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November 3, 2010

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
PO Box 3265  
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Re: Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power Company and Trans-Allegheny Interstate Line Company, Docket Nos. A-2010-2176520 and A-2010-2176732

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Dear Secretary Chiavetta:

On behalf of the Retail Energy Supply Association ("RESA") enclosed please find the original of its Main Brief along with the electronic filing confirmation page. Copies are being served in accordance with the attached Certificate of Service.

Sincerely yours,



Deanne M. O'Dell, Esq.

DMO/lww  
Enclosure

cc: Hon. Wayne Weismandel, w/enc.  
Hon. Mary Long, w/enc.  
Cert. of Service, w/enc.

## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of RESA's Main Brief and upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: November 3, 2010

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Joint Application of West Penn Power	:	
Company d/b/a Allegheny Power, Trans-	:	Docket No. A-2010-2176520
Allegheny Interstate Line Company and	:	Docket No. A-2010-2176732
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	:	

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**MAIN BRIEF OF  
THE RETAIL ENERGY SUPPLY ASSOCIATION**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Under Pennsylvania law, approval of the merger application of West Penn Power Company d/b/a Allegheny Power (“West Penn”), Trans-Allegheny Interstate Line Company (“TrAILCo”) and FirstEnergy Corporation (“FirstEnergy” or “FE”) (collectively, the “Joint Applicants”) requires the Commission to find that the merger will not prevent a properly functioning and workable competitive retail generation market for more than one-third of all Pennsylvanian electric customers who will be receiving distribution services from the combined entity. For decades, consumers have had no choice but to receive all their electricity services, including distribution and generation, from the monopoly electric distribution company (“EDC”). In 1997, the law changed and the Commission is now in a position to implement the rules and requirements necessary to provide consumers in the merger EDC service territories with the benefits of receiving their generation services from a workably competitive market, through electric generation suppliers (“EGSs”). As the Commission has noted, “competition among utilities and independent suppliers of generation is the best means available to keep the cost of electricity down.”<sup>1</sup> This is because many suppliers will be competing to serve the same customers and their presence will – over the long term – drive prices as low as possible.

The Retail Energy Supply Association (“RESA”)<sup>2</sup> consists of EGSs that provide competitive generation services to consumers across the country and in those service territories

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<sup>1</sup> *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271, Opinion and Order entered August 11, 2009 at 1.

<sup>2</sup> RESA’s members include ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; NextEra Energy Services; PPL EnergyPlus; Reliant Energy Northeast LLC; Noble Americas Energy Solutions, LLC. The comments expressed in

in Pennsylvania where generation rate caps have been removed. RESA members are a diverse group of EGSs, including EGSs affiliated with EDCs, EGSs owning generation, and EGSs of varying sizes that offer a variety of products and services.<sup>3</sup> Despite these differences, all RESA members share a common interest in the creation of vibrant and sustainable competitive retail energy markets where competitive retailers, not regulated utilities, provide retail electric service to consumers.

As discussed below, the market that would result from approval of this merger without conditions (or with only the conditions proposed by the recently filed Joint Petition for Partial Settlement<sup>4</sup>) will not be a properly functioning and workable competitive retail generation market for several reasons. First, the proposed merger will reduce the number of competitors in Pennsylvania's retail electricity market. Second, the proposed delay in the transition of Allegheny Power's billing and customer information system for almost a year and a half after Allegheny's generation rate caps expire threatens to disrupt the ability of competitive suppliers to provide service to all classes of customers in the Allegheny service territory after the rate caps expire. Finally, consolidating control over a substantial portion of the Pennsylvania retail market in the hands of a single corporate entity with an avowed retail marketing strategy focused on maximizing revenue by selling its generation output at retail in its affiliated EDC service territories and to affiliated default service providers provides a significant opportunity and

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this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

<sup>3</sup> Neither of the two EGSs affiliated with the Joint Applicants – FirstEnergy Solutions and Allegheny Energy Supply Company, LLC – is a member of RESA.

<sup>4</sup> *Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change of control of West Penn Power*

incentive to pursue anticompetitive and discriminatory actions which could increase the rates consumers are required to pay for generation services.

While the Partial Settlement provides for a few of the most basic competitive retail market features and some minor operational commitments, these proposals are either meaningless or simply too insignificant to make any serious improvement in the overall functioning of the competitive market, as required by the merger approval standards. At a minimum, the competitive market enhancements identified by RESA, which utilize regulatory interventions to address competitive market concerns, must be implemented. These enhancements include:

- (1) revise and strengthen the combined companies' code of conduct;
- (2) implement a comprehensive program to inform customers about specific and available retail offers;
- (3) implement a properly structured Purchase of Receivables ("POR") program for the service territory of Allegheny Power and expand the current POR program for Met-Ed, Penelec and Penn Power to large C&I customers;
- (4) prohibit FirstEnergy from implementing its municipal aggregation programs in Pennsylvania until the Commission issues a final adjudication regarding the legality of such programs;
- (5) require that each affiliated company incorporate certain changes in their next default service program filing, including a supplier load cap, so that default service is properly structured to encourage development of the competitive market;
- (6) require that all affiliated companies update and revise their operational rules; and
- (7) require FirstEnergy and Allegheny Power to retain an independent cost allocation expert to audit the companies' cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross subsidies that provide a benefit to either default service or an affiliated retail supplier.

Without the imposition of these meaningful and substantial conditions to stimulate development of a properly functioning and workable competitive market, the merger must be rejected.

## II. STATEMENT OF THE CASE

On May 14, 2010, West Penn, TrAILCo and FirstEnergy filed a Joint Application pursuant to Chapters 11 and 28 of the Pennsylvania Public Utility Code for approval of a change of control whereby Allegheny, the ultimate parent of West Penn and TrAILCo, would become a wholly-owned subsidiary of FirstEnergy.<sup>5</sup> The Joint Applicants also requested approval of revisions to affiliated interest agreements pursuant to Chapter 21 of the Pennsylvania Public Utility Code, 66 Pa. C.S. §§ 2101, *et seq.*<sup>6</sup>

The proposed merger will produce the “largest” investor owned utility in the nation in terms of customers.<sup>7</sup> It will do this by (i) merging the operations of four Pennsylvania EDCs,<sup>8</sup> and (ii) eliminating (or terminating the activities) of an affiliated EGS participating in the Pennsylvania wholesale and retail competitive market.<sup>9</sup> Following the merger (to be consummated after the expiration of rate caps for each of the merger EDCs),<sup>10</sup> FirstEnergy will

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<sup>5</sup> Joint Applicant’s Exhibit 1, at ¶¶ 1, 9 to 15.

<sup>6</sup> Joint Applicant’s Exhibit 1, at ¶¶ 23 to 16.

<sup>7</sup> Direct Energy, St. 3-SR, at Exhibit FL-1.

<sup>8</sup> Joint Applicants’ Exhibit 1, at ¶¶ 10-12; Joint Applicants’ St. 1 at 3-6.

<sup>9</sup> Joint Applicants’ Exhibit 1, at ¶¶ 10-12; Joint Applicants’ St. 1 at 3-6; OCA St. 1 at 4.

<sup>10</sup> Direct Energy St. 1 at 20; OCA St. 1 at 4; OSBA St. 1 at 17.

serve some 2 million Pennsylvania customers, more than 35% of the Commonwealth's total customer count, while encompassing 70% of the state geographically.<sup>11</sup>

On June 3, 2010, a Secretarial Letter was issued directing the Joint Applicants (and other parties) to address the issues and concerns expressed by the Commission.<sup>12</sup> A Prehearing Conference was held on June 22, 2010 before Administrative Law Judges Wayne L. Weismandel and Mary D. Long (collectively, the "ALJs").<sup>13</sup> RESA filed a timely Petition for Intervention, which was granted. A scheduling and briefing order was issued by the ALJs on June 23, 2010.<sup>14</sup> Public input hearings were held on August 3, 2010.<sup>15</sup>

In accordance with the procedural schedule, RESA served the Direct Testimony of Richard J. Hudson, Jr. (RESA St. No. 1) on August 17, 2010, the Rebuttal Testimony of Richard J. Hudson, Jr. (RESA St. No. 1-R) on September 13, 2010 and the Surrebuttal Testimony of Richard J. Hudson, Jr. (RESA St. No. 1-SR) on October 1, 2010. The active parties also conducted extensive discovery prior to the hearing and, on October 12, 2010, the ALJs granted RESA's Motion to Permit Access to Joint Applicants' Highly Sensitive Material.<sup>16</sup> Hearings were held on October 12, 2010 through October 15, 2010 at which time all of RESA's testimony was admitted into the record.

On October 25, 2010, the Partial Settlement was filed. RESA is not a signatory party of the Partial Settlement. Rather, as will be discussed further below, RESA opposes the Partial

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<sup>11</sup> Direct Energy, St. 3-SR, at Exhibit FL-1; Direct Energy St. 3 at 12; Direct Energy St. 1 at 9-10; OCA St. 1 at 29.

<sup>12</sup> Secretarial Letter of June 3, 2010 at Docket Nos. A-2010-2176520 and A-2010-2176732.

<sup>13</sup> Scheduling and Briefing Order (dated June 23, 2010).

<sup>14</sup> Scheduling and Briefing Order (dated June 23, 2010).

<sup>15</sup> Order Scheduling Public Input Hearing (dated July 7, 2010).

<sup>16</sup> Tr. at 195.

Settlement because the proposed terms and conditions will not ameliorate or remedy the substantial competitive concerns created by the merger, nor produce any real competitive benefits, much less competitive benefits of a substantial nature.

### III. STATEMENT OF THE QUESTIONS INVOLVED

A. **Should the proposed merger be approved, disapproved or approved with conditions?**

RESA's position is that unless appropriate conditions are imposed as a condition of approval of the merger, the merger must be disapproved. RESA submits that the competitive-related terms contained in the Partial Settlement alone are insufficient to satisfy the anticompetitive and discriminatory concerns raised by this merger and cannot be relied upon as legally sufficient support for approval of the merger.

B. **What conditions should be imposed so that the proposed merger will both (i) affirmatively promote the service, accommodation, convenience, or safety of the public in some substantial way and (ii) ensure that retail electricity customers in this Commonwealth obtain the benefits of a properly functioning and workable competitive retail electricity market?**

In addition to the competitive issues purportedly addressed by the Partial Settlement, the Commission must also impose the following minimum conditions as a pre-requisite to merger approval:

- (1) revise and strengthen the combined companies' code of conduct;
- (2) implement a comprehensive program to inform customers about specific and available retail offers;
- (3) implement a properly structured Purchase of Receivables ("POR") program for the service territory of Allegheny Power and expand the current POR program for Met-Ed, Penelec and Penn Power to large C&I customers;
- (4) prohibit FirstEnergy from implementing its municipal aggregation programs in Pennsylvania until the Commission issues a final adjudication regarding the legality of such programs;



- (5) require that each affiliated company incorporate certain changes in their next default service program filing, including a supplier load cap, so that default service is properly structured to encourage development of the competitive market;
- (6) require that all affiliated companies update and revise their operational rules; and
- (7) require FirstEnergy and Allegheny Power to retain an independent cost allocation expert to audit the companies' cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross subsidies that provide a benefit to either default service or an affiliated retail supplier.

### C. Legal Requirements

Joint Applicants are seeking Commission approval pursuant to Chapters 11 and 28 of the Public Utility Code for a change of control of West Penn and TrAILCo through a merger with FirstEnergy.<sup>17</sup> Before the Commission can approve this application, the Commission is required to find that the proposed transaction is “necessary or proper for the service, accommodation, convenience, or safety of the public.”<sup>18</sup> This standard requires Joint Applicants to demonstrate that the merger will affirmatively promote the service, accommodation, convenience, or safety of the public by creating substantial and affirmative public benefits.<sup>19</sup> According to the Pennsylvania Supreme Court, “competitive impact is a substantial component of a rational net public benefits evaluation in the merger context” and Section 1103(a) gives the Commission the authority to impose just and reasonable conditions to satisfy the public benefit test “even where the Commission finds benefit in the first instance.”<sup>20</sup> Thus, the affirmative public benefits test requires an assessment of the effect on existing and potential competition and whether

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<sup>17</sup> Joint Application dated May 14, 2010 at 1.

<sup>18</sup> 66 Pa. C.S. § 1103(a).

