ECKERT SEAMANS
ATTORNEYS AT LAW

Eckert Seamans Cherin & Mellott, LLC
213 Market Street
8th Floor
Harrisburg, PA 17101

TEL: 717 237 6000
FAX: 717 237 6019

Deanne M. O'Dell
717.255.3744
dodell@eckertseamans.com

August 31, 2026

Via Electronic Filing

Matthew Homsher, Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

Re: Petition of FirstEnergy Pennsylvania Electric Company for Approval of Its Default Service Program for the Period from June 1, 2027 to May 31, 2031
Docket No. P-2026-3060298

Dear Secretary Homsher:

Enclosed for electronic filing please find Spark Energy, LLC ("Spark Energy") Exceptions with regard to the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,

Deanne M. O'Dell

Deanne M. O'Dell

DMO/dmc

Enclosure

cc: Honorable Mark A. Hoyer (*via email*)
Honorable Erin L. Gannon (*via email*)
Office of Special Assistants (*via email*)
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Spark Energy's Exceptions, upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only

Tori L. Giesler, Esquire
Angelina Umstead, Esquire
FirstEnergy
341 White Pond Drive
Akron, OH 44320
tgiesler@firstenergycorp.com
aumstead@firstenergycorp.com

Elizabeth R. Marx, Esquire
Lauren N. Berman, Esquire
Ria M. Pereira, Esquire
John W. Sweet, Esquire
Levi Phillips, Esquire
Pa Utility Law Project
118 Locust Street
Harrisburg, PA 17101
pulp@pautilitylawproject.org

Kenneth M. Kulak, Esquire
Brooke E. McGlinn Esquire
Maggie E. Curran, Esquire
Morgan Lewis And Bockius LLN
2222 Market Street
Philadelphia PA 19103-2921
ken.kulak@morganlewis.com
bmcglinn@morganlewis.com
maggie.curran@morganlewis.com

Daniel Markind, Esquire
Flaster Greenberg, PC
1717 Arch Street, Suite 3300
Philadelphia, PA 19103
daniel.markind@flastergreenberg.com

Harrison W. Breitman, Esquire
Katherine M. Kennedy, Esquire
Olivia M. Spergel, Esquire
Office Of Consumer Advocate
555 Walnut Street
5th Floor Forum Place
Harrisburg, PA 17101-1923
hbreitman@paoca.org
kkennedy@paoca.org
ospergel@paoca.org

Rebbeca Lyttle, Esquire
Office of Small Business Advocate
555 Walnut Street, 1st Floor
Harrisburg, PA 17101
relyttle@pa.gov

Susan E. Bruce, Esquire
Charis Mincavage, Esquire
Matthew Garber, Esquire
Rebecca Kimmel, Esquire
McNees Wallace & Nurick LLC
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108
sbruce@mcneeslaw.com
cmincavage@mcneeslaw.com
mgarber@mcneeslaw.com
rkimmel@mcneeslaw.com

Whitney E. Snyder Esquire
Erich Struble Esquire
Melissa A. Chapaska, Esquire
Todd S. Stewart, Esquire
HMS Legal LLP
501 Corporate Circle, Suite 302
Harrisburg, PA 17110
wesnyder@hmslegal.com
ewstruble@hmslegal.com
machapaska@hmslegal.com
tsstewart@hmslegal.com

Michael Gianantonio, Esquire
Robert F. Daley Esquire
Robert Peirce & Associates
707 Grant Street, Gulf Tower Suite 125
Pittsburgh, PA 15219
mgianantonio@peircelaw.com
rdaley@peircelaw.com

Colleen Kartychak, Manager
Marsha Makel, Esquire
Constellation Energy
1310 Point Street 8th Floor
Baltimore, MD 21231
colleen.kartychak@constellation.com
marsha.makel@constellation.com

John M. White, Esquire
Constellation Energy Generation LLC
Constitution Avenue NW 400 East
Washington DC, 20001
john.white@constellation.com

Linda Kizuka, Esquire
Constellation Energy
250 Massachusetts Avenue, NW Suite 760
Washington DC, 20001
linda.kizuka@constellation.com

Aron J. Beatty, Esquire
Duquesne Light Company
800 N. Third Street
Harrisburg, PA 17402
abeatty@duqlight.com

Jamie L. Martines, Esquire
SPILMAN THOMAS & BATTLE, PLLC
301 Grant Street, Suite 3440
Pittsburgh, PA 15219
jmartines@spilmanlaw.com

Samuel W. Cortes, Esquire
R. Taylor Speer, Esquire
Karen M. Kemerait, Esquire
Ashley L. Beach, Esquire
Fox Rothschild LLP
747 Constitution Drive Suite 100
Exton, PA 19341
scortes@foxrothschild.com
tspeer@foxrothschild.com
kkemerait@foxrothschild.com
abeach@foxrothschild.com

Barry A. Naum, Esquire
Steven W. Lee, Esquire
SPILMAN THOMAS & BATTLE, PLLC
1100 Bent Creek Boulevard, Suite 101
Mechanicsburg, PA 17050
bnaum@spilmanlaw.com
slee@spilmanlaw.com

Michael A. Gruin, Esquire
Donald Wagner, Esquire
Nicholas A. Stobbe, Esquire
Stevens And Lee PC
17 North 2nd Street, 16th Floor
Harrisburg, PA 17101
michael.gruin@stevenslee.com
donald.wagner@stevenslee.com
nicholas.stobbe@stevenslee.com

Mitchell H. Kizner, Esquire
Flaster Greenberg PC
1810 Chapel Avenue
West Cherry Hill, NJ 08002
mitchell.kizner@flastergreenberg.com

Date: August 31, 2026

Deanne M. O'Dell
____
Deanne A. O'Dell

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of FirstEnergy Pennsylvania Electric	:	
Company for Approval of Its Default Service Program	:	Docket No. P-2026-3060298
for the Period from June 1, 2027 to May 31, 2031	:	

EXCEPTIONS OF SPARK ENERGY, LLC

Deanne M. O'Dell, Esquire (PA I.D. No. 810640)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-6000 (phone)
(717) 237-6019 (fax)

Lauren M. Burge, Esquire (PA I.D. No. 311570)
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
(412) 566-6000
(412) 566-6099 (fax)

Date: August 31, 2026

Attorneys for Spark Energy, LLC

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I. INTRODUCTION AND SUMMARY OF EXCEPTIONS

Spark Energy, LLC ("Spark"), a licensed electric generation supplier in Pennsylvania,[1] excepts to the Recommended Decision of Deputy Chief Administrative Law Judge Mark A. Hoyer and Administrative Law Judge Erin L. Gannon, issued August 21, 2026 ("Recommended Decision" or "RD"), which recommends that the Commission adopt a non-unanimous settlement (the "Settlement") of FirstEnergy Pennsylvania Electric Company's seventh default service program ("DSP VII") "without modification" and dismiss the non-settling parties' claims wholesale. RD at 248–49, Ordering ¶¶ 1, 4.

