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August 31, 2026

<u>Via Electronic Filing</u>

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 the Retail Energy Supply Association's ("RESA") 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 RESA's Exceptions, upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Date: August 31, 2026

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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TABLE 1
Summary Of Challenged Proposals And Applicable RESA Exceptions

Challenged Provision	What the Proposal Does / RD References	Principal Basis for RESA's Opposition	Applicable Exceptions
Automatic Transfer to Default Service Upon EGS Contract Expiration	Substitutes EDC-provided default service for the customer's chosen EGS at expiration of a fixed-term contract absent renewed affirmative customer action; requires waiver of 52 Pa. Code § 54.10(3). **RD at 163–200; FOFs 98–99; COLs 41–42, 45–46; OP ¶¶ 4, 8.**	Displaces the customer's previously exercised EGS choice notwithstanding § 2806(a) and the existing § 54.10 renewal framework; operates even below the PTC; creates one-way movement toward EDC-provided default service; necessity, alternatives and market effects not established.	**Exc. 1–4:** No. 1 – statutory limits/customer choice; No. 2 – market functioning; No. 3 –necessity/alternatives; No. 4 – data/causation.
Quarterly Affirmative Consent	Requires residential variable-price customers to reaffirm EGS service every 90 days or have EDC-provided default service substituted for their existing EGS service. **RD at 200–209; FOF 99; COLs 42, 45–46; OP ¶ 4.**	Imposes recurring consent friction only on competitive service despite existing renewal and price-change protections; no showing existing protections are inadequate or that the requirement is necessary; practical market effects not evaluated.	**Exc. 1–4:** No. 1 – statutory limits/customer choice; No. 2 – market functioning; No. 3 – necessity/alternatives; No. 4 – data/causation.
POR Restructuring	Conditions POR eligibility on EGS price at/below PTC and rate-ready billing and phases out the existing clawback. **RD at 209–229; FOFs 100, 103–105; COLs 35–36, 42, 45–46; OP ¶ 4.**	Makes the EDC PTC the price threshold for access to Commission-recognized market infrastructure; rate-ready and price restrictions not shown necessary or narrowly tailored; extends residential rationale to commercial customers; alternatives and market effects inadequately evaluated; PTC reflects different risk allocation.	**Exc. 1–5:** No. 1 – generation-price regulation; No. 2 – market functioning; No. 3 – necessity/tailoring; No. 4 – data/causation; No. 5 – PTC/risk inconsistency.
CRP Elimination	Allows the existing CRP to terminate May 31, 2027 and rejects a successor CRP or further collaborative consideration of improvements. **RD at 153–163; FOFs 85–89; COL 34; OP ¶ 4.**	Eliminates rather than reforms a Commission-recognized competitive-market mechanism that produced documented below-PTC savings; declining participation/design concerns do not establish that no reasonable alternative exists.	**Exc. 2–3:** No. 2 – market functioning; No. 3 – necessity/alternatives.
NITS / CPP	Removes NITS from wholesale supplier pricing and continues CPP true-up, shifting specified wholesale price risks from full-requirements suppliers to default-service customers. **RD at 62–82 (NITS); 75–89 (CPP); FOFs 11, 23–24, 32–36; COLs 13–16; OP ¶ 4.**	Shifts rather than eliminates wholesale-market risk; lower bids do not establish least cost over time; restructures the risks reflected in default-service pricing and then uses the resulting PTC as a regulatory measure of competitive generation prices.	**Exc. 5 –** least cost/risk transfer; use of resulting PTC to regulate EGS prices; **No. 1 –** use of Commission-structured PTC to regulate EGS prices.

I. INTRODUCTION

The Retail Energy Supply Association ("RESA")[1] urges the Commission to reject those portions of the August 21, 2026 Recommended Decision ("RD") which would impose unlawful and unprecedented restrictions fundamentally altering – and threatening the continued viability of – Pennsylvania's competitive retail electricity market. Those recommendations conflict with core requirements of the Electricity Generation Customer Choice and Competition Act ("Competition Act")[2] which the Commission is bound to follow.[3] The record in this utility-specific default-service proceeding does not establish that competitive shopping is a root cause of today's affordability concerns or that the restrictions contained in the July 2, 2026 Joint Petition for Non-Unanimous Settlement ("Settlement") are lawful or supported by the required evidentiary showing.[4]

Adopting the RD will be consequential. A FirstEnergy residential customer who affirmatively chose an electric generation supplier ("EGS")[5] and fails to act again after receiving the required contract-expiration notices[6] will have electric distribution company ("EDC")-provided default service[7] substituted for the customer's chosen EGS – even where the EGS

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1 The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial customers. More information is available at www.resausa.org

2 66 Pa. C.S. §§ 2801–2812.

3 The Commission is an administrative agency charged with implementing the Competition Act and must do so consistent with the statutory framework enacted by the General Assembly. See *Dauphin Cnty. Indus. Dev. Auth. v. Pa. Pub. Util. Comm'n*, 123 A.3d 1124, 1133 (Pa. Cmwlth. 2015) (hereinafter "*DCIDA*").

4 Parties to the Settlement are FE PA, 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, Inc., and Duquesne Light Company (collectively, the "Settlement Proponents").

5 *See* 52 Pa. Code § 111.7(a); *see also* 52 Pa. Code §§ 57.172-.174.

6 *See* 52 Pa. Code § 54.10(1)-(3).

7 Incumbent-EDC provision of default service reflects Pennsylvania's current market structure, not a statutory requirement. See 66 Pa. C.S. § 2803 (defining "default service provider" to include an EDC "or alternative supplier of electric generation services approved by the commission"); 52 Pa. Code § 54.182.

renewal offer is below the EDC's Price-to-Compare ("PTC"). That result displaces the customer's previously exercised supplier choice even though the Competition Act provides that "[t]he ultimate choice of the electric generation supplier is to rest with the consumer."[8] Customers who choose variable-priced competitive service must reaffirm that choice every ninety days despite existing Commission rules governing automatic renewal, advance price-change notice and cancellation fees.[9] Access to Purchase of Receivables ("POR") – a Commission-recognized mechanism integral to the practical functioning of the competitive mass market[10] – will become conditioned on EGS pricing and billing method. And the Commission-approved Customer Referral Program ("CRP")[11] will be eliminated, removing a program offering residential and small commercial customers an EGS price guaranteed to be at least 7% below the applicable PTC at enrollment.