<sup>19</sup> *City of York v. Pa. P.U.C.*, 295 A.2d 825 (Pa. 1972). To ensure that a proposed merger is in the “public interest,” Section 1103 specifically permits the Commission to impose conditions in granting a certificate of public convenience. 66 Pa. C.S. § 1103.

competition will be affirmatively advanced for the benefit of customers and competitive suppliers as a result of the proposed merger.<sup>21</sup>

Because this case involves a proposed merger of four EDCs, Chapter 28 of the Public Utility Code sets forth additional obligations that the Joint Applicants must satisfy and the Commission must analyze. Specifically, the Commission is required to address whether the proposed merger “is likely to result in anticompetitive or discriminatory conduct, including the unlawful exercise of market power, which will prevent retail electricity customers . . . from obtaining the benefits of a properly functioning and workable competitive retail electricity market.”<sup>22</sup> If the Commission finds that the merger as now proposed by the Partial Settlement will prevent retail electricity customers from obtaining the benefits of a properly functioning and workable competitive retail electricity market, then the Commission “shall not approve such proposed merger . . . except upon such terms and conditions as it finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market.”<sup>23</sup>

Taken together, these statutory provisions require the Joint Applicants to bear the burden of proving, by a preponderance of the evidence,<sup>24</sup> that the proposed merger will result in

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<sup>20</sup> *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040, 1056-1057 n. 21 (Pa. 2007).

<sup>21</sup> *See, e.g., Joint Application of Commonwealth Telephone, CTSI, LLC and CT Telecom, LLC*, Docket No. A-310800F0010, et al. (Order entered February 8, 2007); *Joint Application of Verizon Communications, Inc. and MCI, Inc. For Approval of Agreement and Plan of Merger*, Docket No. A-310580F0009, et al. (Order entered January 11, 2006).

<sup>22</sup> 66 Pa. C.S. § 2811(e)(1).

<sup>23</sup> 66 Pa. C.S. § 2811(e)(2) (emphasis added).

<sup>24</sup> The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602, 1990 Pa. Commw LEXIS 402, *alloc. den.*, 602 A.2d 863 (Pa.Cmwlt. 1992); *Se-Ling Hosiery v. Marquies*, 70 A.2d 854 (Pa. 1950). Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence. 2 Pa.C.S. § 704; *Mill v. Pa. P.U.C.*, 447 A.2d 1100 (Pa. Cmwlt. 1982); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa.Cmwlt. 1993). More

customers receiving the benefits of a properly functioning and workable competitive retail market. If the merger as now proposed by the Partial Settlement does not satisfy these statutory standards, then the merger must be rejected unless, approved with conditions to mitigate the anticompetitive and discriminatory impacts.

As discussed further below, the merger as initially proposed did not meet the statutory requirements. As filed, nothing was offered to ensure that the resulting entity – which would impact more than one-third of Pennsylvania’s ratepayers and serve almost 70% of the Commonwealth in terms of square miles<sup>25</sup> – will not “prevent retail electricity customers from obtaining the benefits of a properly functioning and workable competitive retail electricity market” as required by Sections 1103(a) and 2811(e) of the Code. On the contrary, the record in this proceeding is replete with evidence that the combined entity will have ample incentive and opportunity to engage in anticompetitive and discriminatory activity after the merger and the form such anticompetitive behavior will take.

The Partial Settlement contains various proposals for conditions on approval of the merger, but does not change the competition-related deficiencies of the initial filing. Some of the settlement proposals are purportedly intended to “enhance retail competition.”<sup>26</sup> While the Commission’s policy is to promote settlements,<sup>27</sup> such agreements are subject to the same standards of Commission review and approval applicable to the Commission’s issuance of a

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is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk and Western Ry. v. Pa. P.U.C.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa.Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlt. 1984).

<sup>25</sup> RESA St. No. 1 at 6 citing [http://www.puc.state.pa.us/general/consumer\\_ed/pdf/Rate\\_Caps.pdf](http://www.puc.state.pa.us/general/consumer_ed/pdf/Rate_Caps.pdf) and Exh. RJH-1, FirstEnergy Response to Direct Energy Set V-1.

<sup>26</sup> Joint Petition for Partial Settlement at 32-33.

<sup>27</sup> 52 Pa. Code § 5.231(a).

valid adjudication in a fully litigated proceeding.<sup>28</sup> Thus, the settling parties bear the burden of proving, by a preponderance of the evidence, how each Partial Settlement proposed resolution satisfies the merger standards set forth in Section 1103(a) and 2811(e) of the Public Utility Code. The Commission's use of any different standards would violate RESA's due process rights to a decision by an impartial tribunal, based on the evidence.

As discussed below, the Joint Applicants and the settling parties have not met this burden. While the Partial Settlement contains some small steps forward on competitive market issues, the majority of the settlement terms related to competition are either meaningless or merely restate currently imposed obligations on the merger EDCs. Approving the merger conditioned only on the terms set forth in the Partial Settlement will not ameliorate or resolve the concerns raised in the record regarding the combined entity's significant potential for anticompetitive and discriminatory behavior in which, if not adequately addressed, violates the requirements of Sections 1103(a) and 2811(e).

Given the fact that the merger as now proposed by the Partial Settlement does not satisfy the statutory requirements, the competitive market enhancements proposed by RESA, which utilize regulatory policies and programs, to address competitive market concerns are the minimum conditions that must be imposed. RESA also recognizes that Direct Energy has proposed a structural remedy through its retail auction and independent BillCo proposal to

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<sup>28</sup> See, e.g., *Pennsylvania Public Utility Commission v. CS Water and Sewer Assoc.*, 74 Pa. PUC 767 (1991); *Pennsylvania Public Utility Commission v. Philadelphia Electric Co.*, 60 Pa. PUC 1 (1985). 2 Pa. C.S. § 704. In *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636, 660 (Pa.Cmwlth. 2002), *alloc. denied*, 815 A.2d 634 (Pa. 2003), the court raised the question whether fact-finding made to support a non-unanimous settlement is the same as independent adjudication fact-finding. The court concluded it did not need to answer that question because there were no operative facts at issue on appeal. However, where as in this case there are operative facts for the Commission to determine, *ARIPPA* must be read to require that Commission approval of a settlement must comply with the requirements for a valid adjudication.

address the same competitive market concerns identified by RESA and other parties. While RESA's recommendations rely on regulatory conditions to mitigate these competitive market concerns, it is important to note that RESA's recommendations and the Direct Energy proposal both seek to address the same underlying concerns raised by the merger.<sup>29</sup>

**D. The Proposed Merger Does Not Satisfy The Standards the Commission Must Consider For Approval of a Merger of Four Electric Distribution Companies**

Today, many years after the introduction of retail competition in Pennsylvania, there is limited participation in the competitive market in all of the EDC service territories involved in the proposed merger.<sup>30</sup> While the lack of competitive market development has been primarily due to the existence of artificial retail rate caps, generation rate caps in Penn Power's service territory expired in 2006, yet four years later there are only two EGSs making offers to residential customers and, as of July 1, 2010, only 14.8% of residential customers are receiving service from an EGS.<sup>31</sup> As the record shows, there are structural deficiencies present in all four of the merger EDC service territories that inhibit customers' enjoyment of a properly functioning and workable competitive market.<sup>32</sup> If the proposed merger is adopted without any significant corrective conditions imposed, these deficiencies will only be exacerbated – in violation of Sections 1103(a) and 2811(e) of the Code.

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<sup>29</sup> RESA St. No. 1R at 3-4.

<sup>30</sup> See RESA St. No. 1 at 5-6.

<sup>31</sup> Tr. at 916, DE Cross Exam Exh. No. 7, Joint Applicants Exh. FG-1.

<sup>32</sup> These deficiencies include a default service model where all customers remain on default service unless they select an EGS, a default service plan that may be improperly structured to advantage either default service or the EDC's affiliated EGS, and the interdependent relationship between the EDC and the EGS to exchange necessary customer information to facilitate shopping. Direct Energy St. No. 1 at 11-13; Direct Energy St. No. 2; RESA St. No. 1 at 22-24.

First, the proposed merger will reduce the number of competitors in Pennsylvania’s retail electricity market. Second, the transition of Allegheny Power’s billing and customer information system to the FirstEnergy platform almost a year and a half after generation rate caps expire will disrupt the ability of competitive suppliers to provide service. Finally, a significant increase in the combined entity’s market power coupled with its avowed business strategy of market “dominance” will present greater opportunity and greater incentive for post-merger First Energy companies to pursue actions to maximize profit to shareholders, at the risk of consumer welfare and competitive market development in the merged company’s Pennsylvania service territories.

**1. The proposed merger will reduce the number of competitors in Pennsylvania’s retail electricity market.**

Currently, FirstEnergy Solutions (“FES”) is the EGS affiliate of the FirstEnergy companies and Allegheny Energy Supply Company, LLC (“AE Supply”) is the EGS affiliate of Allegheny Power.<sup>33</sup> If the merger is approved, Joint Applicants propose to have FES absorb AE Supply’s retail operations.<sup>34</sup> The result will be to decrease by one the already small number of generation supply EGSs operating in the Commonwealth. The Joint Applicants claim that this is not significant because “AE Supply’s market share is extremely small.”<sup>35</sup> However, Joint Applicants conceded that, absent the merger, there are no structural reasons preventing AE Supply from expanding its competitive market share..<sup>36</sup> Further, as stated by OSBA, the

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<sup>33</sup> Joint Applicants St. No. 4 at 12-15.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.*

<sup>36</sup> Tr. at 669-670.

competition potential of both affiliated EGSs should be of concern to the Commission in evaluating the proposal.<sup>37</sup>

Joint Applicants' proposal to eliminate a viable Pennsylvania EGS is not conducive to fostering the development of a properly functioning and workable competitive market. Further, the Joint Applicants offer nothing to mitigate the impact of eliminating an EGS from the market and, as will be discussed below, reliance on just one affiliated EGS whose market share is substantially composed of customers in the merger EDC service territories creates misaligned incentives for the combined entity to pursue anticompetitive and discriminatory behavior after the merger.

**2. The proposed transition of Allegheny Power's billing and customer information system almost a year and a half after Allegheny Power's generation rate caps expire threatens to disrupt the ability of competitive suppliers to provide service.**

After the merger, Joint Applicants propose to transition Allegheny Power's billing and customer information system to the SAP platform used by the FirstEnergy companies.<sup>38</sup> While the Joint Applicants' claim that this will "improve" the supplier operational support functions of Allegheny Power, they clarified that no such guarantees are possible.<sup>39</sup> Even in the Partial Settlement, all the "competitive improvements" to the Allegheny Power system that Joint Applicants claim will result from the computer system transition are not scheduled to be implemented until "three months following the integration."<sup>40</sup> Such integration will not occur

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<sup>37</sup> OSBA St. No 1 at 17.

<sup>38</sup> Tr. at 364-366; 428.

<sup>39</sup> Tr. 470-471.

<sup>40</sup> Partial Settlement at 16-21, ¶¶39-42, 44-45, 48.

until twelve months after consummation of the merger.<sup>41</sup> If the Commission approves the merger on February 1, 2011, which is the current target date, then the earliest these proffered “competitive improvements” would occur is May 2013 – almost a year and a half after the generation rate caps expire in Allegheny Power’s service territory.

Further, the record demonstrates that on at least one issue, implementation of new rate codes, the current Allegheny Power system provides better supplier service than the FirstEnergy system.<sup>42</sup> Instead of appropriately attempting to address this concern in the Partial Settlement, the Joint Applicants essentially restate their commitment to downgrading Allegheny Power’s current functionality to match that of FirstEnergy.<sup>43</sup> As discussed below in Section B, the Partial Settlement does not address these concerns and, in some circumstances, the end result of the Partial Settlement proposals will be to diminish the supplier services currently provided by the Allegheny Power system.

Thus, transitioning to the FirstEnergy system is likely to result in a decreased ability to provide EDC operational support necessary to support a properly functioning and workable competitive market. The Joint Applicants offer nothing to mitigate the adverse impact of disrupting the core EGS operational support systems of Allegheny Power. Additionally, as will be discussed below, the structure of default service and the interplay of the FirstEnergy EDCs and their EGS affiliate creates misaligned incentives for the combined entity to pursue anticompetitive and discriminatory behavior.

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<sup>41</sup> Tr. at 468.

<sup>42</sup> Tr. at 467-468.

<sup>43</sup> Partial Settlement at ¶ 43.



**3. The proposed merger will consolidate control of a substantial portion of the Pennsylvania retail market in the hands of a single corporate entity, giving it greater opportunity and incentive to pursue actions to maximize profit at the risk of competitive market development.**

More than one-third of Pennsylvania's electric customers (35.6%) are served by the four merger EDCs and their combined service territory covers approximately 70% of the Commonwealth in terms of square miles.<sup>44</sup> The concentrated control of these four entities will have a significant impact on the development of the competitive retail market in terms of both the number of EGSs providing service as well as how the merged EDCs coordinate and share information with the EGSs providing service in their territories, including their affiliate FES. Aside from this indisputable "opportunity" to engage in anticompetitive and discriminatory behavior, the record developed in this proceeding reveals a significant "motive" to do so.