Spark is not a bystander to this proceeding. It is a licensed electric generation supplier that serves residential and small commercial customers in each of FirstEnergy's rate districts and that participates in the Company's purchase of receivables program. The Supplier Coordination Tariff provisions that the Recommended Decision approves do not regulate FirstEnergy. They regulate Spark. Every residential contract Spark writes in this territory after June 1, 2027 will terminate into default service unless Spark obtains an affirmative election; every variable-rate customer Spark serves must be re-solicited four times a year; and Spark's access to the receivables program — which the Recommended Decision finds no supplier in this territory operates without — will turn on whether its price sits above or below a benchmark the same order changes. Spark will be bound by this order for four years. It has filed a Petition to Intervene contemporaneously herewith.

Spark files separately because no other party can make these arguments on its behalf. While Spark is a member of the Retail Energy Supply Association ("RESA"), RESA states in its own filing that its positions "may not represent the views of any particular member of the Association." An association speaking for a divided membership cannot bind or speak for a supplier whose

[1] Docket No. A-2009-2145787, Utility Code 110171.

residential book in this territory is directly at stake, and the Commission should not resolve the lawfulness of tariff provisions governing Spark's contracts without hearing from Spark.

The Exceptions that follow are legal, not evidentiary. The Recommended Decision approves conduct that a statute forbids; reverses a statewide regulation by adjudicative "waiver" at the request of an entity the regulation does not govern; conditions access to a tariffed utility service on the price a competitor charges; and reallocates the statutory burden of proof onto the parties opposing the Settlement. Each is an error of law. None turns on how the Commission weighs the pricing data, and none can be cured by the volume of that data. Where another objecting party has developed a record Spark did not develop, Spark says so and joins that showing; everywhere else, the argument is Spark's own.

The Commission need not accept Spark's characterization of the record to see the problem. Four facts appear in the Recommended Decision and the Settlement themselves:

1. Automatic return to default service applies even when the supplier's renewal offer is lower than the price to compare ("PTC"). The Recommended Decision acknowledges this and treats it as a virtue. RD at 199. A remedy for above-PTC pricing that operates identically when pricing is below the PTC is not tailored to the harm it invokes.

2. The Purchase of Receivables ("POR") restriction extends to commercial customers, while Finding of Fact 94 finds that FirstEnergy's commercial and industrial shopping customers "collectively all paid less to EGSs than they would have for default service" over the same 49-month period. RD at 33, FOF 94. The Recommended Decision devotes a single paragraph to this mismatch and resolves

it by observing that uncollectible expense is recovered from commercial customers too. RD at 228.

3. The Recommended Decision rejects the suppliers' POR challenges because they are "undercut by the basic fact that the POR is a voluntary program," RD at 227, and finds one page later that "no EGSs are offering products to residential customers in FirstEnergy's territory without POR." RD at 228. It also adopts Finding of Fact 106, stating that "EGSs remain free to offer and charge any price for their services as they do today." RD at 37, FOF 106. Those findings cannot all be true.

4. Paragraph 78 of the Settlement provides that a Joint Petitioner may elect to withdraw within five business days if the Commission modifies the Settlement; modification does not void it. The Commission followed precisely that course in PECO DSP VI, modifying a non-unanimous default service settlement to reject an automatic-return proposal while approving the remainder. Petition of PECO Energy Co. for Approval of Its Default Service Program for the Period from June 1, 2025 through May 31, 2029, Docket No. P-2024-3046008 (Opinion and Order entered Nov. 7, 2024). No settling party withdrew.

That last point disposes of the pressure the phrase "without modification" is designed to create. The Commission is not confronted with a choice between approving these provisions and disrupting default service. It can reject each challenged provision and still enter a final order approving DSP VII at or before the October 22, 2026 public meeting, which is the outer limit set by 66 Pa. C.S. § 2807(e)(3.6). RD at 1. None of the challenged retail provisions is necessary for FirstEnergy to procure or deliver default service supply beginning June 1, 2027.

Spark's Exceptions are as follows:

Exception No. 1: The Recommended Decision errs in approving the mandatory return of residential shopping customers to default service, which violates 66 Pa. C.S. § 2807(d)(1) and the Commission's unwaived customer-switching regulations at 52 Pa. Code §§ 57.171–57.180. (RD at 170, 183, 196–200; FOFs 92, 98–99; COLs 41–42; Ordering ¶¶ 1, 4, 8.)

Exception No. 2: The Recommended Decision errs in granting a "waiver" of 52 Pa. Code § 54.10(3), which reverses a statewide regulation by adjudication, exceeds the waiver standard at 52 Pa. Code § 5.43, and departs from PECO DSP VI and PPL DSP V without reasoned explanation. (RD at 182, 188–189, 196–97; COLs 42, 45–46; Ordering ¶ 8.)

Exception No. 3: The Recommended Decision errs in approving the PTC-based POR eligibility restriction, which is rate regulation of a deregulated service beyond the Commission's jurisdiction and unreasonable discrimination under 66 Pa. C.S. § 1502, and which rests on criteria the record shows are less related to collections risk than the mechanism they replace. (RD at 225–29, 36–37; FOFs 103–06; COLs 35, 42, 46; Ordering ¶¶ 1, 4.)

Exception No. 4: The Recommended Decision errs in reversing the burden of proof, requiring the objecting parties to disprove the Settlement proponents' case rather than holding the proponents to their burden under 66 Pa. C.S. § 332(a). (RD at 238–47; COLs 4, 15, 27–28, 34, 46, 50; Ordering ¶¶ 1, 4.)

Exception No. 5: The Recommended Decision errs in approving the quarterly affirmative-consent requirement for variable-rate products, for which the record contains no evidence specific to variable-rate customers. (RD at 207–09; FOF 99; COL 42.)

Exception No. 6: The Recommended Decision errs in holding that aggregate price comparisons to the PTC constitute substantial evidence of "actual harm," and in approving remedies that do not fit the harm found. (RD at 33, 37, 198–99, 227–29; FOFs 94, 106; COLs 42, 45–46.)

