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December 27, 2012

**VIA E-FILING**

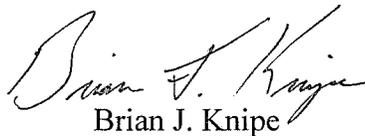
Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: *Petition of PECO Energy Company for Approval of its Default Service Program,*  
Docket No. P-2012-2283641

Dear Secretary Chiavetta:

On behalf of FirstEnergy Solutions Corp., I have enclosed for electronic filing the *Comments of FirstEnergy Solutions Corp. on PECO Energy Company's Revised Default Service Plan Compliance Filing and Exhibits*. Copies of this document have been served in accordance with the attached Certificate of Service.

Very truly yours,



Brian J. Knipe

For BUCHANAN INGERSOLL & ROONEY, P.C.

BJK/tlg

Enclosures

cc: The Honorable Dennis J. Buckley (via Email and First Class Mail)  
Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company For : Docket No. P-2012-2283641  
Approval of Its Default Service Program :

**COMMENTS OF FIRSTENERGY SOLUTIONS CORP. ON  
PECO ENERGY COMPANY'S REVISED DEFAULT SERVICE PLAN  
COMPLIANCE FILING & EXHIBITS**

FirstEnergy Solutions Corp. ("FES"), by its attorneys, hereby files its Comments on the Revised Default Service Plan Compliance Filing & Exhibits ("Revised Plan") filed by PECO Energy Company ("PECO") on December 11, 2012. As PECO explains in the Revised Plan, the parties and other participants in the collaborative discussions reached agreement on a number of issues, but certain issues were not resolved. To facilitate the Commission's consideration of the Revised Plan, PECO has proposed that the Commission set a deadline of December 27, 2012 for parties to file comments on the Revised Plan, and a deadline of January 7, 2013 for Replies to Comments. Revised Plan Paragraph 27. FES supports PECO's proposed deadlines and requests that the Commission approve them, and submits these Comments in accordance with PECO's request.

**I. INTRODUCTION**

FES opposes PECO's proposal to recover the costs of its Standard Offer Program through a discount on EGS receivables which PECO purchases through its Purchase of Receivables ("POR") program, and to potentially recover the costs of its Opt-In Competitive Offer Program ("Opt-In Program") which are not collected from participating electric generation suppliers ("EGSs") through a POR discount as well. PECO's Revised Plan does not offer any new information in support of a POR discount, and continues to raise all the same concerns that a

POR discount will pose a significant barrier to EGS participation. The use of a POR discount should be rejected for the same reasons it was previously rejected. Instead, the costs of PECO's retail market enhancement ("RME") programs should be shared between EGSs and customers, and costs recovered from EGSs should be subject to a cap and made known to EGSs prior to their decision whether to participate. FES has offered an alternative cost recovery proposal which would place primary responsibility for RME program costs on EGSs, while allowing for limited sharing of costs with eligible customers to ensure the programs are carried out.

In addition, PECO's proposed Opt-In Program documentation, attached to the Revised Plan as Exhibit D, and Standard Offer Program documentation, attached to the Revised Plan as Exhibit E, include a number of terms that inaccurately suggest the Opt-In Program and Standard Offer Program are competitions among EGSs to bid the lowest price. Inaccurate and confusing terminology in the program rules will only deter EGSs from participating and should be eliminated. FES has further proposed limited changes to PECO's proposed RME program rules and agreements to ensure the RME programs are fair and do not deter EGS participation.

## **II. COMMENTS**

### **A. PECO's Proposal to Recover Costs of Its Retail Market Enhancement Programs Through a POR Discount Should Be Rejected.**

In the Revised Plan, PECO continues to propose to recover all costs of its RME programs from participating EGSs. The Revised Plan maintains PECO's proposal to recover initial and ongoing costs of the Standard Offer Program through the same POR discount that PECO originally proposed in this proceeding. Revised Plan Paragraph 25. Likewise, PECO continues to advance its original proposal to potentially recover the costs of its Opt-In Program which are not collected from participating EGSs through a POR discount. Revised Plan Paragraph 11.

PECO's RME cost recovery proposal should be rejected for the same reasons set forth in the Commission's Opinion and Order entered October 12, 2012 ("October 12 Order"). In the October 12 Order, the Commission placed primary responsibility for the costs of PECO's RME programs with EGSs, but declined to approve PECO's proposed use of a POR discount to recover costs from EGSs:

We agree with the ALJ that our position articulated in the [Intermediate Work Plan Final Order] was and continues to be that EGSs should be responsible for these costs. However, at this juncture we do not believe we have sufficient information to adopt PECO's proposal.

