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November 15, 2010

VIA FEDERAL EXPRESS

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
P.O. Box 3265
Harrisburg, PA 17120

Re: Joint Application of West Penn Power Company doing business as Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience Under Section 1102(A)(3) of the Public Utility Code Approving a Change of Control of West Penn Power Company and Trans-Allegheny Interstate Line Company, Docket Nos. A-2010-2176520, A-2010-2176732

Dear Secretary Chiavetta:

Enclosed for filing are an original and nine copies of the **Reply Brief Of Joint Applicants West Penn Power Company, Trans-Allegheny Interstate Line Company, and FirstEnergy Corp.** in the above-captioned matter. A copy of the Reply Brief in searchable PDF format is also enclosed. As evidenced by the attached Certificate of Service, a copy of the Reply Brief is being served upon Administrative Law Judges Wayne L. Weismandel and Mary D. Long and all parties.

Pursuant to 52 Pa. Code § 1.11(2), the enclosed Reply Brief shall be deemed filed on the date shown on the express delivery receipt attached to the delivery envelope.

Please date-stamp the extra copy of the Reply Brief and this letter which we have enclosed and return to us in the envelope provided.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

Kenneth M. Kulak

KMK/ap
Enclosures

c: Per Certificate of Service

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November 15, 2010

VIA FEDERAL EXPRESS

Honorable Wayne L. Weismandel
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Honorable Mary D. Long
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Re: Joint Application of West Penn Power Company doing business as Allegheny Power, Trans-Allegheny Interstate Line Company and FirstEnergy Corp. for a Certificate of Public Convenience Under Section 1102(A)(3) of the Public Utility Code Approving a Change of Control of West Penn Power Company and Trans-Allegheny Interstate Line Company, Docket Nos. A-2010-2176520, A-2010-2176732

Dear Judge Weismandel and Judge Long:

Enclosed please find copies of the **Reply Brief Of Joint Applicants West Penn Power Company, Trans-Allegheny Interstate Line Company And FirstEnergy Corp.,** in the above-referenced matter.

As indicated in the transmittal letter to Secretary Chiavetta and the accompanying Certificate of Service, which are also enclosed, the Reply Brief has been filed with the Public Utility Commission and served on all parties. Separately, we are transmitting a copy of the Reply Brief in Microsoft Word format to you by electronic mail.

Very truly yours,

Kenneth M. Kulak

KMK/tp
Enclosures
cc: All parties of record

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JOINT APPLICATION OF WEST PENN POWER COMPANY doing business as ALLEGHENY POWER, TRANS-ALLEGHENY INTERSTATE LINE COMPANY AND FIRSTENERGY CORP. FOR A CERTIFICATE OF PUBLIC CONVENIENCE UNDER SECTION 1102(A)(3) OF THE PUBLIC UTILITY CODE APPROVING A CHANGE OF CONTROL OF WEST PENN POWER COMPANY AND TRANS-ALLEGHENY INTERSTATE LINE COMPANY	:	**DOCKET NOS. A-2010-2176520** **A-2010-2176732**

CERTIFICATE OF SERVICE

I hereby certify and affirm that I have this day served a copy of the **Reply Brief Of Joint Applicants West Penn Power Company, Trans-Allegheny Interstate Line Company, And FirstEnergy Corp.** on the following persons in the matter specified in accordance with the requirements of 52 Pa. Code § 1.54:

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

JOINT APPLICATION OF WEST PENN POWER COMPANY doing business as ALLEGHENY POWER, TRANS-ALLEGHENY INTERSTATE LINE COMPANY AND FIRSTENERGY CORP. FOR A CERTIFICATE OF PUBLIC CONVENIENCE UNDER SECTION 1102(A)(3) OF THE PUBLIC UTILITY CODE APPROVING A CHANGE OF CONTROL OF WEST PENN POWER COMPANY AND TRANS-ALLEGHENY INTERSTATE LINE COMPANY	:	**DOCKET NOS. A-2010-2176520** **A-2010-2176732**

REPLY BRIEF OF JOINT APPLICANTS WEST PENN POWER COMPANY, TRANS-ALLEGHENY INTERSTATE LINE COMPANY AND FIRSTENERGY CORP.

Before Administrative Law Judges
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I. INTRODUCTION

West Penn Power Company ("West Penn"), doing business as Allegheny Power, Trans-Allegheny Interstate Line Company ("TrAILCo") and FirstEnergy Corp. ("FirstEnergy") (collectively, the "Joint Applicants") file this Reply Brief in response to the Main Briefs submitted by Direct Energy Services, LLC ("Direct Energy" or "Direct"), the Retail Energy Supply Association ("RESA"), the Office of Small Business Advocate ("OSBA") and Citizen Power, Inc. ("Citizen Power"). In its Main Brief, Direct Energy continues to advocate that the Pennsylvania Public Utility Commission ("PUC" or the "Commission") fundamentally restructure Pennsylvania's default service model. Additionally, Direct Energy and Citizen Power, in their respective Main Briefs, express concerns about wholesale market power. In the portion of the OSBA's Main Brief to which the Joint Applicants will respond, the OSBA argues that the Commission should attach conditions to its approval of the Merger to limit the ability of FirstEnergy Solutions Corp. ("FES") to contract with municipalities that lawfully adopt "opt-out" municipal aggregation programs.[1] RESA and Direct Energy also press for the adoption of so-called "enhancements" that allegedly would promote retail competition.

To a very large extent, the arguments advanced by Direct Energy, RESA, the OSBA and Citizen Power in their respective briefs were fully addressed in the Joint Applicants' Initial Brief filed on November 3, 2010, and, therefore, an extensive reanalysis is not necessary. However, as an aid to the Administrative Law Judges ("ALJs"), this Reply Brief will revisit certain key areas of disagreement and respond to material errors and misstatements in the non-settling parties' briefs.

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[1] In its Main Brief (pp. 43-66), the OSBA also opposes both Direct Energy's default service proposal and RESA's proposed retail market "enhancements." As to these issues, the OSBA and the Joint Applicants are in agreement.

In addition to responding to the non-settling parties, the Joint Applicants wish to briefly address here the smart meter provisions of the Settlement because the Pennsylvania Department of Environmental Protection's ("DEP") Statement in Support of the Joint Petition for Partial Settlement could be misinterpreted. Specifically, DEP states that "[t]he Settlement gives a firm target for substantially complete deployment in all four electric distribution companies' territories by the end of 2018. This is a substantial acceleration over the current approved plan for the FirstEnergy companies and is in line with the recent settlement filed in the West Penn smart meter proceeding (October 20, 2010; Docket No. M-2009-2123951)." DEP Statement of Support, p. 4. In fact, the Settlement permits deployment schedules to be recommended that provide for "substantially complete deployment" by end dates other than 2018, provided only that a cost-benefit analysis of such deployment must be performed and submitted. *See* Settlement, ¶ 23 ("As part of the implementation and deployment plans for the Smart [M]eter [Technology Procurement and Installation] . . . Plan ('SMIP'), in addition to any other deployment schedule Met-Ed, Penelec, Penn Power and West Penn (the 'post-merger FirstEnergy EDCs') may submit, the implementation and deployment plan shall include a cost/benefit analysis for deployment of smart meters to at least 90% of the EDCs' customers no later than December 31, 2018.").

II. ARGUMENT

A. Opposing Parties' Comments Concerning The Applicable Legal Standard Are Erroneous And Should Be Disregarded

1. The Criticism Of Non-Unanimous Settlements Implied By The OSBA's Discussion Of The Legal Standard Is Totally Inapplicable To This Case, Where The OSBA And Other Non-Settling Parties Have Been Afforded Full Due Process Rights Of Presenting Evidence, Cross-Examining Witnesses And Briefing The Contested Issues

At pages 10-11 of its Main Brief, the OSBA discusses "non-unanimous settlements" including alleged criticisms thereof by the Commonwealth Court of Pennsylvania in *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636, 658-661 (Pa. Cmwlth. 2002).[2] The OSBA seems to imply that the settling parties expect the Commission to apply different and less rigorous evidentiary criteria for determining if Sections 1103(a) and 2811(e) of the Public Utility Code have been satisfied, along the lines of the more relaxed standards criticized in the law review article quoted in *ARIPPA*: "[C]ommissions shift the burden of proof to the non-consenting parties by forcing them to prove the unreasonableness of the settlement." Obviously, that is not the case here.

The Joint Applicants envision that the Commission will make an independent determination as to whether the Merger, as described in the Joint Application and supplemented by the terms of the Joint Petition, satisfies applicable legal standards based on substantial evidence contained in the record in this case. While the additional benefits generated by the terms of the Settlement and the wide array of stakeholder support represented by the eighteen signatories certainly should be carefully considered by the Commission and given due weight in

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[2] Significantly, the non-unanimous settlement at issue in *ARIPPA* was entered in a rate case, and the subject of the Court's musings in its *dicta* in that case all dealt with rate-related settlements, as evidenced by its quotation from S. H. Krieger's law review article titled *Problems For Captive Ratepayers In Nonunanimous Settlements Of Public Utility Rate Cases*, 12 Yale Journal on Regulation 257 (1995).

this process, the Joint Applicants do not contend that the existence of the Settlement in any way short-circuits the Commission's independent review and adjudication described above.

This case was fully litigated, and all parties – including the non-settling parties – have been given a full and fair opportunity to present evidence, cross-examine witnesses and submit briefs on all contested issues. The OSBA availed itself fully of these opportunities. As to the only two narrow issues that the OSBA continues to contest,[3] there will be an independent adjudication by the Commission without any hint of the "pre-ordained outcome" that troubled the Court in *ARIPPA*, where the entire settlement process took place under the aegis of a "Commission-facilitated 'collaborative.'" *See* 792 A.2d at 650. Simply stated, the non-settling parties have been afforded due process rights that are precisely the same as if the Settlement did not exist. Accordingly, the OSBA's suggestion that the existence of the Settlement should, in some undefined way, cloud the Commission's consideration of the issues in this case is without merit and should be disregarded.

2. RESA And Direct Energy Misstate The Law In Contending That The Merger Cannot Be Approved Absent A Finding That The Merger Will Produce Affirmative "Benefits" For "Competitive Suppliers" And "Advance . . . Competitive Opportunities"

Apparently singing from the same hymnal, RESA and Direct Energy contend that the Pennsylvania Supreme Court, in *Popowsky v. Pa. P.U.C.*, 937 A.2d 1040, 1056-57 (2007), dramatically altered the "affirmative benefit" standard articulated in *City of York*[4] by imputing a requirement that combinations of public utilities should not be approved absent a finding that "competition will be advanced for the benefit of customers *and competitive suppliers* . . ."

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[3] Notably, the OSBA conceded that the Settlement will produce "affirmative benefits," but contends that all of those benefits would be "outweighed" by the "harm" that allegedly would result if its "conditions" on municipal aggregation were not adopted (OSBA Main Brief, p. 13).

[4] *City of York vs. Pa. P.U.C.*, 449 Pa. 136, 295 A.2d 825 (1972).

(RESA Main Brief, p. 8; emphasis added) or, in Direct Energy's formulation, the transaction is "shown to affirmatively advance competitive markets, or *competitive opportunities*"(Direct Energy Main Brief, pp. 16-17; emphasis added). *Popowsky* says nothing remotely like the propositions for which RESA and Direct Energy have cited it.

In *Popowsky*, the merger benefits for customers of Commission-regulated services were modest and, in fact, for that reason, the Commonwealth Court believed that the *City of York* standard had not been satisfied.[5] Verizon and MCI contended – and the Administrative Law Judge and the Commission found – that the merger would enhance the range of "competitive" (i.e., non-regulated) services that the combined company could provide.[6] However, the parties opposing the merger, including the OCA, argued that the benefits customers would receive from expanding the array of competitive services should not be considered under the *City of York* test. The Pennsylvania Supreme Court rejected that argument. Within this context, the Court stated that the Commission could consider "competitive" benefits in applying the *City of York* test.[7] However, contrary to RESA's and Direct's contentions, the Court did **not** revise the *City of York* standard to **require** a finding of "competitive" benefits, as the Court make clear in the full discussion of this point, from which RESA and Direct quoted only in part:

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5 *See* 937 A.2d at 1050: "As a result, the Commonwealth Court majority expressed a concern that none of the substantial synergy savings resulting from the Verizon/MCI merger would flow through to consumers."

6 *See e.g.* 937 A.2d at 1046: "The ALJ found that a combined company with these assets and strengths will have the essential infrastructure to offer innovative, high-speed data and video services via a fiber-optic network and to deploy mobile IP devices, permitting customer applications and data to be accessed from any location, free from the previous availability of access only from fixed workstations. *See* 2006 Pa. PUC LEXIS 22, 2006 WL 995853, at *61, *67."

7 *See* 937 A.2d 1058. "Indeed, even from a lay perspective, bearing in mind today's technological advances affecting all segments of business and personal life, there is much force to the Commission's conclusion that a combination of Verizon's and MCI's assets and strengths has substantial potential to create an integrated infrastructure supporting delivery of innovative, high-speed data and video services via the fiber-optic network, as well as deployment of mobile devices freeing workers from fixed workstations. *See Initial Decision*, 2006 Pa. PUC LEXIS 22, 2006 WL 995853, at *61, *67."

> We also differ with the OCA's suggestion that the PUC's analysis of the effect of the Verizon/MCI merger on competition is immaterial to its assessment of public benefit. In line with the DOJ and FCC assessments, competitive impact is a substantial component of a rational net public benefits evaluation in the merger context. That the ultimate determination may be that the impact is modest, minimal, or non-existent does not negate the necessity of undertaking the examination in the first instance or remove the factor from the weighing and balancing process.

In summary, there is no legal requirement to find affirmative "competitive" benefits as a condition precedent to approving the Merger, as RESA and Direct erroneously contend.

B. Direct Energy's Attempt To Dismantle Pennsylvania's Default Service Model Should Be Rejected

In their Initial Brief (pp. 36-59), the Joint Applicants explained at length and in detail why Direct Energy's attempt to dismantle Pennsylvania's default service model was contrary to law, totally unsupported by substantial evidence and inconsistent with sound public policy. Not surprisingly, the Office of Consumer Advocate ("OCA") and OSBA, both of which also presented extensive testimony in opposition to the Direct Energy Plan, similarly concluded that Direct's recommended merger conditions were not in the best interests of customers or the Commonwealth as a whole (OCA Main Brief, pp. 9-43; OSBA Main Brief, pp. 43-62).[8]

Rather than confronting the numerous legal and factual flaws in its Plan that were pointed out in pleadings, responsive testimony and at hearing, Direct apparently decided to play "rope-a-dope" in its Main Brief. Indeed, nowhere in the 64 pages of text and 288 footnotes that it submitted on November 3, 2010 does Direct specifically acknowledge the participation of Mr. Schnitzer or Mr. Graves or Ms. Alexander or Mr. Hahn or Mr. Knecht, each of whom submitted rebuttal testimony that was extremely critical of Direct's proposals. Nor, for that matter, does

[8] Notably, Direct did not propose to auction off industrial customers. If it had, MEIUG/PICA and the WPPII no doubt would have vehemently objected to the Direct Energy Plan as well.

Direct make any effort to address the various errors and inconsistencies that were uncovered during the cross-examination of Ms. Brownell, Mr. Lacey and Dr. Morey.

There are two possible explanations for Direct's silence – either Direct has concluded that it has no defense to the various objections that were leveled against its Plan or, as would seem more likely, it made the tactical decision to keep is powder dry until its Reply Brief. If Direct elected the latter course, any arguments that could have and should have been presented in its Main Brief should be disregarded. The Commission and the Appellate Courts have long frowned on such "sandbagging" because it effectively denies other parties an opportunity to respond. *See, e.g., Park v. Chronister*, 617 A.2d 863, 871 (1992) ("It is not the purpose of a reply brief to remedy a discussion of issues presented in an appellant's brief that is so poorly developed as to preclude meaningful appellate review.").[9]

If Direct Energy had been content to simply ignore the evidence submitted by other parties, the Joint Applicants' reply could end here. Unfortunately, Direct repeatedly mischaracterizes the evidence that it does discuss and, in the process, creates further uncertainty and confusion as to the specifics of its Plan. As demonstrated hereinafter, this pattern is so pervasive as to seriously call into question Direct's credibility. First, however, some comments regarding Direct's commitment to retail competition are in order.

1. Direct Does Not Want To Compete For Customers Unless It Can Do So On Its Own Terms

Direct opens its Main Brief with a comment from Mr. Evanson in which, as he later explained, Mr. Evanson was simply expressing his hope that Allegheny would become part of one of the largest regulated utilities in Pennsylvania (Direct Energy Main Brief, p. 1; Tr. 313).

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[9] *See also Petition of PPL Elec. Util. Corp. For Approval Of A Competitive Bridge Plan,* Docket No. P-00062227, 2007 Pa. PUC LEXIS 38 (May 17, 2007) (striking Reply Brief).

Direct then proceeds, over the next 40 pages or so, to try to convince the Commission that approval of the Merger will somehow sound the death knell for retail competition in Pennsylvania. Thus, it is variously asserted that the Merger will provide the combined entity the ability "to dominate what competition will develop" (p. 3) and "to impose prices that are higher than they would be if a full competitive market with many buyers and sellers" existed (p. 28). Needless to say, none of this is true, much less proven.