As explained further below, the overall intent of FirstEnergy is to ensure that its EGS-affiliate, FES, essentially becomes an unregulated monopoly provider of generation service to customers in the merger EDC markets.<sup>45</sup> This intent is evident through the undisputed FirstEnergy market "dominance" business strategy of obtaining revenues through FES's: (1) direct sales of generation services to consumers in areas that are geographically proximate to FirstEnergy's generation fleet; (2) supplying generation service to consumers through long-term community or municipal aggregation programs; and (3) supply of generation at wholesale to affiliated-EDCs which is then supplied to consumers through default service.

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<sup>44</sup> RESA St. No. 1 at 6.

<sup>45</sup> RESA St. No. 1 at 10.

**(a) FirstEnergy’s business strategy: direct sales to consumers geographically proximate to FirstEnergy’s generation fleet**

FES controls the electric generation assets of FirstEnergy and, with those assets, sells generation services to retail customers.<sup>46</sup> According to Joint Applicants, “[a]pproximately 75% of [FES’] industrial customers, more than 90 percent of its commercial customers and nearly all of its residential customers are located within its affiliated operating companies service areas.”<sup>47</sup> Based on these numbers, only 35% of FES’s commercial customers and none of its residential customers are located in non-FirstEnergy EDC service territories. With this proposed merger, FirstEnergy intends to continue to focus on acquiring competitive retail generation customers from those distribution customers who are served by FirstEnergy affiliated EDCs.<sup>48</sup> By acquiring Allegheny Power’s generation fleet, FirstEnergy intends to expand the reach of FES’s retail marketing strategy as FES will gain another affiliated EDC service territory in which to market.<sup>49</sup> Due to the expansion of this business strategy into Pennsylvania, its anticompetitive and discriminatory ramifications must be fully understood and fully resolved for the Commission to allow the merger to move forward.

FirstEnergy has argued that its success in EDC-affiliated service territories presents no competitive market concerns because this success is based on geographic proximity to generation assets.<sup>50</sup> This argument does not successfully rebut RESA’s competitive market concerns. To the contrary, the fact that FES controls substantial generation geographically close to affiliated

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<sup>46</sup> Joint Applicants St. No. 1-SR at 3.

<sup>47</sup> Joint Applicants St. No. 4 at 14.

<sup>48</sup> RESA St. No. 1 at 8 citing Exh. RJH-1, FirstEnergy Response to OCA I-1, Attachment FE1-22 (excerpted) at 80.

<sup>49</sup> RESA St. No. 1 at 8 citing Exh. RJH-1, FirstEnergy Response to OCA I-1, Attachment FE1-22 (excerpted) at 80.

EDC service territories is one of the primary reasons why the proposed merger presents heightened competitive market concerns. The merger will result in FES gaining control of even more generation – via the acquisition of Allegheny Power’s fleet – this is geographically close to affiliated EDC areas. While the Choice Act does not prohibit EDCs from owning generation near or in their service territories, it does require the Commission to consider the retail competitive market impacts resulting from the consolidation of two major EDCs. Here, one of the impacts is that Allegheny Power’s generation fleet will now be deployed using the FirstEnergy retail business strategy. Thus, less generation will be available in the wholesale market. It stands to reason that Pennsylvania consumers would be better if the FirstEnergy and Allegheny Power “local” generation output were made more liquidly available, which would result in more competitive retail offers from more retail providers.

Additionally, the record is clear that there are other reasons for FES’s success in affiliated EDC markets. Prior to restructuring, EDCs provided all components of electricity service to all customers in their service territories. Thus, consumers have forged attachments to their EDCs which they may believe they are forced to relinquish if they choose alternative competitive generation suppliers.<sup>51</sup> In addition to creating this “status quo” bias,<sup>52</sup> the historic EDC-customer relationship creates a marketing opportunity for FES to associate itself with the “FirstEnergy” name shared with the EDC<sup>53</sup> to create the misimpression that FES’s competitive generation

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<sup>50</sup> Joint Applicants St. No. 1-SR at 8 [HIGHLY CONFIDENTIAL].

<sup>51</sup> ALJ Weisman eloquently described this phenomena on the record: “But would you agree with me that there is also some part of that that have been PPL customers, their parents were PPL customers, their grandparents were PPL customers, and by God, they're going to be a PPL customer until the day they die? Just like there are Buick men. They're going to drive a Buick from now till hell freezes over, and they don't care if Toyota makes a better car.” Tr. at 844.

<sup>52</sup> Direct Energy St. No. 1 at 11-12.

<sup>53</sup> Direct Energy St. 1-SR at 43-45.

service is somehow “better” (e.g., more reliable) than the generation service provided by another EGS with a name that is unfamiliar to the consumer. While Joint Applicants attempted to downplay this marketing advantage,<sup>54</sup> the record evidence from Joint Applicants’ own publicly available marketing materials makes clear that FES does rely on the “FirstEnergy” name to market its products to retail end-users located in “FirstEnergy” EDC territories.<sup>55</sup> This conclusion is also supported by common sense and the use of the identifying name “FirstEnergy” in “FirstEnergy Solutions.”

When the only EGS providing competitive generation service in a service territory is the affiliate of the EDC in that service territory, then incentive is created to ensure that no other EGS in the market provides generation service in sufficient competition to challenge the affiliated-EGS. This is because the parent company – in this case FirstEnergy – is receiving revenue from the affiliated EGS’s generation service as well as revenue from the affiliated EDC’s default service. Given the necessary dependence of EGSs on the EDCs in terms of fostering a functional and competitive retail market through default service plans and operational procedures, EDCs are perfectly positioned to engage in anticompetitive and discriminatory actions with respect to non-affiliated EGSs in an effort to give affiliated-EGSs a competitive advantage. This type of behavior can take the form of an EDC’s erecting structural barriers in the market, such as imposing operational rules and EDC coordination procedures that make it difficult for competing

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<sup>54</sup> Joint Applicants St. No. 1-SR at 6 (“It is FES’ retail strategy to establish itself as a ‘local brand,’ but a ‘local brand’ **on its own, separate from its affiliated EDCs.**”) (emphasis in original).

<sup>55</sup> RESA St. No. 1 at 8-9 citing Exh. RJH-1, FirstEnergy Response to OCA I-1, Attachment FE1-22 (excerpted) at 75; Joint Applicants St. No. 1-SR, Attach 1 at 75.

suppliers to do business, or an EDC's opposing certain policies that would enhance competition.<sup>56</sup>

Joint Applicants claim that these concerns are simply “a market participant [RESA] trying to hamstring a competitor [FES]” and refer to the Commission’s Code of Conduct as the appropriate way to address them.<sup>57</sup> Despite this claim, Joint Applicants failed to rebut the evidence that they are relying on the “FirstEnergy” brand name to leverage sales for their EGS affiliate and that the FirstEnergy EDCs have an incentive to engage in anticompetitive or discriminatory behavior toward non-affiliated EGSs. Further, as will be discussed more below, the facts of this case make clear that enforcement of the existing Code of Conduct is not enough to ensure that consumers receive the benefit of a fully functioning and workable competitive market: the record shows that the existing Code of Conduct must be strengthened.

**(b) FirstEnergy’s business strategy: supplying generation service to long-term community or municipal aggregation programs**

Other mechanisms FirstEnergy intends to use to increase the revenue received by FES for generation services are long-term community and municipal aggregation programs.<sup>58</sup> This strategy has been successful for FES in Ohio, where FES provides annual payments of \$3-4 million to Ohio municipalities and receives \$900 million to \$1 billion in annual revenue from these municipal aggregation programs – quite a return on investment.<sup>59</sup> Further, just prior to the hearings in this proceeding an announcement was made by the City of Meadville, Pennsylvania

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<sup>56</sup> RESA St. No. 11.

<sup>57</sup> Joint Applicants St. No. 1-SR at 4.

<sup>58</sup> RESA St. No. 1 at 9.

<sup>59</sup> RESA St. No. 1 at 9 citing See Exh. RJH-1, FirstEnergy Response to OCA I-1, Attachment FE1-22 (excerpted) at 76.

that FES would be providing generation services through an opt-out municipal aggregation program for 17 months effective January 1, 2011.<sup>60</sup> While the details of the structure of the municipal aggregation program are unclear because the contract has not yet been signed, the ability of FirstEnergy to utilize such programs to provide an exclusive right to FES to serve such large blocks of customers presents significant concerns regarding the development of a properly functioning and workable competitive market. The right to serve the Meadville aggregation customers was not competitively procured, nor does it appear that any of the other municipalities targeted by FES will competitively bid their aggregation programs.

Concerns about the ability of FirstEnergy to structure and utilize municipal aggregation programs in a way that is inconsistent with fostering a vibrant retail market and the best interest of Pennsylvania ratepayers were raised by both RESA, OSBA, and Constellation.<sup>61</sup> One potential example of such harm is the potential for such programs to lock a large segment of the mass market into a long-term contract with switching restrictions such as cancellation penalties and limited opt-out periods. These restrictions would discourage customers in the opt-out program from shopping and would ensure a practical monopoly for FES. While FirstEnergy has stated that the Meadville program will not impose switching restrictions or early termination penalties on participating customers,<sup>62</sup> it is clear from the enabling ordinance<sup>63</sup> that such restrictions are permitted. There is no guarantee that future programs will not contain such restrictions or penalties and it is unclear where FES will adequately inform Meadville customers

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<sup>60</sup> DE Cross Exam Exh. No. 5.

<sup>61</sup> RESA St. No. 1 at 9-10, RESA St. No. 1-R at 5; OSBA at St. No. 1 at 7-9.

<sup>62</sup> Joint Applicants St. No. 8-SR at 6.

<sup>63</sup> City of Meadville, Crawford County, Pennsylvania, Bill No. 2 of 2010, Ordinance No. 3677 of 2010, enacted October 6, 2010, Article 991.05.b.ii, vii. A copy of this ordinance is attached as Appendix E.

of their limited right to leave the program without penalty. There are significant policy issues and related details associated with adoption of such programs that are currently the subject of legislative constraints.<sup>64</sup>

With the goal of obtaining Commission direction about the legality and design of these programs, RESA recently filed a Petition for Investigation and Issuance of Declaratory Order regarding the propriety of the implementation of municipal electric aggregation programs under present law.<sup>65</sup> Based on publicly available information about these programs, RESA's position is that opt-out municipal aggregation programs are not authorized by law, are being conducted without Commission authorization and in a manner inconsistent with Commission rules, requirements and approved default service programs, and pose a real and significant risk of creating confusion and harm to customers and competitive suppliers. A substantially similar petition was subsequently filed by Dominion Retail, Inc.<sup>66</sup> Until the Commission issues a final adjudication regarding the legality of municipal aggregation programs utilized by FirstEnergy, a condition of approving this merger must be to prohibit FirstEnergy from engaging in such activities.

**(c) FirstEnergy's business strategy: supplying wholesale default supply to its affiliated EDCs**

In addition to providing its generation assets to retail customers through competitive generation service and long-term community or municipal aggregation programs, FES also sells

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<sup>64</sup> Constellation St. No. 1-SR at 9-10, citing House Bill 2619.

<sup>65</sup> Petition filed at Docket P-2010-2207062 on October 28, 2010.

<sup>66</sup> *Petition of Dominion Retail, Inc., for Order Declaring that Opt-Out Municipal Aggregation Programs are Illegal for Home Rule and Other Municipalities in the Absence of Legislation Authorizing Such Programs*, Docket No. P-2010-2207953 filed October 29, 2010.

its wholesale generation to its affiliated EDCs through their default service programs.<sup>67</sup>

Commission-approved default service programs govern how the EDC procures the supply used for default service.<sup>68</sup> The structure of the default service program has a direct impact on whether EGSs are able to provide competitive generation service that is attractive enough for default service customers to switch generation suppliers. If the default service program results in a default service rate that is divorced from the market price of energy, then EGSs will not be able to price competitive offerings and consumers will have no choice but to remain on default service.

There are many components of the default service program that influence the resulting default service rate. Likewise, there are many components of the default service procurement processes that influence the ability of wholesale generation suppliers to win bids to provide default generation supply. For example, FES is in a better position to bid on long-term default service contracts because its generation assets are located close to the loads of its affiliated EDCs.<sup>69</sup>

If, as in this situation, an EDC's parent company receives additional revenue from an affiliated EGS's winning a bid to provide default supply, an incentive is created to structure the default service program of that EDC in a way that is most attractive to the affiliated EGS so as to effectively exclude other bidders and maximize these additional revenues. As will be discussed below, one way to mitigate this potential impact is to implement a load cap regarding the amount

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<sup>67</sup> RESA St. No. 1 at 9 citing RJH-1, FirstEnergy Responses to Direct Energy I-7-9 [**HIGHLY CONFIDENTIAL**] and FirstEnergy Response to OCA I-1, Attachment FEI-22 (excerpted) at 73; Joint Applicants St. No. 1-SR, Exh. AJA-1SR-2 at 46.

<sup>68</sup> 66 Pa. C.S. § 2807(e)(3.1).