These are not marginal consumer-protection adjustments. Together, they alter the conditions under which residential competitive supply operates, and every change operates in the same direction – toward EDC-provided default service and away from competitive supply. The challenged retail restrictions also rest, directly or indirectly, on the premise that EGS prices above the EDC's PTC warrant regulatory intervention. But the Competition Act removed generation from traditional public-utility regulation and expressly determined that competitive market forces are more effective than economic regulation in controlling generation costs.[12] The EDC's PTC is a generation rate produced by Pennsylvania's Commission-approved default-

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[8] 66 Pa. C.S. § 2806(a); see also RESA M.B. at 33-41.
[9] *See* 52 Pa. Code § 54.10(2)(ii)(A)(I), (3)(i)(A).
[10] See 52 Pa. Code § 69.1814; RESA St. No. 1 at 27-29.
[11] See 52 Pa. Code § 69.1815.
[12] 66 Pa. C.S. § 2802(5), (14).

service structure, not a Commission-established ceiling for EGS prices. Yet the RD uses it both to justify restrictions on competitive supply and as the price threshold for POR eligibility.[13]

This approach also represents a significant departure from nearly thirty years of Commission implementation of the same Competition Act. Appendix A to RESA's Reply Brief collects that history in one place. Across successive rulemakings, retail-market investigations and default-service proceedings, the Commission repeatedly confronted generation pricing, customer-protection, contract-renewal, variable-rate and other retail-market concerns while preserving competition as the statutory mechanism governing generation supply.[14] The governing statute has not changed. The RD does not explain why the concerns presented here justify departing from that longstanding implementation now.

The potential market consequence is not theoretical. After Maryland imposed restrictions on residential competitive supply, shopping participation declined from approximately 12.8% to 0.3% statewide and to 0.2% in FirstEnergy's Potomac Edison territory.[15] The RD recounts that evidence and the proponents' distinctions, but ultimately answers the competitive-market concern principally by emphasizing that customers remain legally free to shop. That misses the statutory inquiry. The Competition Act places the ultimate supplier choice with the consumer and requires attention to the "proper functioning of a fully competitive retail electricity market."[16] A legal right to shop does not establish that a functioning market will remain in which customers have meaningful competitive options.

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13 *See* 66 Pa. C.S. §§ 2802(5), (14), 2806(a); RESA M.B. at 62.
14 RESA R.B. at 11-17 & App. A.
15 *See* RESA St. No. 1 at 9-11; RESA St. No. 1-R at 14-18; RESA St. No. 1-SR at 8-9, 13-15; RESA M.B. at 48-50.
16 *See* 66 Pa. C.S. § 2806(a); 66 Pa. C.S. § 2811(a)-(b).

Nor do the pricing, termination, uncollectible and complaint data cure those legal defects. The RD treats observed disparities as establishing a causal nexus between above-PTC EGS pricing and customer harm, but the underlying data do not themselves establish that causation or that the challenged restrictions are necessary because no reasonable alternative will adequately address any demonstrated harm.[17]

Finally, the RD changes FirstEnergy's longstanding allocation of Network Integration Transmission Service ("NITS") risk by removing it from what default-service suppliers must competitively price while EGSs must continue to price and manage it.[18] That change is particularly consequential here because the RD then uses the resulting PTC to judge EGS prices and as the price threshold for POR eligibility. The Commission cannot change the risks reflected in FirstEnergy's default-service price and then use that newly structured PTC as the regulatory measure of EGS prices that continue to reflect those risks.

RESA's five Exceptions address these errors: (1) the RD crosses the Competition Act's statutory limits on generation-price regulation and customer choice and applies the wrong legal standard for restricting competition; (2) it treats the technical ability to shop as equivalent to preservation of a functioning competitive market; (3) it approves restrictions without the required showing of necessity and absence of reasonable alternatives; (4) it treats disparate pricing, termination, uncollectible, complaint and related data as sufficient to establish the asserted customer harms; and (5) it treats a transfer of wholesale-market risk as a customer-cost reduction and then uses the resulting Commission-structured PTC to judge competitive generation prices.

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17 See *Coalition for Affordable Utility Servs. & Energy Efficiency in Pa. v. Pa. P.U.C.*, 120 A.3d 1087, 1106 (Pa. Cmwlth. 2015) (en banc), allocatur denied, 136 A.3d 982 (Pa. 2016); *Retail Energy Supply Ass'n v. Pa. P.U.C.,* 185 A.3d 1206, 1228 (Pa. Cmwlth. 2018); see also RESA M.B. at 31-63; RESA R.B. at 7-8.

18 *See* RD at 61-75, 85-86; RESA M.B. at 16-25.

All of the challenged restrictions should be rejected on this record. Doing so neither disregards affordability concerns nor delays implementation of DSP VII on June 1, 2027; none of the challenged provisions is necessary for FirstEnergy to fulfill its default-service obligations. The consequences of approval would extend beyond FirstEnergy. Commission decisions in default-service proceedings routinely guide later proceedings involving other EDCs, and approval here would establish a path for fundamentally restructuring Pennsylvania's competitive retail market utility by utility. If broader review of Pennsylvania's retail market is warranted, it can occur on an appropriate statewide record while DSP VII proceeds. Current affordability concerns do not authorize the Commission to depart from the competitive-market framework enacted by the General Assembly.

II. EXCEPTIONS

A. EXCEPTION NO. 1: The RD Errs By Failing to Apply the Competition Act's Statutory Framework Governing Competitive Generation Prices and Restrictions on a Functioning Competitive Market. FOFs 90, 94, 97; COLs 42, 45; RD at 198-200, 208-209, 227-229; Ordering ¶¶ 1, 4, 8-9.

The threshold error is legal. The Commission possesses only those powers conferred by the General Assembly expressly or by strong and necessary implication.[19] The Competition Act removed generation from traditional public-utility regulation, requires customer access to a competitive generation market, and places competition–not Commission regulation of generation prices–at the center of the statutory mechanism for controlling generation costs.[20]

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[19] *City of Phila. v. Phila. Elec. Co.*, 473 A.2d 997, 999-1000 (Pa. 1984); *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791, 795 (Pa. 1977); RESA M.B., App. B, COL 1.

[20] 66 Pa. C.S. §§ 2802(3), (5), (12)-(14), 2804(2), 2806(a), 2811; RESA Main Brief ("M.B.") at 1-12; RESA Reply Brief ("R.B.") at 2-9.