Citing documents that FirstEnergy submitted as part of the Hart-Scott-Rodino review process, Direct contends that FirstEnergy plans to use the Merger to launch a three-pronged strategy to achieve market "dominance" through direct retail sales, participation in wholesale default service auctions and municipal aggregation. To that end, much is made of FirstEnergy's success in attracting customers in Ohio; of Mr. Alexander's acknowledgement that it is FirstEnergy's goal to achieve a "significant market share" in Pennsylvania; and of FirstEnergy's intention to use Allegheny's generation assets, in concert with its own, to implement its sales strategy. Direct then makes the quantum – and entirely unsupported – leap to conclude that the Merger will allow FirstEnergy to "exploit" its EDCs' status as default service providers to block the development of a "workable competitive market."

Direct's Main Brief may make for interesting reading, but, noticeably, leaves out a few key facts. First, as indicated by Mr. Alexander (Jt. App. St. 1-SR, p. 6), FirstEnergy's three-pronged sales strategy was developed long before FirstEnergy and Allegheny began serious merger talks. Second, FirstEnergy's ability to attract retail, wholesale or municipal aggregation customers will depend entirely on how it prices its services. If FES can beat the default service rate offered by EDCs or the prices bid by other wholesalers in DSP auctions, it will succeed. And that is precisely how the system is supposed to operate.

Moreover, Direct's purported concerns over FirstEnergy's sales strategy are disingenuous and cannot be given serious consideration. For example, Direct criticizes FirstEnergy's acquisition of Allegheny's generating facilities even though it is actively pursuing the purchase of generation to support its own marketing efforts. *See* Exhibit AJA-1SR-3 (excerpts of Centrica plc/Direct Energy March 12, 2010 Capital Markets Presentation), pp. 48, 54 & 66. Similarly, while Direct claims that FirstEnergy may have an unfair advantage in terms of "brand" recognition, its parent, Centrica, was not reluctant to buy incumbent EDC brand names when the opportunity presented itself in Texas (Tr. 799; Jt. App. Cross-Exam. Ex. 10). Finally, Direct complains about "status quo bias" and the need for "many sellers." Yet, in the Pike County service territory, where the Commission allowed Direct to aggregate customers, Direct unquestionably has been the beneficiary of "status quo bias," holding onto nearly 78% of the customers initially assigned to it and "dominating" a market in which it apparently is the only EGS serving residential customers (Direct Energy Cross-Exam. Ex. 8; Jt. App. St. 10-R, p. 16).[10]

In the final analysis, the dispute that has played out in this proceeding between FirstEnergy and Direct can be traced to markedly different corporate philosophies. As Mr. Alexander's cross-examination made abundantly clear, FirstEnergy embraces competition at both the wholesale and retail levels. In contrast, Direct only wants to compete if it can do so on its own terms and without making a meaningful investment to attract and maintain customers. Or, as the OCA aptly wrote:

> DE wishes to procure large groups of customers with little marketing effort or expenditure. An auction process for all current default service customers is uniquely suited to this purpose. The OCA submits, however, that the DE Proposal is not well suited to

[10] Ironically, but perhaps not surprisingly given Direct's success there, Ms. Brownell opined that Pike County represented the "end state" for retail competition in Pennsylvania (Direct Energy St. 2, p. 9).

> being fair to current default service customers or giving customers an affirmative choice, which is what the Electricity Generation Customer Choice and Competition Act was all about -- allowing customers to choose for themselves.

OCA Main Brief, pp. 33-34.

If Direct Energy truly believes, based on the "Zogby Survey" or Ms. Brownell's prior banking experience (Tr. 986), that customers are prepared to switch electric suppliers in return for a $150 or $500 check, there is nothing preventing Direct from making such offers and signing up customers today. That it has not seen fit to do so to date strongly suggests that Direct expects to be able to buy customers for considerably less if its forced auction scheme is approved. In short, for Direct it is all about profit and loss -- its profit and customers' loss.

2. Direct Ignores The Legal Impediments To Its Plan That Were Identified Earlier In This Proceeding

In their *Motion in Limine* and later in their *Answer to Motion to Suspend Schedule*,[11] the Joint Applicants laid out the many reasons why they believe the Direct Energy Plan is contrary to law (e.g., violations of Act 129 of 2008 and the Electric Competition Act, non-compliance with the Commission's default service regulations, estoppel) (*see* Jt. App. Initial Brief, pp. 37-47). As such, Direct was on notice for nearly eight weeks that significant legal impediments might exist to the adoption of its proposals. But, other than several passing references to the Commission's "plenary authority" (pp. 52, 56, n. 250), Direct's Main Brief makes no attempt to address these issues.

[11] The argument contained in the *Motion in Limine* and the *Answer to Motion to Suspend Schedule* are incorporated herein by reference.

3. Direct Seriously Mischaracterizes The Record Evidence

It is common and expected practice for litigants in contested proceedings to put their own "spin" on the record evidence. That said, Direct's Main Brief travels far beyond the acceptable limits of "poetic license." A few examples should suffice to illustrate the point.

The Merger Of The Four EDCs. On the very first page of its Main Brief, Direct asserts that the Joint Applicants have asked to "merge four of the seven major electric utilities in the Commonwealth." This theme is then repeated at pages 7 ("merging the operations of four Pennsylvania [EDCs]") and 14 ("combin[ing] operations of multiple EDCs"). This, of course, is a total mischaracterization of what the Joint Applicants have proposed. To the contrary, each of the four EDCs will maintain its own regional headquarters and manage its own operations, just as Met-Ed, Penelec and Penn Power did following FirstEnergy's acquisition of General Public Utilities in 2001 (*see, e.g.,* Joint Petition for Partial Settlement ¶¶ 14-15).

In like fashion, Direct asserts at page 3 of its Main Brief that the proposed transaction "places the FE service territories in a different category." Notably, Direct witness Morey painted a very different picture when he acknowledged that FirstEnergy would "continue to serve [its EDCs'] customers in the same way as other EDCs in Pennsylvania such as Pennsylvania Power & Light." (*See* Direct Energy St. 1, p. 10). Indeed, Direct's principal complaint throughout this proceeding has not been that the Merger of FirstEnergy and Allegheny would change the way customers are served, but rather that it would maintain the status quo, which Direct finds objectionable.

The Elimination Of A "Significant Competitor." At page 4 (n. 4) of its Main Brief, Direct claims that the Merger would "eliminate a significant competitor in the wholesale and retail market in Pennsylvania." Again, on page 17, Direct characterizes Allegheny Energy

Supply ("AES") as "well-established" and speculates that it "could have grown into a material competitor of FirstEnergy." However, what the record actually shows is that AES is an extremely small retail supplier which only holds itself out to serve commercial and industrial customers (i.e., markets that everyone appears to agree are highly competitive). In fact, AES does not serve any customers in those areas where FES is particularly active (Jt. App. St. 4, pp. 12-14).

The Purported Lack Of A Workable Competitive Retail Market. At page 11, Direct suggests that "independent competitors," which it presumably considers itself, have to date achieved "relatively meager successes" in the retail market. One suspects, however, that this view is not shared by Dominion Resources which has been able to accumulate over 300,000 residential customers in Pennsylvania (Tr. 886). Indeed, Pennsylvania is flush with established EGSs that have more than sufficient scale and experience to compete (Jt. App. St. 10-R, pp. 13-14). Moreover, and as noted by Mr. Graves (*Id.* at p. 11), recent default service auctions for block energy and full requirements service have attracted numerous wholesale bidders and, more importantly, have been found competitive by the Commission. In fact, Direct Energy admits in its Main Brief that its Vice President and General Manager of U.S. North – residential business "characterized the market in [the Duquesne] service territory as a 'great opportunity' and commended the Commission as doing a 'great job to make sure the markets are open and competitive.'" Direct Energy Main Brief, pp. 2-3

Later, at page 20 of its Main Brief, Direct boldly asserts that "[t]here does not appear to be a dispute that, presently, a workably competitive market does not exist in any of the FE or Allegheny service territories." In support of this contention, Direct cites to Mr. Graves' cross-examination at transcript pages 917-919, suggesting that he was on board with Direct's

assessment of the current state of competition. Yet, the exchange in question confirms the opposite:

> Q. Would you consider that in Penn Power's service territory, for residential customers, that market to be workably competitive?
>
> A. I don't think you can tell whether something is competitive from the number of --
>
> Q. I need a yes or no, if you could, and then you can explain.
>
> A. Okay. I would say yes, it is.
>
> Q. This market is workably competitive, this is the end state of competition that you believe the Commission should accept as a workably competitive market; is that your testimony?
>
> A. I think that's a different question --
>
> Q. Okay. Well, answer that one.
>
> A. -- as to what the social goal of restructuring is, but in terms of workable competition, there's ease of entry in this market and there may not be a very large number of customers who are interested in shopping, and so there's no magic number of participants that you need to have to say we're at the workable threshold. What really matters is how readily suppliers can enter the market.

And, as Direct's own witness, Dr. Morey, testified: "[E]ntry barriers are comparatively low; merchant suppliers can readily enter and exit from the market without major limitations such as the presence of sunk costs" (Direct Energy St. 1, p. 37).

Alleged Wholesale Market Power. Consistent with its pattern of ignoring the facts, Direct contends that Dr. Hieronymus' own analysis "showed that the merger would create wholesale market power concerns" (Main Brief, p. 35). Then, citing OCA witness Hahn's direct testimony, Direct cautions that "[FirstEnergy] will, at many times of the year, be capable of withholding generation from the market and raising prices in these markets, to its benefit" (Direct Energy Main Brief, p. 55). Direct's summary of the record evidence is wrong in virtually every respect. To be sure, what Dr. Hieronymus' analysis actually showed was: (1) that under

the Department of Justice's ("DOJ's") revised horizontal merger guidelines, the post-Merger market would be deemed unconcentrated and hence no market power concerns were presented; (2) that under DOJ's former horizontal merger guidelines, only very minor screen failures during off-peak periods were identified and those screen failures did **not** raise any competitive concerns; and (3) that the withholding strategy posited by Mr. Hahn would cause the merged entity to **lose** money (Jt. App. Initial Brief, pp. 22-29).

Information Furnished To New Customers. At page 31 of its Main Brief, Direct, citing to Dr. Morey's surrebuttal testimony at pages 43-45, claims that he provided "one example of how the FirstEnergy name is associated with the local utility in such crucial functions as beginning or changing electric distribution service" (footnote omitted). At that point in his surrebuttal, Dr. Morey discusses his review of Penelec's web-site and specifically concludes that "new customers would not even be informed that they ultimately had a choice of EGS" (p. 43) and "the instructions do not provide information to the customer about potential choices they may have of EGSs" (p. 44). What Direct neglects to mention, however, is that Dr. Morey's understanding of the enrollment process was shown to be in error. Indeed, as Mr. Fullem explained in oral rejoinder (Tr. 429-30), new customers are not only advised that they can shop for an alternative supplier, but are provided (i) a document entitled "How to Shop for an Electric Generation Supplier," (ii) a shopping worksheet and (iii) a screenshot from the OCA's web-site showing currently available EGS offers.

The foregoing examples are illustrative of the hyperbole and the numerous misstatements which pervade Direct's Main Brief and which, the Joint Applicants submit, seriously call into question Direct's credibility.

4. The Specifics Of Direct's Proposal Have Become Even Murkier

As noted in the Joint Applicants' Initial Brief (p. 51-57), critical components of the Direct Energy Plan remain unclear, either because the needed details were never provided or because Direct's witnesses presented conflicting testimony. Unfortunately, Direct's Main Brief only adds to the confusion.

At page 12, Direct states that under its Plan "all billing and customer care functions" will be transferred to the new "BillCo." This point is then reiterated in essentially the same language at pages 39-40 of Direct's Main Brief. These statements, however, cannot be reconciled with Dr. Morey's redirect examination, wherein Direct went to some pains to establish that customer care functions would **not** be transferred to the BillCo, but instead would stay lodged with the incumbent EDC:

> Q. And again, maybe this is now clear. But under our proposal, under the Direct Energy proposal, is the EDC's obligation to provide wire service to make, to termination, customer care functions, any of those functions, are they going to be taken way from the EDC?
>
> A. No.

Tr. 854.

Similarly, at page 45 of its Main Brief, Direct states that "all residential customers choosing to remain on default service (via the previously conducted opt-out approval process) would be auctioned to EGSs" (footnote omitted). This, of course, is entirely contrary to Direct's representation the page before that "[a]ny customer that so wished to do so could opt out and *not* be included in the account auction" (Direct Energy Main Brief, p. 44) (emphasis added). While it appears, at least in this instance, that Direct may have inadvertently misspoken, the issues raised by Direct are far too serious -- and the implications for customers far too dire -- to take anything for granted.

C. The Merger Will Have No Adverse Impact On Wholesale Market Power

In arguing that the Merger raises wholesale market power concerns, Direct Energy and Citizen Power[12] each make essentially the same two arguments: (1) the fact that Dr. Hieronymus identified three minor screen failures in his market power analysis means that the Merger will have an adverse impact on wholesale market power; (2) the Merger will have an adverse impact on wholesale markets in PJM given the structural problems identified by the PJM Market Monitor (the "Market Monitor") and his conclusion that offer capping is effective only "most of the time" (Direct Energy Main Brief, pp. 35-39; Citizen Power Main Brief, pp. 9-11). Neither argument has any validity.

1. Screen Failures Identified By Dr. Hieronymus

Direct Energy and Citizen Power both point to the three minor screen failures identified by Dr. Hieronymus in the ten time periods he analyzed in his market power analysis. Direct Energy refers to these screen failures as representing a showing of "undue market concentration" (Direct Energy Main Brief, p. 36), while Citizen Power refers to the screen failures as evidence of market power "concerns" (Citizen Power Main Brief, p. 9).

These characterizations, especially Direct Energy's assertion that the screen failures demonstrate "undue market concentration," mischaracterize the significance of the screen failures. The Federal Energy Regulatory Commission ("FERC") made clear, when it issued its

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[12] Citizen Power presented no witnesses and offered no testimony throughout this proceeding and is relying entirely upon the testimony of other parties. Aside from issues relating to wholesale and retail markets addressed *infra*, the only other issue addressed by Citizen Power in its brief is a suggestion that the Joint Applicants' commitments regarding employee jobs and corporate headquarters are not in fact benefits. *See* Citizen Power Initial Brief, pp. 14-15. While the Settlement's jobs provisions permit modest reductions over time as the companies are integrated, those provisions do not diminish the substantial benefit of the multi-year commitments to Pennsylvania jobs made by the Joint Applicants, as recognized by the Joint Petitioners. *See, e.g.,* Statement of the OCA in Support of the Joint Petition for Partial Settlement, pp. 5-6 (explaining that minimum employment levels in Settlement are in the public interest).

Merger Regulations, that screen failures alone do not establish that a proposed merger would have anticompetitive consequences:

> However, we also note that *a violation of the Appendix A screen does not conclusively demonstrate that the horizontal aspect of a proposed merger would have anticompetitive consequences.* If the screen is violated, the Commission will take a closer look at whether the merger would harm competition.[13]

Revised Filing Requirements Under Part 33 of the Commission's Regulations, Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897 (2000) (emphasis added). This statement is consistent with FERC's discussion in its Merger Policy Statement that screen failures suggest only that the Commission should take a closer look at whether the proposed merger would harm competition.[14] Neither Direct Energy nor Citizen Power acknowledges this important qualification to the use of the competitive screening analysis.

Consistent with the requirement that screen failures be investigated further to determine whether in fact they represent a market power concern, Dr. Hieronymus examined the factual circumstances underlying the screen failures that he identified. Dr. Hieronymus determined that the screen failures occur only during off-peak periods where the generating units setting the market price are large baseload nuclear and coal units. Dr. Hieronymus explained that these baseload coal and nuclear units are particularly unsuited to being withheld from the market, which is how a generation owner would go about attempting to raise market prices (Jt. App. St. 4; Ex. WHH-1, Ex. J-1 at 46-47. *See also* Tr. 641). As a result, he concluded that minor screen

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[13] *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897 (2000) (emphasis added).

[14] *See Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,044 at 30,120 (1996).

failures in off-peak periods do not indicate any material increase in the Joint Applicants' ability to exercise market power. This is a conclusion that FERC has reached on several occasions.[15]

Direct Energy completely fails to address Dr. Hieronymus' analysis of the screen failures, much less refute that analysis. Instead, Direct Energy argues that this Commission is not obligated to "woodenly accept FERC's conclusions." Direct Energy also argues that this Commission is required to apply a standard of review to the proposed merger that is somewhat different from that applied by FERC (Direct Energy Main Brief, pp. 36-37).

The Applicants agree with both of Direct Energy's propositions as a legal matter. Indeed, FERC has not yet ruled on the Joint Applicants' FERC application; so, to date, there is no FERC finding for this Commission to "woodenly accept." However, Direct Energy has cited to no factual evidence that would cause the Commission to conclude that the screen failures identified by Dr. Hieronymus represent a market power problem. Direct Energy does not contest Dr. Hieronymus' analysis showing that the screen failures occur in off-peak periods when only baseload generation is operating, nor does it offer any evidence to contradict his testimony that baseload generation is not suitable for withholding capacity from the market or otherwise exercising market power. Nor does Direct Energy provide any explanation as to how the different statutory standard applied by the Commission somehow should cause the Commission to nevertheless find a market power problem.