Upon review of the EGS' positions in this proceeding, the Commission has significant concerns that the POR discount method of allocating costs may be a significant barrier to EGS participation. 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.

October 12 Order at 148 (emphasis added).

The October 12 Order expressly found a lack of information justifying the use of a POR discount, but PECO's Revised Plan does not offer any new information in support of its proposal. Moreover, all the same concerns that a POR discount will pose a significant barrier to EGS participation remain. As FES explained at length in its briefs:

- A POR discount will discourage new EGSs from entering the territory or encourage EGSs that currently participate to drop out of the POR program.<sup>1</sup>
- Recovery of costs through an EDC's POR program violates the fundamental principle that cost recovery should follow cost causation, since the discount in PECO's POR program was intended to recover the costs of implementing the POR program.

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<sup>1</sup> If the Opt-In Program fails, there will have been no increase in shopping in the PECO service territory. In that case, PECO's proposed use of a POR discount in connection with its Opt-in Program may have an effect on the level of retail competition that is the exact opposite of what PECO intended when designing its Opt-In Program.

- Use of a POR discount would result in an unfair allocation of costs among EGSs. An EGS may participate in PECO's POR but not in the Standard Offer Program; such an EGS would pay costs of the Standard Offer Program although it did not participate in it.
- Use of a POR discount will allow suppliers that do their own billing to escape responsibility for costs, because participation in PECO's POR program is voluntary. Since POR programs were implemented for the purpose of attracting increased EGS activity in EDC service territories where they might otherwise not participate, it is important to avoid making POR programs unattractive to EGSs.
- Cost recovery through a POR discount unfairly and disproportionately allocates costs based on an EGS's market share. Unfair and disproportionately allocated cost recovery will be harmful to the success of retail competition in an EDC's service territory if it discourages EGSs from participating in the territory.

FES M.B. at 38-42. PECO's Revised Plan does nothing to address these concerns of EGSs, or to respond to the Commission's firm belief that the resolution of the cost allocation issue is "the cornerstone to the success of these programs," since the programs "can jumpstart the market only if they are carried out." October 12 Order at 148-149.

Given its adherence to its initial RME program cost recovery proposal, PECO may again incorrectly claim that the use of a POR discount is consistent with the Commission's IWP Order<sup>2</sup> guidelines. This argument, which PECO has raised several times, relates to the IWP Order's observation that recovery of Opt-In Program costs through a POR discount "should be considered," and that recovery of Standard Offer Program costs through a POR discount "appears to be acceptable." R.D. at 85, 86; see IWP Order at 32, 85. However, the Commission's cursory observation in the IWP Order does not constitute an IWP Order "guideline" or "directive." Rather, the Commission's observation in the IWP Order was based on PECO's own Comments to the Tentative Order in that docket, in which PECO stated:

The Company believes that it is appropriate to recover these costs directly from EGSs and, in *PECO DSP II*, has

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

proposed to use a discount on its existing Purchase of Receivables mechanism to do so.

*Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Comments of PECO Energy Company filed January 17, 2012, at 9. As FES explained previously, the above-mentioned statements in the IWP Order simply addressed PECO's statement of its intention to include the POR discount cost recovery as a proposal in this proceeding. It was in this default service proceeding that PECO had to satisfy the evidentiary requirements of an on-the-record proceeding for its proposal to be accepted. The statements in the IWP Order were only an acknowledgment of the possible validity of PECO's future plan, not a determination on the merits of its proposal in this case. The cost recovery issue was never fully vetted in the Retail Markets Investigation ("RMI"), and FES cautioned strongly in this proceeding against undue reliance on the IWP Order's statements regarding the use of POR discounts as a valid cost recovery mechanism. See FES M.B. at 38. A cursory observation in the IWP Order about a proposal pending at a separate docket cannot be considered binding precedent or a directive on the issue, and any suggestion of PECO to the contrary would be in error. After reviewing the evidence presented, the Commission concluded in the October 12 Order that PECO did not provide sufficient information for its POR discount proposal to be adopted. The Revised Plan does nothing to change this conclusion and PECO's POR proposal should again be rejected.

Therefore, PECO's proposal to recover its RME program costs through a POR discount should be rejected, and PECO's proposed RME program rules and agreements (Revised Plan Exhibits D and E) should be modified accordingly.