The RD recites portions of that framework but does not apply its limits. It accepts the Settlement Proponents' interpretation of selected pricing, termination, uncollectible and other data as demonstrating harm associated with above-PTC EGS pricing; concludes that restrictions on competitive supply are "necessary" to address that harm; and invokes the principle that competition may "bend" to support the restrictions proposed here.[21] Each step implicates a legal boundary the Commission must observe. The RD cannot be adopted unless its recommendations fall within the authority granted by the Competition Act and are supported by the evidentiary showing that statute and controlling precedent require.

1. The Commission May Not Regulate Competitive Generation Prices and Must Rely on Competition–Not Economic Regulation – to Control Generation Costs.

The General Assembly directed that "[t]he generation of electricity shall no longer be regulated as a public utility service or function except as otherwise provided for in this chapter" and separately determined that "[c]ompetitive market forces are more effective than economic regulation in controlling the cost of generating electricity."[22] The Competition Act, therefore, substituted competition for traditional rate regulation as the mechanism for disciplining generation prices.[23] The Commission itself recognized early in implementing the Act that it "may not dictate the pricing in a competitive market."[24]

And yet, that is exactly what the RD recommends the Commission do here in several respects. First, the asserted justification for the challenged retail restrictions is above-PTC EGS

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21 FOFs 90, 94, 97; COLs 42, 45.

22 66 Pa. C.S. §§ 2806(a), 2802(5); see also id. § 2802(14).

23 RESA M.B. at 1-12; RESA R.B. at 5-7.

24 *Rulemaking Re Electric Distribution Companies' Obligation to Serve Retail Customers at the Conclusion of the Transition Period Pursuant to 66 Pa. C.S. § 2807(e)(2),* Docket No. L-00040169, Final Rulemaking Order at 5-7, 33-34 (Pa. P.U.C. entered May 10, 2007); RESA R.B. at 5-7.

pricing. COL 42 expressly finds the affirmative-consent and POR restrictions "necessary to address the harms associated with above-PTC supplier pricing."

The end hope of the RD, then, is to limit the pricing of all generation to the PTC (because EGSs not doing so will lose access to an integral market mechanism, POR) under the mistaken belief that such price will be the more generally affordable option. The Commission may not accomplish indirectly through POR eligibility what the Competition Act prohibits directly by making the EDC's default-service price the dividing line for regulatory consequences imposed on competitive generation prices.[25] Implementing a restriction with the goal of regulating the price of generation, as the RD supports here, is patently inconsistent with the Competition Act and the Commission cannot do it.

The same statutory concern is reinforced by the RD's treatment of default-service procurement. FirstEnergy justifies removal of NITS from wholesale supplier responsibility because doing so is expected to reduce supplier risk premiums and thereby reduce the default-service price.[26] The Competition Act authorizes Commission oversight of default-service procurement, but it requires that procurement to operate through competitive processes and least-cost principles.[27] The Commission cannot use that authority to engineer a preferred PTC through regulatory reallocations of wholesale-market risk and then treat the resulting PTC as the regulatory measure of competitive generation prices. Exception No. 5 addresses that inconsistency in detail.

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[25] 66 Pa. C.S. §§ 2802(5), (14), 2806(a); RESA M.B. at 62.

[26] FE PA Statement No. 2 (Ryan Rose) at 16-17.

[27] 66 Pa. C.S. § 2807(e)(3.4), (3.7); Popowsky v. Pa. P.U.C., 71 A.3d 1112, 1117-18 (Pa. Cmwlth. 2013); *see infra* Exception No. 5.

Automatic substitution of EDC-provided default service for a customer's chosen EGS at contract expiration, and recurring ninety-day consent for continued variable-priced EGS service, do not expressly cap EGS prices. But the RD justifies both as responses to above-PTC pricing and imposes additional regulatory consequences on continued competitive service. The Commission may regulate supplier conduct and protect customers; but it cannot use generalized dissatisfaction with competitive generation prices to recreate through regulatory restrictions the price discipline the General Assembly assigned to competition. That conclusion is consistent with the Commission's nearly thirty-year implementation of the Competition Act summarized in Appendix A to RESA's Reply Brief.[28]

2. The Competition Act Requires the Commission to Preserve Customer Choice Within a Functioning Competitive Market, Not Merely the Technical Right to Shop.

The second clear requirement of the Competition Act that the Commission must preserve is who is in control of the customer's generation-supply choice and the market in which that choice is exercised. Section 2804(2) provides that the Commission "shall allow customers to choose among electric generation suppliers in a competitive generation market through direct access." Section 2806(a) further provides that all EDC customers "shall have the opportunity to purchase electricity from their choice of electric generation suppliers" and, expressly, that "[t]he ultimate choice of the electric generation supplier is to rest with the consumer."[29] Section 2811 separately requires the Commission to monitor the retail electricity market and, upon the

[28] RESA R.B. at 11-17 & App. A.
[29] 66 Pa. C.S. §§ 2804(2), 2806(a).

statutory predicate, investigate impacts on the "proper functioning of a fully competitive retail electricity market."[30]

(a) Statutory Right To Choose Remains With Consumer

The proposals supported by the RD disregard the customer's statutory right to control choice of generation supplier. The process by which the Commission has implemented Section 2806(a)'s requirement that the ultimate supplier choice rests with the customer, and Section 2807(d)(1)'s requirement to establish procedures to ensure that an EGS "does not change a customer's electricity supplier without the direct oral confirmation or written consent of the customer" are fully established in long-standing regulations.[31] The customer exercises that statutory right by selecting an EGS through the Commission-regulated enrollment process and entering into a contract whose disclosures, expiration notices and renewal provisions are governed by Commission regulations.[32] Then, after receiving the required expiration and renewal notices, that relationship continues unless the customer chooses otherwise.[33] The Settlement disregards the customer's exercise of his or her statutory right to choose pursuant to this Commission approved regulatory process and substitutes EDC-provided default service for that chosen EGS solely because the customer does not act again. The Competition Act does not allow the Commission to substitute its judgment for the customer's judgment in this way and, therefore, the proposal must be rejected.[34]

The Commission's switching regulations make the defect still more concrete. Chapter 57 excuses its supplier-change procedures only when the customer's EGS discontinues service and

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30 66 Pa. C.S. § 2811(a)-(b).
31 52 Pa. Code §§ 111.7, 57.171-.180.
32 52 Pa. Code §§ 54.5, 54.10, 111.7.
33 52 Pa. Code § 54.10(1)-(3).
34 RESA M.B. at 33-41.