Citizen Power does, at least, acknowledge Dr. Hieronymus' discussion of why the screen failures do not represent a market power problem. However, Citizen Power does nothing to rebut Dr. Hieronymus' showing but, instead, addresses it as follows:

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[15] *See USGen. New England, Inc,* 109 FERC ¶ 61,361 at P 23 (2004); *Ohio Edison Co.*, 94 FERC ¶ 61,291 at 62,044 (2001); *Commonwealth Edison Co.*, 91 FERC ¶ 61,036 at 61,134 (2000).

> However, if even a "small" screen failure triggers increased scrutiny into whether there are market concerns, it is unclear whether the analysis of Dr. Hieronymus is sufficient to allay the concerns raised by three such screen failures, especially since the burden is on the Joint Applicants to show that the merger is not likely to result in anticompetitive conduct.

Citizen Power Main Brief, p. 10

Other than making the bare assertion that "it is unclear whether the analysis of Dr. Hieronymus is sufficient," Citizen Power provides absolutely no argument and presents absolutely no evidence indicating why that might be so. As is the case with Direct Energy, Citizen Power does not contest Dr. Hieronymus' analysis showing that the screen failures occur in off-peak periods when only baseload generation is operating, nor does it offer any evidence to contradict his testimony that baseload generation is not useful for withholding capacity from the market or otherwise exercising market power.

Thus, while the Joint Applicants agree that the Commission can make its own determination of the merits based on the record of this proceeding, the undisputed record evidence demonstrates that the three minor screen violations identified by Dr. Hieronymus do not represent a market power concern. Not only have Direct Energy and Citizen Power not pointed to any record evidence to support their contentions to the contrary, they have not presented any argument that would support a conclusion that there is a market power problem, whether or not supported by record evidence. Thus, the Commission should reject their contentions regarding the significance of the screen violations.

Both Direct Energy and Citizen Power cite to the same portion of the transcript of the hearing to try to support the proposition that "Dr. Hieronymus admitted that there could be markets that did not fail the market screens under the FERC methodology, but were not

competitive." [16] In the cited testimony, however, Dr. Hieronymus made clear that such markets were unusual, and he gave as an example the California market in 2000 when there was not enough capacity to serve demand and the market rules were flawed. Dr. Hieronymus also made clear that he did not consider PJM to be such a market (Tr. 664-68). Furthermore, neither Direct Energy nor Citizen Power provided a scrap of evidence to indicate that PJM is the kind of noncompetitive market described by Dr. Hieronymus.[17]

Direct Energy also points to what it refers to as "near-failures" in some time periods under Dr. Hieronymus' analysis (Direct Energy Main Brief, p. 36). However, FERC's merger regulations make clear that, if the screens are passed and no "convincing case" is made that there is a market power problem notwithstanding that the screen is passed, "the horizontal analysis stops there."[18] Direct Energy has presented no evidence whatsoever for the Commission to find that the "near-failures" represent a market power problem, much less made a "convincing case" that any market power problem actually exists. Without such evidence, there is no reason to conclude that the near-failures represent a market power concern.

Finally, Direct Energy and Citizen Power both ignore the recent revisions made by the DOJ and Federal Trade Commission ("FTC") to the *Horizontal Merger Guidelines* to increase the thresholds for establishing screen failures. Most important to this proceeding, under the

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[16] Citizen Power Main Brief, p. 10 (citing Tr. 664-68). *See also* Direct Energy Main Brief, p. 37 ("Dr. Hieronymus did allow that there could be markets that did not fail the FERC Market Concentration Screens but were nevertheless not competitive.")

[17] For the same reason, the Commission can reject Citizen Power's argument that Dr. Hieronymus "admitted the possibility that a smaller market may exist not because of transmission constraints looked for in a FERC analysis, but because price differentials may deter transmission into a certain geographic area." Citizen Power Main Brief, p. 10. While it is true that Dr. Hieronymus recognized such a possibility, there is no evidence that such a smaller market actually exists in PJM or that the Merger would raise market power concerns in such a market even if it did exist.

[18] *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897 (2000).

revised thresholds, post-merger markets with an HHI level below 1,500 are deemed to be unconcentrated and no further analysis of such markets is required (Tr. 673-74).

Under this updated definition, the post-Merger market would be well within the unconcentrated range even in the three off-peak periods, where the highest post-Merger HHI is only 1054. Thus, under the revised thresholds adopted by the DOJ and the FTC, the Merger would easily pass all market power screens. Although FERC has not yet adopted these revised thresholds, Dr. Hieronymus testified that, because FERC based its thresholds on the thresholds in the original DOJ/FTC *Horizontal Merger Guidelines*, it is logical to conclude that FERC will revise their thresholds to accord with the new DOJ/FTC approach (Tr. 660).

2. Mischaracterization of Market Monitor Report

The second argument advanced by Direct Energy and Citizen Power is that the Market Monitor has identified structural problems in the PJM Market and indicated that its offer-capping mitigation is effective only "in most cases," but not in every case. They assert that this means that the Merger potentially could cause market power problems some of the time (Direct Energy Main Brief, pp. 38-39; Citizen Power Main Brief, pp. 10-11). Neither party, however, provides any analysis showing that the Merger would create market power problems in any of the PJM markets discussed by the Market Monitor in the State of the Market Report. Similarly, they do not identify the circumstances where they assert offer-capping would not be effective nor do they offer any proof that offer-capping mitigation would be ineffective in the event that the combined company otherwise might be able to exercise market power. In short, their argument is pure speculation with no basis in fact.

Moreover, the argument advanced by Direct Energy and Citizen Power mischaracterizes what the Market Monitor actually said in his report. As Dr. Morey admitted in his testimony, the

Market Monitor's statement about mitigation being effective "in most cases" only applied to market capping in local *energy markets* that are created when congestion creates a smaller local market (Tr. 766). Dr. Morey conceded that the Market Monitor found that the mitigation tools used in the capacity and regulation markets – which Dr. Morey also identified as having structural problems – were effective without any qualification (Tr. 768-69; Jt. App. Cross-Exam. Ex. 6 at 53 and 64). Thus, even if one were to accept Direct's own testimony, the only possible market where there could be a market power concern would be local energy markets. However, the only two PJM local energy zones identified by Dr. Morey that could be affected by the Merger are the Penelec and Allegheny Power zones (Direct Energy St. 1, pp. 23-26). The record demonstrates that Allegheny has no generation in the Penelec zone and FirstEnergy has no generation in the Allegheny zone. Consequently, the combination of the two companies does not increase market power in either zone (Jt. App. St. 4-R, pp. 20-21). Moreover, FirstEnergy has divested almost all of its generation in the Penelec zone. *Id.* at 26. Thus, the Merger does not raise any competition concerns about the energy markets in the only zones Dr. Morey identified as potentially problematic even if Market Monitor's use of offer-capping were not always effective in those zones.

D. The OSBA's Attempt To Make Municipal Aggregation An Issue In This Case Is Misplaced And Should Be Rejected

The OSBA's Main Brief leaves no doubt as to where the OSBA stands on municipal aggregation – the OSBA opposes municipal aggregation and intends to use every opportunity to stop it in its tracks or, if that is not possible, postpone its implementation for as long as possible. While the OSBA is free to advocate its position in an appropriate Commission proceeding, this is not the case for doing so.

The OSBA concedes that state-wide implementation of "opt-out" municipal aggregation cannot proceed until the legislature enacts, and the Governor signs, appropriate enabling legislation granting the necessary authority to all municipalities. *See* OSBA Main Brief, p. 27. Consequently, the OSBA's concerns, and the "condition" it is asking the Commission to attach to its approval of the Merger, would principally affect the use of opt-out aggregation by the subset of municipalities that have adopted "Home Rule." However, because the OSBA devoted a significant part of its Main Brief (pp. 38-43) to arguing that the Commission should find that even Home Rule municipalities lack authority to use opt-out municipal aggregation, one is left to wonder why the OSBA believes its proposed "condition" should be needed at all. The internal inconsistencies exhibited by the OSBA's position simply underscore the impropriety of its attempt to interject municipal aggregation into this case.

Whether municipal aggregation is permissible for Home Rule municipalities and, if so, the ground rules that should apply to those that wish to engage in it, are issues that pre-dated the filing of the Joint Application and would remain unresolved even if the Commission were to disapprove the proposed Merger. In short, municipal aggregation has no discernible connection to the legal standard for approval of the Merger set forth in Sections 1102(a)(3) and 2811(e) of the Public Utility Code, as witnesses for both the Joint Applicants and the OCA explained at length.[19]

The OSBA insists, nonetheless, on forcing municipal aggregation into this case in an effort to have the Commission pre-judge issues that are already before it at other dockets. At last count, three separate Petitions have been filed that present the question of whether opt-out aggregation by Home Rule municipalities is authorized under current law and can be

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[19] *See* Jt. App. Initial Brief, pp. 64-65. *See also* OCA St. 2-R, pp. 11-12.

implemented consistent with the requirements of the Code. Two of those Petitions were discussed in the Joint Applicants' Initial Brief (p. 62, n. 31).[20] Additionally, on November 9, 2010, FES filed a Petition[21] asking the Commission to confirm that it does not need approval to participate, as an EGS, in the "opt-out" municipal aggregation programs authorized by the Cities of Meadville, Warren, and Farrell and the Borough of Edinburgh or, in the alternative, that the Commission grant its approval.[22] (A copy of the FES Petition is attached as Appendix A). On November 10, 2010, the Commission issued a Secretarial Letter consolidating these three Petitions for review.

The OSBA has leveled broad, speculative criticisms of municipal aggregation as the alleged basis for the Commission to condition its approval of the Merger. Specifically, the OSBA contends that: (1) municipal aggregation could have a "negative impact on retail competition" because of the alleged "home team advantage" enjoyed by EGSs that pursue municipal aggregation in the service territory of their affiliated EDCs (OSBA Main Brief, p. 24); (2) municipal aggregation could have a "negative impact on default service" because it could cause suppliers to increase the prices they are willing to bid to serve default load (OSBA Main Brief, pp. 30-37); (3) allowing EGSs affiliated with EDCs to participate in municipal aggregation could make it problematic for such EDCs to comply with the "least cost to customers over time"

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20 *Petition Of The Retail Energy Supply Association For Investigation And Issuance Of Declaratory Order Regarding The Propriety Of The Implementation Of Municipal Electric Aggregation Programs Absent Statutory Authorization*, Docket No. P-2010-2207062 (filed October 28, 2010); *Petition Of Dominion Retail, Inc. For An 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).

21 *Petition Of FirstEnergy Solutions Corp. For Approval To Participate In Opt-Out Municipal Energy Aggregation Programs Of The Optional Third Class Charter City Of Meadville, The Home Rule Borough Of Edinburgh, The Home Rule City Of Warren And The Home Rule City Of Farrell*, Docket No. P-2010-2209253 (filed November 9, 2010) ("FES Petition").

22 Notably, FES has not executed an agreement with any municipality in Pennsylvania to participate in a municipal aggregation program. *See* FES Petition, p. 3. The municipalities identified in the FES Petition have authorized municipal aggregation programs but have not implemented them.

provision of Act 129 (OSBA Main Brief, pp. 37-38); and (4) existing law does not permit "opt-out" municipal aggregation even for Home Rule municipalities (OSBA Main Brief, pp. 38-43).

The OSBA's objections, however, could be directed with equal force at **every** EGS in Pennsylvania that is affiliated with an EDC – not just FES. Thus, to the extent any of the OSBA's objections might merit the Commission's consideration, they raise broad questions of policy and law that should be addressed in a proceeding that is focused on municipal aggregation and not dragged into this case. Of course, the Petitions already pending before the Commission, discussed above, allow the OSBA to vet its issues in just such a properly-focused proceeding, and the OSBA should avail itself of that opportunity to do so.

Moreover, there is no justification for imposing restrictions **only** upon the Joint Applicants as the remedy for alleged problems that, if they exist at all, would be inherent in opt-out municipal aggregation regardless of the identity of the parties that engage in it. Nonetheless, the OSBA proposes that "FirstEnergy Corporation and its affiliates not engage in municipal aggregation in the Met-Ed, Penelec, Penn Power, and West Penn service territories prior to the enactment and implementation of authorizing legislation or June 1, 2013, whichever is later ..." If, as the OSBA seems to believe, municipal aggregation is not permissible in any form until the legislature enacts a statute authorizing it, then the first leg of the proposed condition is unnecessary. And, if the legislature does enact such a statute, why should the Commission prohibit FES from exercising the rights conferred by such legislation until June 1, 2013 while imposing no similar constraint on other EGSs within their affiliate EDCs' service areas? Obviously, there is no principled basis for singling out FES for disparate treatment. If the Commission were to consider limitations on the use of municipal aggregation, such limitations should be applied across the board in an even-handed fashion. That cannot be done in the

context of this proceeding and, therefore, this issue should be addressed at an appropriate docket where a consistent set of rules can be adopted for all market participants.

Municipal aggregation's connection to the issues in this case is tenuous at best. This is evident from the three purported reasons the OSBA offers as the alleged justification for the Commission to address that topic here: (1) the Settlement would implicitly "approve" FirstEnergy's "municipal aggregation strategy;" (2) FirstEnergy made municipal aggregation an issue merely by mentioning it in Mr. Alexander's direct testimony; and (3) the Merger would – in some undefined way – empower FES to use municipal aggregation to impede the progress of retail competition and, thereby, negate every one of the other, admitted benefits of the Merger. There is no basis for any of these contentions.

The OSBA offers the following *non sequitur* as the principal reason for pressing its arguments against municipal aggregation in this case (OSBA Main Brief, p. 16):

> The Settlement is silent on the issue of municipal aggregation. Therefore, the Settlement, in effect, recommends approval of FirstEnergy's municipal aggregation strategy.

One searches in vain for a rule of textual interpretation that might support the OSBA's assertion. Obviously, the Settlement is silent about a great many things, including other aspects of FirstEnergy's retail marketing strategy. Yet, under the OSBA's approach, any issue or topic discussed at any point in this proceeding that is not specifically resolved against the interests of the Joint Applicants should be deemed "approved" by the Settlement and, on that basis, rendered *res judicata* by a Commission Order granting the Joint Petition. One suspects even the OSBA would summarily reject such a principle were it to be applied to any issue other than the one the OSBA is trying to shoe-horn into this case. Simply stated, the OSBA's assertion is false and

provides no valid basis for making municipal aggregation part of this case. Neither the Joint Application nor the Settlement seeks approval of the municipal aggregation strategy.

In like fashion, the OSBA departs from logic and commonsense with its assertion that "the Joint Applicants conceded that municipal aggregation is an issue in this merger proceeding" (OSBA Main Brief, p. 20). The full weight of this astonishingly broad contention is borne by a single phrase the OSBA extracted from the extensive direct testimony the Joint Applicants have submitted, namely, Mr. Alexander's observation that FirstEnergy's support for retail electric competition is "evidenced by its support and endorsement of municipal aggregation" (Jt. App. St. 1, p. 17). Mr. Alexander did not, in any way, "concede" that municipal aggregation is "an issue in this merger proceeding." The OSBA simply has been misled by its own witness, Dr. John W. Wilson, who seriously mischaracterized Mr. Alexander's testimony in making the erroneous contention that "the Joint Applicants have claimed municipal aggregation as a merger benefit" (OSBA St. 4, p. 10). The Joint Applicants made no such claim at any point throughout the proceeding and do not do so now.

The OSBA's third alleged reason for interjecting municipal aggregation into this case flows from its speculation that the Merger would aggravate the deleterious effects the OSBA perceives as inherent in opt-out municipal aggregation. *See* OSBA Main Brief, pp. 20 and 23-38. However, the OSBA's argument is entirely circular since it assumes – as the basis for the Commission's considering municipal aggregation in this case at all – what the OSBA wants the Commission to conclude, namely, that opt-out municipal aggregation is not in the public interest.

Simply stated, the OSBA thinks that municipal aggregation is a bad idea. The only alleged "hook" to this case is the OSBA's contention that the Merger would somehow make a bad thing even worse. The gap in the OSBA's logic, of course, is that it starts with the premise

that opt-out municipal aggregation will hurt default customers (by allegedly raising default service prices) (OSBA Main Brief, pp. 30-37) and shopping customers (by allegedly inhibiting retail competition) (OSBA Main Brief, pp. 23-30). Those propositions are unproven and, more importantly, raise questions that exist independent of the Merger. If, as the OSBA contends, opt-out municipal aggregation is not in the public interest and is not authorized under current law, then it would be off the table as a possible option for retail customers whether or not the Merger is approved. If, on the other hand, opt-out municipal aggregation can be implemented to generate benefits for retail customers, the premise underlying the OSBA's argument for considering "conditions" on Merger approval in this case disappears. Either way, it is the merits of opt-out municipal aggregation itself that must be decided. And that determination will control whether municipal aggregation can be used by **any** EGS in the Commonwealth, not just FES. The Commission already has before it Petitions, filed at other dockets, which are expressly focused on the issue at the heart of the OSBA's objections to opt-out municipal aggregation. The OSBA's arguments should be addressed there – not in this case.

For all of the foregoing reasons, the OSBA's attempt to tie opt-out municipal aggregation to this case has no merit and should be rejected. Accordingly, there is no reason for the Commission to consider the OSBA's claims that the Merger would somehow aggravate the alleged problems inherent in municipal aggregation. That said, it should be noted that the OSBA's arguments lack merit and would not provide any basis for the Commission to adopt the OSBA's proposed "conditions."

