that generation deactivation charges have the same characteristics as NMB transmission charges and, therefore, the same rationale for recovering NMB transmission charges under the Companies' DSS Riders applies with equal force to generation deactivation charges. Ex-Gen St. 1 at 4. The Companies concurred that generation deactivation charges are similar in concept to Regional Transportation Expansion Plan (RTEP) charges, which are a component of NMB transmission charges, since both RTEP and generation deactivation charges are allocated by PJM on a demand basis, are non-market-based, are impossible to hedge, and are assessed by PJM to preserve system reliability. Accordingly, the Companies modified their DSS Riders to include generation deactivation charges. Companies Exhs. REV-22 through REV-26.

In the *August 2012 Order,* we rejected boththe recovery of NMB transmission charges and generation deactivation charges in the Companies’ DSS Riders. Specifically, for the recovery of generation deactivation charges, we were concerned that the collection of these charges through non-bypassable riders would interrupt long-term shopping contracts between large Commercial and Industrial (C&I) customers and their suppliers, and may force contracts to be renegotiated. In addition, we found that this proposal would increase the likelihood of double cost collection whereby customers would incur generation deactivation costs through the DSS Rider while these costs would still be imbedded in the contract rates with their suppliers. *August 2012 Order*
at 77, 81.

Constellation/Exelon’s Petition for Rehearing and Reconsideration (Constellation/Exelon Petition) states that new evidence has come to light in July and August of this year, after the close of the record in this proceeding, “which emphasizes both the reality of the existence, the unpredictable nature, and the magnitude of Generation Deactivation charges.” Constellation/Exelon Petition at 11. Constellation/Exelon explains that during the proceeding, Ex-Gen submitted that PJM was studying the potential reliability impact of over 8,000 MW of announced deactivations. Constellation/Exelon submits that PJM’s deactivation queue, as posted on August 28, 2012, now indicates that PJM has over 14,000 MWof announced deactivations that it is in the process of reviewing. Constellation/Exelon avers 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*.* Constellation/Exelonalso cites new evidence that “several units” in PJM have filed for Reliability Must Run (RMR) recovery which will be recovered in generation deactivation charges.  *Id.*at 11-12*.*

Constellation/Exelon argues that 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. Constellation/Exelon submits that the Public Utilities Commission of Ohio (Ohio PUC) entered an order on July 18, 2012, involving FirstEnergy Corp.’s three Ohio electric distribution companies (EDCs). Constellation/Exelon states that pursuant to the Ohio PUC order, 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. Constellation/Exelon points out that on July 20, 2012, Niagara Mohawk Power Corporation d/b/a National Grid (National Grid) filed for recovery of costs related to RMR on a non-bypassable basis at the New York State Public Service Commission (NYSPSC). Constellation/Exelon asserts that while 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. *Id.* at 12-13.

Constellation/Exelon recommends that, 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 C&I customers with existing electric generating supplier (EGS) contracts. Constellation/Exelon argues that 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. Constellation/Exelon also points out that this approach is consistent with that proposed by the OSBA. *Id.* at 14.

A second alternative proposed by Constellation/Exelon is that the Commission should carve out the industrial customers with existing EGS contracts and allow the Companies to collect generation deactivation charges from the remaining customers. Constellation/Exelon notes that 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. Constellation/Exelon avers that these concerns would notapply to customers without existing contracts, such as default service customers and customers that choose an EGS after the start of the DSP II term. Constellation/Exelon explains that, because most residential contracts with EGSs tend to be shorter term in nature, the shopping industrials’ concerns do not apply to shopping residential customers. Constellation/Exelon also explains that, although the shopping industrials stated that the proposal would result in increased risks to customers, the shopping industrials fail to reconcile that, if suppliers assume the risk of generation deactivation charges, suppliers will charge premiums to consumers regardlessof whether such charges actually occur, in order to account for their otherwise unhedgeable and unpredictable risk. *Id.* at 16-17.

Constellation/Exelon submits that, if necessary, the Commission could couple Constellation/Exelon’s second alternative proposal for the carve-out of industrial customers with EGS contracts with OSBA’s proposed one-year transition period for customers with existing EGS Contracts. *Id*. at 17.

If the Commission does not accept either Constellation/Exelon’s first or second alternatives, *supra*, Constellation/Exelon proposes a third alternative: that the Commission should allow the Companies to collect generation deactivation charges for only default service customers and not shopping customers. Constellation/Exelon recommends that these charges be recovered through the PTC Rider structure currently used by some of the Companies to collect other PJM charges like network integration transmission service, and expansion costs. Constellation/Exelon states that, 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. Constellation/Exelon asserts that these unknown but potentially large costs lack transparency and can cause customers to pay significantly more than required by the actual generation deactivation charges. Constellation/Exelon avers that having the Companies recover generation deactivation charges on behalf of, at the very least, all default service customers, reduces these risks and makes these costs transparent to default service consumers, when and if they occur. *Id.* at 17-18.

