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December 20, 2012

VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17105-3265

Re: Joint Petition Of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval Of Their Default Service Programs
Docket No. P-2011-2273650, Docket No. P-2011-2273668,
Docket No. P-2011-2273669 and Docket No. P-2011-2273670

Dear Secretary Chiavetta:

Enclosed for filing please find the **Reply Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Regarding Their Revised Default Service Plan Retail Market Enhancement Programs** (the "Reply Comments") in the above-captioned proceeding.

As indicated on the enclosed Certificate of Service, the Reply Comments are being served on all active parties and the presiding Administrative Law Judge.

Sincerely,

TPGadsden

Thomas P. Gadsden

TPG/tp
Enclosures

c: Per Certificate of Service

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**

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served copies of the **Reply Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company Regarding Their Revised Default Service Plan Retail Market Enhancement Programs** upon the following persons, in the matter specified below, in accordance with the requirements of 52 Pa. Code § 1.54:

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Dated: December 20, 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JOINT PETITION OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, PENNSYLVANIA POWER COMPANY AND WEST PENN POWER COMPANY FOR APPROVAL OF THEIR DEFAULT SERVICE PROGRAMS	:	**DOCKET NOS. P-2011-2273650 P-2011-2273668 P-2011-2273669 P-2011-2273670**

REPLY COMMENTS OF METROPOLITAN EDISON COMPANY, PENNSYLVANIA ELECTRIC COMPANY, PENNSYLVANIA POWER COMPANY AND WEST PENN POWER COMPANY REGARDING THEIR REVISED DEFAULT SERVICE PLAN RETAIL MARKET ENHANCEMENT PROGRAMS

I. INTRODUCTION AND OVERVIEW

Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec"), Pennsylvania Power Company ("Penn Power") and West Penn Power Company ("West Penn") (collectively, or any combination of the foregoing, the "Companies") hereby reply to Comments filed by the Office of Small Business Advocate ("OSBA"), the Retail Energy Supply Association ("RESA") and Washington Gas Energy Services, Inc. ("WGES")[1] with respect to the Companies' Revised Default Service Plan Retail Market Enhancement Programs ("Revised RME Proposals"). The Revised RME Proposals were filed on November 14, 2012 pursuant to the Pennsylvania Public Utility Commission's ("Commission" or the "PUC") Order entered on August 16, 2012 in this proceeding ("August 16 Order").[2] By that Order, the Commission

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1 The Office of Consumer Advocate ("OCA") submitted Comments supporting the Companies' revised retail market enhancement proposals and highlighting various consumer protections contained in those programs. Therefore, the Companies are not responding to the OCA's comments.

2 As the Companies emphasized in the Revised RME Proposals, it is critically important that the Commission grant them explicit authority to initiate the RME programs by January 10, 2013, in order to assure that those programs can be implemented on a schedule that conforms to the terms of the August 16 Order.

approved, with modifications, the Default Service Programs for the period from June 1, 2013 to May 31, 2015 ("DSPs") that the Companies filed on November 17, 2011. The Commission also directed the Companies to submit new proposals for various elements of their Retail Market Enhancement ("RME") programs. *See* August 16 Order, pp. 161-162.[3]

In its August 16, 2012 Order, the Commission directed the Companies to replace their originally proposed Retail Opt-In Auction Program with a Retail Opt-In Aggregation Program ("ROI Aggregation Program") offering a twelve-month product with a fifty dollar bonus, a four-month guaranteed five percent discount off the Price-to-Compare ("PTC") at the time of enrollment, and an electric generation supplier ("EGS")-provided fixed price for the remaining eight months. August 16 Order, pp. 116-117. The Commission further directed the Companies, in collaboration with interested EGSs,[4] to submit a proposal for customer notification, opt-in enrollment and customer assignment that facilitates the implementation of the ROI Program. *Id.*, p. 160. The Commission generally approved the design of the Companies' Standard Offer Customer Referral Program ("Customer Referral Program" or "CRP") as it had been revised by the Companies in accordance with guidance provided in the Commission's Intermediate Work Plan Final Order,[5] but directed that the Companies make small commercial customers eligible to participate in the CRP (as well as the ROI Aggregation Program). *See* August 16 Order, pp. 103-104.

In their initially-filed DSPs, the Companies proposed to recover the costs of the ROI Aggregation Program and Customer Referral Program (collectively, "Retail Enhancement Programs") from residential customers through each Company's Default Service Support Rider. After the Commission entered the Intermediate Work Plan Final Order, the Companies offered an alternative proposal in the event they were directed to recover such costs from EGSs.

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[3] The August 16, 2012 Order was clarified by a subsequent Commission Order (the "Clarification Order") entered on September 27, 2012. On October 16, 2012, the Commission extended the deadline for the Companies' filing of revised RME program proposals to November 14, 2012.

[4] The Commission subsequently clarified that the collaborative process was open to the participation of the OCA and other interested stakeholders. *See* Clarification Order, pp. 19-20.

[5] Final Order, *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952 (March 2, 2012) ("Intermediate Work Plan Final Order").

Specifically, participating EGSs would be required to make a $100,000 up-front payment towards initial costs and pay additional start-up and on-going costs of the programs as they were incurred. In the August 16 Order, the Commission directed the Companies, with the cooperation of the EGSs, "to resubmit a plan or proposal . . . regarding how EGSs will pay for the Standard Offer Customer Referral Program and the redesigned ROI Aggregation Program." *See* August 16 Order, pp. 136, 160.

In the Companies' initial DSPs, West Penn and Penn Power also proposed residential time-of-use ("TOU") Riders that, if adopted, would authorize those Companies to "bid out" TOU service to an EGS selected on the basis of an annual auction. This proposal was designed to implement the Commission's recommendation that "EDCs contemplate contracting with an EGS" in order to satisfy the requirement imposed by Section 2807(f)(5) of the Public Utility Code[6] to offer a TOU rate as part of default service. As proposed, the TOU Riders would be available to residential customers served on West Penn Rate 10 and Penn Power Rates RS and RH that have been provided a smart meter pursuant to West Penn and Penn Power's approved Smart Meter Plans and that affirmatively elected TOU service.[7] Through the TOU "auction," West Penn and Penn Power would have solicited a twelve-month, fixed price, on-peak (7:00 am, to 11:00 pm weekdays, excluding Company holidays) and an off-peak product. And, at the conclusion of each twelve month TOU service term, participating EGSs would retain customers they served who did not affirmatively elect either to return to default service or to switch to another EGS, and no restrictions would be placed on future TOU pricing. In the August 16 Order (p. 93), the Commission found that the terms and conditions of the TOU Riders – specifically, what it characterized as an "overly expansive" on-peak time period – made the

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6 *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952 (Order entered December 16, 2011), p. 47. Section 2807(f)(5) requires a default service provider to offer TOU rates to all customers that have been provided with smart meter technology.