The "negative impact on retail competition" that the OSBA contends would flow from FES' participation in municipal aggregation is nothing more than a reprise of the argument that EGSs enjoy an "incumbency" advantage in their affiliated EDCs' service territories. There is not

a shred of evidence to support that averment.[23] For that reason, the OSBA has constructed its argument on speculation and conjecture including, for example, the supposition that if an EGS offers a competitively-priced contract to municipally-aggregated customers it can only be the result of "inappropriate interactions between the regulated company and its sales affiliate" (OSBA Main Brief, p. 32). The OSBA's argument assumes that existing codes of conduct can, and will, be ignored with impunity. Putting aside the OSBA's cynical view that the Commission is a toothless watchdog, if any credence were given to the OSBA's position, then all retail marketing efforts by EDC-affiliated EGSs would be called into question, not just marketing directed at municipal aggregation customers. The OSBA's argument should be seen for what it is – mere hyperbole with no basis in record evidence. In contrast to the OSBA's unsupported averments, the Joint Applicants presented substantial evidence that the alleged "incumbency" advantage does not exist, as explained in detail in their Initial Brief (pp. 46-47, 50). *See also* Jt. App. St. 10-R, pp. 16-17.

The OSBA's contention that municipal aggregation would have a "negative impact on default service" underscores its fundamental antipathy to opt-out municipal aggregation in any form; the adverse effects on default customers alleged by the OSBA would exist regardless of the identify of the EGS – i.e., whether or not it is a FirstEnergy affiliate – that is marketing to a municipal aggregator (OSBA Main Brief, pp. 30-37). For that reason alone, the OSBA's

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[23] The OSBA tried to characterize Mr. Alexander's testimony as an affirmation that FirstEnergy "targets" its retail marketing efforts to its EDCs' service territories. *See* OSBA Main Brief, pp. 18-19 and 25). What Mr. Alexander **actually said** is dramatically different from the "spin" the OSBA tried to impart. Specifically, he explained that FirstEnergy markets in those areas where it can get reasonable transmission access without incurring undue risk of congestion costs (Tr. 272). Those areas include not just its EDCs' service territories but many others as well: "We're seeking customers at Duke Energy, American Electric Power, [Ameren] in Illinois, Columbus and Southern. . . . We sell in Illinois. We have no distribution company in Illinois. We sell in Michigan. We have no distribution company in Michigan. . . . Regulated distribution operations just happen to fall in the states in which it is most attractive to us to use our generation. . . . And predominantly that's where we sell, whether it's in our service territories or in utilities outside our service territories that are in that market that we can use our generation to serve. . . . That's where Duke Energy in Cincinnati comes into play, AEP in Columbus, Columbus Southern and Duquesne" (Tr. 270, 273-74).

argument is misplaced in this proceeding. In addition, the OSBA's arguments are incorrect and provide no basis for attaching its proposed condition to the Commission's Merger approval.

The OSBA first contends that municipal aggregation will harm default customers because participating EGSs would "target" "low-cost generation" to municipally-aggregated customers and, as a consequence, such "low-cost generation" would not be available to be bid into default service procurements, thereby raising default service prices (OSBA Main Brief, pp. 30-33).[24] This theory is devoid of record support since it was revealed for the first time in the OSBA's Main Brief and was not discussed in the testimony of its witness, Dr. Wilson, or any other witness in the proceeding. It must be disregarded for that reason alone. Additionally, as the basis for this novel argument, the OSBA implicitly assumes that, if "low-cost" generation were used to supply aggregated customers, all bidders could – indeed, would – increase their bids in the default supply procurements and, in that way, raise the price of default supply. This argument ignores the substantial record evidence demonstrating that FirstEnergy does not have market power in the wholesale generation market and will not have market power after the Merger (Jt. App. Initial Brief, pp. 21-35). In short, even if "low-cost" generation were "targeted" to serve aggregated load – a supposition that has no support in the record – FES could not influence the prices that competitive procurements would produce. For the same reason, the OSBA's proposal that the Commission require FirstEnergy and Allegheny to "keep their generating assets separate" (OSBA Main Brief, pp. 31-32) should be rejected. This extraordinary and unprecedented proposal is premised on the OSBA's unsupported contention

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[24] The OSBA makes essentially the same argument in contending that municipal aggregation would "conflict" with EDCs' "duty" under Act 129 to employ a "prudent mix of contracts" to obtain generation at the "least cost to customers over time" (OSBA Main Brief, p. 37). In addition to its lack of any factual support (as explained above), this argument erroneously extends to EGSs – the entities that would market to municipal aggregators – the legal requirements for default service procurement that apply **only** to EDCs – which have no role in the municipal aggregation process.

that the Merger will give the combined company unlawful market power in wholesale generation. The record evidence thoroughly refutes that contention. *See* Jt. App. Initial Brief, pp. 21-35 and 65.

The OSBA also argues that opt-out municipal aggregation could raise default service prices because default suppliers will factor this new "migration" risk into the bids they submit in default supply procurements (OSBA Main Brief, pp. 33-35). The OSBA's witness did not support this contention; Dr. Wilson's testimony consisted solely of broad, general statements that municipal aggregation could have a "negative impact" on default service procurements. *See* OSBA Main Brief, p. 34. Consequently, the OSBA has tried to rely on testimony by Constellation's witness without acknowledging that Constellation ceased to defend its position and joined in the Settlement. Obviously, the weight to be afforded such testimony was substantially diminished as a result. Moreover, the impact of the alleged migration risk has not been quantified and there is no reason to assume that it would garner a larger premium in suppliers' bids than the risk that individual customers currently receiving default service would choose to "shop" after generation rate caps are lifted on January 1, 2011. In fact, the experience in PPL's service area, where caps ended on January 1, 2010, indicates that the "migration" risk associated with individual "shopping" customers is far greater than anything municipal aggregation might produce.[25]

Lastly, the OSBA discusses at length the legal theory underlying its contention that opt-out aggregation cannot be implemented even for Home Rule municipalities unless specific legislative authority is enacted (OSBA Main Brief, pp. 38-43). It also takes the Joint Applicants to task for not submitting a "memorandum spelling out the legal theory" that Home Rule

[25] Within six months after rate caps expired in PPL's service territory, approximately 36% of all residential customers load was being served by alternative suppliers (Jt. App. St. 9-R, p. 15, n. 16; Tr. 779-80).

municipalities are currently empowered to adopt opt-out municipal aggregation (OSBA Main Brief, p. 22). However, because municipal aggregation is not an issue properly before the Commission in this case, there is no point in burdening this record with legal analysis either supporting or attacking the authority of Home Rule municipalities to engage in it. Those kinds of analyses should be taken up in the proceedings initiated by the Petitions filed by RESA, Dominion Retail and FES, where the issue is squarely presented. In fact, a detailed legal analysis was provided in the FES Petition which highlights the errors and misstatements in the OSBA's arguments. *See* Appendix A hereto.

For all the forgoing reasons, the OSBA's proposed "condition" on the use of opt-out municipal aggregation as well as its proposal that the Commission require FirstEnergy and Allegheny to "keep their generating assets separate" should be rejected.

E. The Settlement Provides Substantial Benefits That Enhance The Retail Market And, As A Consequence, Direct Energy And RESA Have Both Failed To Justify Imposing Additional Retail Market-Related Merger Conditions

In its Main Brief, RESA offers three arguments as to why the Commission should not approve the Merger, as modified by the Settlement: (1) the Merger will reduce the number of competitors in Pennsylvania's retail electricity market by one because AES will be merged into FirstEnergy; (2) FES and FirstEnergy's post-Merger EDCs will have "incentives" to engage in anti-competitive conduct due, in part, to "structural deficiencies" in default service and, as a consequence, the Commission should impose a FirstEnergy-specific code of conduct and appoint both a market monitor and an independent auditor to police the FES/EDC relationship; and (3) the Settlement does not provide sufficient (or sufficiently prompt) competitive retail market enhancements nor does it incorporate various conditions regarding future default service plans that are sought by RESA (RESA Main Brief, pp. 2-3).

Most of RESA's arguments are also made by Direct Energy (a member of RESA) and have already been addressed. Eliminating the separate corporate status of AES will have no material impact on retail competition in Pennsylvania, and allegations regarding the sales strategies of FES, "structural deficiencies" and "incentives" to violate Commission regulations, and any lack of competitiveness of the post-Merger retail markets in Pennsylvania, are entirely unfounded. *See* Jt. App. Initial Brief, pp. 47-51 & 71; Sections II.B.3 and II.D *supra*. Direct Energy's and RESA's proposals for a special FirstEnergy code of conduct and appointment of a market monitor and independent auditor are also flawed; contrary to RESA's claims that the Commission's existing Code of Conduct is insufficiently "specific," that Code of Conduct actually includes detailed provisions governing EDC-EGS relations and prohibits a full range of both general and specific activities that might conceivably compromise retail competition. *See* 52 Pa. Code § 54.122 (prohibiting an EDC from giving *any* preference to its affiliated EGS and explicitly restricting statements regarding affiliates, among other requirements). RESA provided no evidence whatsoever of preferences given to FES by FirstEnergy's Pennsylvania utilities (Tr. 630) and failed to introduce any evidence of EDC credit support for affiliated EGS sales or any other conduct for which it believes a new code of conduct or market monitor is purportedly necessary.[26]

Similarly, Direct Energy's and RESA's requests that the Commission investigate possible cross-subsidization between FirstEnergy EDCs and FES are based either entirely on theoretical concerns of Mr. Lacey (Direct Energy Main Brief, p. 58) or RESA's belief that FirstEnergy and

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[26] Moreover, the Commission is already reviewing its existing Code of Conduct in light of the evolution of Pennsylvania's retail electric markets and the end of generation rate caps. *See Advance Notice of Proposed Rulemaking Order*, Docket No. L-2010-2160942 (Order entered February 25, 2010). While RESA suggests that FirstEnergy should be singled out because of the Merger (RESA St. 1-R p. 8), each of RESA and Direct Energy's conduct-related proposals clearly seek to address issues applicable to **every** EDC with an affiliated EGS. Any changes to the Commission's Code of Conduct should therefore be considered and implemented on a statewide basis as part of the Commission's separate rulemaking and not in this proceeding.

West Penn should be required to fully unbundle all default service costs as a condition of Merger approval (RESA Main Brief, p. 36), despite the Commission's previous approval of each of the EDCs' default service plans without such unbundling. Neither Direct Energy nor RESA established any factual basis to conclude that the Joint Applicants "may not be" properly allocating costs between EDCs and affiliates that could justify audits beyond those the Commission normally conducts in accordance with its broad auditing powers and oversight of affiliate relationships (Jt. App. Initial Brief, pp. 75-76); *see also* Direct St. 1, p. 17 (explaining that Dr. Morey does not believe that FirstEnergy EDCs favoring affiliates "has happened or necessarily will happen" in FirstEnergy's territories).[27]

Given the absence of any reason for the Commission to conclude that the Merger will prevent retail electricity customers in the Commonwealth from obtaining the benefits of a properly functioning and competitive retail electricity market, what remains of RESA's and Direct Energy's opposition to the Merger and Settlement are only allegations that the retail market enhancements and default service-related commitments proposed in the Settlement do not constitute sufficient benefits to satisfy *City of York*. In fact, the retail market enhancements and default service commitments agreed to in the Settlement are substantial benefits and the Commission should approve the Merger, as modified by the Settlement, without additional conditions and provisions sought by RESA and Direct Energy.

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[27] RESA acknowledges that it agreed not to petition the Commission to unbundle rates for Met-Ed and Penelec prior to the companies' next distribution rate proceeding (RESA Main Brief, p. 38, n. 109). However, RESA asserts that it can still make this request as to Penn Power and West Penn, and with respect to Met-Ed and Penelec, it is not actually seeking to unbundle rates but only to appoint an independent auditor to "make recommendations regarding further unbundling in the future." *Id.* But, these distinctions do nothing to overcome the central fact that neither RESA nor Direct Energy has provided any evidence to support a Commission finding that additional auditing or unbundling should be implemented as part of this Merger. The audit undertaken in the Duquesne/MacQuarie merger, which is referenced by RESA, *id.*, was approved only as part of a comprehensive settlement.

1. The Retail Market Enhancements Created By The Settlement Will Substantially Benefit West Penn Customers And EGSs

In their Initial Brief, the Joint Applicants described the extensive retail market enhancements the Settlement will create for West Penn's service territory, which include the provision of flexible (e.g. rate-ready and bill-ready) billing options, a modified purchase of receivables ("POR") program, updated lists of shopping and non-shopping customers, and mailings to customers regarding competitive offers (Jt. App. Initial Brief, p. 73). These programs would make West Penn's retail market offerings consistent with the programs approved by the Commission for Met-Ed, Penelec and Penn Power. *See Joint Petition of Metropolitan Edison Co. & Pennsylvania Elec. Co. for Approval of their Default Serv. Programs*, Docket Nos. P-2009-2093053 & P-2009-2093054 (Order entered November 6, 2009), p. 42 ("*Met-Ed/Penelec Default Service Order*"); *Petition of Pennsylvania Power Co. for Approval of Default Serv. Program for Period from January 1, 2011 through May 31, 2013*, Docket No. P-2010-2157862 (Recommended Decision issued September 3, 2010), pp. 70, 72 (recommending approval of Joint Petition for Settlement, including retail marketing enhancements consistent with Met-Ed and Penelec) ("*Penn Power Recommended Decision*").[28]

RESA and Direct Energy criticize the Settlement's proposed retail market enhancements for West Penn's service territory as "minor incremental improvements" over the programs already offered in the service territories of FirstEnergy's Pennsylvania utilities, or no benefit at all because FirstEnergy's Pennsylvania utilities are already implementing the programs themselves and the Merger will delay or diminish retail market offerings in West Penn's territory (RESA Main Brief, pp. 14 , 26-27; Direct Energy Main Brief, pp. 60-61). RESA then proposes a "minimum" set of additional "enhancements" in the form of: (1) a "comprehensive" customer

[28] On October 21, 2010, the Commission voted to adopt the Recommended Decision. The final Order is pending.

referral program; (2) various additional operational rules for EGSs; and (3) an expanded POR program to include commercial and industrial customers. *See* RESA Main Brief, pp. 25-36. For its part, Direct Energy simply requests that the Commission dismiss the Settlement as insufficient under *City of York* (Direct Energy Main Brief, p. 63). The Commission should reject RESA's proposals and find that the Settlement's retail market enhancements for the West Penn service territory will be an additional substantial benefit of the Merger for several reasons.

First, the factual predicate for RESA's and Direct Energy's arguments against the Settlement – the purported threat to retail markets of the Merger – is simply wrong, as discussed *supra*. Having failed to establish the premise for its arguments, RESA and Direct Energy's repeated invocation of threats to retail markets provides no justification whatsoever for either RESA's additional Merger conditions, or any rejection of the Settlement because such conditions are not included.

Second, the Commission has already found that retail market enhancements similar to those proposed in the Settlement constituted "significant additional steps" in support of retail electric competition when the enhancements were proposed as part of the Met-Ed/Penelec default service plans. *See Met-Ed/Penelec Default Service Order*, p. 40; *see also* Statement of Chairman James F. Cawley, Docket No. P-2009-2093053 & P-2009-2093054 (entered November 6, 2009) (recognizing Met-Ed, Penelec, and the settling parties "for their efforts towards substantial progress in achieving the Commission's goals established for the Retail Markets Working Group"). In the Met-Ed/Penelec proceeding, the Commission approved programs (supported by Direct Energy and RESA) whereby Met-Ed and Penelec would make customer education mailings; provide updated customer lists via supplier support website and usage data via Electronic Data Interchange ("EDI") transactions; offer rate ready, bill ready, and

dual billing capability to EGSs; implement a POR program; and appoint a retail choice ombudsman. All of those undertakings are virtually identical to the corresponding provisions of the Settlement. *Compare Met-Ed/Penelec Default Service Order*, pp. 40-42 and Jt. Petition ¶¶ 38-48.

Here, the Joint Applicants have agreed to implement the same comprehensive retail market enhancements in West Penn's service territory, as well as a consistent "price-to-compare" ("PTC") across all post-Merger FirstEnergy utility operating companies, an EGS training session held by the post-Merger FirstEnergy EDCs, and provision of additional promotional materials on electric choice for all new West Penn customers.[29] *See* Jt. Petition ¶¶ 38-39, 46. The fact that FirstEnergy's Pennsylvania utilities have already agreed to implement these programs does not detract from their significance or diminish their benefit to customers in West Penn's service territory, and RESA's attempt to now obtain an expanded customer referral program (the costs of which remain unquantified) makes no sense when rate caps have not yet ended and new retail market programs are already in the process of being provided to customers and EGSs. Direct Energy's assertion that there is insufficient proof that these customer programs will be effective should be dismissed in light of the Commission's prior conclusions.[30]

Third, RESA's professed concern (RESA Main Brief, p. 14) over the time period for implementing retail market enhancement benefits arising from the need to both consummate the Merger and integrate West Penn into FirstEnergy's more advanced technology platform is

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[29] At hearings, Joint Applicant witness Fullem explained in detail how new customers are already advised about their opportunity to stop for an EGS, including specific inquiries as to whether discount EGS offers may be mailed to the customer and whether the customer's information (including usage data) can be provided to suppliers. Tr. 429.