<sup>69</sup> RESA St. No. 1 at 11.



of supply that can be served by any single wholesale supplier to ensure that the default service load is being served not only by a FirstEnergy affiliated supplier.<sup>70</sup>

**E. The competitive market enhancements identified by RESA are the minimum conditions that must be imposed to resolve the anticompetitive and discriminatory market impacts of the merger.**

As discussed in the previous section, the structure of default service in combination with FirstEnergy's avowed market "dominance" strategy to maximize revenues through generation services provided by its EGS-affiliate FES together create a significant incentive for the post-merger FirstEnergy EDCs to engage in anticompetitive and discriminatory conduct to prevent customers from enjoying the benefits of a fully functional and workable retail competitive market. While the Partial Settlement purports to address some competitive retail market issues, most of its commitments are either meager or meaningless. At a minimum, the following conditions must be adopted to address competitive market concerns, whether or not the competition-related Partial Settlement proposals are adopted.

**1. Revise and strengthen the combined companies' code of conduct**

Joint Applicants point to the Commission's existing Code of Conduct as the way to address any concerns related to the incentive and opportunity of FirstEnergy EDCs to engage in anticompetitive or discriminatory conduct.<sup>71</sup> However, the current Code of Conduct as written and applied to Joint Applicants is outdated and does not sufficiently address all the issues and concerns that will be present if this merger is approved as now proposed.<sup>72</sup> To address these concerns, the following changes should be mandated.

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<sup>70</sup> RESA St. No. 1 at 21-22.

<sup>71</sup> Joint Applicants St. No. 1-SR at 4.

<sup>72</sup> RESA St. No. 1 at 13-14; RESA St. No. 1-SR at 7-8.

First, the current Code of Conduct requires the employees of an EDC to function independently from other related companies.<sup>73</sup> But the current Code provides no specific guidance on how to achieve functional independence, nor does the Code specifically address shared services, facilities and assets. The combined company could also attain a competitive advantage for default service by misallocating costs between distribution and default service or otherwise failing to fully unbundle all default service related costs from distribution rates. Thus, there needs to be a full unbundling and proper allocation of functions and associated costs. Conditions should be placed on the merger to ensure that affiliated EGSs do not inappropriately benefit from the use of resources shared with its EDC. Second, the current Code of Conduct prohibits illegal tying of services and requires that an affiliated EGS include a disclaimer on communications and marketing materials that utilize its EDC's name or logo.<sup>74</sup> However, the current Code does not directly prohibit certain inappropriate joint marketing activities. Conditions should be placed on the merger to explicitly prohibit joint EDC/EGS marketing, sales and promotional activities. Third, the Code of Conduct should prevent direct or indirect cross-subsidies, such as the use of the EDC for credit support for affiliated EGS sales. Finally, the Commission should establish a market monitor for the merged service territory that would examine the combined companies' business activities and specifically affiliate transactions on a confidential basis to ensure that the EDC is not discriminating in favor of its affiliated EGS.<sup>75</sup>

Aside from restating various regulatory requirements related to financial governance, affiliated relations, and the right of parties to initiate a Commission investigation of the impact

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<sup>73</sup> 52 Pa. Code § 54.122(11).

<sup>74</sup> 52 Pa. Code § 54.122(10).

<sup>75</sup> RESA St. No. 1 at 13-14.

on the proper functioning of a fully competitive retail electricity market in Pennsylvania,<sup>76</sup> the Partial Settlement offers nothing of any substance to mitigate the concerns that a strengthened Code of Conduct as proposed by RESA would resolve.

**2. Implement a comprehensive program to inform customers about specific and available retail offers**

RESA recommends implementation of a comprehensive program to inform customers about specific and available retail offers as a way to educate consumers who have been receiving electricity service from the same EDC, for years and sometimes decades, and to mitigate the anticompetitive and discriminatory effect of FES's attempting to leverage the "FirstEnergy" name and engaging in arguably illegal long-term community and municipal aggregation programs. The Commission has already concluded that the public interest would be served by consideration of what is commonly referred to as customer referral programs.<sup>77</sup> A program for FE will address the hesitancy of residential and small commercial customers to seek out competitive market offerings because they are unsure of or lack awareness of their choices. Under RESA's proposal, the post-merger First Energy EDCs would provide customers with information on specific and available retail offers through a variety of communication channels and facilitate customer enrollment with these offers. Implementation of a customer referral program for the post-merger FirstEnergy EDCs would include the following measures, with the implementation details to be worked out in a collaborative with interested parties, and would ultimately be approved by the Commission:

- Developing updated portions of the FirstEnergy and Allegheny EDC websites with general information on retail choice, and new sections with

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<sup>76</sup> Partial Settlement at ¶¶ 35 (financial governance), 55 (investigation under 66 Pa. C.S. § 2811(b)), 57 (affiliate relations)

<sup>77</sup> 52 Pa. Code § 69.1815.

information on specific and available retail offers currently available from suppliers

- Development and issuance of quarterly bill inserts for all residential and small commercial customers to include information on available competitive offers and details regarding how to enroll in these offers
- Development of a process to inform customers about available competitive offers when customers contact the FirstEnergy or Allegheny customer service call center
- Development of a process to inform customers about available competitive offers when customers initiate new service or move service to a new location, such as including a list of offers and a postage pre-paid enrollment card in new customer packets<sup>78</sup>

In the Partial Settlement, the settling parties propose to address these consumer and competitive market concerns through a commitment by Allegheny Power to send mailing that “introduces” EGS offers to residential and small C&I customers twice during the period after merger consummation and prior to June 1, 2013.<sup>79</sup> Additionally, three months following integration of the FirstEnergy billing system with the Allegheny Power system the settling parties propose to include in all “new customer” welcome packets an insert promoting the Commission’s PAPowerSwitch.com website and the OCA’s Residential Electric Shopping Guide.<sup>80</sup>

Both of these commitments are meager and do not signify any real attempt to address the consumer and competitive market concerns shown on the record.<sup>81</sup> The first commitment merely brings Allegheny Power in line with the commitments made by Met-Ed and Penelec in their default service cases. While RESA is supportive of the commitment by Allegheny Power to issue a mailing introducing retail offers to its customers, this commitment is only a minor

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<sup>78</sup> RESA St. No. 1 at 15-16.

<sup>79</sup> Partial Settlement Petition at ¶ 39.

<sup>80</sup> Petition for Partial Settlement at ¶ 39.

<sup>81</sup> RESA St. No. 1-SR at 9-10.

incremental improvement over existing practices and falls far short of the comprehensive program recommended by RESA.

The second commitment – to include links to the OCA shopping guide and the [www.papowerswitch.com](http://www.papowerswitch.com) websites in a bill insert – merely addresses the bare minimum of what any EDC should do in terms of educating its distribution customers about retail electricity choice. RESA’s recommendation, however, would provide customers with a listing of specific and available retail offers in the customer welcome packets along with information on how to enroll in these offers.

Finally, while the Joint Applicants agree that customers on default service may not understand choice and that knowledge about choice could have some benefit,<sup>82</sup> neither of these commitments provides any substantial and meaningful benefit to consumers about their options. Neither will address the status quo bias nor the concern about use of the “FirstEnergy” name by FES. In contrast, RESA recommends a comprehensive program which will inform customers about specific and available retail offers through a variety of customer communication channels.

### **3. Implement a properly structured Purchase of Receivables program**

One retail market enhancement which attempts to level the playing field between the entrenched monopoly-provider of generation service, the (EDC) and the new market entrant, (the EGS) is a Purchase of Receivables (“POR”) program. Under a POR program, an EGS contracts with a customer to provide generation services at an agreed-to price. The EGS then sells the accounts receivable for its customer to the EDC through the POR program. Typically, the EDC provides this service as part of its consolidated billing program where the customer receives a single bill from the EDC that includes the EDC’s distribution charges and the EGS’s supply

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<sup>82</sup> Tr. at 464.

charges. Because the EDC is assuming the EGS's charges, the EDC maintains the right to terminate service to the customer if he or she fails to pay his or her generation charges, pursuant to the same collection and customer notice procedures that exist with respect to distribution charges.

As the Commission has recognized, a properly structured POR program stimulates competition in several ways that also provide specific benefits to consumers. A POR program creates efficiencies by leveraging existing EDC billing platforms and collections practices. It also keeps competitive suppliers on equal footing with the EDCs in terms of uncollectible costs. In Pennsylvania, this is particularly important because EGSs cannot terminate service for non-payment for their own receivables. Without POR programs, EGSs would be at a competitive disadvantage to EDC default service with respect to uncollectible costs for smaller mass market customers. Therefore, a properly structured POR program helps to level the playing field between an EDC's default service and EGS competitive supply service by reducing barriers to entry and, therefore, plays an important role in helping to achieve the Commonwealth's goal of a fully workable competitive electricity market for the benefit of customers and competitive suppliers.<sup>83</sup>

Given the importance of a POR program and the potential anticompetitive and discriminatory incentives that will be created by this merger, RESA recommends that a POR program for the Joint Applicants include the following features:

- Available only for all accounts billed via the EDC consolidated billing option, with no "all in/ all out" restrictions, so an EGS can simultaneously use dual billing for non-POR customers.
- Includes only receivables associated with basic electricity supply services; non-generation products (such as appliance repair) or renewable or

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<sup>83</sup> RESA St. No. 1 at 17.

alternative energy credits that are not associated with delivered energy should be excluded. However, an EGS could bill a standard green energy product through POR, such as a 50% wind product that includes commodity service bundled with RECs.

- Maintains the current POR payments schedule and format (20 days for commercial customers and 25 days for residential customers).
- Uses a “zero discount” steady state POR discount rate (initially, the discount rate will recover implementation costs only).
- Tracks cost recovery and zeros out the discount when implementation costs are fully recovered from participating EGSs (remaining customers are not charged for implementation costs).
- Provides continued EDC recovery of its uncollectible accounts expense, including uncollectible amounts associated with generation service, in distribution base rates or in an unbundled nonbypassable, non-reconcilable default service support rider that would be submitted as part of the EDC’s next base rate case.
- Change EDC electric retail tariffs to treat payment processing of EGS charges on the same basis as default generation service charges and to clarify termination of service for non-payment of purchased receivables.<sup>84</sup>

The Partial Settlement, does address implementation of a POR program for Allegheny Power.<sup>85</sup> While at a quick glance this may look like a step forward, the record indicates that Allegheny Power was already in the process of proposing to implement a POR program, although the details were still being formulated.<sup>86</sup> In fact, on November 1, 2010, Allegheny Power filed its proposed supplier tariff which contains the details of its proposed POR program.<sup>87</sup> In this tariff filing, Allegheny Power proposes to make its POR program available to all customers.<sup>88</sup> Therefore, the proposed settlement term limiting the Allegheny Power POR

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<sup>84</sup> RESA St. No. 1 at 18.

<sup>85</sup> Partial Settlement at ¶ 45.

<sup>86</sup> Joint Applicants St. No. 8-R at 12-13.

<sup>87</sup> See Docket Number Docket No. R-2010-2207938. A copy of the filing with the proposed tariff is available at <https://www.01.alleghenypower.com/Pennsylvania/EGS%20Tariff%202010-11-01.pdf>.

<sup>88</sup> Supplement No. 6 to Electric-Pa. P.U.C. No 1S, Original Page No. 35, Section 12.4.2.

program to only residential and small commercial customers is a less attractive POR program than what would be implemented without the merger.

**4. Require each affiliated EDC to incorporate certain changes in its next default service program filings so that default service is properly structured to encourage development of the competitive market.**

To address concerns regarding the incentive and ability of the FirstEnergy EDCs to engage in anticompetitive or discriminatory conduct regarding the structure of default service plans, RESA proposed that the following changes be made to the default service plans of the EDCs: (1) a reduction in the C&I customer kW threshold for hourly priced service; (2) incorporation of a larger percentage of spot market supply in the default service procurement mix and introduction of shorter term 3-month contracts; and (3) lowering the amount of supply that can be served by any single wholesale supplier to one-third.<sup>89</sup> Each of these proposals is intended to ensure that the default service programs serve the appropriate function of stimulating robust retail competition for a larger group of customers.

The Partial Settlement addresses default service plans by: (1) agreeing not to harmonize the merger EDC default service procurement plans through May 31, 2013; (2) not prohibiting parties from proposing changes to future default service programs; and (3) agreeing not to oppose any recommendation in the next to require hourly pricing for large C&I customers.<sup>90</sup> None of these provisions provides any commitment of substance.

Regarding the first commitment, existing default service procurement plans for the merger EDCs are already in place and approved, so the commitment not to do anything prior to May 31, 2013 to try to change them is meaningless. Further, given the reliance of the default

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<sup>89</sup> RESA St. No. 1 at 21-22; RESA St. No. 1-SR at 15-16, 18-19.