"no other EGS is willing to provide service to the customer."[35] That is not the circumstance here: the proposal applies even where the existing EGS offers renewal and remains willing to serve the customer.[36] And only last year, the Commission held that authorizing a supplier change without advance customer consent would "directly violate Section 2807(d)(1)" and require the Commission to exceed its authority.[37] The RD's conclusion that the proposal is not "slamming" does not reconcile the Settlement with either § 2807(d)(1) or the unwaived Chapter 57 switching rules.

The procedural posture presents an additional concern. The RD rejects the supplier parties' objections to considering the § 54.10(3) waiver here, accepting FirstEnergy's arguments that it is affected by the existing protocol, requires the waiver to implement its Supplier Tariff proposal, and seeks only temporary, EDC-specific relief.[38] Those considerations do not resolve the distinct objection that the Commission would use a utility-specific default-service proceeding to alter the consequence of customer inaction established through statewide rulemaking and thereby change substantive retail-market rights and obligations applicable to EGSs.[39] To the extent the Commission nevertheless approves those changes through this proceeding, RESA maintains that doing so raises procedural due process and other constitutional concerns and preserves those objections, together with its statutory, jurisdictional, administrative-procedure and de facto rulemaking objections.

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35 52 Pa. Code § 57.178.

36 RESA M.B. at 34-41.

37 *Community Choice Aggregation*, Docket No. P-2024-304963, Opinion and Order at 68 (Aug. 14, 2025); RESA M.B. at 42-44.

38 RD at 196-198.

39 RESA M.B. at 33-45; RESA R.B. at 11-17.

(b) Competition Act Requires Commission to Ensure a Functioning Competitive Market

Beyond interfering with a customer's right to choose, neither the Settlement Proponents nor the RD offered the Commission any analysis of how the proposed competitive market restrictions would affect the long-term viability of the competitive market. That is precisely the type of market-functioning inquiry the Competition Act assigns to the Commission and that the Commission itself has undertaken when implementing Chapter 28. In opening its statewide Retail Markets Investigation pursuant to Sections 501 and 2811, the Commission stated that its objective was to develop improvements "to ensure that a properly functioning and workable competitive retail electricity market exists in the state."[40] The Commission subsequently evaluated market functioning by examining supplier participation, barriers to supplier entry, barriers to customer participation, availability of varied products and services, and supplier investment – not merely whether customers remained legally permitted to execute an EGS contract.[41]

As explained more fully in Exception No. 2, RESA placed substantial evidence before the ALJs concerning the practical market effects of these restrictions and specifically identified the questions the Commission's prior market investigations considered: whether suppliers will continue to participate, what products will remain available, what barriers the restrictions create, and whether customers will retain meaningful competitive options.[42] The RD instead relies substantially on the fact that none of the proposals legally prohibits a customer from shopping. That does not resolve the statutory market-functioning question. The Commission cannot

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40 *Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952, Order at 2, 5 (Pa. P.U.C. entered Apr. 29, 2011).
41 *Id.*, Opinion and Order at 4-7, 13 (Pa. P.U.C. entered July 28, 2011).
42 RESA R.B. at 9-16.

approve measures threatening the conditions necessary for meaningful competitive choice without addressing the record evidence concerning those effects.

3. The Commission Cannot "Restrict" Competition Unless The Demanding Evidentiary Burden Is Satisfied.

The Commonwealth Court requires substantial reasons demonstrating why specific restrictions on competition are necessary, including the absence of reasonable alternatives.[43] Importantly, even if the Commission finds that selected data demonstrate concerning customer outcomes, that finding alone does not justify imposing restrictions on competition. The proponents must establish the predicates required by the governing cases: the asserted harm must be shown to be associated with competition, and the record must establish that no reasonable alternative will adequately address that harm.[44] COL 42 declares the affirmative-consent and POR restrictions "necessary," and COL 45 invokes the proposition that competition may bend, but those conclusions do not themselves supply the required evidentiary showing. As neither of the legal requirements are met here, the Commission must reject the RD's recommendation to implement such severe and broad reaching restrictions on competition.

(a) Record Does Not Support A Showing EGS Pricing Causing Harm

The appellate precedents on which the RD relies to support allowing competition to "bend" arose in the materially different context of utility customer assistance programs ("CAPs") funded by other ratepayers. In those cases, the Commission concluded that permitting CAP participants to elect an EGS with prices beyond the EDC's PTC created more expense that other

43 *CAUSE-PA*, 120 A.3d at 1103-04; *Retail Energy Supply Ass'n v. Pa. P.U.C.*, 218 A.3d 769, 789-94 (Pa. Cmwlth. 2019); RESA R.B. at 17-21.

44 *CAUSE-PA*, 120 A.3d at 1106; *Retail Energy Supply Ass'n*, 185 A.3d at 1228.

ratepayers had to pay as part of meeting the universal service mandates of the Competition Act. The Commission concluded that customers receiving subsidized CAP benefits should not impose higher program costs on other ratepayers by purchasing higher-priced competitive supply. The Commission therefore was reconciling competition with a separate statutory obligation, and the courts required an evidentiary showing supporting the restriction and the absence of reasonable alternatives.[45]

That is not the statutory circumstance presented here. The restrictions are not designed to protect the administration or funding of a discrete legislatively mandated subsidy program. They apply broadly to ordinary retail shopping based upon generalized affordability concerns and the RD's inference that above-PTC pricing causes higher terminations, uncollectibles and complaints. The proponents therefore are not asking competition to yield to a separate statutory mandate; they are asking the Commission to alter the competitive mechanism the General Assembly itself chose in response to dissatisfaction with its perceived outcomes.

Here, the RD relies on FirstEnergy's pricing, termination, uncollectible and complaint data to try to find a direct link between EGS pricing and customer harm. However, observed disparities do not establish that above-PTC EGS pricing caused the asserted customer harms, much less that the challenged restrictions are necessary to address them. Controlling precedent requires the Commission to determine what harm the record actually establishes.[46] Here, none of the challenges, questions and concerns raised about the data available from FirstEnergy and the causal links to any perceived "harm" were meaningfully analyzed by the RD. The Commission is

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45 RESA R.B. at 17-21

46 *CAUSE-PA*, 120 A.3d at 1106; *Retail Energy Supply Ass'n*, 185 A.3d at 1228; RESA M.B. at 31-63; RESA R.B. at 7-8.

legally required to engage in a more comprehensive analysis before concluding that EGS pricing is somehow harming customers broadly.