Exception No. 7: The Recommended Decision errs in approving removal of NITS from the wholesale full-requirements product and continuation of the capacity proxy price, and compounds the error by using the resulting PTC as the benchmark for competitive prices. (RD at 60–86; COLs 15–16.)

Exception No. 8: The Recommended Decision errs in approving elimination of the Customer Referral Program without a successor or further collaborative consideration. (RD at 158–63; FOFs 85–89; COL 34.)

II. PROCEDURAL BACKGROUND

FirstEnergy filed its Petition for approval of DSP VII on February 3, 2026, for the period June 1, 2027 through May 31, 2031. RD at 1. Following discovery, written testimony, and evidentiary hearings, six parties — FirstEnergy, the Office of Consumer Advocate ("OCA"), the Office of Small Business Advocate ("OSBA"), the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania ("CAUSE-PA"), Walmart, and Duquesne Light Company ("DLC") — filed a Joint Petition for Non-Unanimous Settlement on July 2, 2026. RD at 38; Ordering ¶ 1. Duquesne Light, which is not a party in interest to FirstEnergy's procurement, joined the Settlement solely to support the supplier coordination tariff provisions and takes no position on the remainder. RD at 38, n.187.

Nine parties objected to the Settlement in whole or in part: Constellation, the Customer Generator Coalition, Dimension, the EGS Parties (Shipley Energy and IGS Energy), the Joint Solar Advocates, Penn Renewables, RESA, Town Square, and WGL. RD at 38. Every competitive supplier interest in the proceeding objected.

The Recommended Decision was issued on August 21, 2026. It recommends that the Commission adopt the Settlement "without modification," grant FirstEnergy a waiver of 52 Pa. Code § 54.10(3), and dismiss the non-settling parties' claims. RD at 248–49, Ordering ¶¶ 1, 4, 8. The Commission must enter a final order on or before the October 22, 2026 public meeting or the plan is deemed approved. RD at 1.

These Exceptions are filed on August 31, 2026, in accordance with 52 Pa. Code § 5.533 and the schedule established in this proceeding. Spark's Petition to Intervene, filed contemporaneously, sets out the basis for its participation. Spark notes here only that it is directly subject to the Supplier Coordination Tariff the Recommended Decision approves, that it raises no issue requiring reopening of the record, and that no party is prejudiced or delayed by its participation.

III. LEGAL STANDARDS

The proponent of a rule or order bears the burden of proof. 66 Pa. C.S. § 332(a); RD at 238, COL 1. That burden is a burden of persuasion, and it does not shift. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990); RD at 238, COLs 1–2. A non-unanimous settlement is evaluated under "the same standards as those for deciding a fully contested case": substantial evidence consistent with statutory requirements must support each contested term, and the Joint Petitioners "share the burden of proof to show that the terms and conditions . . . are in the public interest." RD at 8–9.

Where a proposal restricts retail competition, the Recommended Decision itself states the governing test: the proponents must demonstrate "that (1) an actual harm exists and that (2) the restriction is appropriate because no alternatives would adequately mitigate the harm." RD at 198;

see also RD at 197 (*citing Retail Energy Supply Ass'n v. Pa. Pub. Util. Comm'n*, 185 A.3d 1206 (Pa. Cmwlth. 2018)). Both elements belong to the proponents' affirmative case.

Finally, a Commission regulation may be waived only where the waiver is in the public interest and "supported by facts to constitute the grounds requiring the regulation, amendment, waiver or repeal." 52 Pa. Code § 5.43(a); RD at 197. The Recommended Decision recites the Commission's practice that waivers be "narrowly crafted and generally temporary in nature," RD at 189, and purports to find those criteria satisfied. RD at 197.

IV. EXCEPTIONS

<u>EXCEPTION NO. 1</u>: The Recommended Decision Errs in Approving the Mandatory Return of Shopping Customers to Default Service, Which Violates 66 Pa. C.S. § 2807(d)(1) and the Commission's Unwaived Switching Regulations. (RD at 170, 183, 196–200; FOFs 92, 98–99; COLs 41–42; Ordering ¶¶ 1, 4, 8.)

Paragraph 66 of the Settlement requires that, for residential contracts entered into after June 1, 2027, the customer be transferred from the supplier they selected to FirstEnergy's default service at the expiration of the fixed term unless they affirmatively act to remain. RD at 32, FOF 92. The Recommended Decision recommends approval on the strength of a waiver of one regulation, 52 Pa. Code § 54.10(3). RD at 249, Ordering ¶ 8. A waiver of a regulation cannot authorize what a statute forbids, and it cannot excuse compliance with regulations that were never waived. The Recommended Decision addresses neither problem.

A. <u>Section 2807(d)(1) Requires Consent Before an EDC Changes a Customer's Supplier, and Conclusion of Law 41 Does Not Engage the Statute.</u>

Section 2807(d)(1) directs the Commission to establish regulations ensuring 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 the change. 66 Pa. C.S. § 2807(d)(1); see RD at 183, n. 771. The Settlement directs FirstEnergy to change the customer's supplier — from the EGS the customer affirmatively selected to the utility — on the basis of customer silence.

The Commission held within the past year that transfers of this kind violate the statute. In *Petition of the Boroughs of Camp Hill, Carlisle, Hatboro, Landsdowne, Media, Narberth, State College, and Swarthmore for a Declaratory Order Regarding Implementation of Community Choice Aggregation*, ("*Community Choice*"),[2] the Commission denied boroughs authorization to move residents into an aggregation program absent advance consent, holding that "granting the Boroughs' requested authorization would directly violate Section 2807(d)(1) of the Code and require the Commission to exceed its authority by permitting the type of slamming that the Choice Act prohibits." RD at 185 (*quoting Community Choice* at 68).

The distinction the proponents draw—that a return "to default service (not another supplier)" is different in kind, RD at 180 — has no footing in the statutory text. Section 2807(d)(1) protects the customer's exercise of choice; it does not identify a favored destination. A customer moved from the supplier they chose to a provider they did not choose has had their supplier changed without consent whether the recipient of their load is a competing EGS or the incumbent utility. If anything, the transfer is more difficult to reconcile with the Choice Act when the beneficiary is the incumbent, because the effect is systematically to return load to the entity from which the General Assembly directed that generation service be unbundled.

The Recommended Decision resolves this question in a single sentence: "[W]e do not find the proposal to be inconsistent with anti-slamming or switching protections." RD at 196.