<sup>90</sup> Partial Settlement at ¶¶32-34.



service procurement plans on long-term contracts and the risk that such long-term contracts could result in a default service rate that is substantially out-of-touch with the market and potentially advantageous to the FirstEnergy EGS affiliate because of the affiliate's ability to submit a bid to procure default service, a commitment to propose no changes may actually be detrimental. The second commitment is already an existing right of any interested party and, therefore, it is meaningless. Finally, given that hourly pricing is planned for the large C&I classes for all EDCs effective January 1, 2011, the commitment not to oppose continuation of this requirement in the next default service program filings is meaningless. In sum, nothing in the Partial Settlement addresses the concerns shown on the record regarding the default service structure of the four merger EDCs nor how such structure could be used in an anticompetitive or discriminatory way to deprive customers of a fully functional and workable competitive retail market.

**5. Require all affiliated EDCs to update and revise their operational rules.**

In order to mitigate concerns regarding the ability of the EDCs to gain a competitive advantage in the retail market through the misuse of EDC-EGS coordination, RESA recommended a number of changes that the Joint Applicants should be required to implement.<sup>91</sup> The Partial Settlement offers some changes. But, there are important operational recommendations made by RESA that are not addressed. For example, RESA sought a commitment that the EDC enrollment confirmation letter should not imply a right of a customer to rescind a contract with an EGS, as rescission is addressed by 52 Pa. Code § 54.5(d)<sup>92</sup> and this is not the purpose of the letter. This is an important competitive market issue as the EGS

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<sup>91</sup> RESA St. No. 1 at 23-26.

enrollment confirmation letter sent by the EDC should not be manipulated by the EDC into an opportunity to try to “win-back” (or keep) the customer or to imply that the customer still has an opportunity to reject or change his or her choice of EGS. The Partial Settlement does not address this important issue. Likewise, while the Partial Settlement requires Allegheny Power to provide interval data via EDI three months after integration into the FirstEnergy SAP system, this commitment does not provide that either Allegheny Power or the other EDCs will provide all historical customer usage information to EGSs without charge.<sup>93</sup>

On the operational issues that the Partial Settlement purports to address, the commitments made by the Joint Applicants either do nothing to mitigate the concern expressed, represent matters that all EDCs are required to do, or include ones that the Joint Applicants would have undertaken without Commission direction in the process of merging the operations of Allegheny Power. For example, RESA made the following proposals for each post-merger EDC:

- (1) Implement monthly operational calls with suppliers to assist with technical and operational issues
- (2) Implement the EDI Advance Notice of Drop transaction to provide EGSs with advance notice prior to an EDC’s termination of service to any EGS customer (including POR customers).
- (3) Provide both current and future transmission and capacity Peak Load Contribution (PLC) factors to suppliers in the 814 enrollment response, in EDI historical usage transactions, and on the eligible customer list; and transmit new PLCs to EGSs for their current set of customers when the new values become available.
- (4) Develop clear procedure for treatment of an EGS customer who moves to another location but wants to continue to be served by the existing EGS (“seamless moves”).
- (5) Develop customer-focused procedure for addressing the variety of situations that may inadvertently result in the customer being dropped to default service as a result of an account attribute change, such as account

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<sup>92</sup> RESA St. No. 1 at 26.

<sup>93</sup> RESA St. No. 1 at 25.

number, tax ID or customer name changes (which the EDC considers to create a new customer, resulting in the “former” but existing EGS customer being dropped from EGS service).<sup>94</sup>

In response, Joint Applicants propose to hold an EGS training session within 30 days after consummation of the merger to address:

- a. Conditions that result in a customer being “dropped” from EGS service to default service;
- b. Outlining the process by which EGSs can obtain the specific load information that is reported to PJM for settlement purposes; and,
- c. Outlining the process utilized to settle after-the-fact adjustments with PJM.<sup>95</sup>

While even one EDC-sponsored training session with EGSs is better than nothing, this proposal has no concrete commitments about how to address the specific operational concerns raised by RESA. At its core, this commitment is basically to have one meeting with EGSs to tell them about how the EDC operates rather than committing to work with the EGSs to improve the EDC’s processes. Likewise, Joint Applicants’ commitment in the Partial Settlement to appoint a retail choice ombudsman for Allegheny Power<sup>96</sup> is not a significant commitment to address the EDC-EGS coordination concerns set forth by RESA.<sup>97</sup> What is needed is a comprehensive commitment by FirstEnergy to work with EGSs in a cooperative manner to address the myriad of operational issues needed to support a vibrant competitive market. The mediocre commitments made in this Partial Settlement are indicative of the apathetic and even antagonistic attitude that FirstEnergy has taken with respect to competitive market issues and supplier support.

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<sup>94</sup> RESA St. No. 1 at 25-26.

<sup>95</sup> Partial Settlement ¶ 46.

<sup>96</sup> Partial Settlement ¶ 43.

<sup>97</sup> RESA St. No. 1 at 23-24; RESA St. No. 1-SR at 20.

RESA also made several recommendations regarding customer enrollment.<sup>98</sup> While the Partial Settlement addresses access to customer data,<sup>99</sup> it offers no incremental improvement over current practices and what “improvements” are offered would not occur until after integration of the computer systems. If the Commission approves the merger on February 1, 2011, which is the current target date, then the earliest these proffered “competitive improvements” would occur is May 2013 – almost a year and a half after the generation rate caps expire in Allegheny Power’s service territory.

Finally, the Partial Settlement introduces additional operation issues such as the structure of the PTC, eligible customer lists, EDI change requests, billing options, and removal of a yet-to-be approved supplier administrative charge.<sup>100</sup> The PTC structure and eligible customer list commitments are already required either by the Commission’s regulations or other pending Commission directives.<sup>101</sup> Likewise, it is RESA’s understanding that Allegheny Power already provides both rate ready and bill ready billing so the commitment to provide “flexible billing options” within three months following the integration provides no incremental benefit. While RESA recognizes that the Partial Settlement contains an incremental improvement in the form of a modified budget billing platform for Allegheny Power, this improvement merely brings Allegheny Power in line with the practices of most other Pennsylvania EDCs.

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<sup>98</sup> Create an interval meter flag that would identify whether an account has an interval or summary meter; the flag would be included in all EDI historical usage requests as well as on the EDI 814 enrollment response; (b) Consistent with recent Commission orders, EDCs should not require an LOA in order to provide historical usage data to licensed EGSs; (c) For interval metered accounts, each EDC should create a process that allows the supplier to elect, at the time of customer enrollment, to receive only summary data if that is the supplier’s preference; and (d) Historic Interval data should be available to EGSs via EDI. RESA St. No. 1 at 25-25: (a).

<sup>99</sup> Partial Settlement ¶ 41.

<sup>100</sup> Partial Settlement ¶¶ 38, 40, 42, 44, 47.

Finally, the Partial Settlement commitment to “discontinue billing EGSs for a Commission-approved supplier administrative charge” is an empty commitment. First, this commitment is only meant to address a charge that was informally proposed by Allegheny Power during a supplier conference. The identified charge does not currently exist and, obviously, has not been approved by the Commission. Second, the settlement commitment is narrowly written to relate to a dollar per MW charge and does not address any other charges. In fact, on November 1, 2010, Allegheny Power filed its proposed supplier tariff which appears to restructure the previously discussed charge into an excessive and unnecessary bill charge assessed on consolidated bills.<sup>102</sup> These types of excessive supplier charges have not been approved for any other EDCs in Pennsylvania and RESA expects that such a proposal would be opposed by EGSs and viewed unfavorably by the Commission.

Viewed holistically and in the context of the opportunity and incentive for the merged EDCs to engage in anticompetitive and discriminatory behavior related to EGS operational support issues, RESA’s proposed operational conditions must be imposed as a condition of approval of the merger. The commitments set forth in the Partial Settlement are not enough to address these issues and cannot be relied upon alone as legally sufficient justification for

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<sup>101</sup> 52 Pa. Code § 54.182 (defines PTC); *See Interim Guidelines For Eligible Customer Lists*, Docket No. M-2010-2183412, Tentative Order entered July 15, 2010.

<sup>102</sup> *See* Docket Number Docket No. R-2010-2207938. A copy of the filing with the proposed tariff is available at <https://www01.alleghenypower.com/Pennsylvania/EGS%20Tariff%202010-11-01.pdf>. Supplement No. 6 to Electric-Pa. P.U.C. No 1S, Original Page No. 56., Section 3. While RESA continues to review the proposed tariff, upon initial review this charge appears excessive. By way of comparison, PECO recovers POR administrative costs through the discount at which it purchases and EGSs receivables. Converting that factor into a per bill charge equates to a \$.20 per bill assessment on EGSs for POR administrative costs. Allegheny Power’s proposed per bill charge is significantly greater.

Commission findings that the merger satisfies the statutory standards applicable to competition related matters.

**6. Require FirstEnergy and Allegheny to retain an independent cost allocation expert to audit the EDCs' cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross-subsidies.**

The Commission's regulations require all generation related costs to be included in the default service rate.<sup>103</sup> Some of these costs include administrative costs such as billing, collection, education, regulatory, litigation, tariff filings, working capital, information system and associated administrative and general expenses related to default service.<sup>104</sup> The purpose for ensuring that all costs associated with the provisioning of default service are included in the default service rate is to prevent the EDC from gaining a competitive advantage by paying for these costs through distribution revenues and, therefore, creating a default service rate that is not market-reflective and against which EGSs cannot compete. Joint Applicants conceded that billing costs as well as other management services are not included in the default service rate.<sup>105</sup>

Similarly, the allocation of company-wide costs to FES is also important because company-wide costs related to FES should be assigned to FES otherwise FES is able rely on distribution revenues to lower its costs of doing business to create a competitive advantage. Regarding the allocation of company-wide costs to FES, Joint Applicants maintained that "a large portion" of costs are directly allocated to FES and that there is no "indirect" cost assignment of company-wide costs to FES.<sup>106</sup>

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<sup>103</sup> 52 Pa. Code § 69.1808.

<sup>104</sup> 52 Pa. Code § 69.1808.

<sup>105</sup> Tr. at 517-518.

<sup>106</sup> Tr. at 514-515; RESA Cross Exam Exh. No. 2.

As the record is clear that the FirstEnergy companies may not be properly allocating to default service customers and FES their share of the costs and such misallocation is against Commission policy and may be used to gain an improper advantage, RESA recommends that the Commission order an independent cost allocation and affiliate relationship audit to mitigate concerns regarding the ability and incentive of the combined entity to misallocate costs between and among the affiliated companies, or to bundle default service costs with distribution rates to advantage the EDCs (through default service) or the affiliated-EGS.<sup>107</sup> The Commission should require Joint Applicants to retain the services of an independent audit firm with experience in regulated utility cost allocation matters as they pertain to competitive market issues. This independent auditor would be selected by the Commission. The auditor would initiate an investigation into the existing relationships between and among the FirstEnergy EDCs and the FirstEnergy unregulated businesses, and the Allegheny Power EDC and the affiliated Allegheny Energy unregulated businesses.<sup>108</sup>

The purpose of the audit would be to identify the extent to which the unregulated businesses receive cost advantages or cross subsidies, either directly or indirectly, as a result of their affiliate relationship with Pennsylvania EDCs. The audit would also examine the EDCs' allocation of costs between distribution service and default service and would provide

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<sup>107</sup> RESA St. No. 1 at 26; RESA St. No. 1-SR at 3-5.

<sup>108</sup> RESA's recommended audit is similar to the one recommended by RESA and approved by the Commission as part of the Duquesne/Macquarie Merger. *Applications of Duquesne Light Company and DQE Communications Network Services LLC for Certificates of Public Convenience Under Section 1102(a)(3) of the Public Utility Code Approving the Acquisition of Duquesne Light Holdings, Inc. by Merger*, Docket Nos. A-110150F0035, A-311233F0002, Order entered April 24, 2007, Ordering Paragraph No. 3; Joint Petition for Settlement, Part II, Paragraph 10, Section J. Competitive Markets, Subsection 2, pages 14-18.

recommendations for further unbundling of default service costs.<sup>109</sup> This audit should cover the last three years (2008, 2009 and 2010), and the Commission should impose appropriate additional conditions on the merger as necessary based on the audit results. The independent auditor should also be required to submit a follow-up report one year after closure of the merger with findings on the combined companies compliance with any conditions imposed as a result of the audit. This process will provide the necessary transparency and assurances to the market that the proposed merger will not create competitive advantages or result in anticompetitive conduct on the part of the combined company.<sup>110</sup>

RESA's proposal also addresses concerns raised by OSBA and OCA about the need to implement ring-fencing measures to ensure that a regulated public utility business financially separates itself from a parent company that engages in a non-regulated business.<sup>111</sup> Appropriate ring-fencing provisions can prevent the cross subsidization of unregulated businesses through regulated resources and assets which is essential to a successful, competitive market.<sup>112</sup> An independent cost allocation and affiliate relationship audit would allow parties to gather

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<sup>109</sup> RESA recognizes that it was a signatory to the Met-Ed and Penelec default service settlement in which RESA agreed that it would not petition the Commission for further unbundling of default service costs from distribution rates. RESA's position in this case is not at odds with its agreement to join the default service settlement. The default service settlement only involved Met-Ed and Penelec. This proceeding involves two additional EDCs that are not covered by the settlement. Additionally, RESA's recommendation here is merely to have an independent auditor make recommendations regarding further unbundling. Any action to effectuate further unbundling for Met-Ed and Penelec could take place in their next distribution rate cases consistent with the default service settlement.