(b) The Restrictions Here Are Broad, Not Comparable to the Narrow Statutory Context of the CAP Cases.

Even assuming some harm were established, the scope of the restrictions matters. The CAP precedents involved restrictions tied to a discrete subsidized program and a separate statutory universal-service mandate. The restrictions here reach ordinary residential shopping customers generally: EDC-provided default service is substituted for a customer's chosen EGS at fixed-term contract expiration absent renewed action; variable-price customers must reconfirm their competitive choice every ninety days; and the POR restriction extends to commercial customers as well. These are broad structural restrictions on competitive participation, not program-specific measures implementing an independent statutory mandate. The issue therefore is not whether the Commission agrees as a policy matter with the Settlement Proponents' affordability concerns. It is whether the Competition Act permits restrictions of this breadth on this record. It does not.

B. EXCEPTION NO. 2: The RD Errs By Treating the Continued Technical Availability of Retail Choice as Sufficient Without Evaluating Whether the Settlement's Restrictions Will Preserve a Functioning Competitive Market. FOFs 91-92, 99, 105; COLs 35, 41-42, 45; RD at 168-169, 198-204, 227-229; Ordering ¶¶ 1, 4, 8-9.

1. The RD Applies the Wrong Measure of Whether Competition Is Preserved.

The practical problem with the RD's analysis is straightforward: each challenged retail provision operates to move customers away from competitive supply and toward EDC-provided default service, yet the RD does not evaluate what those provisions are likely to do to the functioning competitive market when they operate together. Automatic return substitutes EDC-provided default service for the customer's chosen EGS when the customer does not act at contract expiration. Quarterly affirmation creates a recurring opportunity for the same result. The CRP – a Commission-approved program designed to introduce default-service customers to competitive supply at a guaranteed discount – is eliminated. And access to POR, a market mechanism upon which no residential or small commercial EGS in FirstEnergy's territory currently operates without, becomes conditioned upon supplier price and billing methodology.[47]

The RD answers these concerns by declaring that shopping remains legally available: customers affected by automatic return remain "free to take action" to stay with an EGS; CRP elimination leaves customers free to shop independently; and suppliers restricted from POR remain free to charge above the PTC and operate without POR.[48] That answers whether shopping remains legally permissible, not whether a functioning competitive market will remain. More fundamentally, it disregards the Commission's own recognition that default service benefits from "status quo bias" because customers may remain there simply from inertia. The Commission previously found that a structure which first places customers on default service "too easily hands the DSP customers who may stay with default service simply out of inertia," a result the Commission called "unacceptable."[49] The automatic transfer of EGS customers to EDC default service creates an even more direct version of the problem the Commission identified: it makes customer inaction operate affirmatively to displace an EGS the customer already selected and substitute EDC-provided default service.

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47 RD at 228; RESA M.B. at 55-63.

48 RD at 162-163, 196-200, 227-229; RESA R.B. at 9-11.

49 *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952, Final Order at 73-74 (Pa. P.U.C. entered Feb. 15, 2013) ("This too easily hands the DSP customers who may stay with default service simply out of inertia. This is unacceptable."); *Investigation of Pennsylvania's Retail Electricity Market*, Docket No. I-2011-2237952, Opinion and Order at 6 (Pa. P.U.C. entered July 28, 2011) (describing "status quo bias" as the default-service model encouraging customers to remain on default service rather than explore competitive options).

As discussed in Exception No. 1, the Competition Act requires the Commission to allow customers to choose among EGSs "in a competitive generation market through direct access," places the "ultimate choice" of supplier with the consumer, and expressly addresses impacts on the "proper functioning of a fully competitive retail electricity market."[50] Those statutory commands do not permit the Commission to end its inquiry upon finding that shopping remains legally available. Consistent with those obligations, the Commission historically has examined actual market structure – not merely whether shopping remains legally permissible. In its statewide Retail Markets Investigation, the Commission examined barriers to customer and supplier participation, supplier participation itself, the competitive effects and status-quo bias associated with EDC-provided default service, and market-design changes necessary to achieve a robust competitive retail market.[51]

The RD errs by failing to consider how the proposed restrictions are likely to negatively impact the functioning of the competitive market and must be overturned.

2. The RD Does Not Evaluate the Practical Competitive Effects of the Challenged Restrictions.

POR illustrates the distinction most clearly. The RD expressly recognizes that <u>no EGS currently offers residential products in FirstEnergy's territory without POR</u> and that POR allows suppliers to compete on price and product innovation rather than financing bad debt and managing collections.[52] It nevertheless accepts the proponents' responses that POR is voluntary, that the eligibility restrictions are rationally related to collection risks and payment outcomes,

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50 66 Pa. C.S. §§ 2804(2), 2806(a), 2811(a)-(b).
51 *Retail Markets Investigation*, Order at 2, 5; id., Opinion and Order at 4-7, 13; *End State of Default Service*, Final Order at 10-15; RESA R.B. at 6-9.
52 RESA M.B. at 55-63.

that rate-ready billing addresses concerns under 52 Pa. Code § 56.83, and that suppliers remain free to charge above the PTC and operate without POR.[53]

Those findings address why the RD considers the restrictions justified as a matter of collection risk and consumer protection. They do not answer the separate market-functioning question RESA put before the ALJs: what happens to supplier participation, product availability, innovation and meaningful customer choice when access to a mechanism upon which the existing residential market actually relies is conditioned upon supplier price and billing methodology?[54] The RD recounts that concern but fails to ever consider the likely practical effect of the restrictions on the competitive market it is statutorily required to preserve.