RESA’s Answer to Constellation/Exelon’s Petition (RESA Answer) states that given the new evidence presented by Constellation/Exelon and the fact that the opposition posed by the Industrials was limited to large C&I customers, RESA can support any of the three alternatives offered by Constellation/Exelon. RESA believes that any of these alternatives is a better way to more reasonably address the concerns raised by the Industrials with the realities of the marketplace for the best interest of all customer classes. RESA Answer at 5.

In the Industrials Answer to the Petition of Constellation/Exelon (Industrials Answer), the Industrials argue that Constellation/Exelon’s Petition fails to meet the Commission’s standard for rehearing or reconsideration. The Industrials submit that Constellation/Exelon’s “new evidence” merely identifies generation deactivation costs that were addressed on the record of this proceeding and “thoroughly evaluated by the Commission.” Industrials Answer at 3. Therefore, the Industrials state that it fails to qualify as new evidence. The Industrials aver that if these costs are deemed relevant by the Commission, it is important to note that generation deactivation costs are constantly changing and affecting different areas. The Industrials state that the PJM retirements referred to by Constellation/Exelon identify only a few instances where generation deactivation costs could affect the Companies’ service territories. The Industrials conclude that this evidence has little weight. *Id*. at 3-4.

The Industrials also oppose Constellation/Exelon’s three alternative proposals discussed, *supra.* The Industrials aver that a one-year transition period would not address the cost causation and customer choice concerns. The Industrials submit that, if the Companies begin to collect generation deactivation charges, it is unclear whether these charges would or could be collected on a customer’s one coincident peak demand, consistent with cost causation principles. The Industrials also submit that the Companies’ collection of generation deactivation charges from all customers would eliminate shopping customers’ ability to negotiate freely in the competitive market with respect to transmission-related costs. *Id.* at 6.

With regard to Constellation/Exelon’s second proposal to carve out existing large C&I customers with shopping contracts, the Industrials aver that it is unclear how the generation deactivation costs would be collected once the large C&I customers’ contracts expire. The Industrials argue that large C&I customers could face the same cost causation, customer choice and transition issues associated with the one-year transition alternative. The Industrials note that large C&I customers often receive service at different sites and large C&I customers with smaller accounts could have generation deactivation costs collected by both EDCs and EGSs depending on the location and size of the account. The Industrials also note that this situation could occur if a large C&I customer, with multiple sites, opens up a new account. *Id.* at 7.

Notwithstanding its opposition to all three of Constellation/Exelon’s alternative proposals, the Industrials submit that if the Commission were persuaded by the arguments about generation deactivation charges, Constellation/Exelon’s third proposal is the only one that may be workable because it only affects default service customers. The Industrials argue that if suppliers are truly committed to eliminating the EDC in the default service provider role, it is counterintuitive to the Industrials that EGSs would no longer provide any element of transmission to customers. The Industrials aver that any steps to continue to place EDCs in the role of providing both transmission and distribution service are inconsistent with the Electricity Generation Customer Choice and Competition Act (Choice Act)[[4]](#footnote-4) and take away from the progress already made in the retail competitive market. Industrials Answer at 8-9.

Constellation/Exelon’s proposal, to allow the Companies to collect generation deactivation charges for only default service customers and not shopping customers, does resolve our concerns expressed in the *August 2012 Order* regarding the impact that inclusion of generation deactivation charges in the DSS Rider would have on contracts between shopping customers and EGSs. However, upon reconsideration, we are not going to permit the Companies to collect generation deactivation charges on behalf of EGSs providing either default or shopping service. These generation deactivation costs are inherently part of the supply of electricity. Consistent with the Commonwealth’s continued migration to a more competitive retail market, we believe that these supply-related costs should remain with the EGSs.

### Small Commercial and Industrial Customer Participation in the Retail Opt-in Aggregation Program

In their DSP II filing, the Companies proposed to exclude small commercial customers from the market enhancement programs[[5]](#footnote-5) because of their widely varying business usage patterns and the fact that they do not have rate schedules dedicated solely to a small commercial customer segment. Companies St. 7 at 23-25. RESA recommended that small business customers, those with loads of up to 25 kW or, in the alternative, customers in the smallest commercial rate class, should also be eligible to participate in the market enhancement programs. RESA St. 2 at 15-17.