The threshold rationale offered in support — that under the proposal "the customer is informed of the result of inaction" in the original contract and the required expiration notices, RD

[2] Docket No. P-2024-3049623, Opinion and Order entered Aug. 14, 2025.

at 196 — concedes the statutory problem rather than answering it. Section 2807(d)(1) requires direct oral confirmation or written evidence of the customer's consent to the change of supplier. A termination-into-default-service term will not appear in Spark's contracts because any customer asked for it; it will appear because the tariff the Recommended Decision approves compels every supplier to include it as a condition of writing residential business in this territory. Notice of a consequence the customer cannot contract around is not consent to that consequence; it is the mechanism by which the transfer is imposed. And the comparison to the existing framework is telling: under current law, the customer's silence continues the relationship they affirmatively chose; under the proposal, silence ends it. The former honors the customer's exercise of choice. The latter overrides it.

Conclusion of Law 41 supplies no more:

> Returning FirstEnergy residential shopping customers that take no action at the end of the contract term to default service is not "slamming." *See Retail Energy Supply Ass'n v. Pa. Pub. Util. Comm'n*, 185 A.3d 1206 (Pa. Cmwlth. 2018).

RD at 245, COL 41. That is the entirety of the Recommended Decision's treatment of a dispositive statutory question. Conclusion of Law 41 does not cite Section 2807(d)(1). It does not cite Chapter 57. It does not cite *Community Choice*, which the Recommended Decision itself reproduces eleven pages earlier. And the single authority it does cite does not support the proposition. *Retail Energy Supply Ass'n v. Pa. Pub. Util. Comm'n* ("*RESA*")[3] sustained the Commission's authority, grounded in the separate universal service mandate, to condition EGS service to Customer Assistance Program participants on pricing at or below the PTC. It concerned neither contract expiration nor supplier switching, and it says nothing about whether an involuntary

[3] 185 A.3d 1206 (Pa. Cmwlth. 2018).

transfer of the general body of residential shopping customers is consistent with Section 2807(d)(1). A conclusion of law that rests on inapposite authority and does not address the governing statute cannot be affirmed. The Commission should reject Conclusion of Law 41 and decide the statutory question itself.

B. The Order Authorizes Conduct That the Commission's Unwaived Regulations Prohibit.

Independent of the statute, the Recommended Decision authorizes transfers that the Commission's customer-switching regulations forbid. Chapter 57, Subchapter M prescribes the procedures by which a customer's supplier may be changed. 52 Pa. Code §§ 57.171–57.180. Those procedures are excused in one circumstance only: "when the customer's service is discontinued by the EGS and subsequently provided by the default service provider because no other EGS is willing to provide service to the customer." 52 Pa. Code § 57.178; RD at 183. Neither condition is satisfied when a solvent, willing supplier is stripped of a customer at contract expiration.

Constellation raised precisely this point below, arguing that even a valid waiver of Section 54.10(3) "does not 'solve the separate switching-law problem' under Chapter 57 . . . if an EGS remains willing to serve and a customer has not authorized the switch." RD at 170. FirstEnergy's only response, as the Recommended Decision recounts it, was to observe that Constellation had elsewhere argued that Section 54.10(3) "controls." RD at 170–71. The Recommended Decision itself never analyzes Chapter 57; its entire treatment of the conflict is the single sentence quoted above. RD at 196. Whether or not Constellation's briefs were consistent has no bearing on whether Chapter 57 permits the transfer.

FirstEnergy never requested a waiver of Chapter 57, Subchapter M. The Recommended Decision grants none. Ordering Paragraph 7 waives Sections 54.182 and 54.187; Ordering Paragraph 8 waives Section 54.10(3). RD at 249. Nothing touches Chapter 57. The result is an order directing a regulated utility to execute transfers that the Commission's own unwaived regulations prohibit, in a proceeding in which the conflict was identified and never resolved.

C. <u>The Provision Cannot Be Sustained as a Service-Quality or Consumer-Protection Measure.</u>

Conclusion of Law 43 invokes 66 Pa. C.S. §§ 2807(d) and 2809(e) for the proposition that the Choice Act authorizes the Commission to impose rules on EDCs and suppliers to maintain service quality. RD at 246, COL 43. Those provisions authorize the Commission to ensure that service quality does not deteriorate under retail competition. They do not authorize the Commission to invert, in one utility's territory and at that utility's request, the default consequence of customer inaction that the General Assembly and the Commission's own regulations establish. Section 2807(d)(1) is the specific provision governing supplier changes, and the specific governs the general.

The asymmetry confirms the point. No default service customer is transferred to a competitive supplier for failing to respond to a notice. No default service customer is required to reaffirm the utility every ninety days. No default service customer loses anything by doing nothing. Under the Settlement, only customers who exercised choice bear a recurring obligation to re-exercise it. A rule under which inaction always deposits the customer with the incumbent is not a service-quality measure.

<u>EXCEPTION NO. 2</u>: The Recommended Decision Errs in Granting the "Waiver" of 52 Pa. Code § 54.10(3), Which Reverses a Statewide Regulation by Adjudication, Exceeds the Waiver Standard, and Departs from Commission Precedent Without Reasoned Explanation. (RD at 182, 188–89, 196–97; COLs 42, 45–46; Ordering ¶ 8.)

A. <u>A Codified Policy Choice Cannot Be Reversed by Adjudicative Waiver.</u>

Section 54.10 is the product of a formal rulemaking in which the Commission considered the precise question presented here and resolved it the other way:

> Because the intent of the competitive market is to encourage customers to shop for their retail electricity supply, we do not believe it is appropriate for a customer to be reverted to default service should that customer fail to respond to either of the two EGS-provided notices.

Rulemaking to Amend the Provisions of 52 Pa. Code § 54.5 Regarding Disclosure Statements . . . and to Add § 54.10 Regarding the Provision of Notices of Contract Expiration or Changes in Terms, Docket No. L-2014-2409385, Final-Omitted Rulemaking Order entered Apr. 3, 2014, at 38; RD at 182. Section 54.10(3) embodies that judgment as binding law of statewide application.

What FirstEnergy obtained is not a waiver in any conventional sense. It is the reversal, for the residential customers of the Commonwealth's largest electric distribution footprint, of the central policy the regulation codifies — accomplished in an adjudication, without notice and comment, without regulatory review, and at the request of an entity whose conduct the regulation does not govern. The Recommended Decision does not dispute that last point; it accepts that Section 54.10(3) governs EGS renewal conduct and answers only that FirstEnergy is "also affected by the current protocol." RD at 196. Being affected by a rule and being subject to it are different things. On the Recommended Decision's reasoning, any party that can show a downstream financial consequence may obtain relief from a regulation that binds someone else.