7 *See Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Approval Of Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123950 (Met-Ed, Penn Power and Penelec) (Order entered June 9, 2010); *Petition of West Penn Power Company d/b/a Allegheny Power for Expedited Approval of its Smart Meter Technology Procurement and Installation Plan*, Docket No. M-2009-2123951 (West Penn) (Order entered on May 3, 2011).

programs, as proposed by the Companies, unreasonable. The Commission, therefore, directed the Companies to consult with stakeholders and submit a revised TOU proposal for West Penn and Penn Power. *Id.*

The directives in the August 16 Order regarding Retail Enhancement Programs for all Companies and TOU programs proposed by West Penn and Penn Power were incorporated in the Revised RME Proposals through the following:

- Revised TOU Riders for West Penn and Penn Power (August 16 Order, p. 93)[8];
- An ROI Aggregation Program to replace the Companies' originally proposed Retail Opt-In Auction Program (August 16 Order, p. 111)[9];
- Procedures for EGSs to pay the costs of the ROI Aggregation Program and the Customer Referral Program (August 16 Order, pp. 136-137)[10]; and
- Revisions to the Retail Enhancement Programs to reflect: (1) the Commission's direction to include small commercial customers; and (2) recommendations from stakeholders to clarify procedures for EGS participation and customer enrollment in the CRP.[11]

In response to a request by RESA and Direct Energy, the Commission issued a Secretarial Letter on November 30, 2012 to provide parties an opportunity to file comments and reply comments regarding the Companies' Revised RME Proposals by December 10 and December 20, 2012, respectively. The Companies submit these Reply Comments to respond to issues raised by RESA, the OSBA and WGES.

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8 *See* Revised RME Proposals, pp. 5-7 (¶ 10), Exhibit B (Revised West Penn Time-of-Use Default Service Rider), Exhibit C (Revised Penn Power Time-of-Use Default Service Rider) and Exhibit D (Revised Penn Power/West Penn Time of Use Aggregation Agreement).

9 *See* Revised RME Proposals, pp. 8-9 (¶ 12) and Exhibit A (Revised Opt-In Aggregation Program Plan).

10 *See* Revised RME Proposals, pp. 10-12 (¶¶ 15-24), Exhibit A, Exhibit E (Met-Ed Electric Supplier Coordination Tariff, Effective June 1, 2013), Exhibit F (Penelec Electric Supplier Coordination Tariff, Effective June 1, 2013), Exhibit G (Penn Power Electric Supplier Coordination Tariff, Effective June 1, 2013), Exhibit H (West Penn Electric Supplier Coordination Tariff, Effective June 1, 2013) and Exhibit I (Revised Customer Referral Program Agreement).

11 *See* Revised RME Proposals, pp. 12-13 (¶ 25), Exhibit I and Exhibit J (Customer Referral Program Implementation Timeline).

II. REPLY TO COMMENTS

A. Reply To RESA

As a general matter, RESA's criticisms of the Revised RME Proposals exhibit an inherent, and fundamental, contradiction. RESA cannot decide whether it wants to advocate strict adherence to the terms of the Commission's prior orders or a wholesale departure from the most straightforward directives in those orders. In the end, RESA's Comments advance both positions simultaneously based solely on whether following, or departing from, the Commission's prior orders might support its latest position on a given issue.

Thus, on the one hand, RESA criticizes the Companies for offering proposals that, allegedly, do not strictly correspond to the letter and the spirit of the Commission's prior orders. For example, RESA attempts a word-by-word parsing of the Clarification Order to try to substantiate its claim that the Commission did not "require" EGSs to submit the terms and conditions of their "opt-in" offers for its review "no later than 45 days before the offers are extended to the potential customers." *See* RESA Comments, p. 14. Similarly, RESA contends that the Commission's prior pronouncements support its contention that EGSs should not have to enter into a Customer Referral Program Agreement. *Id* at 14-17. Even in these instances, however, what RESA presents as the Commission's decision on an issue is, in fact, only RESA's interpretation of language that, on its face, does not support RESA's position, as explained in detail in Sections II.A.3. and 4., *infra*.

On the other hand, in some of the most significant parts of its Comments, RESA advocates reopening and reconsidering issues that the Commission indisputably decided in the August 16 Order and the Clarification Order. The best example of this misuse of the comment process is RESA's attempt to persuade the Commission do a complete about-face on the issue of cost recovery for the RME programs. *See* RESA Comments, pp. 6-8. Notwithstanding the

Commission's prior finding on this issue[12] and its holding in the August 16 Order (p. 136) that "EGSs will pay for the Standard Offer Customer Referral Program and the redesigned ROI Aggregation Program," RESA now asks the Commission to rescind its prior decision and take an entirely new direction on an issue that was put to rest long ago. Similarly, the Commission could not have been clearer in stating the March 1 PTC should be used to establish the five-percent discounted price for the ROI Aggregation Program. *See* Clarification Order, p. 15. Yet, here again, RESA, under the guise of "commenting" on the Revised RME Proposals, is actually asking – belatedly and improperly – that the Commission reconsider its prior holding on this issue. RESA Comments, pp. 11-13.

RESA should not be allowed to have it both ways. It cannot claim to be promoting strict adherence to the Commission's prior orders while, at the same time, advocating dramatic departures from the most fundamental holdings of those very same orders. On balance, RESA's Comments amount to little more than an out-of-time petition for reconsideration and, therefore, should be disregarded for that reason alone.

1. Cost Recovery From EGSs Or Customers

The principal thrust of RESA's Comments in this area is an attempt to re-open the August 16 Order and re-litigate the issue of cost responsibility for Retail Enhancement Programs. This aspect of RESA's Comments is clearly unlawful. Under Section 703(g) of the Public Utility Code, the Commission cannot revise or rescind a prior order without notice and opportunity to be heard, which is not the case here.[13] The Commission authorized "comments" on the Revised RME Proposals – not a wholesale re-litigation of issues already decided.

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[12] *See* Intermediate Work Plan Final Order (p. 78), where the Commission explained that EGSs should bear the costs of the RMEs because "EGSs are the entities reaping the possible customer acquisition benefits."