<sup>110</sup> RESA St. No. 1 at 26-27.

<sup>111</sup> OCA St. No. 1 at 24, OSBA St. No. 1 at 27-28.

<sup>112</sup> RESA St. No. 1-R at 7.



necessary information about existing affiliate relationships and cost allocation practices to identify the need to implement any additional ring-fencing measures that may be necessary.<sup>113</sup>

The Partial Settlement does not offer any provisions to address these concerns.

**7. Other provisions of the Partial Settlement do not address competitive retail market concerns.**

In addition to the provisions discussed in the preceding pages, the Partial Settlement proposes that the merger EDCs contract with “credit worthy industrial customers to purchase SPAECs.”<sup>114</sup> This provision unnecessarily discriminates in favor of “credit worthy industrial customers” rather than permitting the EDCs to purchase SPAECs through a competitive procurement process that is open to any qualified “credit worthy” entity.

**IV. CONCLUSION**

For all the reasons set forth above, the market that would result from approval of this merger without conditions (or with the conditions proposed by the recently filed Joint Petition for Partial Settlement) will not be a properly functioning and workable competitive retail electricity market as required by the Public Utility Code. At a minimum, the following competitive market enhancements proposed by RESA must be implemented:

- (1) revise and strengthen the combined companies' code of conduct;
- (2) implement a comprehensive program to inform customers about specific and available retail offers;
- (3) implement a properly structured Purchase of Receivables ("POR") program for the service territory of Allegheny Power and expand the current POR program for Met-Ed, Penelec and Penn Power to large C&I customers;

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<sup>113</sup> RESA St. No. 1-R at 8.

<sup>114</sup> Partial Settlement at ¶ 26.

- (4) prohibit FirstEnergy from implementing its municipal aggregation programs in Pennsylvania until the Commission issues a final adjudication regarding the legality of such programs;
- (5) require that each affiliated company incorporate certain changes in their next default service program filing, including a supplier load cap, so that default service is properly structured to encourage development of the competitive market;
- (6) require that all affiliated companies update and revise their operational rules; and
- (7) require FirstEnergy and Allegheny Power to retain an independent cost allocation expert to audit the companies' cost allocation practices and affiliate relationships to identify and remove any direct or indirect cross subsidies that provide a benefit to either default service or an affiliated retail supplier.

Without the imposition of these meaningful and substantial conditions to provide customers with a properly functioning and workable competitive market, the merger must be rejected.

Respectfully submitted,



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## Appendix A

### RESA's Positions on Directed Questions

**1. How will the merger impact employment levels in Pennsylvania, particularly, but not limited to, those employees not covered by collective bargaining agreements? What will the impact be on Allegheny Energy's corporate headquarters in Greensburg, PA, as well as the operating companies' offices?**

This question is primarily directed to the Applicants. RESA has not formed as to the impact of the proposed merger on employment levels in Pennsylvania. To the extent there is a concern as to the potential of the merger to adversely impact employment levels in Pennsylvania, RESA's proposed competitive market enhancements can serve as a mechanism for potentially mitigating this impact. The development of a robust competitive retail market will attract investment in Pennsylvania by EGSs, brokers, consultants, third party service providers, and other entities active in the competitive industry. Already the competitive landscape in Pennsylvania has attracted significant investment with several competitive providers establishing offices in the Commonwealth. Therefore, the adoption of the retail market enhancements discussed above will serve to promote growth in a new industry that will help mitigate any potential adverse impacts on employment levels resulting from the merger..

**2. How will the merger affect the customer service and system reliability of West Penn Power and the FirstEnergy Pennsylvania utilities? How will the merger affect West Penn Power and the FirstEnergy Pennsylvania utilities ability to respond to outages and other emergencies?**

Absent the specific mitigation measures discussed above, the proposed merger has the significant potential to adversely impact customer service for the FirstEnergy and Allegheny Power service territories. In Pennsylvania, EDCs provide essential services related to the proper functioning of the competitive retail market. EDCs control all customer meter data that EGSs require in order to price, enroll and service customers. EDCs control Electronic Data Exchange transactions that ultimately impact the customer enrollment process. EDCs provide essential billing services for competitive suppliers, such as consolidated billing. These services are effectively customer service functions provided by the EDC to enable ratepayers to exercise their legislatively mandated right to receive electric generation service from a competitive supplier. As discussed above, numerous operational improvements are needed to ensure a properly functioning competitive market. Thus, the proposed merger must include commitments regarding these operational improvements in order to prevent adverse impacts on customer service standards.

**3. Review the impact of the initially proposed corporate structure of the merger versus the alternately proposed corporate structure. Which corporate structure will better protect the public interest?**

This question is primarily directed to the Applicants and RESA has not formed an opinion on these issues.

**4. What, if any, ring-fencing mechanisms are presently in place, or proposed as part of this transaction, to protect West Penn Power, Met-Ed, Penn Power, and Penelec from the business and financial risk of the parent and other non-regulated affiliates? Are any changes or additions necessary to better protect the public interest and make the regulated electric distribution subsidiaries bankruptcy remote?**

RESA is recommending two mitigation measures that would address concerns related to affiliate relationships: an enhanced Code of Conduct for Applicants and conditioning the merger on the results of an independent audit of Applicants' affiliate relationships and cost allocation practices.

**5. How will the merger impact the Act 129 smart meter and energy efficiency implementation plans of West Penn Power and FirstEnergy's regulated utilities, Met-Ed, Penelec and Penn Power?**

This question is primarily directed to the Applicants. RESA has not formed an opinion on these issues.

**6. How will the merger affect the capital structure of FirstEnergy Corporation? Will the merger create a more leveraged organization? How will the proposed merger impact the credit rating of FirstEnergy?**

This question is primarily directed to the Applicants. RESA has not formed an opinion on these issues.

**7. Will West Penn Power and the other Allegheny Energy subsidiaries that currently issue their own debt maintain their own external borrowing authority and separate bond rating?**

This question is primarily directed to the Applicants. RESA has not formed an opinion on these issues.

**8. Will West Penn Power participate in the FirstEnergy Utility money pool? If, yes, please provide an updated agreement.**

This question is primarily directed to the Applicants. RESA has not formed an opinion on these issues.

**9. How will the proposed merger savings benefit Pennsylvania ratepayers? Will cost savings benefit ratepayers or only shareholders?**

This question is primarily directed to the Applicants. RESA has not formed an opinion on these issues.

**10. Are the proposed affiliated interest agreements and cost allocation proposals reasonable and consistent with the public interest under Section 2102(b) of the Public Utility Code?**

As discussed in testimony RESA is recommending two mitigation measures that would address concerns related to affiliate relationships: an enhanced Code of Conduct for Applicants and conditioning the merger on the results of an independent audit of Applicants' affiliate relationships and cost allocation practices.

**11. Investigate the impact the proposed merger may have on the potential for anticompetitive behavior per 66 Pa. C.S. § 2811(e)(1). How will the merger affect wholesale and retail competition for power/electric generation and transmission?**

As discussed in detail in its main brief, RESA's position is that the proposed merger creates the incentive and opportunity for the combined entity to engage in anticompetitive and discriminatory behavior. The exercise of such power could lead the FirstEnergy affiliated EDCs to create advantages in favor of the FirstEnergy affiliated EGS in both the ability of the affiliated EGS to submit bids to provide generation for default service customers and to provide generation service directly to retail customers. The conditions in the Partial Settlement purporting to address these concerns are not significant and will not ameliorate the concerns raised by this merger.

**12. How will transmission projects in the western part of the state be affected by the merger?**

This question is primarily directed to the Applicants. RESA has not formed an opinion on these issues at this time, but reserves the right to respond to the positions of the Applicants and others.

## **Appendix B**

### **Proposed Findings of Fact**

1. The Retail Energy Supply Association (RESA) consists of EGSs that provide competitive generation services to consumers across the country and in those service territories in Pennsylvania where generation rate caps have been removed. RESA St. No. 1 at 2.

2. RESA's members include ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; NextEra Energy Services; PPL EnergyPlus; Reliant Energy Northeast LLC; Noble Americas Energy Solutions, LLC. RESA St. No. 1 at 2. (Note this list has been updated to reflect new members as well as company name changes effectuated after the filing of testimony in this proceeding.)

3. All RESA members share a common interest in the creation of vibrant and sustainable competitive retail energy markets where competitive retailers, not regulated utilities, provide retail electric service to consumers. RESA St. No. 1 at 2.

4. RESA's comments expressed in this proceeding represent the position of RESA as an organization but may not represent the views of any particular member of RESA. RESA St. No. 1 at 2.

5. More than one-third of Pennsylvania's electric customers (35.6%) are served by the four merger EDCs and their combined service territory covers approximately 70% of the Commonwealth in terms of square miles. RESA St. No. 1 at 6.

6. While the lack of competitive market development in the merger EDC service territories has been due primarily to the existence of artificial retail rate caps, generation rate caps in Penn Power's service territory expired in 2006, yet four years later there are only two EGSs making offers to residential customers and, as of July 1, 2010, only 14.8% of residential customers are receiving service from an EGS. Tr. at 916, DE Cross Exam Exh. No. 7, Joint Applicants Exh. FG-1.

7. There are structural deficiencies present in all four of the merger EDC service territories that will prevent customers' enjoyment of a properly functioning and workable competitive market post-merger unless conditions are imposed to address these deficiencies. These deficiencies include a default service model where all customers remain on default service unless they select an EGS, a default service plan that may be improperly structured to advantage either default service or the EDC's affiliated EGS, and the interdependent relationship between the EDC and the EGS to exchange necessary customer information to facilitate shopping. Direct Energy St. No. 1 at 11-13; Direct Energy St. No. 2; RESA St. No. 1 at 22-24.

8. FirstEnergy Solutions ("FES") is the EGS affiliate of the FirstEnergy companies and Allegheny Energy Supply Company, LLC ("AE Supply") is the EGS affiliate of Allegheny Power. St. No. 4 at 12-15.

9. Joint Applicants propose to have FES absorb AE Supply's retail operations after the merger. Joint Applicants St. No. 4 at 12-13.

10. Absent the merger, there are no structural reasons preventing AE Supply from expanding its competitive market share. Tr. at 669-670.

11. Joint Applicants propose to transition Allegheny Power's billing and customer information system to the SAP platform used by the FirstEnergy companies, but integration will not occur until twelve months after consummation of the merger. Tr. at 364-366; 428.

12. Joint Applicants' claim that the integration of Allegheny Power's billing and customer information system to the SAP platform used by the FirstEnergy companies will improve the supplier operational support functions of Allegheny Power but cannot guarantee this result. Tr. at 470-71.

13. On at least one issue, implementation of new rate codes, the current Allegheny Power system provides better supplier service than the FirstEnergy system. Tr. at 468.

14. The overall intent of FirstEnergy's post-merger business strategy is to ensure that its EGS-affiliate, FES, essentially becomes an unregulated monopoly provider of generation service to customers in the post-merger EDC markets. RESA St. No. 1 at 10.

15. FES controls the electric generation assets of FirstEnergy and, with those assets, sells generation services to retail customers. Joint Applicants St. No. 1-SR at 3.

16. Approximately 75% of FES's industrial customers, more than 90 percent of its commercial customers and nearly all of its residential customers are located within its affiliated operating companies service areas. Joint Applicants St. No. 4 at 14.

17. After the merger FirstEnergy intends to continue to focus on acquiring competitive retail generation customers from those distribution customers who are served by FirstEnergy affiliated EDCs. RESA St. No. 1 at 8 citing Exh. RJH-1, FirstEnergy Response to OCA I-1, Attachment FE1-22 (excerpted) at 80.

18. By acquiring Allegheny Power's generation fleet, FirstEnergy intends to expand the reach of FES's ability to acquire competitive retail generation customers from the Allegheny



Power distribution customers who will be newly acquired FirstEnergy affiliated EDC customers. RESA St. No. 1 at 8 citing Exh. RJH-1, FirstEnergy Response to OCA I-1, Attachment FE1-22 (excerpted) at 80.

19. Prior to restructuring, EDCs provided all components of electricity service to all customers in their service territories, such that consumers have forged attachments to their EDCs which they may believe they are forced to relinquish if they choose an alternative competitive generation supplier. Tr. at 844.

20. The historic EDC-customer relationship creates a marketing opportunity for FES to associate itself with the “FirstEnergy” name shared with its affiliated EDC. Direct Energy St. 1-SR at 43-45.