Pennsylvania law is settled that an agency may establish binding norms of general applicability only through rulemaking conducted in compliance with the Commonwealth Documents Law and the Regulatory Review Act, and may not create such norms through other instruments. *Nw. Youth Servs., Inc. v. Commonwealth, Dep't of Pub. Welfare*, 66 A.3d 301 (Pa. 2013); *see* Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §§ 1102–1208; 71 P.S. § 745.1 et seq.; RD at 189 (Commonwealth Documents Law and Regulatory Review Act procedures). What an agency may not accomplish by unpromulgated rule it may not accomplish by adjudicative waiver of a promulgated one.

The consequence proves the point. If the Recommended Decision is adopted, the legal effect of a residential customer's silence at contract expiration will depend on whether they live in FirstEnergy's territory or PPL's or PECO's — not because the General Assembly or a rulemaking so provided, but because one utility negotiated for it in a settlement to which no supplier subject to the new rule agreed. The Recommended Decision answers that default service proceedings are "already EDC-specific." RD at 197. That is true of procurement plans, riders, and referral programs. It is not true of Chapter 54, which governs supplier conduct statewide and was adopted through statewide process.

B. **<u>The Waiver Is Neither Narrow Nor Temporary Under the Commission's Own Standard.</u>**

The Recommended Decision finds the waiver "limited to a narrow and specific subset of FirstEnergy customers" and "temporary in nature, because it applies to the Company's default service program for the period beginning June 1, 2027 and ending May 31, 2031, and will be subject to review in the Company's next DSP." RD at 197. Neither characterization survives the standard the Recommended Decision itself recites, which requires that waivers be "narrowly crafted and generally temporary in nature." RD at 189.

The waiver reaches every residential customer in FirstEnergy's four rate districts who signs a competitive contract after June 1, 2027 — that is, every new residential competitive relationship in the territory for four years. A four-year term, renewable in the next default service proceeding, is not temporary; it is indefinite in installments. The Recommended Decision relies on *Duquesne Light*, RD at 189, but that case involved an EDC seeking relief from a regulation governing EDC conduct, for a genuinely short period, pending implementation. *Duquesne Light Co. Petition for*

Waiver of the Three-Day Switching Requirements under 52 Pa. Code § 57.174, Docket No. P-2014-2448863 (Order entered Dec. 4, 2014); RD at 189, n.796. Neither feature is present here.

C. The Departure from PECO DSP VI and PPL DSP V Is Unexplained.

The Commission has twice recently rejected materially similar affirmative-consent proposals, holding that above-PTC pricing does not itself establish harm and that a restriction on competition requires proof that no reasonable alternative would suffice. *Petition of PECO Energy Co. for Approval of Its Default Serv. Program for the Period from June 1, 2025 through May 31, 2029*, Docket No. P-2024-3046008 (Opinion and Order entered Nov. 7, 2024); *PPL Elec. Utils. Corp. for Approval of Its Default Serv. Plan for the Period June 1, 2021 through May 31, 2025*, Docket No. P-2020-3019356 (Opinion and Order entered Dec. 17, 2020); RD at 167, nn. 688–89; RD at 183–84, 198.

An agency may change course, but it must acknowledge the change and explain it. The Recommended Decision offers volume: the same PTC comparison, repeated over one hundred months. RD at 179, 198. A larger quantity of a comparison the Commission has twice found insufficient is not a reasoned basis for abandoning two recent, on-point precedents. And the Recommended Decision nowhere confronts the 2014 rulemaking's policy holding — the only Commission determination that squarely addresses the question of what should happen when a customer does nothing. It distinguishes PECO and PPL on their evidentiary records and leaves the rulemaking unaddressed. The waiver should be denied and Ordering Paragraph 8 rejected.

EXCEPTION NO. 3: The Recommended Decision Errs in Approving the PTC-Based POR Eligibility Restriction, Which Exceeds the Commission's Jurisdiction, Discriminates Unreasonably Under 66 Pa. C.S. § 1502, and Rests on Criteria Less Related to Collections Risk Than Those They Replace. (RD at 36–37, 225–29; FOFs 103–06; COLs 35, 42, 46; Ordering ¶¶ 1, 4.)

Paragraph 67 of the Settlement conditions EGS participation in FirstEnergy's POR program — for residential and commercial accounts alike — on the supplier charging "a rate that is at or below the PTC at the time of the customer's enrollment transaction or rate change transaction," and on the supplier's use of rate-ready billing. RD at 53, Settlement ¶ 67. The same paragraph phases out the existing clawback mechanism over the first year of the term. The Recommended Decision approves these conditions as "reasonable and rationally related to documented differences in collections risks and payment outcomes." RD at 227. The approval fails on jurisdiction, on non-discrimination, and on its own stated rationale.

A. **The New Criteria Are Less Related to Collections Risk Than the Mechanism They Replace.**

Take the Recommended Decision's rationale on its own terms. The mechanism being eliminated — the clawback the Commission approved in 2017 — applied two screens. It reached only EGSs "whose write-offs as a percentage of revenues are 200% higher than their peers and whose average price per kWh is greater than 150% of the average PTC of the Company." RD at 36, FOF 103 (emphasis added). It measured actual collections performance and it measured price, and it required both.

The replacement measures only price, and it lowers the threshold from 150% of the PTC to 100%. The write-off screen — the only criterion in the existing mechanism that measures collections risk directly — is discarded. The consequence is that a supplier with a spotless payment record loses POR on an account priced one mill above the PTC, while a supplier generating write-offs several times the peer average retains POR on every account priced at or below it. A criterion that removes the direct measure of collections risk and retains only an indirect proxy cannot be "rationally related to documented differences in collections risks" in preference to the criterion it displaces. RD at 227. The Recommended Decision does not address this inversion; it does not mention Finding of Fact 103 in its POR analysis at all. RD 227–29.

Finding of Fact 104 does not close the gap. It finds that some EGSs continue to generate elevated write-offs notwithstanding clawback charges and that the clawback recoups only a fraction of the uncollectible expense generated even by EGSs meeting both screens. RD at 36, FOF 104. Taken as true, that finding establishes at most that the existing mechanism's parameters are too lenient — a defect remediable by tightening the write-off screen or increasing the recovery percentage. It does not explain why the answer to an under-inclusive collections screen is to abolish collections screening altogether and substitute a criterion that measures collections performance not at all. If the existing mechanism recoups too little from high-write-off suppliers, a restriction under which those same suppliers retain POR in full — so long as their prices sit at or below the PTC — recoups nothing from them either.