In the *August 2012 Order*, we adopted RESA’s recommendation to include small C&I customers in the market enhancement programs. While we recognized that this decision deviates from our conclusions within our recent *IWPF Order*,[[6]](#footnote-6) we found RESA’s position with regard to the relatively low levels of current shopping in the Companies’ service territories to be compelling. In particular, the record indicates that over half of the small commercial customers in the Companies’ service territories are not participating in the competitive market and the reasons for these customers not shopping are similar to those for residential customers. *August 2012 Order* at 103-104.

The OSBA’s Petition for Reconsideration (OSBA Petition) argues that the Commission has made an error of law in completely reversing its position on the inclusion of small C&I customers in the ROI Aggregation Program without providing an explanation, reasoning or analysis to support its change. The OSBA points out that the Parties were making the same argument about the low shopping rates of small C&I customers in the IWPF proceeding, and the argument was not deemed persuasive by the Commission. OSBA Petition at 9. The OSBA avers that although nothing has changed, and although it presented evidence that even the smallest C&I customers have higher shopping rates than residential customers and small C&I customers are increasing their shopping with time, the same “low shopping argument” previously rejected by the Commission is somehow now persuasive to the Commission*. Id.* Alternatively, the OSBA argues that in the *August 2012 Order*, the Commission ignores the arguments made by the Companies and others that variations in small C&I customer usage patterns would create difficulties, even though the Commission relied on this very argument in the *IWPF Order* to reasonably exclude small C&I customers from the ROI Aggregation Program. *Id.* at 8.

RESA opposes the OSBA’s request for reconsideration because the arguments and consideration set forth in the OSBA Petition do not meet the legal standards for either reconsideration or rehearing. RESA submits that the arguments which the OSBA restates in support in of its position were clearly set forth and rejected by the Commission in the *August 2012 Order*. RESA avers that the OSBA has presented nothing new to justify its request for reconsideration on this issue and, therefore, it should be rejected. RESA Answer at 8-9.

The OSBA, however, offers an additional argument for reconsideration. The OSBA submits that the Commission made a mistake when it did not limit the size of the C&I customers that could participate in the market enhancement programs. The OSBA recommends that if the Commission denies its Petition, it should clarify that small C&I participation in the market enhancement programs is limited to customers with loads under 25 kW. *Id*. at 9.

While the Companies continue to believe that there are sound reasons not to include small C&I customers in the ROI Aggregation Program, they oppose the OSBA’s clarification that the market enhancement programs be available to only small C&I customers with loads up to 25 kW. The Companies note that the Commission adopted RESA’s recommendation to include small commercial customers which the *August 2012 Order* specifically defines as “those with loads of up to 25 kW or, in the alternative, customers in the smallest rate class.” *August 2012 Order* at 101. The Companies explain that Met-Ed and Penelec have small general service rate schedules that encompass loads up to, but not generally above 25 kW. However, the Companies submit that for Penn Power and West Penn, the smallest general service rate schedules extend to 50 kW and 100 kW, respectively. The Companies state that it would be highly impractical to segregate Penn Power and West Penn customers in those rate classes based on a 25 kW breakpoint, and therefore, as the *August 2012 Order* authorizes, the Companies are making all customers in Penn Power’s GS Small and West Penn’s rate 20 classes eligible for the market enhancement programs. Answer of the Companies to Petitions for Reconsideration and/or Clarification (Companies Answer) at 6-7.

We do not agree with the OSBA that the Commission has made an error of law with regard to the inclusion of small C&I customers in the ROI Aggregation Program. Our findings and directives in the *IWPF Order* were clearly established as *guidelines* for the development of EDC default service plans. *See,* *IWPF Order* at 6-7, 103. While the Commission places considerable weight on the findings and directives developed in the *IWPF Order,* we are not bound by those guidelines. In fact, the *IWPF Order* expressly provided for deviations from those guidelines. *IWPF Order* at 6-7. In addition, we do not find the arguments presented by the OSBA to be new or novel arguments sufficient to convince us to alter our position set forth in the *August 2012 Order.* We continue to find that including small commercial customers in the market enhancement programs will further the objectives of the Choice Act by inducing more customers to shop and ultimately reduce the costs of electric generation.

We concur with the Companies that it may be impractical to segregate Penn Power and West Penn C&I customers based on a 25 kW breakpoint. As the Parties get more experience with the participation of small C&I customers in the market enhancement programs, we will achieve better insights into the scope of C&I customers that should be targeted for market enhancement initiatives. However, at this juncture, we concur with the Companies’ proposal to make customers in Penn Power’s GS Small and West Penn’s rate 20 classes eligible for the market enhancement programs.