21. FES relies on the “FirstEnergy” name to market its products to retail end-users located in “FirstEnergy” EDC territories. RESA St. No. 1 at 8-9 citing Exh. RJH-1, FirstEnergy Response to OCA I-1, Attachment FE1-22 (excerpted) at 75; Joint Applicants St. No. 1-SR, Attach 1 at 75.

22. Given the necessary dependence of EGSs on the EDCs in terms of fostering a functional and competitive retail market through default service plans and operational procedures, EDCs are perfectly positioned to engage in anticompetitive and discriminatory actions with respect to non-affiliated EGSs in an effort to give affiliated-EGSs a competitive advantage. This type of behavior can take the form of an EDC’s erecting structural barriers in the market, such as imposing operational rules and EDC coordination procedures that make it difficult for competing suppliers to do business, or an EDC’s opposing certain policies that would enhance competition. RESA St. No. 11.

23. Other mechanisms FirstEnergy intends to use to increase the revenue received by FES for generation services are long-term community and municipal aggregation programs. RESA St. No. 1 at 9.

24. FES has received approval from the City of Meadville to provide generation services through a municipal aggregation program for 17 months beginning January 1, 2011. DE Cross Exam Exh. No. 5.

25. While FirstEnergy has stated that the Meadville program will not impose switching restrictions or early termination penalties on participating customers, it is clear from the enabling ordinance that such restrictions are permitted. Joint Applicants St. No. 8-SR at 6; City of Meadville, Crawford County, Pennsylvania, Bill No. 2 of 2010, Ordinance No. 3677 of 2010, enacted October 6, 2010, Article 991.05.b.ii, vii. A copy of this ordinance is attached as Appendix E.

26. There are significant policy issues and related details associated with adoption of such programs that are currently the subject of legislative constraints. Constellation St. No. 1-SR at 9-10, citing House Bill 2619.

27. With the goal of obtaining Commission direction about the legality and design of these programs, RESA recently filed a Petition for Investigation and Issuance of Declaratory Order regarding the propriety of the implementation of municipal electric aggregation programs under present law. Petition filed at Docket P-2010-2207062 on October 28, 2010.

28. FES also sells its wholesale generation to its affiliated EDCs through their default service programs. RESA St. No. 1 at 9 citing RJH-1, FirstEnergy Responses to Direct Energy I-7-9 [HIGHLY CONFIDENTIAL] and FirstEnergy Response to OCA I-1, Attachment FEI-22 (excerpted) at 73; Joint Applicants St. No. 1-SR, Exh. AJA-1SR-2 at 46.

29. There are many components of the default service procurement processes that influence the ability of wholesale generation suppliers to win bids to provide the default generation supply. For example, FES is in a better position to bid on long-term default service contracts because its generation assets are located close to the loads of its affiliated EDCs. RESA St. No. 1 at 11, RESA St. No. 1-SR at 14.

30. The current Code of Conduct as written and applied to Joint Applicants is outdated and does not sufficiently address all the issues and concerns that will be present if this merger is approved as now proposed. RESA St. No. 1 at 13-14; RESA St. No. 1-SR.

31. Aside from restating various regulatory requirements related to financial governance, affiliated relations, and the right of parties to initiate a Commission investigation of the impact on the proper functioning of a fully competitive retail electricity market in Pennsylvania, the Partial Settlement offers nothing of any substance to mitigate the concerns that a strengthened Code of Conduct as proposed by RESA would resolve. Partial Settlement at ¶¶ 35 (financial governance), 55 (investigation under 66 Pa. C.S. § 2811(b)), 57 (affiliate relations).

32. The Partial Settlement commitments regarding consumer education are meager and do not signify any real attempt to address the consumer and competitive market concerns shown on the record. RESA St. No. 1-SR at 9-10.

33. Joint Applicants agree that customers on default service may not understand choice and that knowledge about choice could have some benefit. Tr. at 464.

34. A comprehensive consumer education program for FirstEnergy will address the hesitancy of residential and small commercial customers to seek out competitive market offerings because they are unsure of or lack awareness of their choices. RESA St. No. 1 at 13-14.

35. A properly structured Purchase of Receivables (POR) program helps to level the playing field between an EDC's default service and EGS competitive supply service by reducing barriers to entry and, therefore, plays an important role in helping to achieve the Commonwealth's goal of a fully workable competitive electricity market. RESA St. No. 1 at 17.

36. Allegheny Power was already in the process of proposing to implement a POR program during this proceeding, although the details were still being formulated. Joint Applicants St. No. 8-R at 12-13.

37. A properly structured POR program will provide the necessary transparency and assurances to the market that the proposed merger will not create competitive advantages or result in anticompetitive or discriminatory conduct on the part of the combined company. RESA St. No. 1 at 26-27.

38. While the Partial Settlement does address implementation of a POR program for Allegheny Power, the limitation of the program to residential and small commercial customers is a less attractive POR program than Allegheny has recently proposed in its recent supplier tariff filing. Partial Settlement at ¶ 45. Supplement No. 6 to Electric-Pa. P.U.C. No. 1S, Original Page No. 35, Section 12.4.2.

39. In order to mitigate concerns regarding the ability of the EDCs to gain a competitive advantage in the retail market through the misuse of EDC-EGS coordination, RESA recommended a number of changes that the Joint Applicants should be required to implement. The Partial Settlement offers some changes. But, there are important operational recommendations made by RESA that are not addressed. RESA St. No. 1 at 23-26.

40. On the operational issues that the Partial Settlement purports to address, the commitments made by the Joint Applicants either do nothing to mitigate the concern expressed,

represent matters that all EDCs are required to do, or include ones that the Joint Applicants would have undertaken without Commission direction in the process of merging the operations of Allegheny Power.

41. Joint Applicants' commitment in the Partial Settlement to appoint a retail choice ombudsman for Allegheny Power is not a significant commitment to address the EDC-EGS coordination concerns set forth by RESA. Partial Settlement ¶ 43; RESA St. No. 1 at 23-24; RESA St. No. 1-SR at 20.

42. While the Partial Settlement addresses access to customer data, it offers no incremental improvement over current practices and what "improvements" are offered would not occur until after integration of the computer systems. If the Commission approves the merger on February 1, 2011, which is the current target date, then the earliest these proffered "competitive improvements" would occur is May 2013 – almost a year and a half after the generation rate caps expire in Allegheny Power's service territory. Partial Settlement ¶ 41.

43. The Partial Settlement commitment to "discontinue billing EGSs for a Commission-approved supplier administrative charge" is an empty commitment. First, this commitment is only meant to address a charge that was informally proposed by Allegheny Power during a supplier conference. The identified charge does not currently exist and, obviously, has not been approved by the Commission. Second, the settlement commitment is narrowly written to relate to a dollar per MW charge and does not address any other charges. In fact, on November 1, 2010, Allegheny Power filed its proposed supplier tariff which appears to restructure the previously discussed charge into an excessive and unnecessary bill charge assessed on consolidated bills. *See* Docket Number Docket No. R-2010-2207938. A copy of the filing with the proposed tariff is available at <https://www01.alleghenypower.com/>

Pennsylvania/EGS%20Tariff%202010-11-01.pdf. Supplement No. 6 to Electric-Pa. P.U.C. No 1S, Original Page No. 56., Section 3.

44. The purpose for ensuring that all costs associated with the provisioning of default service are included in the default service rate is to prevent the EDC from gaining a competitive advantage by paying for these costs through distribution revenues and, therefore, creating a default service rate that is not market-reflective and against which EGSs cannot compete. 52 Pa. Code § 69.1808.

45. Joint Applicants conceded that billing costs as well as other management services are not included in the default service rate. Tr. at 517-518.

46. The allocation of company-wide costs to FES is also important because company-wide costs related to FES should be assigned to FES otherwise FES is able rely on distribution revenues to lower its costs of doing business to create a competitive advantage. Regarding the allocation of company-wide costs to FES, Joint Applicants maintained that “a large portion” of costs are directly allocated to FES and that there is no “indirect” cost assignment of company-wide costs to FES. Tr. at 514-515; RESA Cross Exam Exh. No. 2.

47. As the record is clear that the FirstEnergy companies may not be properly allocating to default service customers and FES their share of the costs and such misallocation is against Commission policy and may be used to gain an improper advantage. Therefore, the Commission must order an independent cost allocation and affiliate relationship audit to mitigate concerns regarding the ability and incentive of the combined entity to misallocate costs between and among the affiliated companies, or to bundle default service costs with distribution rates to advantage the EDCs (through default service) or the affiliated-EGS. RESA St. No. 1 at 26; RESA St. No. 1-SR at 3-5.

48. Appropriate ring-fencing provisions can prevent the cross subsidization of unregulated businesses through regulated resources and assets which is essential to a successful, competitive market. An independent cost allocation and affiliate relationship audit would allow parties to gather necessary information about existing affiliate relationships and cost allocation practices to identify the need to implement any additional ring-fencing measures that may be necessary. RESA St. No. 1-R at 7; RESA St. No. 1-R at 8.

49. The Partial Settlement proposes that the merger EDCs contract with “credit worthy industrial customers to purchase SPAECs” unnecessarily discriminates in favor of “credit worthy industrial customers” rather than permitting the EDCs to purchase SPAECs through a competitive procurement process that is open to any qualified “credit worthy” entity. Partial Settlement at ¶ 26.

## Appendix C

### Proposed Conclusions of Law

1. To approve the proposed merger, Pennsylvania law requires the Commission to find that the merger will not prevent customers from receiving the benefits of a properly functioning and workable competitive retail generation market. 66 Pa. C.S. § 2811(e)(1).

2. Joint Applicants have the burden of proving by a preponderance of the evidence that the merger will result in customers receiving the benefits of a properly functioning and workable competitive retail generation market. 2 Pa.C.S. § 704; 66 Pa. C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, *alloc. den.*, 602 A.2d 863 (Pa.Cmwlth. 1992); *Selling Hosiery v. Marquies*, 70 A.2d 854 (Pa. 1950); *Mill v. Pa. P.U.C.*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transportation Corp. v. Pa. P.U.C.*, 623 A.2d 6 (Pa.Cmwlth. 1993). *Norfolk and Western Ry. v. Pa. P.U.C.*, 413 A.2d 1037 (Pa. 1980); *Erie Resistor Corp. v. Unemployment Compensation Bd. of Review*, 166 A.2d 96 (Pa.Super. 1960); *Murphy v. Commonwealth, Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa.Cmwlth. 1984).

3. Joint Applicants have failed to meet their burden of proof.

4. Pennsylvania law prohibits the Commission from approving a merger that will prevent customers from receiving the benefits of a properly functioning and workable competitive retail generation market, unless the Commission imposes terms and conditions the Commission finds necessary to preserve the benefits of a properly functioning and workable competitive retail electricity market. 66 Pa. C.S. § 2811(e)(2).

5. Partial Settlement agreements are subject to the same standards of Commission review and approval applicable to the Commission's issuance of a valid adjudication in a fully



litigated proceeding. 2 Pa. C.S. § 704; *Pennsylvania Pa. P.U.C. v. C S Water and Sewer Assoc.*, 74 Pa. PUC 767 (1991); *Pa. P.U.C. v. Philadelphia Electric Co.*, 60 Pa. PUC 1 (1985); *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636, 660 (Pa.Cmwlth. 2002), *alloc. denied*, 2003 Pa. LEXIS 34.

6. The market that would result from approval of this merger without conditions to address the merger's anticompetitive and discriminatory impacts, or with only the competition-related conditions proposed by the Joint Petition for Partial Settlement, will not be a properly functioning and workable competitive retail generation market.

7. The structure of default service in combination with FirstEnergy's avowed market dominance strategy to maximize revenues through generation services provided by its EGS-affiliate FES together create a significant incentive for the post-merger FirstEnergy EDCs to engage in anticompetitive and discriminatory conduct to hinder the development of a fully functional and workable retail competitive market.

8. The imposition of RESA's proposals as conditions for merger approval is necessary to provide and preserve the benefits of a properly functioning and workable competitive retail electricity market after the merger in the service territories of the merger EDCs.

9. The Commission has concluded that the public interest would be served by consideration of customer referral programs. 52 Pa. Code § 69.1815.

10. The Commission has concluded that the public interest is served by implementation of properly structured Purchase of Receivables (POR) programs. 52 Pa. Code § 64.1814.

11. The Commission has concluded that default service rates should include all costs related to providing default service, including costs such as billing, collection, education,

regulatory, litigation, tariff filings, working capital, information systems and associated administrative and general expenses related to default service. 52 Pa. Code § 69.1808.