[13] 66 Pa.C.S. § 703(g); *see also Popowsky v. Pa. Pub. Utility Comm'n*, 805 A.2d 637, 642-643 (Pa. Cmwlth. Ct. 2002) (vacating PUC's order adopting a settlement that rescinded a prior order resolving a water utility's
(continued)

In its Comments (pp. 6-8), RESA contends that the costs of the Retail Enhancement Programs should be shared equally between EGSs and the Companies' distribution customers. RESA's proposal is not supported by the August 16 Order. In fact, it is directly contrary to the Commission's decision to assign all RME program costs, exclusively, to EGSs. The August 16 Order (p. 136), consistent with the PUC's guidance in the Intermediate Work Plan Final Order (pp. 32, 78), held that EGSs were to bear the costs of the Companies' RME programs because they are the beneficiaries of those programs. The Commission directed the parties to collaborate to try to agree to a method for how costs were to be recovered from EGSs, but did not suggest that any party other than EGSs should bear those costs.

The Commission made it abundantly clear, in directing the Companies to revise their cost recovery proposal for the Retail Enhancement Programs, that all costs incurred with respect to those programs would be borne entirely by EGSs:

> Accordingly, the Companies, with the cooperation of the EGSs, are directed to resubmit a plan or proposal within sixty days for Commission review regarding *how EGSs will pay for the Standard Offer Customer Referral Program and the redesigned ROI Aggregation Program.*

August 16 Order, p. 136 (emphasis added). As the Commission acknowledged, the Administrative Law Judge ("ALJ") also opined that EGSs benefit from RME programs and should bear those costs rather than customers. *Id.*, p. 134. There was no ambiguity about this point and, if there were, it was incumbent on RESA to request clarification or reconsideration, which it did not do. In fact, RESA's protestations at this stage of the proceeding are largely undercut by the fact that it did not file an exception to the ALJ's recommendation that EGSs should bear the cost of the Retail Enhancement Programs (*see* RESA Exc.).

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requested base rate increase and holding that the established comment process was not a meaningful opportunity to be heard, as required by Section 703(g)).

RESA's attempt to manufacture support for its proposed modification to cost assignment for the Retail Enhancement Programs by citing the Commission's decision in the default service proceeding for PECO Energy Company ("PECO") is unavailing.[14] In PECO's case, the Commission did not limit responsibility for RME program costs to EGSs:

> Accordingly, PECO, EGSs and interested parties are directed to resubmit a plan or proposal within sixty (60) days of the date of entry of this Opinion and Order, for Commission review and approval, *addressing how participating EGSs or customers will pay for the costs of market enhancements approved in this DSP proceeding.*

PECO DSP II Order, p. 148 (emphasis added).

However, RESA fails to acknowledge the Commission's deliberate reference to "customers" when directing PECO to revise its cost recovery approach and the total absence of similar language in the August 16 Order. That additional language appeared for the first time in the PECO DSP II Order. Consequently, when the Commission, in response to PECO's request for "clarification," said that PECO should consider "the possibility that customers as well as EGSs may be responsible for some program costs," it was repeating a directive from the PECO DSP II Order that applies only to PECO. Contrary to RESA's assertion (RESA Comments, p. 6), the Order on Reconsideration in PECO's DSP II case[15] does not – indeed, cannot – change the holding in the August 16 Order.

Likewise, notwithstanding its contentions, RESA's position is not supported by the Commission's note that it might order an "allocation" of costs from among the proposals made by stakeholders if a consensus on a cost recovery approach were not achieved (August 16 Order,

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[14] Opinion and Order, *Petition of PECO Energy Company for Approval of its Default Service Program*, Docket No. P-2012-2283641 (entered October 12, 2012) ("PECO DSP II Order").

[15] Order on Reconsideration, *Petition of PECO Energy Company for Approval of its Default Service Program*, Docket No. P-2012-2283641 (entered Nov. 21, 2012) ("PECO DSP II Order on Reconsideration").

p. 137 n. 30). The full context in which that note appears makes it clear that the Commission was not addressing the assignment of costs between EGSs and customers – an issue it had already resolved by directing that EGSs should bear the Retail Enhancement Program costs. Rather, as the Commission explicitly stated, it was addressing the "allocation" of Retail Enhancement Program costs among EGSs. Indeed, any other interpretation would put the Commission's note in direct conflict with the extended discussion of the cost recovery issue in the body of the Commission's Order.

In short, the fact that, in the PECO DSP II Order, the Commission inserted additional language – not present in the August 16 Order – permitting PECO to entertain the possibility that some part of the costs of the its retail market enhancement programs could be borne by customers simply underscores the fact that no similar departure from the clear instructions of the Intermediate Work Plan Final Order was carved out in this case.

In view of the holding in the August 16 Order, it would be a clear violation of Section 703(g) for the Commission to accede to RESA's approach for cost recovery at this time. Accordingly, RESA's Comment on this issue is incorrect and should be disregarded.

a. RESA's Alternative Proposal For Cost Recovery

In its Comments (p. 7), RESA offers an alternative cost recovery approach that allegedly would have EGSs and distribution customers "share" the costs of the Retail Enhancement Programs. Under that alternative proposal, the Companies would provide a "detailed" implementation proposal and cost estimate. EGSs would be responsible for a portion of such costs based on a per-customer charge subject to a low not-to-exceed level of $1.00 per customer for the ROI Aggregation Program and $30 per customer for the CRP. The balance of the estimated costs of the Retail Enhancement Program costs would have to be recovered from distribution customers by means of a non-bypassable surcharge. However, if the costs of implementing and operating the Retail Enhancement Programs exceeded the Companies' estimate, the Companies would be forced to seek recovery of their actual costs in a "future base rate proceeding" where they would be subject to an unprecedented after-the-fact review to determine whether the previously approved Retail Enhancement Programs were "designed to achieve the greatest success at the lowest, reasonable cost." RESA Comments, p. 7.

For the reasons discussed in Section II.A.1, *supra*, RESA's alternative cost recovery proposal – which it presented for the first time in its "Comments" – cannot be considered at this late stage, and it would be clear violation of law for the Commission to do so.[16] Moreover, RESA's proposal for cost recovery contains other fatal defects.

First, RESA's recommendation that EDCs should be at risk of not recovering their costs (RESA Comments, p. 7) is antithetical to the assurance of full and current cost recovery that underlies the obligation imposed on EDCs as default service providers by Act 129 of 2008 ("Act 129"). Costs incurred to implement Commission-mandated programs, which the Commission has explicitly made part of EDCs' default service plans, cannot be denied recovery under the Section 1307 adjustment clause authorized by Section 2807(e)(3.9) of the Public Utility Code.[17] Contrary to RESA's assumption, the Commission does not have statutory authority to deny electric distribution companies ("EDCs") the right to full and current recovery under Section

[16] The issue of cost-recovery was extensively litigated in the evidentiary phase of this proceeding, at which time RESA had ample opportunity to propose alternative cost recovery approaches, including the so-called "sharing" mechanism it now recommends. It did not do so then, and it is estopped from doing so now. Moreover, to reiterate, the ALJ recommended that EGSs should bear the costs of the Retail Enhancement Programs, and RESA did not take exception to that recommendation. Finally, and also previously noted, RESA did not seek reconsideration of the Commission's decision, in the August 16 Order, directing the Companies to propose a method "regarding how EGSs will pay for the Standard Offer Customer Referral Program, and the redesigned ROI Aggregation Program." *See* August 16 Order, p. 136. The fact that RESA may now be having second thoughts about its previous inaction is not a legally cognizable basis to allow RESA to ask the Commission to entertain its proposal at this stage of the proceeding, in violation of the Public Utility Code and well-established due process principles.