Nor does the record support extending the restriction to commercial accounts. Finding of Fact 94 states that FirstEnergy's "commercial and industrial shopping customers collectively all paid less to EGSs than they would have for default service" over the 49-month study period. RD at 33. The Recommended Decision's entire treatment of this mismatch is that "the record evidence in this proceeding establishes harm in the form of higher uncollectible expense that is recovered from both residential and commercial customers." RD at 228. That reasoning would justify any restriction on any class whose rates recover any shared cost. It is not a finding that commercial suppliers caused the harm or that restricting them will remedy it.

B. <u>Conditioning Access to a Tariffed Utility Service on Price Is Rate Regulation Beyond the Commission's Jurisdiction.</u>

The General Assembly determined that "competitive market forces are more effective than economic regulation in controlling the cost of generating electricity" and that generation is no longer to be regulated as a public utility service. 66 Pa. C.S. §§ 2802(5), (12), 2806(a); *see* RD at 186. The Commission accordingly has no authority to set, cap, or approve the prices EGSs charge the general body of retail customers. *RESA* sustained a PTC-referenced condition only for Customer Assistance Program participants, and only because the Commission's statutory universal-service obligations supplied affirmative authority as to that ratepayer-subsidized population. *RESA,* 185 A.3d 1206. Nothing in that decision extends a PTC ceiling to every residential and commercial account in a service territory.

The Recommended Decision's answer is that POR is "a voluntary program." RD at 227. Its own findings refute that. One page later it finds that "no EGSs are offering products to residential customers in FirstEnergy's territory without POR," and credits Town Square's testimony that "POR removes supplier credit and collections risk so suppliers can compete on price and product innovation, rather than their ability to finance bad debt and manage collections." RD at 228. A service without which no supplier serves the residential market is a practical condition of market participation, not an elective convenience. Conditioning access to it on matching the incumbent's own price is a price ceiling enforced through the incumbent's control of essential billing and collections infrastructure.

Finding of Fact 106 makes the tension explicit. It finds that "EGSs remain free to offer and charge any price for their services as they do today." RD at 37. That finding cannot be reconciled with Finding of Fact 105 and the finding at page 228 that no supplier serves residential customers without POR. Either POR is dispensable, in which case the restriction accomplishes nothing the proponents claim for it, or it is not, in which case the price condition is a price cap. The Recommended Decision adopts both propositions.

This also disposes of the distinction the Recommended Decision accepted with respect to Maryland. FirstEnergy argued that the Maryland reforms were inapposite because they constituted "a complete overhaul of the retail electric market in Maryland, including price caps for residential supply and contract term limits." RD at 171. Given the Recommended Decision's own finding that residential competitive supply in FirstEnergy's territory does not exist without POR, conditioning POR on pricing at or below the PTC is a price cap for residential supply in operation if not in form. The distinction FirstEnergy drew, and the Recommended Decision accepted, collapses on the Recommended Decision's own findings.

C. Conclusion of Law 35 Answers a Question No Party Asked.

Conclusion of Law 35 states that "[t]he Commission does not have authority to mandate POR programs for EDCs." RD at 244 (*citing* 66 Pa. C.S. § 2807(c)(3); *Petition of PPL Elec. Utils. Corp. Requesting Approval of a Voluntary Purchase of Receivables Program and Merchant Function Charge*, Docket No. P-2009-2129502 (Opinion and Order entered Nov. 19, 2009)). That proposition is correct and irrelevant. No supplier asked the Commission to compel FirstEnergy to offer POR. The question is whether a POR service that FirstEnergy has offered for more than fifteen years, that it furnishes under its Commission-approved Supplier Coordination Tariff, and that it proposes to continue offering, may be furnished on terms that discriminate among similarly situated suppliers on the basis of price. The absence of authority to compel a service says nothing about the terms on which a tariffed service, once offered, must be provided.

D. The Restriction Discriminates Unreasonably Under Section 1502.

Section 1502 prohibits a public utility from establishing or maintaining an unreasonable difference as to service, or subjecting any person to unreasonable prejudice or disadvantage, as between similarly situated persons. 66 Pa. C.S. § 1502. The EGS Parties raised this squarely below, arguing that FirstEnergy's proposal "would withhold access to market infrastructure from any product priced above the current PTC at enrollment or at a pricing change" and that price relative to the PTC is "an arbitrary measure that may not reflect the supplier's current wholesale costs, product features, contract duration, risk allocation, or customer-selected value." RD at 225.

Under the Settlement, two EGSs identical in creditworthiness, payment history, write-off experience, and product quality receive different access to a tariffed utility service based solely on where their prices stand relative to the utility's own benchmark. A thirty-six-month fixed renewable product priced modestly above today's PTC is excluded; a short-term introductory product priced marginally below it is not, whatever its collections history. The classification is both over-inclusive and under-inclusive as to the risk it purports to address — as Finding of Fact 103 confirms, since the displaced clawback screened for exactly the variable the new criterion omits.

The Recommended Decision does not resolve this argument. Section 1502 appears in the Recommended Decision only in the recitation of the parties' positions, at pages 218 and 225–26. The analysis at pages 227 through 229 does not mention Section 1502, does not address the Commission's jurisdiction over generation prices, and does not address whether a tariffed service may be conditioned on a competitor's price. A contested question of law that the presiding officers did not reach is properly decided by the Commission on exceptions.

<u>EXCEPTION NO. 4</u>: The Recommended Decision Errs in Reversing the Burden of Proof, Requiring the Objecting Parties to Disprove the Proponents' Case Rather Than Holding the Proponents to Their Burden Under 66 Pa. C.S. § 332(a). (RD at 238–47; COLs 4, 15, 27–28, 34, 46, 50; Ordering ¶¶ 1, 4.)

The Recommended Decision states the correct standard and then applies its inverse. It recites that the proponent bears the burden of proof, RD at 238, COL 1, and that a non-unanimous settlement is judged by fully litigated standards with the burden on its proponents, RD at 8–9. But four of the Conclusions of Law that dispose of contested issues are framed as findings that the objecting party failed to carry a burden it never bore:

1. COL 15: "The record evidence does not support a finding that RESA has established that removal of NITS costs . . . or the continued use of a capacity proxy price . . . is unreasonable or would transfer risk to customers." RD at 240.
2. COL 27: "The record evidence does not support a finding that the Commission should re-examine cost allocation . . . as requested by RESA." RD at 243.
3. COL 28: "The record evidence does not support RESA's recommendation that FirstEnergy replace the fixed adder under the HP Rider . . . ." RD at 243.
4. COL 34: "The record evidence does not support a finding that RESA has established a basis for FirstEnergy to implement a successor CRP . . . or hold additional collaboratives . . . ." RD at 244.