## **Appendix D**

### **Proposed Ordering Paragraphs**

THEREFORE,

IT IS ORDERED:

1. That the Joint Application of West Penn Power Company d/b/a Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for Certificate of Public Convenience under Section 1102(a)(3) of the Public Utility Code approving a change in control of West Penn Power Company and Trans-Allegheny Interstate Line Company filed at Docket Nos. A-2010-2176520 and A-2010-2176732 on May 14, 2010, is hereby granted, subject to compliance with the following conditions:

- a. That each merger EDC shall revise and strengthen its Code of Conduct consistent with the discussion above and RESA's proposal.
- b. That each merger EDC shall implement a comprehensive customer referral program consistent with the discussion above and RESA's proposal.
- c. That FirstEnergy shall implement a Purchase of Receivables ("POR") program for the service territory of Allegheny Power and expand the current Met-Ed, Penelec, and Penn Power POR programs to large C&I customers consistent with the discussion above and RESA's proposal.
- d. That FirstEnergy is prohibited from implementing its municipal aggregation programs in Pennsylvania until the Commission issues a final adjudication regarding the legality of such programs.
- e. That each merger EDC shall incorporate changes in its next default service program filing consistent with the discussion above and RESA's proposal.
- f. That each merger EDC shall update and revise its operational rules consistent with the discussion above and RESA's proposal.
- g. That FirstEnergy shall retain an independent cost allocation expert to audit each merger EDC's cost allocation practices and affiliate relationships consistent with the discussion above and RESA's proposal.

h. That the Joint Applicants shall file a written acceptance of the conditions set forth in this Order within thirty (30) days of its entry.

2. That the Joint Petition for Partial Settlement filed on October 25, 2010, is hereby denied as inconsistent with the public interest and Section 2811(e) of the Public Utility Code.

3. That upon compliance with Ordering Paragraph 1, above, a certificate of public convenience be issued evidencing the Commission's approval of the Joint Application at Docket Nos. A-2010-2176520 and A-2010-2176732, and the record at these docket numbers be then marked closed.

**Appendix E**

**City of Meadville, Ordinance No. 3677 of 2010**

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Bill No. 3 of 2010  
Ordinance No. 3677 of 2010

CITY OF MEADVILLE  
CRAWFORD COUNTY, PENNSYLVANIA

AN ORDINANCE OF THE CITY OF MEADVILLE, CRAWFORD COUNTY, PENNSYLVANIA TO ADD A NEW ARTICLE 991 TO PART 9, THE STREETS, UTILITIES, AND PUBLIC SERVICES CODE OF THE MEADVILLE MUNICIPAL CODE, WHICH ARTICLE SHALL BE NAMED THE MUNICIPAL ENERGY AGGREGATION PROGRAM, TO AUTHORIZE ALL ACTIONS NECESSARY TO EFFECT A MUNICIPAL ENERGY AGGREGATION PROGRAM WITH OPT-OUT PROVISIONS FOR THE MUNICIPAL AGGREGATION OF ELECTRIC GENERATION SUPPLY TO CERTAIN CONSUMERS OF ELECTRICITY WITHIN THE BOUNDARIES OF THE CITY OF MEADVILLE

*WHEREAS*, the City of Meadville is governed by the Optional Third Class City Charter Law under which the City of Meadville is given substantial powers of local self-government consistent with the Constitution of the Commonwealth of Pennsylvania; and

*WHEREAS*, Municipal Energy Aggregation Programs provide an opportunity for certain eligible residential and small commercial consumers to participate collectively in the benefits of electricity deregulation through lower electricity rates which may not otherwise be available to those electric consumers individually; and

*WHEREAS*, FirstEnergy Solutions Corp. has offered to contract with the City of Meadville to supply electricity through a Municipal Energy Aggregation Program for the period of January 1, 2011 through May 31, 2012 for certain residential and small commercial consumers if the City were to adopt such a Program; and

*WHEREAS*, the City Council finds that certain eligible residential and small commercial electric consumers within the City of Meadville should receive savings on their electric service rate as a result of adoption of a Municipal Energy Aggregation Plan; and

*WHEREAS*, the adoption of the Municipal Energy Aggregation Program by the City of Meadville is not prohibited by Commonwealth statute or the Constitution of the Commonwealth of Pennsylvania; and

**WHEREAS**, the adoption of the Municipal Energy Aggregation Program by the City of Meadville will not mandate participation in the Municipal Energy Aggregation Program, but will provide this service on an opt-out basis.

**NOW THEREFORE, BE IT ORDAINED AND ENACTED** by the City Council of the City of Meadville, as follows:

**Section 1.** The Meadville Municipal Code of the City of Meadville, Part 9 (Streets, Utilities and Public Services Code) is hereby supplemented by adding new Article 991 entitled Municipal Energy Aggregation Program to read as follows:

**Article 991**  
**Municipal Energy Aggregation Program**

**991.01 Municipal Energy Aggregation Program Established.**

There is hereby created and existing in the City of Meadville a Municipal Energy Aggregation Program which is established in accordance with applicable provisions of law to provide the opportunity for eligible end-use electric customers in the City of Meadville to receive electrical service at rates more favorable than those provided to individual customers who do not participate in the Energy Aggregation Program.

**991.02 Definitions.**

- a. *"Contracted Electrical Generation Supplier"* means the entity with which the City of Meadville has contracted through the Municipal Energy Aggregation Program to provide a supply of electricity.
- b. *"Excluded Customers"* means electricity consumers within the City of Meadville (1) that have opted out of the City of Meadville Municipal Aggregation Program pursuant to the provisions of 991.05 below; (2) that have a special contract or agreement with an electric distribution company; (3) other than residential consumers who are classified as retail electric consumers or small commercial consumers which are under a small commercial, small industrial or small business rate classification, and whose maximum registered peak load was less than 25 kW with the last twelve (12) months; (4) that are enrolled in an electric distribution company's customer assistance program that does not include any electric generation supplier charges in the calculation of the customer assistance program benefit; or (5) that are end-use consumers served or authorized to be served by an electric cooperative.

- 
- c. *"Municipal Energy Aggregation"* means the aggregation of residential consumers who are classified as retail electric consumers within the City of Meadville and small commercial consumers within the City of Meadville which are under a small commercial, small industrial or small business rate classification, and whose maximum registered peak load was less than 25 kW within the last twelve (12) months.
  - d. *"Municipal Energy Aggregation Program"* means the Program hereby adopted as implemented by a contract with a Contracted Electrical Generation Supplier which provides a supply of electricity to certain residential and small commercial electricity consumers within the City of Meadville on an Opt-Out basis.
  - e. *"Non-Excluded Consumer"* means an end-use electric customer within the City of Meadville which or who is not an Excluded Consumer.
  - f. Other terms defined in this Article or as adopted in applicable legislation are incorporated by reference.

#### **991.03 Municipal Energy Aggregation Program Hereby Authorized.**

Under the Municipal Energy Program hereby authorized, the City of Meadville is authorized to grant by contract, an exclusive right to a Contracted Electrical Generation Supplier to provide electrical service to end-use electric customers within the City of Meadville who are not Excluded Customers and who do not Opt-Out of the Program.

Consistent with the broad powers granted the City under the Optional Third Class City Charter Law, and by reason of the uniqueness of the Program and the fact that City funds are not expended for the service or the administration of the service to its residents, it is hereby determined that competitive procurement for the contract for implementation of the Program is not required.

Upon the effective date of a contract entered into by the City of Meadville with an Electrical Generation Supplier for the supply of electric to eligible Non-Excluded Consumers in accordance with the City of Meadville's Municipal Energy Aggregation Program, all Non-Excluded Consumers shall be supplied with and shall be obligated to receive electric generation supply pursuant to and in accordance with the Municipal Energy Aggregation Program hereby established.



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#### 991.04 Municipal Energy Aggregation Program Requirements.

- a. The proper officials of the City of Meadville are hereby authorized to enter into a contract without competitive bidding, with an Electric Generation Supplier for the provision of electric generation supply to Non-Excluded Consumers within the City of Meadville on an opt-out basis.
- b. The contract shall, at a minimum, clearly indicate the price that the Contracted Electrical Generation Supplier will charge Non-Excluded Consumers for electric generation supply as well as the term of the contract. If the price is a fixed rate, the price shall be expressed in cents per kilowatt hour. If the contract provides for a percentage-off of the default service rate, or any other type of pricing arrangement, an understandable description of the amount of the percentage discount, or other pricing arrangement, and how the rate may change shall be provided. If the Contracted Electrical Generation Supplier will charge different rates to different rate classes within the City of Meadville, the applicable rate(s) to Non-Excluded Consumers within each rate class shall be described.
- c. No Non-Excluded Consumer shall be bound by a contract until at least thirty (30) days following the mailing of the opt-out notices required by 991.05 below, and the expiration of any waiting period for a consumer to cancel the pending change to the electric generation supplier following written confirmation by Contracted Electrical Generation Supplier.
- d. The Contracted Electrical Generation Supplier may not impose any terms, conditions, fees, or charges on any consumer served by a Municipal Aggregation Program that is materially different from the particular term, condition, fee, or charge which was included within the contract between the City of Meadville and the Contracted Electrical Generation Supplier or the notices provided pursuant to this section.
- e. The Contracted Electrical Generation Supplier shall provide appropriate consumer education materials to inform consumers about the existence of the Municipal Aggregation Program and the highlights of the program at no cost to the City of Meadville.
- f. In the event a final determination shall be made by a court of competent jurisdiction or the Public Utility Commission that cities organized under the Pennsylvania Option Third Class City Charter Law do not have authority to implement a Municipal Energy Aggregation Program for any reason, the contract shall be

terminable upon notice by the City of Meadville and shall provide for such termination without liability of the City of Meadville or participating electric consumers.

**991.05 Opt-Out Program.**

- a. The Municipal Energy Aggregation Program shall be offered on an opt-out basis.
- b. After the City of Meadville executes a contract for electric generation services with the Contracted Electrical Generation Supplier, but prior to including a consumer's electric account or accounts in the Municipal Aggregation Program, the Contracted Electrical Generation Supplier shall provide each consumer with written notice that the consumer's account(s) will be automatically included in the Municipal Aggregation Program unless the consumer affirmatively opts out of the Municipal Aggregation Program. The notice, written in plain language, shall, at a minimum, include:
  - i. Disclosure of the price that the Contracted Electrical Generation Supplier will charge Non-Excluded Consumers for electric generation service.
  - ii. An itemized list and explanation of all fees and charges that are not incorporated into the rates charges for electric generation services that the Contracted Electrical Generation Supplier will charge to the Non-Excluded Consumer for participating in the Municipal Aggregation Program, including any early termination penalties and any surcharges, or portions thereof, that may be assessed.
  - iii. Disclosure of the estimated service commencement date and notice that the Non-Excluded Consumer may opt out of the Municipal Aggregation Program at the end of the term of the contract with the Contracted Electrical Generation Supplier and prior to the commencement of any subsequent municipal aggregation contract.
  - iv. A statement informing consumers that if they choose to opt out of the Municipal Aggregation Program they will be served by the default service provider until the consumer chooses an alternative electrical generation supplier.

- v. A statement informing Non-Excluded Consumers that, if they switch back to the default service provider, they may not be served under the same rates, terms, and conditions that apply to other Non-Excluded Consumers within the Municipal Aggregation Program.
- vi. Disclosure of any credit, collection and/or deposit policies and requirements.
- vii. Disclosure of any limitations or conditions on consumer acceptance into the Municipal Aggregation Program, including the date by which the consumer must affirmatively opt-out of the program. The date shall not be less than thirty (30) days following the mailing of the opt-out notice.
- viii. A description of the process and associated time period for consumers to opt out of the Municipal Aggregation Program.
- ix. A local or toll free telephone number, with the available calling hours, that consumers may call with questions regarding the formation or operation of the Contracted Electrical Generation Supplier.

**Section 2. *Effective Date.***

The provisions of this Ordinance shall become effective at 12:01 a.m., prevailing time, on the 21<sup>st</sup> day after the date of final passage and enactment.

**Section 3. *Severability.***

If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Ordinance which can be given effect without the invalid provision or application, and for this purpose the provisions of this ordinance are declared severable.

**Section 4. *Repealer.***

All ordinances and parts of ordinances inconsistent herewith are hereby repealed.

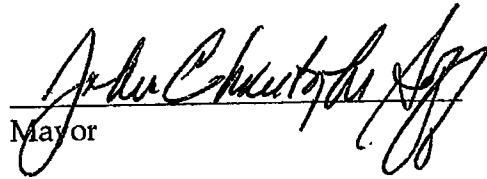
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Introduced This 22nd day of September, A.D., 2010

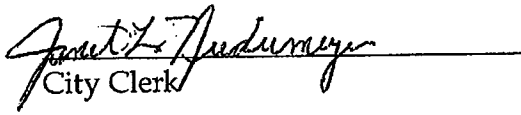
Second Reading This 22nd day of September, 2010

Finally Passed and Enacted This 6th day of October, 2010

CITY OF MEADVILLE

  
\_\_\_\_\_  
Mayor

Attest:

  
\_\_\_\_\_  
City Clerk