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December 20, 2012

Via Electronic Filing
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
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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 the Retail Energy Supply Association ("RESA") enclosed is its Reply Comments to Revised Default Service Plan Retail Market Enhancement Programs that has been electronic filed with regard to the above-referenced matter. Copies being served in accordance with the attached Certificate of Service.

Sincerely,

Deanne M. O'Dell

Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Elizabeth H. Barnes w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Reply Comments to Revised Default Service Plan Retail Market Enhancement Programs upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: December 20, 2012

* Indicates that I do not have a record of receiving an Executed Protective Order Agreement

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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 P-2011-2273670

RETAIL ENERGY SUPPLY ASSOCIATION REPLY COMMENTS TO REVISED DEFAULT SERVICE PLAN RETAIL MARKET ENHANCEMENT PROGRAMS

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I. INTRODUCTION

The Retail Energy Supply Association ("RESA")[1] submits these Reply Comments in response to comments filed by the Office of Small Business Advocate ("OSBA") regarding the Revised Default Service Plan Retail Market Enhancement Programs ("Revised Default Service Plan") filed on November 14, 2012 by Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), Pennsylvania Power Company ("Penn Power") and West Penn Power Company ("West Penn") (collectively, the "Companies" or "FirstEnergy").

OSBA's comments advocate that: (1) EGSs should be required to bear 100% of the costs of the RME programs; and, (2) marketing for the opt-in aggregation program should directly target those small commercial and industrial customers ("C&I") who are receiving service from an electric generation supplier ("EGS"). As explained further in Section II, OSBA's new – and seriously flawed – attempt to place a value on acquiring new customers through one of the Retail Market Enhancement ("RME") programs to claim that any costs below that should be acceptable to EGSs has no merit or factual support. Moreover, even though OSBA unreasonably assails the efforts of other parties to reach resolution of the important design and cost recovery issues, the reality is that these two issues are inextricably linked and the best chance of successfully implementing the RME programs is by finding the structure that most equitably balances all concerns. RESA respectfully recommends that the Commission take this into consideration as it resolves these issues.

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1 RESA's members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

As explained further in Section III, OSBA's recommendation that small C&I customers being served by an EGS receive direct marketing to participate in the opt-in aggregation program must be rejected. Not only is this proposal completely inconsistent with the Commission's guidance on this direct point, but actively encouraging shopping customers – who have already taken the action that is the intended result of the RME program – to leave their existing EGS will lead to negative consequences for the implementation of the RME programs and the retail market in general.

II. THE COSTS OF THE RME PROGRAMS MUST BE ALLOCATED IN AN EQUITABLE WAY TO ENHANCE THE LIKELIHOOD OF SUCCESSFUL IMPLEMENTATION

As set forth in RESA's initial comments, there is no legal or other requirement that EGSs participate in any of the RME programs and, without the supportive participation of the EGSs, these programs cannot succeed.[2] EGSs will not participate in the RME programs if: (1) the programs are poorly designed and unlikely to achieve the result of encouraging default service customers to participate; and, (2) the cost to the EGS to participate is too unjustifiably high, especially coupled with costs incurred via sustained periods of discounted electricity and bonus payments required of EGSs. The serious problems with the design of the opt-in aggregation program as proposed by FirstEnergy, which requires EGSs to choose to participate and provide pricing information before knowing the relevant Price-to-Compare ("PTC"), were described by RESA and further explained in the comments submitted by Washington Gas Energy Services, Inc. ("WGES").[3] Likewise addressed in those comments was the failure of FirstEnergy to

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2 RESA Comments at 3-8.

3 RESA Comments at 11-15. WGES Comments at 2-3.

provide actual costs and/or offer a standard offer customer referral program design that is cost efficient and effective. Resolving these design issues is critical for the success of the programs.

Just as critical to a successful outcome, is equitably addressing cost allocation issues in a way the permits the programs to go forward. OSBA tries to dismiss these concerns by restating arguments that have already been addressed in the context of this and other cases and RESA will not restate all the reasons why OSBA is incorrect on those well-vetted issues.[4] However, OSBA does raise a brand new contention in its comments that it has not set forth either in this or other proceedings. Pursuant to this new theory, OSBA states that EGSs will participate in the RME programs based on OSBA's claim that the costs of the RME programs are projected to be less than the amount per customer that one EGS – Direct Energy, LLC ("Direct Energy") – testified (in a different proceeding) could be obtained when acquiring customers through the outright acquisition of another entity or "book" of customers.[5] There are two major problems with this theory: (1) the numbers relied upon by OSBA do not represent the value EGSs are likely to place on acquiring customers through the RME programs in this case; and, (2) the costs EGSs would be required to pay to participate in the RME programs is unknown.