[30] In fact, Direct Energy and RESA expressed strong support for the customer education mailings that were part of the Met-Ed/Penelec Settlement: "These [mailing] commitments satisfy RESA and Direct Energy's concern that customers will be properly educated and given timely information on their available competitive options." *See* August 10, 2009, RESA and Direct Energy Joint Statement In Support Of The Joint Petition For Settlement, Docket No. P-2009-2093053 & P-2009-2093054.

without merit. Under RESA's logic, the Merger (and all other Merger benefits) must be rejected in their entirety because FirstEnergy is not committing to develop retail market enhancements for West Penn's territory twice – once immediately on West Penn's older computer systems that are due to be replaced and, again, when West Penn is integrated into FirstEnergy's systems. *See* Jt. App. St. 3, pp. 8-9 (explaining how the Merger and migration to FirstEnergy's more current infrastructure will save customers significant money); Tr. 470 (explaining that FirstEnergy's systems are more robust and Allegheny's systems are constrained). Moreover, while there may be some changes as the West Penn systems are migrated to FirstEnergy's platform, nothing in the record supports RESA's assertion that the migration will be in any way "disruptive." Indeed, RESA can't have it both ways – to the extent RESA believes the proposed retail enhancements are only "mediocre," that contention is undermined by RESA's insistence that these enhancements should be implemented more quickly to benefit competitive retail markets in West Penn's service territory. It should be noted that several of the additional "enhancements" that RESA proposes will themselves require a substantial amount of time before implementation. For example, RESA's proposed changes to default service procurement, discussed in Section II.E.2, *infra*, would not take effect until June 1, 2013, and, with regard to the "comprehensive" customer referral program "the implementation details [will] be worked out in a collaborative with interested parties." *See* RESA Initial Brief, pp. 25, 30.

RESA's related claim that the operational rules for EGSs will be "downgraded" as a result of the Merger (RESA Main Brief, p. 14) is simply groundless. The only actual operating rule that RESA cites (but does not actually describe) as diminished under the Merger is simply the time period for implementation of rate ready billing codes, which Allegheny currently implements in ten days while FirstEnergy has committed to a fourteen-day implementation. Tr.

468. Even assuming a significant difference between ten and fourteen days for such implementation, FirstEnergy's use of a fourteen-day period is based upon the specific recommendation of Commission staff, which RESA entirely ignores.[31]

As with other retail market enhancements, RESA now asserts that the array of retail operational enhancements that the Commission approved in the Met-Ed/Penelec proceeding as significant (and which it supported) are deficient and recommends a wide range of additional programs to address the "incentives" for anticompetitive and discriminatory behavior by FirstEnergy and its affiliates. *See* RESA Main Brief, pp. 31-36. As discussed *supra*, these allegations are without merit, and the fact that RESA wants more programs provides no basis to conclude that the Settlement commitments (and the programs previously approved for Met-Ed and Penelec) are unsubstantial. At this time, the Commission, EDCs, and the retail supplier community should evaluate the results of the retail market enhancements already being implemented and pursue any unresolved issues through such Commission initiatives as the Committee Handling Activities for Retail Growth in Electricity ("CHARGE") and Electronic Data Exchange Working Group ("EDEWG") instead of seeking to impose yet more retail market programs as part of this proceeding.

Finally, RESA also notes that the West Penn POR program filed on November 1, 2010 provides that it will be available to EGSs serving large industrial customers, while the Settlement provides that the POR program will be revised for consistency with other FirstEnergy programs and be available to EGSs serving only residential and small commercial customers. While RESA claims that this will be a less attractive program, the Joint Applicants believe that a continuing program to support EGS sales to large industrial customers in West Penn's territory is

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[31] *See Commission Staff Rate Ready Report With Recommendations*, Docket No. M-2010-2189433 (Filed August 6, 2010).

not needed in light of evidence showing that once generation rate caps end, these customers are shopping for, and finding, EGSs to serve their electric commodity needs.[32] *See* Jt. App. St. 8-R, pp. 11-12. For example, according to the OCA's shopping statistics for July 2010, 94.5% of Penn Power's, 89% of Duquesne Light's and 93% of PPL Electric's industrial load is now served by an EGS, while roughly 60% of Penn Power's and Duquesne Light's, and 81% of PPL Electric's commercial load is served by an EGS. *Id.* In addition, Met-Ed and Penelec have seen 30 EGSs, and West Penn 23 EGSs, register to serve load under their alternative generation supplier tariffs. *Id.*[33]

2. The Settlement's Provisions Regarding Default Service Constitute Substantial Benefits

In their Main Briefs, Direct Energy and RESA criticize the Settlement on the grounds that it either does not include certain restrictions on future default service procurements or the restrictions it does include are insubstantial (Direct Energy Main Brief, pp. 61-62; RESA Main Brief, pp. 30-31). Specifically, both Direct Energy and RESA assert that the Joint Applicants' commitment not to "harmonize" default service procurements before June 1, 2013 or maintain the status quo with respect to hourly pricing for industrial customers is meaningless. Each of these criticisms is misplaced.

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[32] Direct Energy, in fact, recently expressed strong support for the POR program proposed in the Penn Power default service settlement: "Direct Energy is satisfied that the POR program that Penn Power proposes to implement pursuant to the Settlement will advance the goal of encouraging the development of retail energy markets in Pennsylvania . . . The POR proposal in the Settlement is a workable program that has the potential to encourage the development of robust competition in Penn Power's service territory." *See* July 23, 2010 Letter of Support of Direct Energy, Docket No. P-2010-2157862.

[33] Direct and RESA's criticisms of particular operational rules and other provisions of adopted in the Settlement on the grounds that they are going to be required by "pending" Commission directives, involve charges that RESA or Direct Energy expect to successfully litigate, or only bring West Penn "in line with the practices of most other Pennsylvania EDCs" are inapposite. First, the avoidance of litigation is a well established benefit of settlements. *See Re PECO Energy Co.*, 186 PUR4th 105, 110 (1998). Further, the early adoption of future regulatory requirements and changes in retail market procedures in West Penn's territory, that RESA acknowledges are in fact improvements, that will create consistency for suppliers across retail markets in the Commonwealth are clearly benefits as well.

With respect to harmonization, testimony in this proceeding made clear that this was a significant issue for some customers in light of existing procurement contract terms (some of which will expire before June 1, 2013) and the possibility that alternative procurement contracts could be developed. *See* OSBA St. 1, pp. 22-23 (noting different rate classes and contract terms and proposing that procurements not be harmonized until June 1, 2013). Similarly, a commitment to preserve the status quo with respect to hourly pricing for industrial customers was specifically recognized as a benefit of the Settlement by a retail and wholesale energy supplier. *See* Statement of Support of Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc., p. 4. While these issues may not be important to Direct Energy or RESA, that alone does not render them insubstantial either for other participants in this proceeding or West Penn's customers.[34]

[34] RESA also proposed mandating hourly pricing for all commercial customers with demand greater than 100kW and mandating a 33% load cap in all default service procurements following the Merger. These issues are addressed in the Joint Applicants' Initial Brief (pp. 72-73).

III. CONCLUSION

WHEREFORE, for the reasons set forth above and in the Joint Applicants' Initial Brief, the Joint Petition For Partial Settlement, filed on October 25, 2010, should be approved without modification and the relief requested by the non-signatory parties should be denied.

Respectfully submitted,

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APPENDIX A

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of FirstEnergy Solutions Corp. for Approval to Participate in Opt-Out Municipal Energy Aggregation Programs of the Optional Third Class Charter City of Meadville, the Home Rule Borough of Edinboro, the Home Rule City of Warren and the Home Rule City of Farrell.	:	Docket No. P-2010-_____

PETITION OF FIRSTENERGY SOLUTIONS CORP. FOR APPROVAL TO PARTICIPATE IN OPT-OUT MUNICIPAL ENERGY AGGREGATION PROGRAMS OF THE OPTIONAL THIRD CLASS CHARTER CITY OF MEADVILLE, THE HOME RULE BOROUGH OF EDINBORO, THE HOME RULE CITY OF WARREN AND THE HOME RULE CITY OF FARRELL

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

FirstEnergy Solutions Corp. ("FES"), by and through its counsel, Knox, McLaughlin Gornall & Sennett, P.C., submits this Petition pursuant to 52 Pa. Code § 5.41, to request that the Pennsylvania Public Utility Commission ("Commission") confirm that no approvals are necessary for FES, a licensed electric generation supplier ("EGS"), to participate in opt-out municipal energy aggregation programs developed by the Optional Third Class Charter City of Meadville, Crawford County, Pennsylvania, the Home Rule Borough of Edinboro, Erie County, Pennsylvania, the Home Rule City of Warren, Warren County, Pennsylvania, and the Home Rule City of Farrell, Mercer County, Pennsylvania; or in the alternative, to approve FES's participation in the municipal aggregation programs.

I. INTRODUCTION

Since the enactment of the Electricity Generation Customer Choice and Competition Act (the "Competition Act"), 66 Pa.C.S. §§ 2801-2815, it has been the policy of Pennsylvania to encourage retail customers to obtain direct access to alternative retail electric suppliers. 66 Pa.C.S. § 2802(3), (12), (13), (14). The City of Meadville ("Meadville"), the City of Warren ("Warren") and the Borough of Edinboro ("Edinboro"), which are located within the service territory of Pennsylvania Electric Company ("Penelec"), and the City of Farrell ("Farrell"), which is located within the service territory of Penn Power, want to enable customers within their municipal boundaries to realize the benefits of direct access promised by the Competition Act. In an exercise of the powers granted to Meadville as an Optional Third Class City Charter municipality, and to Warren, Edinboro and Farrell as Home Rule municipalities, the elected officials of the Home Rule and Optional plan form municipalities, acting in their proper authority and on behalf of their constituency, have developed and adopted opt-out municipal energy aggregation programs (the "Programs") for eligible residential and small commercial retail electric customers within their respective municipal boundaries who are not already receiving retail electricity supply service from a licensed EGS.

As explained further below, the Programs would aggregate the load of customers who do not opt-out, and who are to be served by an EGS which enters into a contract with the respective Home Rule or Optional Plan form municipality to participate in the Program by supplying electricity at retail to participating customers at a significant discount from the price-to-compare offered by Penelec or Penn Power as the default service provider. A participating customer could, after receiving the benefit of customer education, exercise one of the multiple opportunities to opt-out or not participate in the Program, or switch to an alternative EGS or

return to default service at any time without incurring any switching fee or penalty. The Programs will benefit the Home Rule and Optional Plan form municipalities' citizens by creating an opportunity for them to participate in a buying pool and use economies of scale to obtain lower pricing for retail electricity than they could otherwise. FES has offered to participate in the Programs and offer participating customers within the respective municipal boundaries retail electric supply service at a discount. FES has yet to execute an agreement with any municipality to participate in a municipal aggregation program.

Neither the Home Rule or Optional Plan form municipalities nor FES believes this arrangement requires the Commission's prior approval. The Programs were developed through an exercise of the Home Rule and Optional Plan form municipality's powers as Home Rule or Optional Third Class Charter municipalities, and are not subject to the Commission's jurisdiction. Further, the Competition Act, which recognizes that the generation of electricity is no longer regulated as a public utility function, see 66 Pa.C.S. §§ 2802(14), 2806(a), nowhere requires prior Commission approval of an EGS's participation in a municipal aggregation program. Even if prior Commission approval were required, the Home Rule and Optional Plan form municipalities, as explained below, designed their Programs to be consistent with the requirements of the Pennsylvania Public Utility Code ("Code") and the Commission's regulations, orders and guidelines.

While FES believes the Programs lie outside the Commission's jurisdiction, FES is aware of concerns expressed with respect to the possible aggregation of customers that are already served by a licensed EGS, as well as alleged adverse impacts on default service. While these concerns are completely unfounded, competitors of FES have used them as an opportunity to file petitions with the Commission seeking Commission orders declaring the Meadville Program and

similar municipal aggregation programs invalid, and preventing FES and other EGSs from entering into contracts to participate in the Meadville Program and similar programs.[1] While these petitions are based on inaccurate allegations, they have created such confusion and unfounded concerns regarding the Programs that FES believes it is necessary to address these inaccurate allegations immediately and directly before the Commission. Therefore, while FES in no way concedes this Commission's jurisdiction over Meadville, Edinboro, Warren or Farrell, or their Programs, or any contract(s) FES executes with a Home Rule or Optional Plan form municipality to participate in the Programs, this Petition seeks an order from the Commission clarifying that no approvals are necessary for FES to participate in the Programs, or in the alternative, approving FES's participation in the Programs.

I. BACKGROUND

1. FirstEnergy Solutions Corp. ("FES") is a Commission-licensed EGS (A-11078) that serves residential, commercial, and industrial customers in Pennsylvania, as well as throughout the Northeast, Midwest, and Atlantic regions of the United States. FES has a principle place of business at 341 White Pond Drive, Akron, Ohio 44320.

2. FES is represented by:

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[1] See *Petition of the Retail Energy Supply Association for Investigation and Issuance of Declaratory Order Regarding the Propriety of the Implementation of Municipal Electric Aggregation Programs Absent Statutory Authority*, Docket No. P-2010-2207062 (filed October 28, 2010); *Petition of Dominion Retail, Inc. for an 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).

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3. The City of Meadville ("Meadville"), Crawford County, Pennsylvania, is governed by the Optional Third Class City Charter Law, 53 P.S. §§ 41101 et seq.

4. The City of Warren ("Warren"), Warren County, Pennsylvania, the City of Farrell ("Farrell"), Mercer County, Pennsylvania and the Home Rule Borough of Edinboro, Erie County, Pennsylvania, are governed by the Pennsylvania Constitution, Pa. Const. Art. 9 § 2, and the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. §§ 2901 et seq.

5. The Competition Act declares that the policy of Pennsylvania is to permit retail customers to obtain direct access to alternative retail electric suppliers. 66 Pa.C.S. § 2802(3), (12), (13), (14).

6. On October 6, 2010, Meadville, adopted Ordinance No. 3677 of 2010 ("Ordinance") in which Meadville specifically authorized the aggregation of eligible customers within Meadville's territorial limits who do not opt-out of the Program. See Meadville's Ordinance, attached hereto as Exhibit A. The Ordinance took effect twenty-one days after passage, or October 27, 2010. Id.. The City of Warren adopted Ordinance No. 1793 on October 18, 2010 which created a similar opt-out municipal aggregation program to that of Meadville's. See Warren's Ordinance, attached hereto as Exhibit B. The Ordinance becomes effective on November 17, 2010. Id. The Home Rule Borough of Edinboro created a similar opt-out municipal aggregation program through the adoption of Ordinance No. 581 of 2010 on October 11, 2010 which became effective on October 19, 2010. See Edinboro's Ordinance,

attached hereto as Exhibit C. On October 25, 2010 the City of Farrell adopted Ordinance No. 0-4-2010 which also created a similar opt-out municipal aggregation program. See Farrell's Ordinance, attached hereto as Exhibit D. Farrell's Ordinance became effective immediately. Id.

7. A municipal aggregation program provides residents and small businesses an opportunity to pool their buying power to participate collectively in the benefits of electric deregulation and obtain lower electricity rates than might otherwise be available to those consumers individually. Customers who have not chosen a different EGS or opted out remain with the larger buying group and receive savings on their electric bills.

8. Under the Programs, the Home Rule and Optional Plan form municipalities and an EGS would enter into an agreement whereby the EGS would supply electricity at retail to eligible residential and small commercial customers within their respective municipal boundaries. The Programs are "opt-out" programs, which means all eligible consumers are automatically included in the buying pool, but only after significant customer education has occurred and customers have been given multiple opportunities to exercise the option to exclude themselves from the Program. An opt-out municipal aggregation program attracts more participation from EGSs and promotes greater competition in the retail electricity marketplace. An opt-out program leads to lower marketing costs for an EGS, which allows the EGS to pass the savings directly to customers in the form of lower prices or guaranteed savings.

9. In contrast, an "opt-in" municipal aggregation program includes customers in the buying pool only if they affirmatively elect to be included. Opt-in aggregation is not adequate to attract competitive offers due to historically low participation rates, significant acquisition costs

spread over fewer customers, and a high level of uncertainty in customer load.[2] Greater amounts of customers shopping for electric supply service means more customers paying less for their electric service, which ultimately would result in the ability of those residents to spend their savings elsewhere to the benefit of the local and regional economies.

10. All end-use electric customers within the respective territorial limits of the Home Rule and Optional Plan form municipalities are eligible to participate in Program, except for those customers: (1) who have opted-out of the Program; (2) that have a special contract or agreement with an EDC; (3) that are not residential or small commercial consumers under a small commercial, small industrial or small business rate classification whose maximum registered peak load was less than 25kW within the last twelve months;[3] (4) that are enrolled in an EDC customer assistance program that does not include any EGS charges in the calculation of the program benefit; or (5) that are served by an electric cooperative. See § 991.02(b) of Meadville Ordinance, Exhibit A; §2(b) of Warren Ordinance, Exhibit B, § 2(b) of Edinboro Ordinance, Exhibit C; and §2(b) of Farrell Ordinance, Exhibit D. Further, those who already receive retail electric supply services from an EGS would not be initially eligible to participate in the Programs, however those customers may choose to later participate.

11. The Home Rule and Optional Plan form municipalities are not required to publicly bid the municipal aggregation contract with an EGS as a condition precedent to selecting an EGS to provide a supply of electricity to the customers served by the Programs because the municipalities are not expending taxpayer dollars in the operation of the Programs.

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[2] See recitation of testimony by Direct Energy, Dominion Retail and the Office of Consumer Advocate in *Petition of Direct Energy Services for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company*; Docket No. P-00062205 (Order entered April 20, 2006).