### Retail-Opt-In Discount from the Price to Compare

Under the Companies’ proposed ROI Aggregation Program, EGSs would bid in an ROI Auction to provide competitive retail service that is at least five percent below the applicable PTC on the date of the ROI Auction. Winning bidders would be required to provide service under the terms of an Opt-In Aggregation Agreement beginning with the customers’ June 2013 meter reading and ending with the customers’ May 2014 meter reading. Companies M.B. at 92; Exh. CVF-10.

In the *August 2012 Order*, we directed the Companies to develop a twelve-month ROI product, comprised of a fifty dollar bonus, a four-month guaranteed five percent discount off of the PTC at the time of enrollment, and an EGS-provided fixed-price product for the remaining eight months.[[7]](#footnote-7) *August 2012 Order* at 116-117.

#### Clarification of the Initial Four-Month Discount

The OCA requests that the Commission clarify that “the PTC at the time of enrollment” is referring to the PTC on June 1, 2013, the start of the Retail Opt-in Aggregation Program. Petition for Clarification of the OCA (OCA Petition) at 4. The OCA submits that it is its understanding that the Commission’s intent is to provide a guaranteed discount at the start of the ROI Aggregation Program. The OCA states that since there may be a time difference between the enrollment process dates and the start of the Program discount, it requests that the Commission should clarify its intent. *Id*. at 4-5.

In response to the OCA’s request, the Companies submit that if the Commission directs that the initial four-month price must be five percent off of the PTC as of June 1, 2013, then it will not be possible for them to provide customers with a specific price at the time enrollment begins. The Companies explain that the ROI Aggregation Program materials will have to be provided to customers by the beginning of April 2013, and the data needed to compute the June 1, 2013 PTC will not be available until late April 2013. Companies Answer at 4.

Consistent with the *August 2012 Order*, we maintain our conclusion that the ROI product shall include a four-month guaranteed five percent discount off of the PTC *at the time of enrollment*. *August 2012 Order* at 117.  *“*Time of enrollment” means when the customer enrolls in the ROI Aggregation Program, not at the start of the Program. We continue to believe that customers should be aware of the price they will be paying and EGSs should have a better idea of the price they will have to offer. In response to the OCA’s concerns regarding a guaranteed discount at the start of the Program, the fifty-dollar bonus should address the potential of a lower PTC at the beginning of the Program.

#### Prices for the Remaining Eight-Month Period

The OCA submits that the Commission did not specify how the price for the remaining eight months of the ROI Aggregation Program would be determined and whether all participating customers would receive the same price. The OCA avers that it is important that customers are fully informed about the program including the method for establishing the price after the initial four months. The OCA states that if it is the Commission’s intent that EGSs can charge different prices for the latter eight months, questions regarding proper notice to customers and how customers will be assigned to individual EGSs will arise. OCA Petition at 5-6.

While RESA agrees with the OCA that clarification regarding the ROI Aggregation Program is appropriate, it does not agree that EGSs participating in the ROI Aggregation Program be required to offer customers the same fixed price in months five through twelve. RESA avers that price flexibility gives the EGSs the appropriate incentive to actively compete against one another after the initial four-month period expires, which should result in better product offerings for customers. RESA states that the terms and conditions of service, including price, for the remaining eight months would be communicated to the customer consistent with standard Commission regulations requiring two notices prior to a price change. RESA Answer at 6-7.

Because the Commission modified the Companies’ proposed ROI Aggregation Program, we directed the Companies, in consultation with the EGSs, to update their proposals for customer notification, opt-in enrollment and customer assignment to coordinate with the revised ROI Aggregation Program design. *August 2012 Order* at 109. The Companies submit that as part of that collaborative process, interested parties will have an opportunity to fully explore all of the inter-related implementation issues, including those the OCA believes may exist. The Companies recommend that the elements of the ROI Aggregation Program implementation process should not be addressed until the consultative process has run its course. Companies Answer at 3-4; 11-12.

The Companies also point out that if each EGS is permitted to individually determine the price for the last eight months of the ROI Aggregation Program without Commission oversight and customers are allocated to participating EGSs, then any two customers could get radically different “deals” when they are assigned to a particular EGS. Companies Answer at 11. The Companies aver that this approach could cause customer misunderstanding and could erode trust in shopping. The Companies are concerned that customers are likely to perceive at least a tacit endorsement of the EGSs’ offers by the EDC simply because of the EDCs’ association with the ROI Aggregation Program. The Companies submit that a poor shopping experience is likely to damage the goodwill that EDCs have built up with ratepayers and, therefore, the Companies have a substantial interest in seeing that the implementation issues raised by RESA have been analyzed carefully. The Companies suggest that, like the implementation issues raised by the OCA, *supra*, RESA’s issues regarding the ROI Aggregation Program should be addressed, at least initially, in the collaborative process with interested parties. *Id.* at 11-12.