As to the first point, the testimony to which OSBA cites was provided by Dr. Matthew J. Morey in the West Penn Power/FirstEnergy merger proceeding in support of Direct Energy's

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4 For example, OSBA's claim that shopping customers (i.e. EGSs) are "causing" the costs of the RME programs is simply wrong. As the Commission has noted, the purpose of the opt-in program "is to encourage shopping by those customers who, for whatever reason, have shown an aversion to shopping." *Investigation of Pennsylvania Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Final Order entered March 2, 2012 ("*IWP Final Order*") at 41. Likewise, the Commission has stated that the purpose of the customer referral program is "to facilitate customers participation in the competitive market." *Investigation of Pennsylvania Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Tentative Order entered December 16, 2011 ("*IWP Tentative Order*") at 9. Clearly, the RME programs are intended to reach the default service customers and, from a cost causation perspective, requiring them to pay for the costs of the programs is justified.

5 OSBA Comments at 11.

proposal to require the default service provider to conduct an auction of default service customers to retail suppliers which would move all customers (except for those that chose not to be moved) from default service to competitively supplied retail market service.[6] By analyzing the then recent major industry acquisitions, Dr. Morey calculated the value – on a per customer basis – of those transactions (based on the number of customers transferred and the cost of the transaction) as a way to estimate the amount of revenue that might be generated by the auction proposed by Direct Energy.[7]

Dr. Morey's calculation does not – as OSBA claims here – establish the value EGSs would place on acquiring a single new customer through one of the RME programs. Rather, it provided an average of the amount per customer account that one entity was willing to pay to acquire the entire gas or electric retail business of another entity. In other words, the figures provided in the FirstEnergy merger case attempted to calculate the value buyers of certain entities with established customers placed on acquiring those customers in those specific transactions. In calculating this value, Dr. Morey looked that the total cost of each acquisition divided by the number of customers acquired. These costs reflected other elements of value beyond just the value of obtaining a new customer including the value of additional assets, such as systems and employees, in addition to the future revenue potential for each customer served.[8]

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6 *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Code Approving a Change of Control of West Penn Power Company and Trans-Allegheny Interest Line Company*, Docket Nos. A-2010-2176520 and A-2010-2176732, Direct Energy St. No. 1 (Direct Testimony of Mathew J. Morey dated August 17, 2010). Direct Energy's proposal for an auction was explained by witness Frank Lacey. *See* Direct Energy St. No. 3 at 9-12.

7 Direct Energy St. No. 1 (Direct Testimony of Mathew J. Morey dated August 17, 2010) at 48-52.

8 *Id.* at 49.

Importantly, the transactions in Dr. Morey's analysis also involved the value placed on acquiring a guaranteed number of customers.

The value to EGSs of acquiring new customers through the RME programs at issue here is not analogous to the transactions analyzed by Dr. Morey. This is because neither RME program involves transactions transferring a guaranteed number of customers en masse to EGSs. The opt-in aggregation program requires EGSs to incur participation costs simply for the opportunity to acquire a customer. Under the standard offer customer referral program, although each enrollment would be guaranteed, EGSs – just by virtue of their participation in the program – must commit to a cost recovery obligation without knowing the number of customers they will acquire. Although the per customer enrollment fee for the standard offer program is intended to recover the costs, EGSs are subject to a retroactive cost assessment that could turn out to be significantly more than the per customer cost of referral program enrollments. These significant differences between the transactions analyzed by Dr. Morey and the RME programs render meaningless OSBA's claim regarding the value EGSs would place on acquiring new customers in the RME programs.