[17] *See, e.g., Pennsylvania Power Co. v. Pa. Pub. Utility Comm'n*, 932 A.2d 300, 307 (Pa. Cmwlth. Ct. 2007) (vacating order denying electric utility's provider of last resort reconciliation plan and remanding to PUC to determine mechanism for full recovery of costs).

2807(e)(3.9) of their actual costs to implement Commission-mandated programs that have been made part of their DSPs. Additionally, while RESA insists on a "known and certain fee structure" for EGSs that elect to participate in the Retail Enhancement Programs (*see* RESA Comments, p. 9), it nonetheless advocates exposing EDCs to a substantial risk of not recovering costs they will have expended for the express purpose of implementing the Commission's directives to establish and administer those programs. The unfairness inherent in RESA's position is compounded by the fact that EGSs are the principal beneficiaries of the Retail Enhancement Programs, which are not part of an EDC's statutorily mandated service obligations under the Public Utility Code and are not necessary for the provision of safe and reliable service.

Second, RESA's proposal must be assessed in light of the Commission's findings that "EGSs are the entities reaping the possible customer acquisition benefits"[18] of the RMEs and, therefore, "EGSs will pay for the Standard Offer Customer Referral Program and the redesigned ROI Aggregation Program."[19] Given those findings, RESA's proposal clearly contravenes the principle of cost causation that has long been applied by the Commission and affirmed by appellate courts, which dictates that costs should properly be borne by the parties that cause such costs to be incurred. The costs to implement and maintain the Retail Enhancement Programs are being incurred by the Companies on behalf of EGSs, which will be the primary beneficiaries of those programs. As previously explained, the Retail Enhancement Programs are not part of EDCs' statutorily mandated service obligations under the Public Utility Code, nor are they necessary for the provision of safe and reliable service. In fact, absent the Commission's mandate that EDCs implement such programs to accelerate retail competition – which generates significant benefits for EGSs, including the avoidance of substantial customer-acquisition costs –

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18 Intermediate Work Plan Final Order, p. 78.

19 August 16 Order, p. 136.

the Companies would not incur any program costs. Therefore, a proper application of the principle of cost causation would not hold the Companies responsible for such costs. Rather, cost responsibility should lie with EGSs that commit to participate in the Retail Enhancement Programs even if those EGSs later decide to terminate their participation. Because the Commission will have relied upon those EGSs' original commitment as the basis for both establishing the Retail Enhancement Programs and directing the Companies to incur the associated implementation costs, EGSs should not be permitted to walk away from their cost responsibility simply by terminating their participation in the programs and leaving the Companies holding the bag.

Third, the standard of review proposed by RESA in its Comments (p. 7) – i.e., "designed to achieve the greatest success at the lowest, reasonable cost" – is also contrary to the law. Public utilities are entitled to recover all of their prudently incurred costs and cannot be denied recovery based on a different and far stricter standard of RESA's devising. Applying that principle, Pennsylvania appellate court jurisprudence has interpreted prudent to mean reasonably calculated to achieve the desired goal.[20] In *UGI Corp.*, a gas company claimed expenses for feasibility studies relating to investing in a synthetic natural gas plant and a storage project. 401 A.2d at 932. It had ended its participation six months before the beginning of the test year. *Id.* The PUC denied recovery of the claimed expenses on the grounds that they produced no benefit to consumers. *Id.* On appeal, the Commonwealth Court rejected the PUC's standard for cost recovery and held that the appropriate question is whether the claimed expense was reasonable in light of the purpose for which the expense was incurred (in the *UGI* case, to acquire more gas for customers) – *not* whether that outcome was actually achieved:

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[20] *See, e.g.*, *UGI Corp. v. Pa. Pub. Utility Comm'n*, 410 A.2d 923, 932 (Pa. Cmwlth 1980).

> The Commission's position that only those actions which result in increased gas supplies being provided to UGI's customers may be considered recoverable expenses is untenable. Such a rule would discourage feasibility studies conducive to efficient operations. The question to be asked and answered with regard to this kind of management action is not whether the utility got more gas as the result of the study but whether the study was reasonably calculated to achieve such a result. *Cheltenham & Abington Sewerage Co. v. Public Service Commission*, 122 Pa. Superior Ct. 252, 275, 186 A. 149, 160-61 (1936). The reasonableness of UGI's decision in the latter sense is not questioned.

Id. at 932.

Additionally, RESA simply ignores the fact that the programs the Companies will implement – and the way in which those programs will be implemented – will have been approved in advance by the Commission, after extensive input by interested parties, and will be subject to ongoing review and supervision by the Commission itself. Under these circumstances, there is no valid reason to place the Companies at jeopardy of not recovering their actual costs based on an after-the-fact review that, as RESA virtually concedes, will employ impermissible hindsight.[21] In light of the foregoing facts and long-standing appellate court precedent, the Commission should reject RESA's proposed standard of review for recovery of expenses the Companies incur to implement the Retail Enhancement Programs.

Compounding the defects in RESA's alternative proposal for cost recovery discussed above, RESA is also attempting to introduce new factual issues for the first time in its Comments. Specifically, RESA claims that the cost recovery approach embodied in the Revised RME Proposals "unreasonably rel[ies] on unknown costs and create a serious disincentive for

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21 *Pa. P.U.C. v. Philadelphia Suburban Water Company*, 75 Pa. P.U.C. 391, 396-97 (1991) ("The prudence standard enunciated by the courts requires that the Commission assess the reasonableness of utility management's decision-making based on the state of information available at the time [the] decision had to be made without reliance upon after discovered facts."); *Pa. P.U.C. v. Philadelphia Electric Co.*, 561 A.2d 1224, 1227 (1989) ("the Commission cannot fall prey to judging management action by hindsight"); *City of Pittsburgh v. Pa. P.U.C.*, 370 Pa. 305, 319, 88 A.2d 59, 64 (1952) ("no abuse of discretion . . . can be inferred based solely on hindsight"); *Richardson v. Pennsylvania R.R.*, 338 Pa. 155, 159, 12 A.2d 583 (1940) ("No man's foresight is required to equal his critic's hindsight").