[3] FES has proposed increasing this load to 50 kW.

Much like all types of municipalities within the Commonwealth of Pennsylvania,[4] Meadville, Warren, Edinboro and Farrell are only required to publicly bid contracts where the municipality is anticipating spending more than ten thousand dollars ($10,000). Further, even assuming, arguendo, that a Home Rule or Optional Plan form municipality were required to publicly bid such a contract, such a requirement is outside the purview of this Commission.

12. Under the Programs, a participating EGS would provide materials to customers to educate them about the Programs. The EGS would use information available on the utility's eligible customer list ("ECL") to identify the accounts within the community's boundaries. It is FES's understanding that Pennsylvania's electric distribution companies ("EDCs"), including Penelec and Penn Power, have updated their ECL after giving customers an opportunity to opt-out. The EGS would prepare opt-out notices and forward them to the municipality for review and approval. The EGS would also provide the municipality with a mailing list for review and verification of correct addresses. The EGS would then send eligible customers thirty (30) day opt-out notices with a detailed description of terms and conditions of service. At the end of the 30 days, the EGS would send a list of customers that did not opt out to the EDC for enrollment, and provide customers with a disclosure statement, which would advise customers of terms and conditions of service including the three-day contract rescission period. The EDC would also mail a confirmation letter to customers advising them of the ten (10) day waiting period during which they could contact the EDC to stop the enrollment.

13. The Programs include numerous customer protections, such as: (1) a clear statement of the price; (2) a thirty-day opt-out period; (3) a requirement that the terms of the contract between the municipality and the EGS shall not be materially different from the contract

[4] See, e.g., First Class Township Code, 53 P.S. § 56802; Second Class Township Code, 53 P.S. § 68102; Borough Code, 53 P.S. § 46401; Second Class City Code, 53 P.S. § 23308.1; Third Class City Code 53 P.S. § 36901(b).

provided to the customers (such contract will include the non-inclusion of customers who have previously chosen an EGS); (4) the provision of customer education materials to inform consumers about the existence of the program and the highlights of the program at no cost to the municipality; and (5) the provision of detailed opt-out notices which provide disclosure of price, a list and explanation of all fees and charges, disclosure of service commencement date and term as well as a procedure and time period to opt-out, statements pertaining to default service in the event customers opt-out, disclosure of any credit, collection and/or deposit policies and requirements, disclosure of any limitations or conditions on acceptance into the program, and the provision of a local customer service telephone number. See §§ 991.04-991.05 of Meadville Ordinance, Exhibit A; §§4-5 of Warren Ordinance, Exhibit B; §§ 4-5 of Edinboro Ordinance, Exhibit C; and §§4-5 of Farrell Ordinance, Exhibit D.

14. The Programs leave the ultimate choice of EGS with the customer. 66 Pa.C.S. § 2806(a). Customers who already receive electric supply services from an EGS will not initially be included in the Programs, however those customers may choose to later participate. Further, customers always have the ability to leave the Programs and choose a different supplier for their electricity generation service, or receive default service from their local utility. Opt-out municipal aggregation Programs, such as Meadville's, Warren's, Edinboro's and Farrell's Programs, do not include early termination or switching fees.

15. FES has offered to provide guaranteed savings to eligible consumers through Meadville's, Warren's, Edinboro's and Farrell's Programs, with such savings being 6% off of the Price-to-Compare for residential consumers and 4% off of the Price-to-Compare for small commercial consumers.

16. Neither Meadville, Warren, Edinboro nor Farrell have, or will, receive any compensation or other incentives for creating its Program or for contracting with FES to supply eligible customers. FES has not promised compensation to a municipality for developing a municipal aggregation program. Further, none of the municipalities will expend any funds other than necessary publishing costs with respect to the adoption of an ordinance to participate in the Program.

II. THE MEADVILLE, WARREN, EDINBORO AND FARRELL PROGRAMS DO NOT REQUIRE PRIOR COMMISSION APPROVAL

A. Home Rule and Optional Plan Form Municipalities Have the Requisite Powers for Municipal Aggregation.

1. Home Rule and Optional Plan Form Municipalities Enjoy a Broad Grant of Expansive Powers.

17. Home Rule or Optional Plan form municipalities currently developing opt-out municipal aggregation programs are governed by the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. §§ 2901 et seq. (e.g. Warren, Edinboro and Farrell), or the Optional Third Class City Charter Law (e.g., Meadville). 53 P.S. §§ 41101 et seq.

18. Home Rule municipalities are granted broad powers of local governance by the Pennsylvania Constitution, which provides that Home Rule municipalities "may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time." Pa. Const. Art. 9, § 2. This broad grant is affirmed in the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. § 2961.[5]

[5] "A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter. All grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality." 53 Pa.C.S. § 2961.

19. The Pennsylvania Constitution also provides for Optional Plan forms of governance, Pa. Const. Art. 9, § 3,[6] which have been granted the "greatest power of self government consistent with the Constitution of Pennsylvania and with the provisions and the limitations prescribed by this subpart.... [which] shall be liberally construed in favor of the municipality." 53 Pa.C.S. § 2973.[7]

20. Optional Third Class City Charter municipalities are also provided for by the Pennsylvania Constitution, Pa. Const. Art. 9, § 3, and have similar expansive powers of local governance as do Optional Plan form municipalities, including "the greatest power of local self-government consistent with the Constitution of [Pennsylvania]" whereby "any specific enumeration of municipal powers" of any law shall not be construed to limit the greatest power of local self-government consistent with the Constitution, and any such specifically enumerated municipal powers "shall be construed as in addition and supplementary to the powers conferred in general terms by" the Optional Third Class City Charter Law; and that all grants of municipal powers "shall be liberally construed in favor of the city." 53 P.S. § 41304.[8]

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[6] "Municipalities shall have the right and power to adopt optional forms of government as provided by law. The General Assembly shall provide optional forms of government for all municipalities." Pa. Const. Art. 9 § 3.

[7] "The general grant of municipal power under this subpart is intended to confer the greatest power of self government consistent with the Constitution of Pennsylvania and with the provisions of and the limitations prescribed by this subpart. Any specific enumeration of municipal powers contained in this subpart or in other statutes does not limit the general description of power contained in this subpart. Any specifically enumerated municipal powers are in addition and supplementary to the powers conferred in general terms by this subchapter. All grants of municipal power to municipalities governed by an optional plan under this subpart, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality." 53 Pa.C.S. § 2973.

[8] "The general grant of municipal power contained in this article is intended to confer the greatest power of local self-government consistent with the Constitution of this State. Any specific enumeration of municipal powers contained in this act or in any other law shall not be construed in any way to limit the general description of power contained in this article, and any such specifically enumerated municipal powers shall be construed as in addition and supplementary to the powers conferred in general terms by this article. All grants of municipal power to cities governed by an optional plan under this act, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the city." 53 P.S. § 41304.

21. The general grant of expansive authority provided to Home Rule and Optional Plan form municipalities is expressly different than those granted to First Class Townships, Second Class Townships, Boroughs, Second Class Cities, Second Class Cities-A and Third Class Cities which are governed solely by their respective Codes.[9] Municipalities governed by these Codes are only given such powers as those which have been granted to them by the legislature through these Codes.[10]

22. Thus, while non-Home Rule and Optional Plan form municipalities are restricted in their powers to the particular grants of power within their respective Codes, Home Rule municipalities enjoy large grants of expansive power which are only limited to the extent that an action directly violates the Constitution, an Act of the General Assembly, or the municipality's charter, and with respect to Optional Plan forms of governance, the large grant of expansive power is the greatest power of self-government conferred by the Constitution which is to be liberally construed in favor of the municipality.

23. Thus, Home Rule and Optional Plan form municipalities are not required to have a specific grant of authority to operate a municipal aggregation program, so long as they are not expressly prohibited by law or the Pennsylvania Constitution from doing so. No such prohibition, specific or general, exists within the Commonwealth of Pennsylvania.

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[9] First Class Townships are governed by the First Class Township Code, 53 P.S. §§ 55101 et seq. Second Class Townships are governed by the Second Class Township Code, 53 P.S. §§ 65101 et seq. Boroughs are governed by the Pennsylvania Borough Code, 53 P.S. §§ 45101 et seq. Third Class Cities are governed by the Third Class City Code, 53 P.S. §§ 35101 et seq. Two cities in Pennsylvania are of the Second Class; Pittsburgh is a City of the Second Class, and Scranton is a City of the Second Class A. Both are Home Rule Communities governed by the Home Rule Charter and Optional Plans Law, 53 Pa.C.S. §§ 2901 et seq. Only one city, Philadelphia, is a City of the First Class. Philadelphia is a Home Rule Community governed by the First Class City Home Rule Act. 53 P.S. §§ 13101 et seq.

[10] Hydropress Envtl. Servs. v. Twp. of Upper Mount Bethel, 836 A.2d 912, 919 (Pa. 2003).

2. The Limitations of Power for Home Rule and Optional Plan Form Municipalities Do Not Prevent the Creation of Opt-Out Municipal Aggregation Programs.

24. Home Rule municipalities are only restricted in their powers by the Pennsylvania Constitution, statutes of the General Assembly and the municipality's adopted charter. 53 Pa.C.S. § 2961, Pa. Const. Art 9, § 2.

25. The Home Rule and Optional Plan Law prohibits only a limited number of activities of Home Rule municipalities, which include: (1) engaging in any proprietary or private business, except as authorized by statute; and (2) exercising powers contrary to, or in limitation or enlargement of, powers granted by statutes applicable throughout the Commonwealth. 53 Pa.C.S. § 2962(c).

26. Optional Plan form municipalities are restricted in their power in that they cannot: (1) exercise any powers extraterritorially; or (2) engage in proprietary or private business except as authorized by the General Assembly. 53 Pa.C.S. § 2974.

27. Similarly, Optional Third Class City Charter limitations provide that such municipalities cannot: (1) exercise any powers extraterritorially; (2) engage in proprietary or private business except as authorized by the General Assembly; or (3) operate in contravention to statutes of general applicability throughout the Commonwealth. 53 P.S. §41305.

28. None of these limitations prevent Home Rule or Optional Plan form municipalities, from adopting an opt-out municipal aggregation program. Such programs are not operated extraterritorially, adopting a municipal aggregation program does not constitute engaging in proprietary or private business, and a municipal aggregation program does not offend any statute of general applicability within the Commonwealth of Pennsylvania, including the Public Utility Code, 66 Pa.C.S. §§ 101 et seq.

a. Opt-Out Municipal Aggregation Programs Do Not Operate Extraterritorially.

29. As previously discussed, Home Rule and Optional Plan form municipalities are only able to legislate within their municipal boundaries.

30. Meadville's Program applies only to eligible customers within the City of Meadville. See §991.04(a) of Meadville's Ordinance, Exhibit A. Similarly, Warren's, Edinboro's and Farrell's Programs only apply to eligible customers with the respective municipalities. See §4(a) of Warren's Ordinance, Exhibit B, §4(a), 3 of Edinboro's Ordinance, Exhibit C, §4(a) of Farrell's Ordinance, Exhibit D.

31. Because Meadville, Warren, Edinboro and Farrell are acting solely within their respective geographic boundaries they are not subject to the Code's EGS licensing requirements.[11] Nevertheless, the Programs will operate consistent with the Commission's regulatory framework, as discussed below.

b. Municipal Aggregation, Such as Meadville's, Is Not a Proprietary or Private Business.

32. Home Rule and Optional Plan form municipalities do not engage in a private or proprietary business by adopting and maintaining opt-out municipal aggregation programs.

33. In every case where a court has determined that a municipality is engaging in a proprietary or private business, the municipality was receiving compensation, raising revenue, or

[11] 66 Pa.C.S. §2809(a).

competing within a particular industry.[12] With an opt-out municipal aggregation program, the municipality does not own or operate a utility, is not performing a service for compensation, and does not, at any time, take title to the electricity. Further, an opt-out municipal aggregation does not create a situation where a municipality is competing within the electric industry. Additionally, and of significant importance, the municipality is neither raising nor receiving any compensation or revenue from offering the benefits of municipal aggregation to its residents. Accordingly, a Home Rule or Optional Plan form municipality which starts an energy aggregation program cannot be contemplated to be operating a private or proprietary business.

34. The determination of whether a municipal corporation is performing a government function or a proprietary function is a different determination than whether a municipal corporation is performing a private or proprietary business. The "government function test" is typically utilized in matters of contract or tort to determine whether governmental immunities or protections apply.[13] While the government function test is used as a guide to determine whether an activity is proprietary or governmental, the prohibition provided by the Home Rule and Optional Plan form laws is against operating a proprietary or private business, not merely a function. Even if the government function test alone was impermissibly utilized in determining whether a business is being operated by a municipal corporation, it has been recently determined by the Commonwealth Court that when a government unit enters into a

[12] See, e.g., City of Philadelphia v. PUC, 829 A.2d 1241 (Pa. Cmwlth. Ct. 2003) (City of Philadelphia owns and operates PGW); Philadelphia Facilities Management Corporation et al v. Biester, 431 A.2d 1123 (Pa. Cmwlth Ct. 1981) (PGW supplying utility service for compensation); White Oak Borough Authority Appeal, 93 A.2d 437 (Pa. 1953) (Municipal corporation supplying water for compensation and extraterritorially); Associated Pennsylvania Contractors v. City of Pittsburgh, 579 A.2d 461 (Pa. Cmwlth. Ct. 1990) (City of Pittsburgh operating an asphalt plant for compensation, to raise revenue, and competing within the asphalt industry).

[13] E. Stroudsburg Univ. Found. v. Office of Open Records, 995 A.2d 496, n. 14 (Pa. Cmwlth. Ct. 2010).

contract, it does so in its governmental capacity, "because the government always acts as the government."[14]

35. Home Rule and Optional Plan form municipalities that create and maintain municipal aggregation programs do not receive compensation, are not raising revenue and are not competing within a particular industry. To the contrary, the elected officials of these municipalities are merely acting as elected officials to promote the interests of their residents and small business owners. Accordingly, Home Rule and Optional Plan form municipalities that create and maintain municipal aggregation programs are not engaged in proprietary or private business.

c. Opt-Out Municipal Aggregation Does Not Offend Statutes of General Applicability.

i. The Public Utility Code Does Not Require a Home Rule or Optional Plan Form Municipality to Hold an EGS License to Implement the Program.

36. As mentioned above, a Home Rule or Optional Plan form municipality is not required to hold an EGS license, as a broker, marketer, aggregator or otherwise, to implement its municipal aggregation program. The Code only requires a municipal corporation to hold an EGS license when it is providing service outside its municipal limits. 66 Pa.C.S. § 2809(a).

[14] Id. at 504.

Similarly, a municipal corporation is an EGS only when choosing to provide service outside its municipal limits. 66 Pa.C.S. § 2803.[15]

37. Provided Home Rule and Optional Plan form municipalities engaging in opt-out municipal aggregation programs only aggregate customers within their municipal limits, they do not need to hold an EGS license.

ii. The Code Does Not Preempt Opt-Out Municipal Aggregation.

38. The Programs are not preempted by the Public Utility Code, which does not either expressly or impliedly preempt a municipal law allowing for opt-out aggregation.

39. The Pennsylvania Supreme Court has identified only three areas where complete field preemption exists: alcoholic beverages, banking and anthracite strip mining.[16] As a result,

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[15] A municipality's operation of a municipal aggregation program is not subject to licensure by this Commission as the Commission may only subject a municipality to licensure if it is operating extraterritorially. In Barnes Laundry Co. v. Pittsburgh, 109 A.2d 535 (Pa. 1920), the Supreme Court reviewed whether a city's water department's rate structure was regulated by the Public Service Commission. In determining that a city's water department was not subject to Commission regulation, the Court reviewed the applicable law to find that a municipal corporation was expressly defined out of the definition of a public service corporation, "except as otherwise provided in this act." After reviewing all areas of the precursor to the Public Utility Code to determine where a municipal corporation is expressly determined to be regulated, the Court determined that, because the Public Service Commission is not expressly given the power to regulate a municipal corporation in the area of rate structures, "there is not enough in all the provisions of the act to permit a construction which would confer upon the [ ] Commission the right to regulate the service rates charged by a municipal water plant; on the other hand, there is much to be found therein which strongly evidences an intention that the statute shall not, in any such extended sense, apply to municipal corporations." Id. at 537. The same analysis applies to a municipal corporation's power to adopt a municipal aggregation program under the current Public Utility Code. Municipal corporations are expressly removed from regulation as a corporation "except as otherwise expressly provided," 66 Pa.C.S. §102, and municipal corporations are only determined to be acting as an EGS subject to licensure by this Commission if they are operating extraterritorially. 66 Pa.C.S. § 2809(a). There are no other applicable provisions of the Public Utility Code pertaining to the licensure of a municipal corporation. Following the analysis in Barnes Laundry, an interpretation of the Public Utility Code does not permit licensure of a municipal corporation *until and unless* the municipal corporation is operating extraterritorially. Further, as the Public Utility Code only provides for licensure of a municipal corporation upon the provision of a service extraterritorially, municipal corporations are prohibited from being determined, under the current statutory authority, to be brokers, marketers or aggregators.