The second part of OSBA's analysis is likewise flawed. Even assuming, *arguendo*, that the value to EGSs of acquiring new customers through the RME programs could be established, measuring when that value exceeds the cost of the program is not possible here because FirstEnergy's proposals do not provide any concrete information about the costs it expects to be incurred for implementing the RME programs. Particularly for the standard offer customer referral program, the estimates discussed in the collaborative were too unreasonably high,[9] and RESA believes that there is a significant chance that no EGS will participate in the program if

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9 RESA Comments at 4-6.

the actual costs are near the projections offered by FirstEnergy. Accordingly, if the Commission wishes to enhance the chance that EGSs will participate in the RME programs and avoid an outright failure of the Commission's pro-competition policy initiative, some method of making the costs more reasonable needs to be found. While redesigning both RME programs consistent with RESA's recommendations would make the programs more attractive, a more equitable allocation of the costs also needs to be considered. Allocating a reasonable portion of the costs of the programs to consumers would be fair because the RME programs benefit all stakeholders, including default customers who are the targets of the programs.

One possible modification that the Commission could consider might be to structure the existing products in ways that would reasonably address concerns that have been raised by the Office of Consumer Advocate ("OCA") in exchange for allocating some of the costs to consumers. For example, OCA has expressed concerns about assuring consumers a "guaranteed" savings for a particular period of time. If the amount of time an EGS is required to guarantee this savings is lessened and the cost burden to EGSs is shared, then such a result may be possible. The opt-in aggregation program could be structured so that the term of the program is six months and EGSs agree to provide a 5% guaranteed savings from the PTC in effect during the term (in addition to the $50 bonus paid after three months if the customer stays with the EGS) in exchange for a cost allocation agreement whereby 50% of the costs are recovered from consumers. Similarly, the standard offer customer referral program could be structured so that EGSs would provide customers a guaranteed discount of 7% off the PTC for the first four months of the twelve-month program again, in exchange for a cost allocation agreement whereby 50% of the costs are recovered from consumers.

OCA has also expressed concerns about the product consumers will receive at the end of the RME program if they take no other action.[10] Assuming both programs are restructured as suggested above to address the guaranteed savings issue, OCA's concern about the end of the program can also be addressed in exchange for allocating the costs of the program on a 50/50 basis between EGSs and consumers. For the six month aggregation program, EGSs could be required to provide a fixed price product to participating customers in the aggregation program at the end of the six month aggregation term. This additional six month fixed price offering would not be a continuation of the aggregation program and RESA would not recommend any additional regulatory requirements – beyond the requirement of a fixed price product to address OCA's concerns – on this product. In contrast, the standard offer customer program would be a twelve-month program term with the guaranteed savings in operation only during the first four months. For the remaining eight months, to address OCA's concern, EGSs would offer a fixed price product to those customers who have not selected another option. Standard Commission regulations and rules would apply at the end of the twelfth month of the customer referral program.

While RESA continues to believe that its primary positions regarding the design of the RME programs are superior and justify full allocation of the costs to consumers, RESA also recognizes that the programs may have a better chance at being successfully implemented if reasonable compromise is reached. In that spirit, RESA requests that the Commission give due

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10 Customers in both programs would remain free to leave at any time and without penalty. They would also be free to affirmatively select another product of the EGS. OCA's concern, as understood by RESA, is limited to those customers who have chosen to participate in the program and have taken no other action at the time the program ends.

consideration to comprehensively addressing the design and cost recovery issues consistent with the suggestions set forth herein.

III. OSBA'S RECOMMENDATION THAT CUSTOMERS OF EGSs RECEIVE DIRECT MARKETING TO PARTICIPATE IN THE OPT-IN AGGREGATION PROGRAM MUST BE REJECTED

OSBA advocates that "all customers in the residential and eligible Small C&I rate classes" should be actively solicited for participation in the program even if they are already receiving service from an EGS.[11] This is not consistent with the Commission's long-held decision that shopping customers would not be specifically targeted for participation in either program but they could participate if they became aware of the program.[12] While RESA does not agree with the Commission's decision to include shopping customers in the RME programs, RESA has not sought to alter this aspect of the proposed plan offered by FirstEnergy. Ironically, while OSBA argues that "the time has come to stop *designing* the RME programs and to start *implementing* them,"[13] its proposals here go well beyond the limits of the Commission's stated position on this issue and must be rejected.

In the *IWP Tentative Order*, the Commission sought comments on the following initial determination:

> We agree with the parties that suggested that the opt-in auction program targeted to non-shopping, default service customers, with the marketing efforts, notifications and consumer education targeted towards that audience. However, we also agree with those that noted that, as a practical matter, shopping customers will become aware of these opt-in action pools and may want to participate. In order to avoid the impression of discrimination and to avoid the return of shopping customers to default service to

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11 OSBA Comments at 7-8

12 *IWP Final Order* at 42.