**B. The Amount of Costs of PECO's RME Programs Imposed on EGSs Should Be Capped and Made Known to EGSs Prior to Participation in the Programs, With a Mechanism for Limited Sharing of Costs With Customers.**

While FES throughout this proceeding has expressed its preference that all customers, in any class eligible to participate, bear the costs of the RME programs, FES recognizes that the October 12 Order clearly expressed the Commission's preference to place primary responsibility for program costs with EGSs. However, the October 12 Order, as well as the Commission's Opinion and Order entered November 21, 2012 ("November 21 Order") which provided further clarifications, also permit limited sharing of costs with customers to ensure the programs are carried out.<sup>3</sup> As FES explained in briefs, unless an EGS's cost per customer is a known, capped amount, it is unreasonable to expect significant EGS participation. FES R.B. at 27-29. The October 12 Order and November 21 Order recognize that limited sharing of costs with customers would leave primary responsibility for costs with EGSs, while giving EGSs sufficient certainty regarding the level of program expenses they will incur to determine whether to participate in the programs.

FES offered cost recovery proposals for each RME program which would place primary responsibility for costs with EGSs, while giving EGSs sufficient certainty of the level of program expenses they will incur in order for the programs to succeed. With respect to the Opt-In Program, FES proposed:

- The costs should be allocated based on the number of customers actually enrolled by each EGS, rather than the number of customers allocated to the EGS.

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<sup>3</sup> This is consistent with the IWP Order, which does not direct that EGSs must bear all of the costs of the Standard Offer Program, nor state that all costs of the Opt-In Program must be recovered from participating suppliers. IWP Order at 32, 84. The IWP Order recognized the possibility of cost sharing between EGSs and customers. With respect to Standard Offer programs, the IWP Order's guideline was that "the bulk of the costs, including the costs of maintaining the referral programs once they are put into place, should be the responsibility of the participating EGSs." IWP Order at 32 (emphasis added). Similarly, with respect to Opt-In Programs, the IWP Order's guidelines state that "in general, most, if not all, of these costs should be recovered from participating suppliers." IWP Order at 84.

- There should be a cap on the amount charged to EGSs for each customer enrolled
- All costs should be made known to all qualified EGSs prior to the due date for EGSs' proposals of the maximum numbers of Residential and Small Commercial customers to which they are prepared to offer the fixed-price product.
- Any under-collection of program costs as a result of the supplier cost cap should be recovered from all customers in the classes of customers eligible to participate in the program.

PECO (Banks) Cross Ex. 4; see FES R.B. at 27. With respect to the Standard Offer Program,

FES proposed:

- The initial costs be divided equally among all EGSs licensed to serve customers eligible for the programs in the PECO service territory.
- EGSs should be given the option to sign a waiver stating they will not participate in the program prior to June 1, 2015 in order to avoid being allocated these initial costs.
- Ongoing costs should be collected from EGSs through a per customer fee from each participating supplier based on actual enrollments.
- A cap should be imposed on the initial and ongoing charges.
- At the end of the default service program, any under-collection should be recovered from all customers in any class eligible to participate in the Referral Program.

PECO (Banks) Cross Ex. 4; see FES R.B. at 29.

These methods of recovering RME program costs would place primary responsibility for program costs on EGSs while maximizing the likelihood that the programs are carried out. FES requests that the costs of PECO's RME programs be recovered through the alternative methodologies proposed by FES, and that PECO's proposed RME program rules and agreements (Revised Plan Exhibits D and E) be modified accordingly.

**C. PECO's RME Program Rules Should Be Modified To Eliminate Inaccurate and Confusing Suggestions That the Opt-In Program and Standard Offer Program Are Competitively Bid.**

It is important that the Opt-In Program and Standard Offer Program rules and documentation accurately reflect the true nature of these programs. There will likely be a number of EGSs which consider participating in the programs but did not actively participate in the RMI, this proceeding or the associated collaborative. These EGSs will be unfamiliar with the nature of the RME programs and the Opt-In Program's evolution. In addition, even in the case of EGSs which are parties to this proceeding and participated in the RMI, the individuals who evaluate whether to participate in the RME programs will likely be different than those who represented the EGS's interests in the litigation and collaborative negotiations. It is critical that the RME program documentation be accurate if the programs are to maximize EGS participation. As explained below, each program's documentation should be revised to remove inaccurate indications that the programs are competitively bid.