Transferring EGS customers to EDC default service at contract expiration presents the same deficient analysis. The RD rejected the supplier objections because customers will receive notice of the changed consequence of inaction, the waiver is limited and temporary, FirstEnergy is affected by the shopping-customer uncollectible, termination and complaint data discussed elsewhere in the RD, and customers remain "free to take action" to remain with an EGS.[55] Those reasons explain why the RD believes the rule is justified; critically, they do not evaluate what a rule expressly "intended to impact the competitive market" by substituting EDC-provided default service for the existing supplier relationship will do to competitive-market participation. The customer has already selected competitive supply. The new rule substitutes EDC-provided default service for that customer's chosen EGS unless the customer acts again. The ability to re-enroll later establishes continued legal access to shopping; it does not establish

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53 RD at 227-229; COL 35.
54 RESA M.B. at 61-63; RESA St. No. 1-SR at 19-21.
55 RD at 196-200.

what a rule deliberately creating movement from competitive supply to EDC-provided default service will do to competitive-market participation.[56]

Quarterly affirmation and CRP elimination reinforce the same one-way movement toward EDC-provided default service. For quarterly affirmation, the RD accepts the proponents' arguments that variable prices may fluctuate significantly, disclosure statements may not specify the pricing methodology, existing regulations do not require periodic reaffirmation, and the broader record demonstrates affordability concerns associated with residential shopping.[57] For the CRP, the RD credits evidence of post-contract above-PTC pricing, declining supplier participation and unsuccessful prior reforms, while emphasizing that suppliers remain free to market directly and customers remain free to shop even though CRP is no longer available.[58] Those rationales may explain why the RD believes additional protection or program change is warranted. They do not address the cumulative market effect of requiring repeated affirmative action only for competitive service while simultaneously eliminating a Commission-approved pathway from default service to competitive supply. Default-service customers face no reciprocal reaffirmation requirement, and EDC-provided default service does not lose access to billing and collection infrastructure based on price. Every new point of regulatory friction operates in the same direction – toward EDC-provided default service.[59] The RD does not evaluate their cumulative effect on competitive participation.

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56 RESA M.B. at 46-50; RESA R.B. at 9-11, 14-16.
57 RD at 162-163, 208-209
58 RD at 162-163.
59 RESA R.B. at 16.

The question is not whether any one provision formally abolishes choice. It is whether their combined operation preserves the functioning competitive market within which that choice must exist. On this measure the RD fails and must be rejected.

3. The Maryland Experience Demonstrates Why Technical Choice Is Not Enough.

The Maryland experience shows clearly what can happen when market conditions do not support EGS involvement. After Maryland adopted a series of retail-market restrictions, including measures materially like those proposed here, residential shopping participation declined from approximately 12.8% to 0.3% statewide and to 0.2% in FirstEnergy's Potomac Edison territory.[60]

FirstEnergy attempted to distinguish the Maryland experience, on the ground that Maryland enacted a broader "complete overhaul" of its retail market, including residential price caps and contract-term limits, while FirstEnergy maintains that its proposals neither regulate EGS prices nor prohibit customer choice.[61] Mr. Lacey's response was that this distinction does not answer RESA's market-functioning concern: formal retail choice remained in Maryland while practical residential participation fell to a fraction of one percent.[62] That is RESA's point: a formal legal right to shop does not establish that customers will retain meaningful competitive options through which to exercise that right.

The RD recounts the Maryland evidence and the parties' competing positions, but its substantive analysis does not evaluate what that experience implies for the practical effects of the combination of restrictions approved here. Instead, when addressing the individual provisions,

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60 RESA St. No. 1-SR at 8-9, 13-15; RESA M.B. at 48-50.
61 RD at 171-172; FE PA St. No. 1-R at 12-13; FE PA R.B. at 41.
62 RESA St. No. 1-SR at 8-9, 13-15; RESA M.B. at 49-50.

the RD repeatedly relies on the continued legal availability of shopping, the asserted consumer-protection rationale for each restriction, and the fact that suppliers remain legally able to participate under the new conditions.[63]

Maryland therefore demonstrates why preserving the formal legal right to shop does not answer what these restrictions may do to the market in which that right must be exercised. The RD had concrete evidence before it concerning those practical market effects,[64] yet resolves the competitive-market concern principally by finding that customers and suppliers remain legally able to participate and by crediting the consumer-protection rationales for the individual restrictions. The RD does not answer the statutory question presented by RESA's evidence: whether a meaningful residential competitive market will remain after these provisions operate together.[65] That applies the wrong measure of market preservation under the Competition Act. The Competition Act requires preservation of a functioning competitive market, not merely preservation of a legal right to shop regardless of whether the market in which that right is exercised materially contracts as a result of the Commission's action.

Accordingly, the Commission must reject FOFs 91-92, 99 and 105 and COLs 35, 41-42 and 45 to the extent they conclude that the challenged provisions adequately preserve customer choice and Pennsylvania's competitive-market framework without evaluating their practical effects on market functioning, and reject the corresponding provisions of Ordering Paragraphs 1, 4, 8 and 9.

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63 RD at 162-163, 196-200, 208-209, 227-229.

64 *See* RESA St. No. 1 at 9-11, 27-29; RESA St. No. 1-SR at 8-9, 13-15, 19-21; RESA R.B. at 9-16.

65 66 Pa. C.S. §§ 2804(2), 2806(a), 2811(a)-(b); *Retail Markets Investigation,* Order at 2, 5; *id.*, Opinion and Order at 4-7, 13; *End State of Default Service*, Final Order at 10-15.

C. **<u>EXCEPTION NO. 3: The RD Errs By Approving Restrictions on Competition Without the Required Showing That No Reasonable, Less Restrictive Alternative Would Adequately Address Any Harm Established on the Record. FOFs 87-89, 98-99, 103-105; COLs 27, 34, 42, 46; RD at 162-163, 198-200, 208-209, 227-229; Ordering ¶¶ 1, 4, 8-9.</u>**

As established in Exception No. 1, restrictions on competition require substantial reasons demonstrating necessity, including that an actual harm exists and that no reasonable alternative will adequately address that harm.[66] That showing was the Settlement Proponents' burden. Section 332(a) places the burden of proof on the party seeking a rule or order from the Commission.[67]

COL 46 nevertheless declares that "no reasonable alternative exists." But the RD does not establish that proposition. Even accepting for purposes of this Exception the RD's conclusion that the record establishes a "direct nexus" between above-PTC supplier pricing and identified customer outcomes, (which RESA does not), that finding does not establish that these restrictions will remedy those outcomes, that their scope corresponds to the asserted harm, or that reasonable approaches preserving competition are inadequate.[68]

The failure of an existing protection to eliminate every asserted concern does not establish that the next – and substantially more restrictive – measure is necessary. The proponents still had to establish the connection between any demonstrated harm, the particular restriction proposed, and the inadequacy of reasonable approaches that would preserve competition. The RD credits their reasons for believing additional restrictions are warranted, but

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[66] *CAUSE-PA*, 120 A.3d at 1106; *Retail Energy Supply Ass'n*, 185 A.3d at 1228; *Petition of PECO Energy Co. for Approval of Its Default Service Program*, Docket No. P-2024-3046008, Opinion and Order at 75-76 (Pa. P.U.C. entered Nov. 7, 2024) ("PECO DSP VI").
[67] 66 Pa. C.S. § 332(a); RESA M.B. at 18-19.
[68] RESA M.B. at 48-63; RESA R.B. at 7-8.

those reasons do not establish that the particular restrictions approved are necessary or that reasonable, less restrictive alternatives are inadequate.