13 OSBA Comments at 6.

> participate, we propose that all customers be eligible to participate in these programs.[14]

RESA did not support permitting shopping customers to participate even though the Commission did not propose to have any direct marketing targeted to them. Nonetheless, the Commission maintained its earlier position in the *IWP Final Order*:

> However, to ensure the focus of this competitive enhancement is on those customers who have not shopped, the Commission will also maintain its original position that <u>all marketing notification and consumer education efforts for the Retail Opt-in Auctions should be targeted to non-shopping, residential, default service customers</u>. As such, although a shopping customer may become aware of the Retail Opt-in Auction and request participation<u>, the auction materials themselves will be directed toward the non-shopping segment of the residential sector.</u>[15]

For FirstEnergy specifically, RESA advocated that special circumstances warranted a deviation from the Commission's determination in the prior orders but, ultimately, the Commission affirmed its decision in the *IWP Final Order*.[16] Importantly, during the default service proceeding, FirstEnergy never proposed to target shopping customers for the opt-in program and none of the parties in the proceeding objected. Even during the collaborative discussions – after the Commission made clear its decision that small C&I customers were to be included in the program – RESA is unaware of OSBA <u>ever</u> proposing that the marketing

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14 *IWP Tentative Order* at 26 (emphasis added).

15 *IWP Final Order* at 42 (emphasis added).

16 *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, P-2011-2273670, Opinion and Order entered August 16, 2012 (*"FE DSP II Order"*) at 107.

materials should directly target and include shopping customers.[17] Nevertheless, RESA opposes OSBA's modifications.

OSBA claims that its modification is "particularly important . . . in light of the relatively high level of shopping that currently exists among those customers" who should not be "disenfranchised" from participating in "this Commission-sponsored program."[18] OSBA's advocacy is nonsensical and misplaced. As the Commission has rightly recognized, the purpose of the RME programs is to encourage <u>default service</u> customers to enter the competitive retail market. Actively encouraging shopping customers – who have already taken the action that is the intended result of the RME program – to leave their existing EGS will lead to negative consequences and must not be permitted.

First, actively marketing shopping customers is likely to send mixed signals to the customer. The shopping customer has already made a decision to shop – presumably in response to consumer education received from the Commission, the EDC and the EGS. Now the customer will be receiving more marketing materials about a different type of program which may or may not be more favorable than the existing contract depending on the value the customer places on the different aspects of the two products such as the overall product term and/or other value-added services. The Commission should not be put in the position of inadvertently creating the misimpression that the RME programs are better deals for current shopping customers.

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17 OSBA attempts to excuse this failure to at least give the stakeholders the courtesy of an opportunity to discuss its proposals by negatively casting the discussion of other parties as their attempt to "re-negotiate key aspects of the entire program." OSBA Comments at 5. Even if this premise were accepted as true, it merely proves that OSBA had ample opportunity to share its desired proposed modifications with the parties during the collaborative process but it choose not to do so.

18 OSBA Comments at 7.

Second, actively encouraging shopping customers to participate in the RME programs completely ignores the significant financial investment EGSs already serving those customers have already made in acquiring them. These EGSs – with the encouragement of the Commission in its support of retail competition – have expended time and resources in acquiring and serving these customers and they should not face the risk of losing that investment as a result of a retail opt-in aggregation program that is actively soliciting their customers to leave. In other words, current customers of the EGS are already doing exactly what the retail opt-in program is trying to accomplish and that is receiving competitive supply. Actively soliciting these customers to participate in this program – at the risk of undermining an EGSs investment in acquiring them – makes no sense.

Finally, customers already receiving service from an EGS may be subject to fees or penalties for cancelling their contracts prior to the end of the term. By actively soliciting these customers, the misimpression may be created that these fees or penalties either do not exist or will be waived. The Commission should be concerned about this because customers choosing to participate in a Commission sponsored program who are required to pay these penalties to their existing EGSs could leave these consumers with a negative overall impression about retail competition. Such a result would undermine all efforts to date.

For all of these reasons, RESA recommends that the Commission reject OSBA's proposals to require FirstEnergy to actively solicit shopping customers for participation in the retail opt-in aggregation program.

IV. CONCLUSION

For all the reasons discussed above, RESA respectfully requests that the Commission reject the proposed modification offered by OSBA to the Revised Default Service Filing of FirstEnergy consistent with the discussion herein.

Respectfully submitted,

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