The vehicle for this reallocation is Conclusion of Law 4, which states that once a utility establishes a prima facie case "the burden shifts to an opposing party to present 'some evidence' to support an alternative approach." RD at 238 (*citing NRG Energy, Inc. v. Pa. Pub. Util. Comm'n*, 233 A.3d 936, 950 (Pa. Cmwlth. 2020)). NRG describes a burden of production with respect to an affirmative alternative proposal advanced by an opponent. It does not shift the burden of persuasion, which under Section 332(a) remains with the proponent throughout. RD at 238, COLs 1–2.

The error is not academic, because on the issues that matter most, the proponents' burden includes a negative element. The Recommended Decision states that a restriction on competition may be approved only on a showing that "no alternatives would adequately mitigate the harm."

RD at 198. Proving the inadequacy of alternatives is part of the proponents' affirmative case. It cannot be established by the objectors' failure to prove that some alternative would work.

Conclusions of Law 34 and 46 cannot both stand. Conclusion of Law 46 declares that "[t]he record evidence supports a finding that no reasonable alternative exists." RD at 246. Conclusion of Law 34 faults RESA for failing to "establish[] a basis" for the leading alternative. RD at 244. If the proponents carried their burden on the absence of alternatives, RESA's showing is beside the point; if the conclusion depends on RESA's failure of proof, the proponents did not carry it. And the record supplies the answer: as RESA demonstrated through testimony and discovery responses — a showing the Recommended Decision recites and nowhere contradicts — FirstEnergy "performed no analysis of enhanced customer education, improved contract disclosures, additional customer notifications, or other less restrictive measures." RD at 184 (*quoting* RESA M.B. at 42–43). A failure to evaluate alternatives cannot become proof that alternatives are inadequate.

The disposition confirms the pattern. Ordering Paragraph 1 adopts the Settlement "without modification." Ordering Paragraph 4 dismisses the non-settling parties' claims in a single sentence, by category. RD at 248. Conclusions of Law 47 through 50 recite the Commission's settlement policy — including its preference for outcomes "in which the interested parties have had an opportunity to participate," RD at 247, COL 49 — as though a policy encouraging compromise among consenting parties supplied a reason to impose contested terms on parties who did not consent. It does not, and it cannot lighten the statutory burden of proof on the issues the non-signatories litigated.

<u>EXCEPTION NO. 5</u>: The Recommended Decision Errs in Approving the Quarterly Affirmative-Consent Requirement, for Which the Record Contains No Evidence Specific to Variable-Rate Customers. (RD at 207–09; FOF 99; COL 42.)

The Settlement requires EGSs to obtain and attest to affirmative customer consent every ninety days for every residential customer on a month-to-month variable-priced product, on pain of the customer's return to default service. RD at 52–53, Settlement ¶ 66. The Recommended Decision's analysis of this requirement occupies four short paragraphs. RD at 208–09.

Those paragraphs contain no evidence specific to variable-rate customers. They observe that variable prices can fluctuate and that disclosure statements may not specify a supplier's pricing methodology (RD at 208) — propositions about the nature of variable products, not findings of harm — and then conclude: "We agree with the settling parties that, after 12 years and $888 million in documented harm to FirstEnergy customers, it is in the public interest to require that suppliers charging a month-to-month variable rate attest to whether the consumer provided affirmative consent to be charged in that manner." RD at 209. The $888 million aggregate is an all-shopping-customer figure. RD at 198. The record contains no finding of the price differential attributable to variable-rate customers, no finding of their termination or uncollectible experience as distinct from shopping customers generally, and no finding as to complaint volume specific to variable products.

The Commission has already regulated this precise circumstance. Customers automatically renewed into month-to-month products receive advance notice of price changes and may cancel without penalty. 52 Pa. Code §§ 54.5, 54.10; *see Review of Rules, Policies and Consumer Education Measures Regarding Variable Rate Retail Electric Products*, Docket No. M-2014-2406134 (Order entered Mar. 4, 2014); *Rulemaking Regarding Electricity Generation Customer Choice*, Docket No. L-2017-2628991 (Final Rulemaking Order entered Feb. 27, 2020). Neither FirstEnergy nor the Recommended Decision identifies evidence that those protections have failed.

On burden, the Recommended Decision credits FirstEnergy's testimony that "no system changes are necessary" and that the attestation will be handled through electronic data interchange.

RD at 202, 209; RD, p. 37, FOF 107. That evidence concerns FirstEnergy's costs. No party analyzed the cost to suppliers of soliciting, obtaining, and documenting affirmative consent from every variable-rate customer four times a year, or the customer consequence of a missed response. A satisfied customer who does not answer a quarterly solicitation — because she is traveling, ill, or simply attending to her life — loses the product she selected. Default service customers are never asked.

The Commission should reject the second sentence of Settlement Paragraph 66, and Paragraph 73 insofar as it implements that requirement, and reject Finding of Fact 99 and Conclusion of Law 42 insofar as they extend to variable-rate products.

EXCEPTION NO. 6: The Recommended Decision Errs in Treating Aggregate PTC Comparisons as Substantial Evidence of Actual Harm and in Approving Remedies That Do Not Fit the Harm Found. (RD at 33, 37, 198–99, 227–29; FOFs 94, 106; COLs 42, 45–46.)

Every contested retail provision rests on one evidentiary pillar: that FirstEnergy's residential shopping customers paid "$888 million in aggregate net costs above the PTC since 2017." RD at 198. Spark joins RESA's showing that the comparison cannot bear that weight, including because the products compared no longer allocate wholesale risk in the same way once NITS and capacity risk are removed from the default service product. Spark does not repeat that showing. It presses two independent points that require no weighing of evidence at all, because both appear on the face of the Recommended Decision.

First, the Recommended Decision concedes that the principal remedy operates regardless of the asserted harm. "We also do not find it a fault that the proposed change would mean that customers could be returned to default service even where the supplier's renewal offer is lower than the PTC." RD at 199. A restriction justified as necessary to prevent above-PTC pricing, which applies with equal force to below-PTC pricing, is not "narrowly tailored" in any sense the term will bear. RD at 199. The Recommended Decision converts this defect into a virtue by reframing the objective as informed choice rather than affordability — but affordability is the harm the record establishes and the ground on which Conclusions of Law 42 and 46 rest.