EGS participation in the programs." RESA Comments, p. 4. RESA then offers specific, maximum per-customer cost levels that, if exceeded, it contends would bar EGSs from participating in the Retail Enhancement Programs. RESA Comments pp. 5 and 7. However, the estimated cost of the Retail Enhancement Programs was addressed in the evidentiary phase of this proceeding. *See, e.g.*, OCA St. 2, pp. 6-7 (setting forth the Companies' estimates of the costs of each of the Retail Enhancement Programs and specifically raising cost as an issue); Dominion Retail, Inc. St. R-1, p. 11 (stating that EGSs might decline to participate in the Retail Enhancement Programs if the costs they were asked to bear were too high). RESA had ample opportunity to raise factual issues about the cost of implementing the Retail Enhancement Programs during the evidentiary phase of this case, at which time it could have presented evidence of the per-customer cost EGSs allegedly would find excessive in light of the expenses they currently incur to acquire new customers. Having waived the opportunity to explore that issue during the litigation phase of this case, when all parties could have tested RESA's assertions and presented responsive evidence, RESA cannot simply interject new facts – and new factual arguments – at this late stage. RESA's tactic violates principles of fundamental fairness and, for that reason, any reliance by the Commission on the non-record evidence presented in RESA's Comments would be precluded by Section 504 of Pennsylvania's Administrative Agency Law and the Commission's own regulations.[22] Accordingly, the positions and arguments advanced by RESA on the basis of non-record factual averments improperly introduced in its Comments should be rejected.

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[22] *See Kowenhoven v. County of Allegheny*, 901 A.2d 1003, 1010 (Pa. 2006) (holding that an agency's adjudication is not valid, under 2 Pa.C.S. § 504, unless the adjudication is based on a record created after the parties have been given reasonable notice and the opportunity to be heard); 52 Pa. Code § 5.431(b) ("After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion.").

Moreover, the figures being thrown around by RESA now are vastly different from the customer acquisition costs that were implicit in the RME proposals RESA made during the evidentiary phase of this proceeding. Specifically, RESA now asserts that EGSs will not participate in the Customer Referral Program if they are asked to bear costs for that program of more than $30 per customer. RESA Comments, p. 7. However, RESA's witness previously testified that RESA's research supported a "signing bonus" of "at least $100-$200" per customer to acquire residential customers as part of the RME programs. Thus, RESA's own evidence – which was properly introduced during the evidentiary phase of this case – clearly indicates that EGSs' residential customer acquisition costs are at least $200 per customer. RESA St. 2 (Kallaher), p. 22. Indeed, if they were not, RESA could not support a "signing bonus" of that amount. Obviously, customer acquisition costs did not shrink by $170 per customer in the interim. RESA's figure of $30 per customer as the alleged maximum that EGSs can bear to participate in the Customer Referral Program has no foundation in fact and is totally contrary – and far below – earlier indications of customer acquisition costs presented by its own witness. Additionally, by not presenting its factual averments on the record, RESA has precluded other parties from presenting countervailing evidence, including prior inconsistent statements by witnesses on behalf of RESA's members in other proceedings. For example, as the OSBA pointed out (OSBA Comments, p. 11), in the proceeding for Commission approval of the merger of FirstEnergy Corp. and Allegheny Energy, Inc.,[23] Dr. Mathew Morey, a witness on behalf of Direct Energy Services, LLC, one of RESA's members, testified that the "range of acquisition offers" by EGSs to obtain new residential and commercial customers "could lie from $150 to

[23] *Joint Application Of West Penn Power Company Doing Business As Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. For A Certificate of Public Convenience Under Section 1102(a)(3) Of The Public Utility Code Approving A Change Of Control Of West Penn Power Company And Trans-Allegheny Interstate Line Company*, Docket Nos. A-2010-2176520 et al.

$500 per account" and likely averaged $200 per residential account and $400 per commercial account (Direct Energy St. 1, p. 52). This is precisely the kind of evidence that the Companies and other parties would, if they were afforded the opportunity, place in the record in opposition to RESA's non-record factual averments.

To reiterate, even if, as RESA now represents, $30 were a valid customer acquisition cost – which it certainly is not – RESA should have presented that evidence when the issues in this case were being litigated so that the Commission could decide – if it chose to give any credence to RESA's figure – to forego implementing a program that, apparently, in RESA's estimation, does not pass a reasonable cost-benefit test.

For all of the foregoing reasons, RESA's Comments proposing an alternative cost recovery approach are without merit and should be disregarded.

b. Implementation Cost Estimates

RESA also criticizes the Companies for allegedly failing to "submit a detailed projection of both how [they] [intend] to implement both the Aggregation Program and the Standard Offer/CRP and the implementation and ongoing costs it projects it will incur for each." RESA Comments, p. 7. RESA asserts that absent a clear indication of the way the programs will be "implemented" and the associated costs, its members cannot make an informed decision as to whether they can cost-effectively participate in either program. *Id.*, pp. 4-6. However, RESA's comments simply ignore the substance of the Revised RME Proposals, which contained carefully crafted provisions to inform EGSs of the latest and best estimates of the programs costs and provide them opportunities to tentatively assent to participate and, based on further assessment of costs, to withdraw if they so choose. Specifically, the Revised RME Proposals provide:

> After EGSs indicate their interest in participating in the Program, individual estimates of Opt-In Aggregation Program costs will be provided to each eligible EGS. Eligible EGSs that confirm participation will be permitted to

> withdraw during the five-day period following provision of the cost estimates.
>
> ***
>
> The Companies will update their estimate of the CRP Costs prior to soliciting EGS participation in the CRP.

Revised RME Proposals, Exhibit A, pp. 10-11.

Consequently, the relevant provisions of the revised DSP clearly provide EGSs the opportunity to review the most current cost estimates prior to electing to participate in the Retail Enhancement Programs. RESA's suggestions to the contrary are simply at odds with the express terms of the Revised ROI Aggregation Program and revised CRP. In addition, RESA is seeking a degree of precision that it is not possible to attain at this time. As evidenced by the fact the parties continue to disagree about important elements of both the ROI Aggregation Program and the CRP, the firm estimate of costs that RESA desires cannot be made until a clear, Commission-approved implementation plan has been established. Indeed, it was for exactly this reason that the Companies proposed the withdrawal opportunity set forth in the portion of the Revised RME Proposals quoted above.

c. Amortization

RESA also contends that the Companies should "amortize" the costs of each of the RMI programs over periods as long as seven years to match the alleged "useful life of the asset." RESA Comments, p. 8. However, RESA ignores the fact that the "useful life" in each instance is the life of a program for which the costs are incurred. For the ROI Aggregation Program that period is only one year. Just as important, for the ROI Aggregation Program, there are neither "capital" costs nor any costs to set up structures, systems or processes that survive the expiration of the ROI Aggregation Program itself; all of the costs to be incurred will be expensed as they are incurred. Moreover, there will be no on-going relationship between the Companies and the participants in the ROI Aggregation Program once that program expires. Consequently, it is critical that the expenses the Companies incur be recovered from the EGSs that participate in the ROI Aggregation Program and that the Companies' recovery occur contemporaneously with the operation of that program.