1. The RD Does Not Establish the Required Nexus Between the Asserted Harms and the Scope of the Specific Restrictions.

That failure is apparent when each proposed restriction is compared with the asserted harm and the existing regulatory framework.

(a) Automatic transfer of EGS customers to EDC default at contract expiration.

As discussed in Exception No. 1, the proposal reverses the existing § 54.10 consequence of customer inaction and the Commission's prior policy judgment preserving the chosen EGS relationship. The RD accepts FirstEnergy’s response that the Company already attempted less restrictive measures – including the POR clawback, collaborative processes and customer education – and relies on that history in finding the proposal narrowly tailored.[69] But those measures addressed broader shopping, collection and customer-education concerns; they do not establish that reasonable alternatives directed to the perceived contract-renewal problem the parties raise here were evaluated and found inadequate.[70]

More fundamentally, the RD acknowledges that an EGS customer will be moved to EDC-provided default service upon contract expiration even when the EGS’ renewal price is below the PTC.[71] A restriction justified by concerns about above-PTC pricing but operating where the EGS’ renewal price is lower than the PTC is not narrowly tailored. The customer’s

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69 RD at 198-200.
70 RESA M.B. at 33-50; RESA R.B. at 11-16.
71 RD at 199-200.

ability to take yet another action to keep the EGS he or she already entered into a contract with does not explain why displacing the existing EGS relationship at contract expiration is necessary.

(b) Quarterly affirmative consent.

Existing regulations already require advance notice of subsequent price changes and prohibit cancellation fees for automatically renewed month-to-month products.[72] The RD accepts the proponents' response that the existing regulations do not require periodic reaffirmation, that variable prices may fluctuate significantly, that disclosure statements may not specify the supplier's pricing methodology, and that the broader shopping record demonstrates affordability concerns notwithstanding existing protections.[73] But a rationale for additional protection does not establish why existing protections are inadequate, why ninety-day reaffirmation is necessary, or why a reasonable alternative preserving the existing EGS choice would not address the concern.[74] More fundamentally, the RD identifies no record evidence establishing that month-to-month variable-price products themselves caused the pricing, termination, uncollectible or complaint outcomes relied upon to justify the restriction.

(c) POR

The same error is particularly stark with POR. The Commission has expressly recognized that "[t]he public interest would be served by the consideration of an EGS receivables purchase program in each service territory."[75] And the existing POR framework already reflects targeted Commission responses to concerns involving uncollectibles. In DSP V, the Commission required quarterly arrears reporting so suppliers could identify and address payment problems before

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72 52 Pa. Code § 54.10(2)(ii)(A)(I), (3)(i)(A).
73 RD at 208-209.
74 RESA M.B. at 51-55.
75 52 Pa. Code § 69.1814.

write-off; in DSP VI, it continued the clawback as a reasonable mechanism for managing POR-related uncollectibles while recognizing that experience could support future modification.[76]

The RD accepts FirstEnergy's response that the clawback recovers only a fraction of certain uncollectibles, operates retrospectively and does not prevent the asserted risk at enrollment.[77] CAUSE-PA further responded that RESA had not developed a record proving its suggested alternatives and that the governing standard does not require proponents to pursue "all eventualities," only to consider alternatives advanced on the record.[78] Neither response actually supports the conclusion of COL 46 that "the record evidence supports a finding that no reasonable alternative exists." The issue is not whether the existing clawback perfectly eliminates the asserted harm or whether RESA proved that a particular replacement must be adopted. The proponents bore the burden to establish that the substantially broader price-based restriction is necessary and that no reasonable alternative would adequately address the demonstrated harm. Evidence that one existing mechanism is imperfect does not establish that reasonable refinement of that mechanism – or another less restrictive approach – is inadequate.

The rate-ready requirement presents the same problem. The record does not establish how many suppliers currently use bill-ready billing, how many would lose POR solely because of the new requirement, or what effect that restriction would have on supplier participation, product availability or customer choice.[79] The RD adopts CAUSE-PA's argument that, because bill-ready billing does not allow FirstEnergy to distinguish basic from non-basic supplier charges, it "can lead to" termination for nonpayment of non-basic charges contrary to 52 Pa.

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76 *FE DSP V* Order at 17-21; *FE DSP VI* RD at 85-86, adopted by Opinion and Order entered Aug. 4, 2022; RESA M.B. at 59-63.

77 RD at 212-213, 227-228.

78 CAUSE-PA R.B. at 40-41.

79 RESA M.B. at 61-63; RESA St. No. 1 at 30-32.

Code § 56.83, and concludes that conditioning POR on rate-ready billing therefore "ensures compliance" with that regulation.[80] While that might be a legitimate consumer-protection position, it does not establish that conditioning POR eligibility on rate-ready billing is the necessary response. The RD does not identify evidence showing that the asserted § 56.83 problem has resulted in unlawful terminations under the existing framework, or establish the magnitude or frequency of the problem. And RESA expressly identified preservation and improvement of the existing POR framework, utility billing enhancements, supplier consolidated billing, outsourced billing and other market-design improvements as approaches that could be examined while preserving competitive-market access.[81] The RD does not determine whether such approach could address the § 56.83 concern. Speculating about a potential regulatory-compliance problem is different from establishing that this particular restriction is necessary or that no reasonable, less restrictive alternative exists.

The breadth of the POR restriction also independently demonstrates the missing nexus. The affordability case presented by the Settlement Proponents focuses principally on residential shopping customers, while the proposed POR restrictions extend to commercial customers as well. RESA raised that mismatch expressly.[82] Indeed, FOF 94 recognizes that commercial and industrial shopping customers collectively paid less than default service during the period examined. Yet those customers and their suppliers remain subject to the same price-based POR restriction.