Second, the same mismatch recurs across the other provisions. The POR restriction reaches commercial customers whom Finding of Fact 94 finds paid less than default service. RD at 33. The Customer Referral Program — the one mechanism in FirstEnergy's territory that guaranteed participating customers a price below the PTC — is eliminated in the same order that invokes above-PTC pricing as the justification for everything else. RD at 158–63. And Finding of Fact 106 finds that suppliers "remain free to offer and charge any price for their services as they do today," RD at 37, which if true means none of these measures addresses the pricing the Recommended Decision identifies as the harm.

A remedy that operates when the asserted harm is absent, that reaches a class for which the harm was not found, and that eliminates the program most directly targeted at the harm, is not a tailored response. The Commission should reject Conclusions of Law 42, 45, and 46 to the extent they rest on aggregate PTC comparisons as proof of harm and on the assertion that the challenged provisions are appropriately tailored to it.

<u>EXCEPTION NO. 7</u>: The Recommended Decision Errs in Approving Removal of NITS from the Full-Requirements Product and Continuation of the Capacity Proxy Price. (RD at 60–86, 240; COLs 15–16.)

Conclusion of Law 15 states that the record "does not support a finding that RESA has established" that removing NITS or continuing the capacity proxy price "would transfer risk to customers." RD at 240. That conclusion contradicts the record the Recommended Decision itself recites four pages into its own discussion: OCA's witness acknowledged that the proposal "shift[s] cost risks associated with NITS charges from suppliers to customers, in return for eliminating risk premiums in wholesale FPFR suppliers' bids tied to NITS cost uncertainty." RD at 62 and n. 214. Whether the transfer is beneficial is a different question from whether it happens. Conclusion of Law 15 denies that it happens, and it independently misallocates the burden for the reasons in Exception No. 4. Spark joins RESA's development of the underlying record.

Spark adds one point. These wholesale provisions cannot be evaluated in isolation from the retail provisions they enable. The Recommended Decision approves removing NITS and continuing the capacity proxy price on the express ground that doing so lowers the risk premiums suppliers must build into their bids and therefore lowers default service procurement costs. RD at 74–75, 85–86. It then uses the resulting PTC as the measure of whether competitive prices are excessive. RD at 198; COL 42. The Commission cannot treat risk allocation as material when it reduces the default service price and immaterial when it is used to indict competitive prices. At minimum, the Commission should decline to adopt any retail restriction keyed to a PTC whose composition the same order changes.

EXCEPTION NO. 8: The Recommended Decision Errs in Approving Elimination of the Customer Referral Program. (RD, pp. 158–63; FOFs 85–89; COL 34.)

Conclusion of Law 34 rests on the same burden-allocation error identified in Exception No. 4: it faults RESA for failing to "establish[] a basis" for a successor program (RD at 244) when the proponents of eliminating a Commission-approved program bear the burden of justifying its elimination. 66 Pa. C.S. § 332(a). The substantive difficulty is plainer still. The Customer Referral Program was the one mechanism in FirstEnergy's territory that guaranteed participating customers a price below the PTC. The Settlement eliminates it in the same order that invokes above-PTC pricing as the justification for every other restriction it imposes. An order cannot rest on the proposition that customers pay too much relative to the PTC and simultaneously abolish the only program that guaranteed they would not. Spark joins RESA's showing on the record underlying this issue.

V. CONCLUSION AND REQUESTED RELIEF

The Commission is not required to choose between taking affordability seriously and following the Public Utility Code. Nor is it required to choose between rejecting these provisions and disrupting default service. Settlement Paragraph 78 provides only that a Joint Petitioner may elect to withdraw within five business days of a modification; modification does not void the Settlement. The Commission modified a non-unanimous default service settlement on materially the same issue in PECO DSP VI, rejecting an automatic-return proposal while approving the remainder, and no settling party withdrew. The Commission can do the same here and enter a final order approving DSP VII on or before October 22, 2026.

Spark Energy, LLC respectfully requests that the Commission:

1. Grant these Exceptions;
2. Reject the recommendation to approve the Settlement "without modification" and reject the following provisions: the mandatory return of residential shopping customers to default service; the quarterly affirmative-consent requirement for variable-rate products; the PTC-based POR eligibility restriction and rate-ready billing condition together with the associated phase-out of the clawback mechanism; the elimination of the Customer Referral Program; and the removal of NITS obligations from the full-requirements product and continuation of the capacity proxy price (Settlement ¶¶ 28–29, 34, 65–67, 73);
3. Deny FirstEnergy's requested waiver of 52 Pa. Code § 54.10(3) and reject Ordering Paragraph 8;

4. Reject Findings of Fact 85–89, 92, 94, 98–100 and 103–106, and Conclusions of Law 4, 15–16, 27–28, 34–35, 41–43 and 45–50, to the extent they support the challenged provisions;

In the alternative, and if the Commission does not reject the challenged provisions outright, Spark requests that the Commission:

5. Sever the retail-market provisions (Settlement ¶¶ 65–67, 73) from DSP VII, approve the balance of the plan effective June 1, 2027, and refer the retail-market questions to a generic statewide investigation or rulemaking applicable to all electric distribution companies and all electric generation suppliers on equal terms;
6. If any return-to-default requirement is adopted, exempt renewals priced at or below the applicable PTC at the time of renewal — the circumstance the Recommended Decision concedes is unaffected by the harm it identifies, (RD at 199) — and exempt long-term fixed-price and renewable products;
7. If any POR eligibility restriction is adopted, limit it to residential accounts, retain a collections-performance criterion of the kind reflected in the existing clawback mechanism (FOF 103) rather than a price criterion alone, and defer any rate-ready billing mandate to a separate proceeding addressing 52 Pa. Code § 56.83 compliance directly;
8. If any quarterly affirmation requirement is adopted, defer its effective date pending a Commission assessment of supplier implementation cost and customer response rates; and
9. Grant such other relief as the Commission deems appropriate.

Respectfully submitted,

Deanne M. O'Dell, Esquire
(PA I.D. No. 81064)
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101
(717) 237-6000 / (717) 237-6019 (fax)
dodell@eckertseamans.com

Lauren M. Burge, Esquire
PA I.D. No. 311570
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
(412) 566-6000 / (412) 566-6099 (fax)
lburge@eckertseamans.com

Counsel for Spark Energy, LLC

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