The CRP has a two-year duration. However, the Revised RME Proposals reflect the Companies' acceptance of the EGSs' position advanced during stakeholder discussions that EGSs must not be required to commit to a minimum participation period for the CRP. However, if there is no commitment from EGSs to participate for any specified minimum period – let alone the two-year duration of the program – then the Companies must be able to collect their start-up and capital costs from participants over an appropriate period. For that reason, the Companies proposed twelve months in an attempt to minimize the risk that they will not collect their costs from EGSs that decide to leave the program prior to its expiration. In addition, and contrary to RESA's unsubstantiated assertions, the bulk of the costs for the CRP are ongoing operating expenses that are incurred to run the program and should, therefore, be recovered on a current basis and not "amortized."

d. Commission's Authority to Require EGSs to Bear the Costs of the RME Programs.

RESA contends the Commission does not have statutory authority to impose any costs on EGSs that have terminated their participation in a particular RME program. RESA Comments, p. 10. RESA simply glosses over the fact that EGS participation in the RME programs is entirely voluntary and contractual, as the Commission has previously affirmed.[24] If any EGS decides to participate, it must do so in accordance with the terms specified by the Commission, and, therefore, must agree to bear the costs that are being incurred to provide the benefits to

[24] *See* Clarification Order, p. 18: "However we emphasize that EGS participation in the ROI programs is voluntary."

EGSs that participation will create. RESA's argument simply misses the point. Furthermore, in order to avoid the possibility of additional disputes over the recovery of CRP cost from EGSs, it is critically important that EGSs that participate in the CRP must enter into a Customer Referral Program Agreement, which is an integral part of the CRP that the ALJ and the Commission have approved, as explained in Section II.A.4.a., *infra*.

2. Rate Ready Billing

RESA contends that the Companies have not provided a sufficient basis for requiring EGSs participating in the Retail Enhancement Programs to employ "Rate Ready Consolidated EDC Billing." RESA Comments, p. 10. According to RESA, many EGSs use the "bill ready billing" platform and requiring those EGSs to switch to rate ready billing could deter participation. RESA, therefore, urges the Commission to require the Companies to remove the rate ready billing requirement from Sections 5 and 2.6(d) of the ROI Aggregation Program Plan and CRP Agreement, respectively. RESA Comments, pp. 10-11.

At the outset, it should be emphasized that the Companies have required rate ready consolidated billing for EGSs choosing to participate in the Retail Enhancement Programs since the very beginning of this case. *See* Companies' Ex. CVF-4, p. 6 and Ex. CVF-5, pp. 6-7. Neither RESA nor any other party voiced any opposition to the Companies' proposal in testimony, briefs, exceptions or petitions for reconsideration/clarification, and it is clearly too late for RESA to try to do so now. Furthermore, the Companies require "rate ready" billing to assure that customers are billed the rate that properly applies under the applicable RME program and to create an appropriate audit trail for subsequent verification and dispute resolution.

Additionally, and unmentioned by RESA, rate ready billing is the only form of consolidated billing that would allow the Companies to implement the cost allocation mechanism that EGSs requested in the collaborative process for the CRP, i.e., on a per-enrollment basis.

With respect to the Customer Referral Program, rate ready billing using a specific, coded fixed price is required to track customer enrollments and, in turn, calculate the CRP charge for each EGS based its enrollments resulting from that program.

Rate ready billing is not required for the ROI Aggregation Program to function in the manner the Companies have proposed, namely, by billing participating EGSs on a per-letter-mailed basis. However, RESA has requested that billing under the ROI Aggregation Program should be on a per-enrollment basis, just as it would be for the CRP. If per-enrollment billing were adopted for the RMI Aggregation Program, then rate ready billing would also be required for that program.

In addition to the reasons that rate ready billing is a necessity if EGSs are to be billed on a per-enrollment basis, rate ready billing provides substantial benefits that are not afforded by bill ready billing. Rate ready billing makes it possible to track the number of customers enrolled by each EGS participating in the ROI Aggregation Program, and the use of a specific, coded rate will facilitate reporting to the Commission on the success of the Retail Enhancement Programs.

In summary, cost allocation for the CRP on a per-customer enrollment basis cannot be accomplished with "bill ready" billing, as RESA has requested in its Comments. Accordingly, RESA's request to employ bill-ready consolidated billing for the CRP must be rejected. Although cost allocation on the basis proposed by the Companies for the ROI Aggregation Program can be accomplished with bill ready billing, the cost allocation method favored by RESA for that program would require rate ready billing. In any event, there are substantial benefits for auditing, customer tracking, and RME analysis and reporting that can only be achieved with rate ready billing. Consequently, RESA's Comments should be disregarded.

3. RESA's Proposed Modifications to the ROI Aggregation Program Structure

a. Composition of Product Offer

RESA's Comments on this issue again improperly attempt to re-litigate an issue already resolved by the August 16 Order and Clarification Order, namely, the appropriate PTC for the initial four-month discount. RESA contends that the five percent discount should be based on the PTC as of June 1, 2013, which is the time when customers would begin receiving service under the ROI Aggregation Program. RESA Comments, pp. 11-13. This issue, however, was resolved by the Commission in its Clarification Order (p. 15). In particular, the Commission affirmed in that Order the conclusion it previously expressed in the August 16 Order that the ROI Aggregation Program product shall include a four-month guaranteed five percent discount off the PTC being charged when the customer *enrolls* in the ROI Aggregation Program – i.e., the PTC in effect from March 1, 2013 to May 31, 2013 – not at the PTC in effect at the start of the program. In light of the Commission's holding in the August 16 Order, which it reinforced in the Clarification Order, there is no basis for RESA's proposal to change the relevant PTC as the basis for the four-month ROI discount, and doing so would be a clear violation of Section 703(g) of the Public Utility Code.