We concur and direct that the issues raised by the OCA, RESA and the Companies, *supra*, be addressed, at least initially, in the collaborative process established in the *August 2012 Order* at 109.

#### Commission Review of Retail Opt-In Offerings

In the *August 2012 Order*, the Commission stated “[s]o that we can fully evaluate the terms of this program, we will require that participating EGSs provide to the Commission for review and approval, the terms and conditions of the eight-month ROI fixed-price offering.” *August 2012 Order* at 118.

In its Petition, RESA states that it does not object to the Commission’s review and approval of an EGS’s ROI Aggregation Program if it is focused on ensuring that EGSs do not impose any early termination fees or otherwise stymie the ability of customers to leave the program. RESA submits that it would object if the requirement of review and approval is for the Commission to approve the price that the EGS plans to offer during months five through twelve. RESA avers that Sections 2802(14) and 2806(a) of the Code, 66 Pa. C.S. §§ 2802(14) and 2806(a), are clear that “[t]he generation of electricity shall no longer be regulated as a public utility service or function.” RESA argues that generation, whether provided by an EDC or an EGS, is not a public utility service or function and is not regulated by the Commission pursuant to its ratemaking authority. Petition for Reconsideration filed by RESA (RESA Petition) at 13-14.

WGES submits that EGS participation in the ROI Aggregation Program could be chilled if EGSs do not know if their product meets Commission approval until after the program participation deadline passes. WGES suggests that if “general rules or boundaries for the pricing terms” were clarified upfront, EGSs would be more confident that their price proposals would be acceptable to the Commission. WGES Answer to the OCA’s Petition and RESA’s Petition (WGES Answer) at 4. WGES states that it is important that the Commission consider the impact of the timing of its review of EGS ROI Aggregation Program product proposals, and the benefits of providing upfront guidance on pricing and other terms that EGSs can follow in preparing their product offerings. *Id.*

We acknowledge RESA’s concerns relating to our review of the pricing of EGS ROI plans for months five through twelve. However, we emphasize that EGS participation in the ROI programs is voluntary. As a condition to an EGS’s voluntary participation in the ROI programs, we have directed that EGSs which want to participate will file their proposed terms and conditions, including pricing, for our review. Given that EGS participation is voluntary, and that the ROI programs will be implemented and conducted under the auspices of this Commission, we find that it is entirely appropriate to provide for our review of EGS ROI proposed offerings, including terms, conditions and pricing.

In response to WGES’ concerns regarding the timing of the Commission’s review of their product offerings, Ordering Paragraph No. 14 of the *August 2012 Order* states that the terms and conditions of the EGS offerings shall be submitted to the Commission *no later than* forty-five days before the offers are extended to potential customers. *August 2012 Order* at 161. An EGS that elects to participate in the ROI Aggregation Program is free to submit its filing in advance of that deadline. WGES’ request for guidance on the terms and conditions of ROI offerings will, at least initially, be developed as part of the collaborative process discussed, *supra*.

### Allocation of Participating Customers in the ROI Aggregation Program

With the removal of the auction structure from the ROI Aggregation Program, RESA submits that the Commission appears to be permitting any EGS, who can offer a product directed by the Commission and is willing to share in the cost recovery of the program, to participate. RESA and WGES note that the Commission does not address how customers will be assigned to the participating EGSs. RESA and WGES state that clarification on this issue is important because it is one of the key elements for EGSs in deciding to participate in the program. RESA and WGES recommend that the Commission clarify that customers will be allocated on an equitable basis to all EGSs who are willing to participate. RESA Petition at 12; WGES Answer
at 1.

As we discussed with regard to our disposition of the issues regarding pricing for the final eight months of the ROI programs, *supra*, our *August 2012 Order* provided for a collaborative process to address issues such as customer notification, opt‑in enrollment and *customer assignment*. *August 2012 Order* at 109. The issue raised by RESA and WGES here was specifically intended to be included in that collaborative process as the “customer assignment” issue. Therefore, further clarification is unnecessary.

### Participation in the ROI Aggregation Program Consultative Process

As discussed, *supra*, we directed the Companies, in consultation with the EGSs, to address specific issues related to the implementation of the ROI Aggregation Program.[[8]](#footnote-8) The OCA recommends that it be permitted to work with the Companies, the EGSs and other interested stakeholders regarding these residential customer program issues. OCA Petition at 6. The Companies agree that the OCA and other interested stakeholders may participate in the consultative process to develop a proposal for implementing the ROI Aggregation program. Companies Answer at 3.

We welcome the participation of the OCA and other stakeholders and we shall expand the scope of participants in the collaborative process accordingly.