**1. Opt-In Program**

The November 21 Order clarified that PECO's Opt-In Program is an "aggregation" program, rather than an "auction" program. There will be no price-based bidding "competition" among EGSs to decide which EGSs will "win" customers. Instead, every qualified EGS that participates will merely indicate the maximum number of customers to which it is prepared to offer its fixed price product, the price of which is already set 5% below PECO's price-to-compare. Every qualified EGS that participates will be randomly allocated a portion of participating customers up to their designated maximum. Revised Plan, Exhibit D, Paragraphs 1.4 and 1.5.

To ensure the Opt-In Program documentation reflects these changes in the nature of the Opt-In Program, the parties worked in the collaborative to eliminate terms associated with a bidding competition from Exhibit D, including but not limited to references to “bids,” “winning” EGSs and an “RFP Monitor.” However, the parties could not agree on the elimination of all such terms, and there remain some inaccurate indications that the Opt-In Program is competitive. For example, Exhibit D is still entitled “PECO Energy Company Electric Generation Supplier Opt-In Competitive Offer Program Request for Proposals and Program Rules.” To be accurate, the terms “Competitive”<sup>4</sup> and “Request for Proposals”<sup>5</sup> must be eliminated. Instead, Exhibit D should be entitled “PECO Energy Company Electric Generation Supplier Opt-In Offer Program Rules.” Also, throughout Exhibit D, there are many references to “Request for Proposals (‘RFP’),” “competitive” offers, and “submission of proposals” which must be eliminated. These references indicate that participating suppliers, once qualified, are still submitting proposals and competing on some terms. However, according to the described program rules, once a supplier submits an application demonstrating its qualification to participate, there are no other events that prevent a supplier from serving customers through the program. While the correction of these and all other similarly incorrect terms in the Opt-In Program Rules may be inconvenient, it is critical that the rules clearly and accurately describe the program. Confusing terminology in

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<sup>4</sup> While “Competitive” may be intended to reflect the fact that the offer is provided by an alternative supplier rather than the default service provider, this concept is already adequately captured by the inclusion of the term “Electric Generation Supplier.”

<sup>5</sup> The association of the term “RFP” with a bidding competition based on price is consistent with not only EGSs’ experience and common industry practice, but also the formal legal definition of a “request for proposal:”

An invitation to prospective suppliers or contractors to submit proposals or bids to provide goods or services. • Unlike most invitations for bids, an RFP requires bidders to give more information than the proposed price. For instance, bidders may have to provide evidence of good financial condition, acceptable technical capability, stock availability, and customer satisfaction. — Abbr. RFP.

Black’s Law Dictionary, Ninth Ed. 2009 (emphasis added). By any reasonable standard, an invitation to EGSs to cap their participation in a program by indicating a maximum number of customers is inconsistent with the notion of an RFP.

the program rules will decrease the likelihood that EGSs decide to participate in the Opt-In Program. Accordingly, PECO's Exhibit D Opt-In Program documentation should be revised to eliminate all terminology suggesting that the program includes a price-based bidding competition or any submission of competing proposals.

## **2. Standard Offer Program**

PECO's Standard Offer Program documentation, attached to the Revised Plan as Exhibit E, also incorrectly suggests that the Standard Offer Program is competitively bid. For example, Exhibit E is entitled "PECO Energy Company Electric Generation Supplier Standard Offer Program Request for Proposals and Program Rules." For the same reasons explained above in connection with the Opt-In Program, the term "Request for Proposals" must be eliminated from the Standard Offer Program Rules in order for the Rules to be accurate and minimize confusion among potential EGS participants. Instead, Exhibit E should be entitled "PECO Energy Company Electric Generation Supplier Standard Offer Program Rules." Also, throughout Exhibit E, all references to a "Request for Proposals ('RFP')" must be eliminated. Accordingly, PECO's Exhibit E Standard Offer Program documentation should be revised to correct these and all other similarly incorrect terms suggesting that the program includes a price-based bidding competition.