The Commission approved the use of the March 1 PTC to set the five percent discount so that customers would be informed of a specific price at the time enrollment begins in order to support a June 1 start date for furnishing service to customer under the ROI Aggregation Program. *See* Clarification Order, p. 15 (" '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 . . .") The Companies would note that, if the Commission harbors any concerns that the discounted price for the four-month period should reflect a PTC that is more current, relative to the program's start date, than the one established as of March 1, a change in the implementation schedule would be required. Specifically, if the June to August PTC were to be used as the basis for the five-percent discount, then the ROI Aggregation Program schedule would have to slip to a start date of July 1 instead of June 1.

b. Timing of EGS Filing of Eight-Month Product Terms

In its Comments, RESA expresses its concern about the Companies' proposal to require EGSs to submit the terms and conditions for their eight-month fixed price product to the Commission for review on February 25, 2013 and to include those terms in the initial customer offer letter. RESA contends that this program requirement is problematic because it requires EGSs to establish a price for their eight-month product offerings six months in advance of the filing of the first PTC in effect during that product term. To allay its concern, RESA recommends that the Commission determine that EGSs' eight-month product offers should be filed by August 2013 and, therefore, the Commission should require the Companies' to revise their proposal to include those offers in the initial customer mailing. RESA Comments, pp. 13-14.

The same concern expressed by RESA was specifically raised by WGES in its Answer to the Petitions for Reconsideration filed by RESA and the OCA. In the Clarification Order, the Commission rejected WGES's position, stating as follows:

> 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.*

Clarification Order, p. 18 (emphasis in original).

The critical portion of the Commission's holding states that the "terms and conditions of the EGS" must be submitted to the Commission no later than forty-five days "before offers are extended to *potential* customers." (Emphasis added.) The Commission's emphasis on "potential" customers clearly indicates that the "terms and conditions of the EGS" must be submitted at least forty-five days before opt-in offers are extended. Once opt-in offers have been accepted, "potential customers" become actual customers (or simply "customers"). The Commission's use of "potential customers" to delineate the timeline for submission of terms and conditions for its review clearly signals the importance the Commission placed on "potential customers" knowing both the discount price and the eight-month fixed price **before** they opt in. The Clarification Order fully supports the Companies' position and, as previously explained, the Commission, in that Order, previously rejected the very same recommendation RESA is making here. Accordingly, RESA's comment should be disregarded.

4. Customer Referral Program Structure

a. Use of a Standard Agreement

Under the Revised RME Proposals, EGSs participating in the CRP would be required to enter into a Customer Referral Program Agreement in the form provided as Exhibit I thereto. Appendix B to that agreement is a Consumer Contract and Disclosure Statement that the qualifying EGSs would enter into with customers they serve under the program. In its Comments (pp. 14-17), RESA objects to the proposed standard contracts as an unnecessary intrusion on the competitive market and claims that the Commission did not approve of the use of a standard Customer Referral Program Agreement in the August 16 Order.

In support of its Comment, RESA makes the totally inaccurate claim that the ALJ "ruled against requiring EGSs to use FirstEnergy's form of standard contract [for the Customer Referral Program] and the Company never challenged this ruling." RESA Comments, p. 16. While it is true that the ALJ expressly approved the use of standard contracts for the ROI Aggregation Program, she did so over RESA's objection. Recommended Decision, pp. 111-112. However, no similar opposition was voiced by RESA or anyone else to the use of a standard contract for the Customer Referral Program. The ALJ recommended approval of the Customer Referral Program just as it was proposed by the Companies, and the standard contracts are an integral part of that program. The ALJ did not write separately to discuss the use of standard contracts for the CRP because no one – including RESA – objected to them.

In its Comments, RESA appears to imply that, despite its previous silence on the subject, its opposition to standard contracts for the Standard Offer Customer Referral Program should have been inferred from its opposition to standard contracts for the ROI Aggregation Program. No such inference is appropriate, and it should not be made. Moreover, even if such an inference were justified, then the ALJ's recommendation to approve standard contracts for the Retail Opt-In Aggregation Program should likewise be construed to cover both programs, and, in that case, RESA's claim that the Companies did not "challenge" the ALJ's ruling makes no sense since there would have been no reason to "challenge" a ruling in their favor. In the August 16 Order, the Commission did not disturb the ALJ's recommendation to approve all of the essential elements of the Customer Referral Program, including the standard contracts. Consequently, on this issue, like others addressed in its Comments, RESA is urging the Commission to revisit and reconsider an earlier ruling long after the time permitted for reconsideration has expired.

b. RESA's Proposal to Employ an Interactive Voice Response System

In its Comments (p. 5), RESA states that "[d]uring the collaborative sessions, RESA suggested that FirstEnergy consider a potentially more cost efficient means of administering the CRP, such as the use of an IVR (Interactive Voice Response) System which is used successfully in New York by some EDCs." As RESA candidly admitted, it floated this suggestion for the first time during the collaborative process – it was never mentioned during the evidentiary phase of this case or, for that matter, in briefs, exceptions or its Petition for Reconsideration. RESA is proposing that the Companies and the Commission completely re-think how the CRP is to be structured and implemented. Clearly, it is too late for that. Moreover, beginning with their direct testimony filed on December 20, 2012, the Companies have consistently proposed the use of a live "Customer Referral Plan Implementation Team" to implement the CRP. *See* Companies' St. 7, p. 28. RESA did not object to the use of a live Customer Referral Plan Implementation Team at any point in this proceeding. Only now, a full year after that proposal had been made and long after it has been approved by the ALJ and the Commission, has RESA decided to question the efficacy of using the Customer Referral Plan Implementation Team. Obviously, RESA cannot "sandbag" the Companies and the Commission in this fashion, and its recommendation should be disregarded for that reason alone.

Moreover, there is no evidence in the record in this case to support RESA's claim that an IVR system would be just as effective and more cost-efficient than "live" referrals. Along those lines, and unmentioned by RESA, during the collaborative process, a number of EGSs questioned the effectiveness of an IVR system to implement the CRP. In short, it is simply wrong to suggest that the Companies summarily rejected consideration of an IVR system for the CRP. In truth, that recommendation was never made in a timely fashion and, in any event, does not have uniform support within the EGS community, contrary to what RESA would have the Commission believe.

c. Procedures for Customer Enrollment.

RESA generally supports the procedures for enrolling customers in the CRP but recommends a refinement to the Companies' proposal that referred customers be assigned on a rotating basis to EGSs that participate in the program ("Customer Referral Suppliers"). *See*

Revised RME Proposals (p. 13). Specifically, RESA would like referred customers to have the option of selecting an EGS from among the Customer Referral Suppliers before the Company assigns the customer to a Customer Referral Supplier. The Companies agree that customers should have the option to select a specific Customer Referral Supplier before the random assignment process begins. Accordingly, the Companies will include a question in the CRP call center script that allows the customer either to select an EGS from a list of Customer Referral Suppliers or to elect a rotating assignment by the Companies. However, the Companies note that incorporating RESA's suggestion into the CRP call center scripts will undoubtedly increase call length and, therefore, increase the attendant CRP costs.