### Clarification of the Discount Offered under the Standard Offer Program

In the *August 2012 Order*, we stated that, “[c]onsistent with our recent conclusions within the *IWPF Order,* we concur with the ALJ’s recommendation that the Companies Standard Offer Customer Referral Program should be based upon a seven percent discount from the PTC *at the time the offer is made* and should extend for a one-year service term.” *August 2012 Order* at 146 (emphasis in original). We concluded that customers participating in this referral program should be assured that the standard offer discount will be in place for the duration of the contract term. *Id.*

RESA seeks further clarification that it is the Commission’s intention that a competitive supplier does not have to alter its price to maintain a seven percent discount when the PTC changes during the twelve-month term of the Standard Offer Program. RESA Petition at 9.

In their Answer, the Companies offer a further explanation of the pricing of the Standard Offer Program. The Companies explain that when a customer elects to participate in the program, the customer will receive the same fixed price, seven percent off the prevailing PTC, for the entire one-year duration of the customer’s contract with the EGS. The Companies also explain that if another customer enrolls in the program at a later date and the PTC has changed, that customer will get a seven percent discount off of the new prevailing PTC for a one-year duration. The Companies submit that, if it is RESA’s understanding the Standard Offer rate would change quarterly with the PTC, “then RESA’s understanding is entirely incorrect.” Companies Answer at 10.

We agree with the Companies’ explanation of the discount to be offered under the Standard Offer Program, *supra*. Consistent with the *August 2012 Order,* the customer will be offered a rate of seven percent below the prevailing PTC at the time the offer is made and that rate will then be fixed for a period of twelve months.

### Participation of Customer Assistance Program Customers in the Market Enhancement Programs

CAUSE requests that the Commission reverse its decision to permit the Companies’ Customer Assistance Program (CAP) customers to participate in the market enhancement programs. In the alternative, CAUSE recommends that the Commission remand this matter back to the ALJ for the introduction of additional evidence on the impact and effect of the Commission’s newly promulgated ROI Aggregation Program on the affordability of CAP customers’ bills and, in particular, for a determination as to whether CAP customers would be harmed by their participation in this newly announced program. A third alternative proffered by CAUSE is for the Commission to provide “an explanation, rationale and reasoning for its reversal of its position regarding the appropriate standard to be used in determining whether to include CAP customers in the retail market enhancements so that parties can have a proper basis for determining whether to file an appeal.” Petition for Reconsideration and/or Clarification filed by CAUSE (CAUSE Petition) at 12.

CAUSE avers, *inter alia*, that there was ample evidence on the record in this proceeding that CAP customers would be harmed by participation in the ROI Opt-in Auction Program proposed by the Companies. CAUSE argues that there is no basis in the record for the Commission to have made a determination on the effect of the revised ROI Aggregation Program on CAP customers because that only became an issue when the Commission revised the Program in the *August 2012 Order*. Moreover, CAUSE argues that the elimination of the Opt-in Auction model and its replacement by the Commission with a different aggregation model that was not previously proposed, analyzed, or subject to review, testimony, and briefing is an error of law and is not based on substantial evidence. CAUSE Petition at 8.

CAUSE submits that pursuant to the Choice Act,[[9]](#footnote-9) the Commission has an essential statutory obligation to “continue the protections, policies and services that now assist customers who are low-income to afford electric service” in the competitive environment. CAUSE asserts that the Commission also erred in its failure to analyze or determine whether potential increases in costs to non-CAP low income customers, as a result of participation in market enhancements, particularly the ROI Aggregation Program, violates the Choice Act. CAUSE Petition at 9.

CAUSE also challenges the Commission’s reliance on the portability of CAP customers’ benefits as a basis for the protection from harm. CAUSE submits that, while the Companies have made their CAP benefits portable, they have not structured their CAP program in such a way as to insulate CAP customers from harm via a loss of benefits. CAUSE avers that evidence in this proceeding demonstrates that the Companies’ CAP structure perpetuates the loss of benefits by creating a CAP structure that bears no relationship to the household’s energy costs. CAUSE Petition at 11.

The Companies argue that CAUSE’s attempt to support reconsideration based on the differences in the ROI Auction Program proposed by the Companies and the ROI Aggregation Program approved by the Commission must fail. The Companies submit that the difference between an auction-determined discount off of the PTC that could never be less than five percent and an administratively-determined five percent discount is “immaterial.” Companies Answer at 14. The Companies state that whether the discount period is four months, as the Commission has directed, or more than four months, as the Companies proposed, is equally immaterial. *Id.* at 14-15.