[16] Nutter v. Dougherty, 938 A.2d 401, 414 (Pa. 2007); *see also* Hydropress Envir. Servs. Inc. v. Twp. Of Upper Mount Bethel, 836 A.2d 912, 918 (Pa. 2003) ("we have found an intent to totally preempt local regulation in only three areas: alcoholic beverages, banking and anthracite strip mining.")

preemption may occur only if the Programs run afoul of a specific law enacted by the General Assembly.

40. Yet the Code is silent with regard to governmental aggregation, and preemption cannot occur in an area in which the General Assembly has not affirmatively acted.[17]

41. Indeed, the Supreme Court's opinion in Nutter v. Dougherty, 938 A.2d 401, 414 (Pa. 2007), properly identifies the limited scope of the preemption doctrine. In Nutter, the local municipality passed an ordinance that sought to restrict the amount a person or corporation could contribute to candidates for certain public offices. The ordinance was challenged as preempted by the Election Code. The Court concluded that, while the Election Code addressed many issues involving elections and the reporting of campaign contributions, it was silent with regard to contribution limits. Thus, because the Election Code was silent with regard to campaign contribution limits, and because "a home rule municipality's exercise of its local authority is not

[17] The reliance by RESA, at ¶23 of their *Petition for Investigation and Issuance of Declaratory Order Regarding the Propriety of the Implementation of Municipal Electric Aggregation Programs Absent Statutory Authority*, as to Chester v. Philadelphia Electric Co., 218 A.2d 331 (Pa. 1966), for the proposition that local governments are unable to establish local regulations, is misplaced. RESA's misleading interpretation that the Supreme Court stated that local governments cannot be allowed to establish their own regulations for electric service because such regulations "could become so twisted and knotted as to affect adversely the welfare of the entire state" is blatantly wrong. In Chester, the Supreme Court did not say that the **regulations** would become twisted and knotted. In fact, what the Supreme Court actually held was that the conveyors of power and fuel could become twisted and knotted, in reference to wires, pipe lines and oil lines. The Supreme Court, therefore, stated that the Commission has preempted local regulation only as it pertains to "complex and technical service and engineering questions arising in the location, construction and maintenance of all public utilities facilities." Id. Further, Dominion Retail's reliance on supposed precedential authority for the proposition that the Commission has engaged in field preemption over all local regulations is also misplaced. (Dominion Retail's *Petition 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*, at ¶22). In PECO Energy Co v. Upper Dublin Township, 922 A.2d 966 (Pa. Cmwlth. Ct. 2006), the Commonwealth Court noted that the Public Utility Code specifically preempted a local ordinance only as it applied to "public utilities' vegetation management activities" as the Public Utility Code gave express preemption to the Commission over such matters. Id. In South Coventry v. Philadelphia Electric Co., 504 A.2d 368 (Pa. Cmwlth. Ct. 1986), the Commonwealth Court reviewed a case where the Township attempted to apply local zoning restrictions on the construction of a nuclear power plant. The Court determined that the Public Utility Code specifically preempted the zoning, or regulation of utility facilities. The Public Utility Code does not preempt municipal aggregation programs as the Courts and the Public Utility Code are silent with respect to municipal aggregation.

lightly intruded upon, with ambiguities regarding such authority resolved in favor of the municipality," the ordinance at issue was not preempted by the Election Code.

42. The ordinances adopting the Programs are comparable to the ordinance found not to be preempted in Nutter. The Public Utility Code is silent with respect to municipal aggregation. Thus, as in Nutter, a Home Rule or Optional Plan form municipality engaging in an opt-out municipal aggregation has merely exercised its broad authority to pass an ordinance that addresses an area that the Code does not address. Preemption does not apply in this situation. [18]

B. Prior Commission Approval is Not Required for an EGS Such as FES to Participate in an Opt-Out Municipal Aggregation Program.

43. A licensed EGS is not required to obtain prior Commission approval to enter into a contract with a Home Rule or Optional Plan form municipality to participate in an opt-out municipal aggregation program. As an initial matter, under the Competition Act electric generation service is no longer regulated as a public utility function in Pennsylvania. See 66 Pa.C.S. §§ 2802(14), 2806(a). Further, while the Competition Act is quite clear in specifying when an EGS must obtain prior Commission approval, see, e.g., 66 Pa.C.S. § 2809(d) (requiring prior Commission approval to transfer EGS license), it does not require an EGS to obtain Commission approval prior to participating in an opt-out municipal aggregation program.

44. While FES is aware of three instances in which the Commission has reviewed and approved opt-out programs, in each instance there was a clear contractual or regulatory requirement for the EDC or EGS implementing the program to submit the program to the Commission for review and approval. In the case of PECO Energy Company's Market Share

[18] Should a question arise over whether or not the Public Utility Code preempts the statutory authority under which a Home Rule, Optional Plan or Optional Third Class City Charter adopts and implements a municipal aggregation, FES respectfully submits that it is a question for the civil Courts, not the Commission, to decide.

Threshold ("MST") program,[19] and the Competitive Default Service Plans of Metropolitan Edison Company and Penelec,[20] prior Commission review and approval was specifically required by the terms of each EDC's Restructuring Settlement. Neither Meadville, Warren, Edinboro, Farrell nor FES has made any such contractual commitment.

45. In the third instance, which involved Direct Energy Services' request for Commission approval of an opt-out retail aggregation program for customers of Pike County Light & Power Company, the opt-out aggregation program's design necessitated requests that, among other things, the Commission waive several of its regulations, e.g. to enable the use of New York EDI and protocols.[21] In addition, the opt-out aggregation program encompassed an EDC's entire service territory. In contrast, the Programs are designed to conform to the Code and the Commission's regulations, orders, policy statements and interim guidelines, as explained further below, and the Programs are confined to the borders of a single municipality within Penelec's or Penn Power's territory.

46. Moreover, in the absence of any other authority in the Direct Energy Services case, the Commission approved the program for the customers of Pike County Light & Power; whereas regarding the Meadville, Warren, Edinboro and Farrell Programs, the elected officials of each respective Home Rule and Optional Plan form municipality possess the authority to determine that such a program can be implemented on behalf of their constituents.

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[19] See *Petition for Approval of PECO Energy Company's Market Share Threshold Bidding/Assignment Process*, Docket No. P-00021984; *Petition for Approval of "The Better Choice" Plan to Meet PECO Energy Company's Market Share Threshold Requirements*, Docket No. P-0021992 (Opinion and Order entered February 6, 2003).

[20] See *Application of Metropolitan Edison Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code*, Docket No. R-00974008, *Application of Pennsylvania Electric Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code*, Docket No. R-00974009 (Opinion and Order entered June 30, 1998).

[21] See *Petition of Direct Energy Services for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company*, Docket No. P-00062205 (Order entered April 20, 2006).

III. THE PROGRAMS ARE CONSISTENT WITH THE REQUIREMENTS OF THE CODE AND THE COMMISSION'S REGULATIONS, ORDERS AND GUIDELINES.

A. The Programs Do Not Violate the Anti-Slamming Provisions of the Code or the Commission's Regulations.

47. Even if Commission review and approval were required for the Programs, the Programs do not result in a Home Rule or Optional Plan municipality's exercise of powers contrary to generally applicable Acts of the General Assembly. In particular, the Programs would not violate the prohibition in Section 2807(d)(1) of the Code against the unauthorized switching of customers from one supplier to another – what is commonly referred to as "slamming." 66 Pa.C.S. § 2807(d)(1). Specifically, Section 2807(d)(1) requires that the Commission "establish regulations to ensure that an electric distribution company does not change a customer's electricity supplier without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier." 66 Pa.C.S. § 2807(d)(1); *see also* 52 Pa. Code §§ 54.42(a)(9), 57.171-.179.[22]

48. The Commission has previously ruled that opt-out aggregation programs do not violate the requirements of Section 2807(d)(1) of the Code. In fact, the Commission definitively stated, in its order approving Direct Energy Services' proposed retail aggregation program for the entire service territory of Pike County Light & Power Company, that "[w]e conclude that an opt-out program is not prohibited by Section 2807(d)(1) of the Public Utility Code, 66 Pa.C.S. §

[22] Since this is merely direction to the Commission to adopt slamming regulations, the Municipalities are incapable of violating the statute.

2807(d)(1) . . . ."[23] Although a number of other findings in the Commission's Order on Direct Energy Services' proposal may not be precedent as a result of the unique circumstances presented in that case, this statement is a definitive interpretation of Section 2807(d)(1) of the Competition Act, on which Home Rule and Optional Plan form municipalities and licensed EGSs are entitled to rely.

49. Further, as mentioned earlier, the Commission has previously ruled that opt-out programs did not violate the Competition Act's prohibition against slamming not only in the case of Direct Energy Services' opt-out aggregation proposal, but also in connection with the restructuring proceedings of PECO Energy Company, Metropolitan Edison Company and Penelec.[24] With respect to the PECO Energy Company MST program, the Commission did not question the use of an opt-out procedure as a means of furthering customer choice:

> It should be noted that no interested party objected to the use of the opt-out process, and opt-out procedures have been utilized in other electric industry restructuring proceedings as a means of furthering customer choice. *See, Re Procedures Applicable to Electric Distribution Companies and Electric Generation Suppliers During the Transition to Full Retail Choice*, M-00991230, 92 Pa. P.U.C. 400 (Order entered May 18, 1999); *Re PECO Energy Company Competitive Default Service Program Bidding*, A-110550F0147 (Order entered November 29, 2000). Therefore, we are not questioning the use of an opt-out procedure here. Our purpose in discussing it is merely to recognize the effect that the opt-out procedure has on our evaluation of other aspects of the proposal.[25]

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[23] *Petition of Direct Energy Services for Emergency Order Approving a Retail Aggregation Bidding Program for Customers of Pike County Light & Power Company*, Docket No. P-00062205, 2006 Pa. PUC LEXIS 3 (Order entered April 20, 2006) (emphasis added); *Petition for Clarification by Pike County Light & Power Company*, Docket No. P-00062205, 2006 Pa. PUC LEXIS 42, (Order entered June 28, 2010) (opt-out aggregation "provided sufficient notice and customer consent to remain in the program or to opt-out, as desired.").

[24] *Petition for Approval of PECO Energy Company's Market Share Threshold Bidding/Assignment Process*, Docket No. P-00021984 (Order entered May 1, 2003); and *George v. PA PUC*, 735 A.2d 1282 (Pa. Cmwlth. 1999).

[25] *Petition for Approval of PECO Energy Company's Market Share Threshold Bidding/Assignment Process*, Docket No. P-00021984; *Petition for Approval of "The Better Choice" Plan to Meet PECO Energy Company's Market Share Threshold Requirements*, Docket No. P-0021992 (Opinion and Order entered February 6, 2003).

50. These Orders illustrate that the Commission has been less concerned with the use of opt-out procedures than with fostering the development of retail competition by moving customers away from the default service provider. The same concerns that applied to the EDC restructuring proceedings at the beginning of the transition to retail competition, and to the expiration of rate caps in the service territory of Pike County Light & Power Company, apply equally today in EDC service territories where rate caps are about to expire on December 31, 2010.

51. As explained above, the Programs will exclude from the pool of eligible customers any customer that is already receiving service from an EGS. It will provide the remaining eligible customers with thirty (30) days to opt out of the Program, in observance of the prohibition of 66 Pa.C.S. § 2807(d)(1) against slamming, will provide for the EDC to issue a 10-day confirmation to customers in compliance with 52 Pa. Code §§ 57.173 and 57.174, and will provide customers with the required disclosure statement and three-day rescission period in accordance with 52 Pa. Code § 54.5(d). Further, customers that do not opt out and are included as participants in the aggregation may switch to another EGS or return to the default service provider at any time, without any termination or switching fees.

52. Further, the provision of 52 Pa. Code § 57.173 requiring that an EGS may initiate a customer switch of an EGS only upon contact by the customer or an authorized representative of the customer is not violated by municipal aggregation as the government entity representing the Home Rule or Optional Plan form municipality has determined itself to be the authorized representative of the eligible customers.[26]

B. The Programs Do Not Violate the Commission's Regulations Concerning the Sharing of Customer Information.

53. The Programs also comply with the Commission's regulation prohibiting an EDC from releasing customer information unless the customer is notified of the intent, and given a convenient method of notifying the EDC (either by returning a signed form, orally, or electronically) of the customer's desire to restrict the release of private information (specifically the customer's telephone number and historical billing data).[27] The information needed for municipal aggregation is limited to the customer's name, account number, rate class, service address and billing address. With respect to this information, the Commission, in its Order on PPL Electric Utilities Corporation's Retail Markets – which the Commission indicated should serve as a template for the other Pennsylvania EDCs – approved PPL Electric Utilities Corporation's plan to update its eligible customer list ("ECL") by giving customers an opportunity to opt out via a one-time mailing.[28] The Commission indicated that the approved procedure would meet the requirements of 52 Pa. Code § 54.8 and further directed PPL to tell

[26] The eligible customers' interests are represented by their elected officials, such as the governing body of a Home Rule or Optional Plan form municipality. The governing body, through the adoption of an ordinance creating an opt-out municipal aggregation program, assumes the role, as elected representatives of the eligible customers, as the authorized representative of the eligible customers. Should an eligible customer not wish to cede such authorization, the customer may opt-out of the program.

[27] 52 Pa. Code § 54.8.

[28] *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271 (Clarification Order entered October 22, 2009).

customers, as part its consumer education program, that they should not opt out if they wish to receive competitive offers.

54. Upon information and belief, every other Pennsylvania EDC, including Penelec and Penn Power, has by now updated its ECL after giving customers an opportunity to opt out, in a manner sufficient to satisfy 52 Pa. Code § 54.8. Accordingly, because the Programs will rely solely on the ECL, they do not violate the Commission's regulations regarding an EDC's release of customer information.

C. The Programs Will Comply With Other Requirements Promulgated by the Commission.

55. In addition to the aforementioned consumer protections, the Programs will also include other customer protections as described below in compliance with all other applicable provisions of the Code and the Commission's regulations, orders and guidelines.

56. Following the thirty-day period discussed above, should a customer not opt-out, FES would notify the EDC of the inclusion of the customer in the municipal aggregation program pursuant to 52 Pa. Code § 57.173, and the EDC would not make the switch to FES until the beginning of the first feasible billing period following the ten day period. 52 Pa. Code. § 57.174.

57. Prior to the effective date of any service to the customer, the customer would be provided the required disclosure statement and be granted the three-day rescission period required by 52 Pa. Code §52.5(d).

58. Further, municipal aggregation will not trigger the requirements of the Commission's aforementioned Interim Guidelines for notice to customers already served by an EGS of renewals or changes in the terms of their contracts.[29] These Interim Guidelines are not implicated, as FES avers that municipal aggregation shall not be available to customers who have already made an affirmative choice to be served by an EGS. Additionally, all customer notices contemplated by the Interim Guidelines are able to be complied with upon the expiration of an EGS's initial contract term with the municipality.

59. Opt-out municipal aggregation does not create a situation where favoritism by the EDC of the EGS could occur, 52 Pa. Code §54.122(2), as the information needed for municipal aggregation is limited to the customer's name, account number, rate class, service address and billing address.

60. Lastly, because the Programs are confined to the borders of the Home Rule or Optional Plan form municipality, there will be no significant impact on default service programs, contrary to any allegations that the Programs would cause adverse impacts on default service programs. In fact, the electric load associated with residents in Meadville, Warren and Edinboro combined is around 1% of the total load of Penelec. Similarly, the electric load associated with residents in Farrell is less than 1% of the total load of Penn Power.

61. Also, FES will not, and has not, promised or provided any inducements or incentives to any Pennsylvania Home Rule or Optional Plan form municipality to exercise its authority to adopt an opt-out aggregation program.

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[29] See also *Interim Guidelines Regarding Advance Notification by an Electric Generation Supplier of Impending Changes Affecting Customer Service; Amendment re: Supplier Contract Renewal/Change Notices*, Docket Nos. M-2010-2195286, M-0001437 (Order entered September 23, 2010). ("*Interim Guidelines*"); see also 52 Pa. Code § 54.5(g).

62. As opt-out municipal aggregation does not violate any applicable portion of the Public Utility Code or corresponding Commission regulations, orders or guidelines, FES respectfully submits that this Commission should have no regulatory concern with the implementation of the Programs.

IV. CONCLUSION

For the foregoing reasons, FirstEnergy Solutions Corp. respectfully requests that the Commission rule that no approvals are necessary for FirstEnergy Solutions Corp. to participate in the Programs of the City of Meadville, the City of Warren, the Borough of Edinboro or the City of Farrell. In the alternative, FirstEnergy Solutions Corp. requests that the Commission issue an order approving FirstEnergy Solutions Corp. to participate in the Programs.

KNOX McLAUGHLIN GORNALL & SENNETT, P.C.

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925582.v2

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of FirstEnergy Solutions Corp. for Approval to Participate in Opt-Out Municipal Energy Aggregation Programs of the Optional Third Class City Charter City of Meadville, the Home Rule Borough of Edinboro, the Home Rule City of Warren and the Home Rule City of Farrell.	:	Docket No. P-2010-_____

VERIFICATION

On this, the 9th day of November, 2010, Tony C. Banks, the undersigned, deposes and states that he is Vice President, Product and Marketing Development of FirstEnergy Solutions, a corporation, that as such he is authorized to execute this verification on behalf of the corporation, and that the facts set forth in the foregoing Petition to of FirstEnergy Solutions Corp. for Approval to Participate in Opt-Out Municipal Energy Aggregation Programs of the Optional Third Class City Charter City of Meadville, the Home Rule Borough of Edinboro, the Home Rule City of Warren and the Home Rule City of Farrell are true and correct to the best of his knowledge, information and belief, subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

Vice President
Product & Market Development,
FirstEnergy Solutions

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

EXHIBIT
"A"

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.