5. TOU Program

RESA also expressed support for the Revised West Penn and Penn Power TOU Riders, with two caveats. First, like the CRP, RESA contends that the Companies should provide an opportunity for customers to designate their TOU provider. Second, RESA argues that service under the Revised West Penn and Penn Power TOU Riders should conclude on May 31, 2015 at the same time as the Companies' DSPs, subject to standard end-of- term rules that apply, under Part 54 of the Commission's regulations, to customers whose contracts with an EGS are about to expire. RESA Comments, pp. 18-19.

As to RESA's first point, the Companies agree with RESA and, therefore, will permit customers to designate a specific EGS as their TOU provider. However, RESA's proposed "hard stop" of TOU service terms on May 31, 2015 is contrary to Act 129. Section 2807(f)(5) of the Public Utility Code expressly requires the Companies to offer a TOU rate to all customers who have been furnished smart meter technology by the Companies.[25] Pursuant to that obligation, the

[25] 66 Pa.C.S. § 2807(f)(5).

Companies must continue to offer a TOU rate beyond May 31, 2015. Therefore, RESA's proposal to change the termination provisions for TOU service should be rejected. In that regard, it should be noted that EGSs that participate in the TOU are under no obligation to continue to serve customers beyond the end of the current DSP period and could discontinue service at that point. However, the Companies' obligation to offer a TOU rate, pursuant to Section 2807(f)(5) extends beyond the end of DSP period and continues in full force and effect unless and until that statutory provision is amended or revoked.

B. Reply To The OSBA

The OSBA expressed general support for the Companies' revised ROI Aggregation and Customer Referral Programs, with one exception. The OSBA recommends that the Commission require the Companies to revise the ROI Aggregation Program Plan (i.e., Exhibit A to the Revised RME Proposals) to include explicit notification and enrollment rules for shopping customers. OSBA Comments, pp. 7-8. As an initial matter, the Companies agree with the OSBA that shopping customers are eligible to participate in the ROI Aggregation Program. Accordingly, the Companies will process the enrollments of shopping customers who opt-in to the program by returning an opt-in card.

Any shopping customer might obtain an enrollment card and, if it does, can submit the enrollment card to its Company with the appropriate customer account information. If that occurs, the customer will be forwarded to an EGS for enrollment. The Companies have committed to post the opt-in offers of all EGSs on their website. Consequently, shopping customers can download an opt-in card from the website, or they could obtain one from a neighbor or friend, insert their correct customer account information and forward it to the Company.

However, the OSBA's contention that the Companies' marketing, notification and customer education efforts for the ROI Aggregation Program should target shopping customers is plainly inconsistent with the August 16 Order. Consistent with its guidance in the Intermediate Work Plan Final Order (p. 42), the Commission adopted the ALJ's recommendation that the Companies should not target their marketing efforts to shopping customers, even though such customers would be eligible to participate in the ROI Aggregation Program. August 16 Order, pp. 106-107. Accordingly, the OSBA's Comment regarding shopping customer notification procedures, including its proposal to mail shopping customers the opt-in offers of participating EGSs, should be disregarded.

C. Reply To WGES

WGES' Comments address three areas: (1) the sequence of the customer's decision to "opt-in" to the ROI Aggregation Program and the initial offer mailing; (2) the customer notification process for the EGSs' eight-month product offerings; and (3) the Companies' proposed CRP per-customer charge. WGES Comments, pp. 2-4.

First, WGEs proposes to streamline the initial offer process. Specifically, WGES recommends that the Companies' replace the initial customer mailing, which includes EGS marketing materials, with a uniform mailing that simply explains that customers who return an enclosed tear-off postcard will receive a guaranteed five percent discount from the PTC for four months, plus a fifty dollar bonus, followed by a fixed priced product for eight months with no penalties for termination. Under WGES' recommendation, only customers who return a postage paid tear-off form to the applicable Company would be randomly assigned to a specific EGS through the allocation process outlined in the Revised RME Proposals. Then, each EGS would send its fixed-price offer terms to the responding customers and complete the enrollment. WGES Comments, p. 2. The Companies have previously considered, and rejected, WGES's proposed enrollment process. In fact, WGES's recommendation was also made during the collaborative process where it failed to get any traction from other parties. Additionally, during that process, the Companies explained why they were opposed to WGES's recommendation. Specifically, the Companies are convinced that customers will not respond to an offer from the Companies that does not identify the supplier and does not provide a price beyond the four-month discount period. As previously noted, the Companies' view was shared by many of the participants in the collaborative process. The Companies believe that more customers will respond to the solicitation if it follows the design outlined by the Company, where each EGS is allowed to submit marketing material in support of its offer.

Second, like RESA, WGES contends that customers should be notified of the EGS' eight-month fixed price during the third month of their service contract (i.e., August 2013) rather than in the initial offer mailing. WGES Comments, p. 3. This is the same issue raised by RESA, and the Company's response to RESA, which was previously provided in Section II.A., *supra*, is equally applicable to WGES's comparable comment.

Finally, WGES argues that EGSs participating in the CRP should only be charged for customers actually enrolled, as opposed to referrals. However, WGES' comment on this issue appears to reflect WGES's misunderstanding of what the Companies proposed. Under the Revised CRP, the costs of the program are to be recovered from EGSs based on *actual customer enrollments*. Indeed, the revised DSP expressly provides that the calculation of the CRP charge is a function of completed customer enrollments:

> Each Company will track and record its CRP Costs separately, and each Company will recover CRP Costs from Customer Referral Suppliers by assessing a standard, per-customer charge (the "CRP Charge"). A Customer Referral Supplier will be assessed a CRP Charge *for every CRP customer enrollment that has been completed* for that Customer Referral Supplier.

Revised RME Proposals, Exhibit I, pp. 5-6. Therefore, the concerns expressed in WGES's Comments are without foundation and should be disregarded.

III. CONCLUSION

For the reasons set forth above, the Revised RME Proposals, as modified by this Reply, conform fully to the August 16 Order and, therefore, the Commission should enter an Order approving the Revised RME Proposals. The Comments of the OSBA, RESA and WGES should be disregarded except to the limited extent that the Companies have found merit in certain of those Comments, as explained in detail previously. In any event, the Commission should firmly reject RESA's attempt to, in effect, reopen the record in this case to present, by way of "Comments," non-record evidence. That tactic violates the Commission's regulations, is contrary to principles of due process and is simply unfair. Additionally, as explained in the Companies' filing, it is critically important that the Commission grant the Companies express authority to proceed with the Retail Opt-In Aggregation Program and other proposed retail market enhancements by January 10, 2013, in order to assure that those programs can be implemented on a schedule that conforms to the terms of the August 16 Order.

Respectfully submitted,

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Dated: December 20, 2012