### **D. Additional Changes to PECO's Proposed RME Rules and Agreements Are Necessary.**

FES has identified further changes to the RME program rules and agreements which are necessary to ensure the RME programs are fair and do not deter EGS participation:

- Opt-In Program Calendar. Paragraph 2.1 of PECO’s Opt-In Program Rules sets forth a schedule of events in the Opt-In Program. To prevent confusion on the part of EGSs, PECO should include in its schedule the approximate date when the 8-month EGS fixed price begins.
- Opportunity to Cure Alleged Deficiencies. Paragraph 3.5 of the Opt-In Program Rules provides that PECO will provide each Participant with notice of its satisfaction or failure to satisfy the Participant Qualifications for inclusion in the Opt-In Program, but provides no opportunity for an EGS to cure. In fact, Paragraph 3.4 provides that "PECO shall have no duty to inform any participant of any deficiency." Fairness requires that EGSs be given notice of any alleged deficiency and an opportunity to cure. Accordingly, the reference in Paragraph 3.5 to “failure to satisfy” should be changed to “any deficiencies,” and this paragraph, together with Paragraph 3.4, should be further revised to provide EGSs with notice of any deficiencies and a reasonable opportunity to cure.

Similarly, Paragraph 6.11 of the Standard Offer Program Rules provides that “PECO reserves the right to reject any Application at any time on the grounds that it does not conform to the terms and conditions of this RFP or the Applicant has not complied with the provisions of this RFP.”<sup>6</sup> Again, the Standard Offer Program Rules provide no opportunity for an EGS to cure any alleged deficiency, and Paragraph 3.4 provides that “PECO shall have no duty to inform any Applicant of any deficiency in its Application.” Therefore, Paragraphs 3.4 and 6.11 should be revised to provide EGSs with notice of any alleged non-conformance or non-compliance and a reasonable opportunity to cure.

- Reports on Bonus Checks. Paragraph 7.7 of the Opt-In Program Rules requires a participating EGS to provide, upon request and on a confidential basis, reports on the details of the bonus check mailed to each and every customer the EGS serves through the Opt-In Program. To avoid making the Opt-In Program unduly burdensome for participating EGSs while ensuring compliance with program rules, an EGS’s report should include aggregated information on the bonus checks mailed to all customers. Alternatively, the EGS should certify to the Commission that it has complied with the bonus payment requirement.
- Publicity. Paragraph 8.8 of the Opt-In Program Rules and Paragraph 6.8 of the Standard Offer Program Rules provide that an EGS participating in the Opt-In Program, or an Applicant for the Standard Offer Program, may not use the PECO name or any other information which identifies PECO in the EGS’s sales, marketing and publicity activities, without PECO’s express prior written consent. The paragraph further provides that “[f]or all other references to PECO not requiring PECO’s prior consent, the references must be factual and cannot infer an endorsement by or affiliation with PECO.” This subject is governed by well-established federal and state laws, and a provision that may alter rights under existing law will discourage EGS participation. Therefore these paragraphs should be deleted from each program’s rules. Alternatively, each paragraph should be revised to provide that it is not intended to infringe upon or alter either party’s rights under existing federal and state law.

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<sup>6</sup> As explained above, all references to an “RFP” are inaccurate and confusing and should be revised.

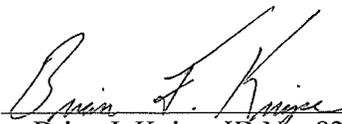
- Indemnification. Paragraph 11 of PECO's proposed Opt-In Supplier Agreement (Ex. 1, Attachment A) and Paragraph 8 of PECO's proposed Standard Offer Supplier Agreement (Ex. 1, Attachment A) require the EGS to indemnify PECO against losses and liabilities incurred as a result of the EGS's material breach of the Agreement, failure to comply with applicable laws, or intentional, negligent or willful misconduct. To ensure each program is fair and increases the likelihood of EGS participation, each paragraph should be revised to provide for reciprocal indemnification of a participating EGS by PECO in similar circumstances.

### III. CONCLUSION

For the foregoing reasons, FirstEnergy Solutions Corp. requests that the Commission (i) reject PECO Energy Company's proposal to recover any costs of its retail market enhancement programs through a discount on purchased EGS receivables; (ii) direct that costs of the RME programs be shared between EGSs and eligible customers in accordance with FirstEnergy Solutions Corp.'s recommendations; (iii) direct that PECO Energy Company's Opt-In Program and Standard Offer Program Rules and Agreements be revised in accordance with the above recommendations; and (iv) grant such further relief as the Commission deems appropriate.

Respectfully submitted,

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Dated: December 27, 2012

Attorneys for FirstEnergy Solutions Corp.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PECO Energy Company for : Docket No. P-2012-2283641  
Approval of its Default Service Program :

**CERTIFICATE OF SERVICE**

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

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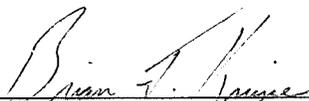
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Dated this 27<sup>th</sup> day of December, 2012.

  
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