The Companies submit that CAUSE has assumed a definition of “harm” that bears no resemblance to what the Commission had in mind when it cautioned that “CAP customers should not be subject to harm” in the *IWPF* Order. *See, IWPF Order* at 43 cited in Companies Answer at 15. The Companies opine that the Commission made it clear that the harm it expects to avoid is CAP customers’ loss of benefits as a result of the market enhancement programs. The Companies assert that their proposed market enhancement programs satisfy the “no harm” standard because the CAP benefits are portable and, therefore, cannot be lost if the customer shops. *Id*. According to the Companies, CAUSE considers CAP customers harmed if at any point in the competitive contract they would pay more than the PTC, regardless of whether shopping could provide an overall net benefit. The Companies argue that there is no reason to deny CAP customers the benefits of shopping based on that standard. *Id*.

In response to CAUSE’s claim that the Commission failed to consider this issue in the context of the statutory obligations under the Choice Act, RESA states that the Commission has expended a great deal of time and effort considering this issue and CAUSE has been an active participant in these and other proceedings on this issue. RESA avers that, to the extent these issues have not already been considered and rejected by the Commission, CAUSE’s efforts to raise new legal arguments for the first time at this point is not an appropriate justification for reconsideration. RESA Answer at 9.

In the *August 2012 Order*, we permitted the Companies’ CAP customers to continue to shop and to participate in market enhancement programs because we were persuaded by the Companies’ arguments that: (1) CAP customers are already permitted to shop under the terms of the Companies’ existing retail tariffs; (2) under their Commission-approved Universal Service Programs, CAP funding is entirely “portable” and CAP benefits cannot be diminished if a customer switches to an EGS; and (3) the Companies’ proposed Market Enhancement Programs assure that the customer will receive a price lower than the PTC at the time of enrollment or referral. We noted that if the EGS price would become higher than the PTC during the term of the program, the customer can return to default service without penalty. *August 2012 Order* at 143.

We fully appreciate the economic vulnerability of the Companies’ low-income customers that are participating in the CAP. To that end, we have undertaken another review of the testimony and arguments made by CAUSE and the OCA in the DSP II proceeding. We understand CAUSE’s concerns that changes in the prices offered by a competitive supplier can have an effect on a CAP participant’s current payment obligations and future CAP benefits. However, we continue to believe that on balance, it would cause a greater overall economic harm to CAP participants if we were to deny them access to the lower electric costs that may result from shopping in the competitive market. We emphasize that all participants will receive advance notice of any price changes and can leave the ROI Aggregation Program without penalty.

### Implementation of the New/Moving Customer Program

In this DSP II proceeding, RESA averred that the Companies’ proposed New/Moving Customer Referral Program was unlikely to be worth the cost and effort and instead recommended that the Standard Customer Referral Program be merged with the New/Moving Customer Referral Program. RESA Petition at 6. In the *August 2012 Order,* we stated that the facts clearly supported our position that the New/Moving Customer Referral Program can be implemented in a relatively short period of time with minimal effort on the part of an EDC. Accordingly, rather than wait until December 2012 to implement the New/Moving Customer Referral Program as recommended by the ALJ, we directed the Companies to begin this program as soon as possible, while anticipating refinement of the program once the RMI working group is able to finalize the “call center scripts” as described in the *IWPF Order* at 20*. August 2012 Order* at 154.

In its Petition, RESA submits that in reaching its conclusion, the Commission erroneously stated that “RESA and the Companies suggested ‘dropping’ the New/Moving Customer Referral Program entirely, and instead, focusing its resources solely on the Standard Offer Customer Referral Program.” RESA Petition at 5-6. RESA avers that it has always been a strong proponent of the customer referral program and that it should be implemented as soon as possible. RESA also submits that a customer referral program can and should be offered in a relatively short period of time. *Id.* at 6. Because RESA did not advocate the elimination of the New/Moving Customer Referral Program but rather that the Standard Referral Program be merged with the New/Moving Customer Referral Program, it requests clarification on this issue. RESA also submits that, since the Commission’s rejection of RESA’s recommendation was based on an apparent misunderstanding of its position, RESA respectfully requests that the Commission reconsider its initial determination and adopt the RESA recommendation. *Id.* at 8.

In Response to RESA’s Petition, the Companies explain, *inter alia*, that there is not enough time to implement the Standard Offer Referral Program before
June 1, 2013. The Companies also submit that even if the implementation of the Standard Offer Referral Program could be accelerated, doing so would unfairly burden default service suppliers with additional migration risks when they bid to provide default service generation. Companies Answer at 8.

We do not agree with RESA that reconsideration or clarification of position on the New/Moving Customer Referral Program is warranted. As reflected in the *August 2012 Order*, it is the Commission’s desire to initiate a New/Moving Program as soon as possible, with the anticipation that subsequent improvements will be implemented to the Program over time. While we continue to support the merger of the New/Moving Customer Referral Program with the Standard Offer Program, at this time we shall maintain our position that the New/Moving Customer Referral Program be implemented on its own as soon as possible, but no later than sixty days following the entry of the *August 2012 Order*.