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 21st 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.

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

ORDINANCE
NO. 1793

AN ORDINANCE SUPPLEMENTING THE CODE OF CITY OF WARREN, BY ESTABLISHING PART _____ "MUNICIPAL ENERGY AGGREGATION" WHICH AUTHORIZES 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 BORDERS OF THE CITY OF WARREN.

WHEREAS, the CITY OF WARREN is governed by the Home Rule Charter and Optional Plans Law, 53 Pa C.S. §2901-3171, and the CITY OF WARREN Charter, which provides that the CITY OF WARREN has, and may exercise, any power, and may perform any function not denied by the Constitution of Pennsylvania, by the Charter or by the General Assembly and where the powers of the City of Warren shall be construed broadly in favor of the City of Warren; and

WHEREAS, Municipal Energy Aggregation Programs provide an opportunity for certain 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 electricity consumers individually; and

WHEREAS, the City of Warren may enter into a contract with a "Contracted Electric Generation Supplier" to supply electricity through the City of Warren Municipal Energy Aggregation Program for the period of January 1, 2012 through March 31, 2012 for certain residential and small commercial consumers; and

WHEREAS, certain residential and small commercial electric consumers within the City of Warren stand to receive savings as a result of the adoption of the Municipal Energy Aggregation Plan; and

WHEREAS, the adoption of the Municipal Energy Aggregation Program by the City of Warren 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 Warren will not mandate participation in the Municipal Energy Aggregation Program, but will be provided on an opt-out basis.

NOW THEREFORE, The City of Warren hereby ordains:

Section 1. Title. Municipal Energy Aggregation Ordinance of the City of Warren.

EXHIBIT
"B"

Section 2. Definitions:

The following definitions shall be used in reference to the provisions of this section:

(a) "Contracted Electric Generation Supplier" means the entity with which the City of Warren has contracted through the Municipal Energy Aggregation Program to provide a supply of electricity.

(b) "Excluded Consumers" means electricity consumers (1) that have opted out of the Municipal Aggregation Program pursuant to the provisions of section 5, 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 50 kW within 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 Warren and small commercial consumers within the City of Warren which are under a small commercial, small industrial or small business rate classification, and whose maximum registered peak load was less than 50 kW within the last twelve (12) months

(d) "Municipal Energy Aggregation Program" means the Program negotiated with the Contracted Electric Generation Supplier which provides a supply of electricity to certain residential and small commercial electricity consumers within the City of Warren on an Opt-Out basis.

(e) "Non-Excluded Consumer" means an electricity consumer within the City of Warren which or who is not an Excluded Consumer.

(f) Other terms defined in this section are so defined in this article by reference.

Section 3. Administration.

All Non-Excluded Consumers shall be supplied with electric generation supply pursuant to the Municipal Energy Aggregation Program.

Section 4. Municipal Energy Aggregation Program.

(a) On approval of City Council, the City Manager of the City of Warren is authorized to enter into an agreement with an Electric Generation Supplier for the

provision of electric generation supply services to Non-Excluded Consumers within the City of Warren on an opt-out basis.

(b) The contract shall, at a minimum, clearly indicate the price that the Contracted Electric Generation Supplier will charge Non-Excluded Consumers for electric generation supply as well as the term of the contract; liability coverage; indemnification; and that the supplier can satisfy certain requirements including but not limited to that they have sufficient resources of power to supply retail electrical power to the residents and small businesses of the City of Warren and is licensed by the Public Utility Commission (PUC).

(i) 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 Electric Generation Supplier will charge different rates to different rate classes within the City of Warren, 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 Section 5 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 Electric Generation Supplier.

(d) The Contracted Electric Generation Supplier may not impose any terms, conditions, fees, or charges on any consumer served by a Municipal Aggregation Program that is different from the particular term, condition, fee, or charge which was included within the contract between the City of Warren and the Contracted Electric Generation Supplier or the notices provided pursuant to this section.

(e) The Contracted Electric 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 Warren.

Section 5. Opt-Out Program

(a) The Municipal Energy Aggregation Program shall be offered on an opt-out basis.

(b) After the City of Warren executes a contract for electric generation services with the Contracted Electric Generation Supplier, but prior to including a consumer's electric account or accounts in the Municipal Aggregation Program, the Contracted Electric 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 electric 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 charged for electric generation service that the Contracted Electric 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 Electric 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 electric 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 Electric Generation Supplier.

Section 6. Savings Clause

If any provision of this Ordinance or the application thereof to any Person or circumstances is held invalid, such holding shall not affect the other provisions or applications of this Ordinance, which shall be given affect without the invalid provisions or applications, and to this end, the provisions of this Chapter are declared severable.

All Ordinances or parts of Ordinances which are inconsistent herewith are hereby repealed to the extent of such inconsistency.

Section 7. Effective Date.

That this Ordinance shall be effective thirty days after enactment.

ADOPTED this 18th day of October, 2010.

ATTEST:

James C. Nelles, City Manager

Mark A. Phillips, Mayor

APPROVED AS TO FORM:

Andrea L. Stapleford, City Solicitor

HOME RULE BOROUGH OF EDINBORO

Ordinance No. 581 of 2010

AN ORDINANCE SUPPLEMENTING THE CODE OF THE HOME RULE BOROUGH OF EDINBORO, BY ESTABLISHING CHAPTER 13 PART 6 "MUNICIPAL ENERGY AGGREGATION" WHICH AUTHORIZES 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 BORDERS OF THE HOME RULE BOROUGH OF EDINBORO.

WHEREAS, the Home Rule Borough of Edinboro is governed by the Home Rule Charter and Optional Plans Law, 53 Pa C.S. §2901-3171, and the Home Rule Borough of Edinboro Charter, which provides that the Home Rule Borough of Edinboro has, and may exercise, any power, and may perform any function not denied by the Constitution of Pennsylvania, by the Charter or by the General Assembly and where the powers of the Home Rule Borough of Edinboro shall be construed broadly in favor of the Home Rule Borough of Edinboro; and

WHEREAS, Municipal Energy Aggregation Programs provide an opportunity for certain 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 electricity consumers individually; and

WHEREAS, the Home Rule Borough of Edinboro may enter into a contract with a "Contracted Electric Generation Supplier" to supply electricity through the Home Rule Borough of Edinboro Municipal Energy Aggregation Program for the period of January 1, 2011 through March 1, 2012 for certain residential and small commercial consumers; and

WHEREAS, certain residential and small commercial electric consumers within the Home Rule Borough of Edinboro stand to receive savings as a result of the adoption of the Municipal Energy Aggregation Plan; and

WHEREAS, *the adoption of the Municipal Energy Aggregation Program by the Home* Rule Borough of Edinboro 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 Home Rule Borough of Edinboro will not mandate participation in the Municipal Energy Aggregation Program, but will be provided on an opt-out basis.

NOW THEREFORE, The Home Rule Borough of Edinboro hereby ordains:

Section 1. **Title.** Municipal Energy Aggregation Ordinance of the Home Rule Borough of Edinboro.

EXHIBIT "C"

Section 2. Definitions:

The following definitions shall be used in reference to the provisions of this section:

(a) "Contracted Electric Generation Supplier" means the entity with which the Home Rule Borough of Edinboro has contracted through the Municipal Energy Aggregation Program to provide a supply of electricity.

(b) "Excluded Consumers" means electricity consumers (1) that have opted out of the Municipal Aggregation Program pursuant to the provisions of section 5, 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 within 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 Home Rule Borough of Edinboro and small commercial consumers within the Home Rule Borough of Edinboro 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 negotiated with the Contracted Electric Generation Supplier which provides a supply of electricity to certain residential and small commercial electricity consumers within the Home Rule Borough of Edinboro on an Opt-Out basis.

(e) "Non-Excluded Consumer" means an electricity consumer within the Home Rule Borough of Edinboro which or who is not an Excluded Consumer.

(f) Other terms defined in this section are so defined in this article by reference.

Section 3. Administration.

All Non-Excluded Consumers shall be supplied with electric generation supply pursuant to the Municipal Energy Aggregation Program.

Section 4. Municipal Energy Aggregation Program.

(a) On approval of Borough Council, the Borough Manager of the Home Rule Borough of Edinboro is authorized to enter into an agreement with an Electric Generation Supplier for the providing of electric generation supply services to Non-Excluded Consumers within the Home Rule Borough of Edinboro on an opt-out basis.

(b) The contract shall, at a minimum, clearly indicate the price that the Contracted Electric Generation Supplier will charge Non-Excluded Consumers for electric generation supply as well as the term of the contract; liability coverage; indemnification, and that the supplier can satisfy certain requirements including but not limited to that they have sufficient sources of power to provide retail electrical power to the residents of the Borough of Edinboro and is licensed by the PUC.

(i) 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 Electric Generation Supplier will charge different rates to different rate classes within the Home Rule Borough of Edinboro, 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 Section 5 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 Electric Generation Supplier.

(d) The Contracted Electric Generation Supplier may not impose any terms, conditions, fees, or charges on any consumer served by a Municipal Aggregation Program that is different from the particular term, condition, fee, or charge which was included within the contract between the Home Rule Borough of Edinboro and the Contracted Electric Generation Supplier or the notices provided pursuant to this section.

(e) The Contracted Electric 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 Home Rule Borough of Edinboro.

Section 5. Opt-Out Program

(a) The Municipal Energy Aggregation Program shall be offered on an opt-out basis.

(b) After the Home Rule Borough of Edinboro executes a contract for electric generation services with the Contracted Electric Generation Supplier, but prior to including a consumer's electric account or accounts in the Municipal Aggregation Program, the Contracted Electric 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 electric 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 charged for electric generation service that the Contracted Electric 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 Electric General 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 electric 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 Electric Generation Supplier.

Section 6. Savings Clause

If any provision of this Ordinance or the application thereof to any Person or circumstances is held invalid, such holding shall not affect the other provisions or applications of this Ordinance, which shall be given affect without the invalid provisions or applications, and to this end, the provisions of this Chapter are declared severable. All Ordinances or parts of Ordinances which are inconsistent herewith are hereby repealed to the extent of such inconsistency.

Section 7. Repealer Clause.

Borough Council may repeal any part of this Ordinance. Any part of this Ordinance found to be inconsistent with law may be repealed without nullifying the entire Ordinance.

Section 8. Effective Date.

That this Ordinance shall be effective eight (8) days after enactment.

THE BOROUGH OF EDINBORO HEREBY **ORDAINS AND ENACTS** THIS 11th DAY OF October, 2010 by the Council of the Home Rule Borough of Edinboro.

SEAL:

Manager Taras Jemetz

Mayor John Austin

899754.v1

CITY OF FARRELL, MERCER COUNTY, PENNSYLVANIA

BILL NO. B-4-2010 ORDINANCE O-4-2010

AN ORDINANCE OF THE CITY OF FARRELL, MERCER COUNTY, PENNSYLVANIA, AUTHORIZING THE ESTABLISHMENT OF A "MUNICIPAL ENERGY AGGREGATION"; AUTHORIZING ALL ACTIONS NECESSARY TO EFFECT A MUNICIPAL ENERGY AGGREGATION PROGRAM WITH OPT OUT PROVISIONS FOR THE MUNICIPAL AGGREGATION OF ELECTRIC GENERATION SUPPLY TO IDENTIFY CERTAIN CUSTOMERS OF ELECTRICITY SITUATE WITHIN THE CITY BOUNDARIES.

WHEREAS, the City of Farrell is a municipal corporation having elected to be governed by Home Rule pursuant to its charter effective on the 1st Monday of January, 1976 and as registered at 343 Pa. Code §11.1-101, 343 Pa. ACD §11.1-101 and which charter provides that the powers of the City shall be construed broadly in favor of the City and as such may exercise, any power, and may perform any function not denied by the Constitution of Pennsylvania, by the Charter or by the General Assembly and where the powers of Home Rule shall be construed broadly in favor of the City; and

WHEREAS, Municipal Energy Aggregation Programs provide an opportunity for certain 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 electricity consumers individually; and

WHEREAS, the City of Farrell has negotiated a contract with First Energy Solutions Corp. to supply electricity through the City of Farrell Municipal Energy Aggregation Program for the term commencing on the effective date and continuing until expiration or termination pursuant to Article 3 of the Master Agreement all of which is attached hereto and incorporated herein, for certain residential and small commercial consumers; and

WHEREAS, certain residential and small commercial electric consumers within the City stand to receive savings as a result of the adoption of the Municipal Energy Aggregation Plan; and

WHEREAS, the adoption of the Municipal Energy Aggregation Program by the City of Farrell 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 Farrell will not mandate participating in the Municipal Energy Aggregation Program, but will be provided on an opt-out basis.

NOW, THEREFORE, the City of Farrell hereby ORDAINS as follows:

SECTION 1. **Title.** Municipal Energy Aggregation Ordinance of the City of Farrell.

EXHIBIT
"D"

SECTION 2. **Definitions.**

The following definitions shall be used in reference to the provisions of this section:

(a) "Contracted Electric Generation Supplier" means the entity with which the City of Farrell has contracted through the Municipal Energy Aggregation Program to provide a supply of electricity.

(b) "Excluded Consumers" means electricity consumers (1) that have opted out of the Municipal Aggregation Program pursuant to the provisions of Section 5, 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 within 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 Farrell and small commercial consumers within the City of Farrell 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 negotiated with the Contracted Electric Generation Supplier which provides a supply of electricity to certain residential and small commercial electricity consumers within the City of Farrell on an opt-out basis.

(e) "Non-Excluded Consumer" means an electricity consumer within the City of Farrell which or who is not an Excluded Consumer.

(f) Other terms defined in this section are so defined in this article by reference.

SECTION 3. **Administration.**

All Non-Excluded Consumers shall be supplied with electric generation supply pursuant to the Municipal Energy Aggregation Program.

SECTION 4. **Municipal Energy Aggregation Program.**

(a) The City Manager of the City of Farrell is authorized to enter into an agreement with an Electric Generation Supplier for the provision of electric generation supply services to Non-Excluded Consumers within the City of Farrell on an opt-out basis.

(b) The contract shall, at a minimum, clearly indicate the price that the Contracted Electric 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 Electric Generation Supplier will charge different rates to different rate classes within the City of Farrell, 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 Section 5 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 Electric Generation Supplier.

(d) The Contracted Electric 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 Farrell and the Contracted Electric Generation Supplier or the notices provided pursuant to this section.

(e) The Contracted Electric 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 Farrell.

SECTION 5. **Opt-Out Program**

(a) The Municipal Energy Aggregation Program shall be offered on an opt-out basis.

(b) After the City of Farrell executes a contract for electric generation services with the Contracted Electric Generation Supplier, but prior to including a consumer's electric account or accounts in the Municipal Aggregation Program, the Contracted Electric 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 electric generation supplier will charge Non-Excluded Consumers for the electric generation service.

(ii) An itemized list and explanation of all fees and charges that are not incorporated into the rates charged for electric generation service that the Contracted Electric 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 Electric General 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 electric 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 Electric Generation Supplier.

SECTION 6. Approval of Master Agreement.

The Master Agreement to provide services to an aggregated group between the City of Farrell and First Energy Solutions Corp. is attached hereto and incorporated as a part of this Ordinance, the execution of which is authorized by the proper City officers.

SECTION 7. Savings Clause.

If any provision of this Ordinance or the application thereof to any Person or circumstances is held invalid, such holding shall not affect the other provisions or applications of this Ordinance, which shall be given affect without the invalid provisions or applications, and to this end, the provisions of this Chapter are declared severable. All Ordinances or parts of Ordinances which are inconsistent herewith are hereby repealed to the extent of such inconsistency.

SECTION 8. Repealer Clause.

Borough Council may repeal any part of this Ordinance. Any part of this Ordinance found to be inconsistent with law may be repealed without nullifying the entire Ordinance.

SECTION 9. Effective Date.

That this Ordinance shall be effective immediately upon passage and publication thereof in accordance with the Home Rule Charter of the City of Farrell and applicable law.

ORDAINED and ENACTED by Council of the City of Farrell this 25th day of October, 2010.

ATTEST: CITY OF FARRELL

City Clerk

Robert T. Burich, Deputy Mayor

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of FirstEnergy Solutions Corp. for Approval to Participate in Opt-Out Municipal Energy Aggregation Programs of the Optional Third Class Charter City of Meadville, the Home Rule Borough of Edinboro, the Home Rule City of Warren and the Home Rule City of Farrell.	:	Docket No. P-2010-_____

CERTIFICATE OF SERVICE

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

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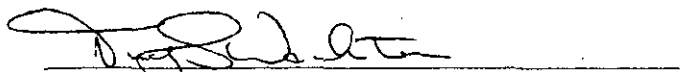

Timothy S. Wachter

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

ORIGIN ID: REDA (215) 963-5917
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1701 MARKET STREET

PHILADELPHIA, PA 19103
UNITED STATES US

SHIP DATE: 15NOV10
ACTWGT: 10.8 LB
CAD: 0684922/CAFE2470

BILL SENDER

TO ROSEMARY CHIAVETTA, SECRETARY
PA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET
HARRISBURG PA 17120

REF: 13847 – 042057 – 0006

FedEx Express

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TUE – 16 NOV A1
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