### Authorization to Proceed with Competitive Procurements

The Companies request clarification that their default service plans were decided with finality and that the Companies were authorized to deploy those plans upon filing the documents submitted in a compliance filing in response to the *August 2012 Order.*[[10]](#footnote-10) The Companies aver that an express statement of such authority is needed to assure that competitive procurements can be conducted in sufficient time to provide for power flow to default service customers on and after June 1, 2013. Petition for Clarification of the Companies (Companies Petition) at 11-12.

The OCA agrees that the Companies’ concerns warrant clarification. The OCA states that given the Companies’ need to move forward with the default supply procurement, the Companies request for certainty on this important issue is reasonable. OCA Answer at 4.

As noted in the*August 2012 Order,* specific issues have been carved out of the DSP II proceeding for further consideration by the Parties and the Commission. Moreover, as indicated, *supra*, the Companies have filed their Revised DSP II as a compliance filing to the *August 2012 Order* and Comments to the Revised DSP II have been submitted to the Commission. Consequently, we are only able to clarify that the *August 2012 Order* is a final disposition of the Companies’ DSP II, subject to the Commission’s disposition of the Revised DSP II and those issues carved out of the DSP II proceeding.

# Conclusion

For the reasons set forth in this Opinion and Order, the Commission:
(1) grants, in part, and denies, in part, the Petition for Reconsideration and/or Clarification filed by CAUSE; (2) denies the Petition for Rehearing and Reconsideration of Constellation/Exelon ; (3) grants, in part, and denies, in part, the Petition for Clarification of the Companies; (4) grants, in part, and denies, in part, the Petition for Clarification filed by the OCA; (5) denies the Petition for Reconsideration filed by the OSBA; and (6) grants, in part, and denies, in part, the Petition for Reconsideration filed by RESA. **THEREFORE,**

**IT IS ORDERED:**

1. That the Petition for Reconsideration and/or Clarification filed by the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania is granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the Petition for Rehearing and Reconsideration of Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc., Exelon Generation Company, LLC, and Exelon Energy Company is denied, consistent with this Opinion and Order.
3. That the Petition for Clarification of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company is granted, in part, and denied, in part, consistent with this Opinion and Order.
4. That the Petition for Clarification filed by the Office of Consumer Advocate is granted, in part, and denied, in part consistent, with this Opinion and Order.
5. That the Petition for Reconsideration filed by the Office of Small Business Advocate is denied for the reasons set forth in this Opinion and Order.
6. That the Petition for Reconsideration filed by the Retail Energy Supply Association is granted, in part, and denied, in part, consistent with this Opinion and Order.
7. That a copy of this Opinion and Order be served on all active Parties to the proceedings at Docket No. P-2011-2272650*, et seq*.

 **BY THE COMMISSION,**

 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: September 27, 2012

ORDER ENTERED: September 27, 2012

1. A more complete discussion of the history of this proceeding, the Companies’ Joint Petition and the standards applicable to default service are presented in the *August 2012 Order* at 3-8. [↑](#footnote-ref-1)
2. The Revised DSP II filing will not be addressed by this Opinion and Order. [↑](#footnote-ref-2)
3. Exelon Generating Company, LLC and Exelon Generating Company. [↑](#footnote-ref-3)
4. 66 Pa. C.S. §§2801 et seq.; *see esp*. 66 Pa. C.S. § 2804(3) [↑](#footnote-ref-4)
5. The market enhancement programs proposed by the Companies include the Retail Opt-in (ROI) Aggregation Program and a Standard Offer Referral Program. [↑](#footnote-ref-5)
6. Commission’s Final Order in the case of *Investigation of Pennsylvania’s Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, (Final Order entered March 2, 2012) (*IWPF Order*). [↑](#footnote-ref-6)
7. We note that this proposal closely mirrors RESA’s recommendation for the Standard Offer Program that the Commission adopted which provided for a standard offer term of four months at seven percent off the PTC at the time of the offer, with a requirement that the EGS provide a fixed price for the remaining eight months. *See,* RESA Exc. at 42. [↑](#footnote-ref-7)
8. *See,* *August 2012 Order* at 136-137. [↑](#footnote-ref-8)
9. 66 Pa. C.S. § 2802(10) [↑](#footnote-ref-9)
10. The Companies have included a list of items to be contained in its compliance filing in its Petition at 8. As noted, *supra*, the compliance filing (Revised DSP II) was submitted to the Commission on September 6, 2012 and Comments on Revised DSP II have been filed. [↑](#footnote-ref-10)