The RD does address that mismatch, concluding that higher uncollectible expense is recovered from both residential and commercial customers and therefore provides a basis for

80 RD at 228; CAUSE-PA R.B. at 42; CAUSE-PA St. No. 1-R at 23-24.
81 RESA St. No. 1 at 36-37; RESA M.B. at 61-63.
82 RESA M.B. at 57-59.

applying the restrictions to POR-eligible commercial classes as well.[83] But that answer addresses who ultimately bears uncollectible expense, not whether commercial shopping customers exhibit the pricing or collection-risk characteristics the RD relies upon to justify the price-based POR restriction. Indeed, FOF 94 recognizes that C&I shopping customers collectively paid less than default service during the period examined. The fact that commercial customers may share in recovery of uncollectible expense does not, without further analysis, establish the required nexus between commercial EGS pricing and the price-based POR restriction imposed on that class.

(d) CRP

Elimination of the CRP presents the inverse problem. The Commission's default-service regulations expressly recognize that "[t]he public interest would be served by consideration of customer referral programs in which retail customers are referred to EGSs."[84] FirstEnergy's data showed more than $750,000 in cumulative savings relative to the PTC, while the record identified potential reforms involving education, enrollment, pricing methodology and supplier participation.[85] The RD acknowledges the savings and the proposal for further reform, but relies on subsequent above-PTC renewals, declining supplier participation and prior unsuccessful reforms to conclude there is no reasonable assurance that further reform would succeed.[86] That explains why the RD is skeptical of further reform; it does not establish that no reasonable alternative exists. Evidence that the current CRP has design problems and declining participation explains why the program may warrant change; it does not establish that elimination is the only

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83 RD at 228.
84 52 Pa. Code § 69.1815.
85 RESA Exhs. FL-22, FL-32; RESA M.B. at 29-32.
86 RD at 162-163.

reasonable response, particularly where the specific reform alternatives RESA identified were not evaluated and the program itself produced documented below-PTC savings.

2. The RD Improperly Shifts to RESA the Proponents' Burden to Establish That No Reasonable Alternative Exists.

The RD misconstrues the purpose of RESA's alternatives evidence in a way that effectively shifts the burden. COL 27 treats RESA's discussion of potential market-design improvements as though RESA proposed a replacement market design and bore the burden of proving its benefits; COL 34 similarly faults RESA for failing to "establish[] a basis" for a successor CRP or further collaborative consideration. But RESA offered those alternatives to demonstrate that the proponents had not established the absence of reasonable approaches preserving competition – not as affirmative proposals RESA was required to prove should be adopted.

CAUSE-PA responded that the proponents were not required to pursue "all eventualities" and that the Commission need only consider alternatives actually advanced on the record.[87] RESA does not contend that the proponents were required to pursue "all eventualities." The error is that the RD treats RESA as though it bore an affirmative burden to establish that a particular alternative should be adopted. It did not. The proponents bore the burden to establish the opposite proposition – that no reasonable alternative would adequately address the demonstrated harm.

Mr. Lacey identified POR improvements, billing enhancements, supplier consolidated billing, outsourced billing, alternative default-service providers, unbundling and other market-design changes as illustrative approaches that could be examined if the Commission concludes

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[87] CAUSE-PA R.B. at 40-41.

the existing market requires improvement – not as substitutes RESA was required to prove.[88] If the Settlement Proponents carried their burden to establish that no reasonable alternative exists, COLs 27 and 34 need not rely on what RESA supposedly failed to establish. If those conclusions instead depend upon requiring RESA to prove the efficacy of a particular alternative, the RD has placed the burden on the wrong party. COL 46 cannot substitute a conclusion for the proponents' evidentiary showing.

Accordingly, the Commission must reject COL 46 and FOFs 98-99 and 103-105 to the extent they conclude that the challenged restrictions are necessary and appropriately tailored without the required showing concerning reasonable alternatives; reject COLs 27 and 34 to the extent they impose upon RESA an affirmative burden to establish that a particular alternative should be adopted, rather than requiring the Settlement Proponents to establish that no reasonable alternative exists; and reject the corresponding provisions of Ordering Paragraphs 1, 4, 8 and 9.

D. EXCEPTION NO. 4: The RD Errs By Treating Additional Pricing, Termination, Uncollectible, Complaint and Related Data as Sufficient to Establish the Harm Necessary to Justify the Challenged Restrictions. FOFs 85-89, 98-100, 103-105; COLs 34, 42, 45-46; RD at 162-163, 198-200, 227-229; Ordering ¶¶ 1, 4, 8-9.

The RD distinguishes PECO DSP VI and PPL DSP V on the grounds that this record contains pricing, termination, uncollectible, complaint and related data that the RD finds establish the customer harm missing from those proceedings. In particular, the RD finds a "direct

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[88] RESA St. No. 1-SR at 20-21; RESA M.B. at 62-63; *see also* 66 Pa. C.S. § 2803; 52 Pa. Code § 54.182; *Petition of Direct Energy Services, LLC,* Docket No. P-00062205, Final Opinion and Order (Pa. P.U.C. entered Apr. 20, 2006).

nexus" between continual above-PTC supplier pricing and higher termination rates, uncollectible expense and complaints and relies on that finding in approving the challenged restrictions.[89]

That conclusion goes further than the underlying record supports. RESA did not dispute that the record contains numbers, allocations and observed differences among customer populations. RESA and other parties specifically disputed what those data show.[90] Those data do not become substantial evidence of customer harm merely because they are collected, compared or presented together. This is not simply a disagreement over the weight the Commission should assign the evidence. The proponents bear the burden under 66 Pa. C.S. § 332(a), and the Commission's findings must rest on substantial, legally credible evidence establishing the propositions for which the data are relied upon.[91] To support the RD's "direct nexus" finding, the record therefore must establish what the data measure, whether the comparisons are valid, and what causal conclusions reasonably may be drawn from them.

The RD accepts the proponents' theory that these different datasets, considered together, establish the required causal nexus. But the individual datasets measure different things, and the proponents' characterization of the observed relationships does not supply the causal analysis necessary to connect them. The pricing data compare amounts billed to shopping customers with what the same generation quantity would have cost at the contemporaneous PTC.[92] FirstEnergy itself describes the analysis in those terms. The termination data compare termination rates among shopping and default-service customer populations. The uncollectible evidence includes accounting allocations, purchased-receivable balances and write-off comparisons. The complaint

89 RD at 198-200.

90 RESA R.B. at 7-8; RESA M.B. at 31-63.

91 66 Pa. C.S. § 332(a); *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990); *Norfolk & Western Ry. Co. v. Pa. P.U.C.*, 489 Pa. 109, 413 A.2d 1037 (1980); RESA M.B. at 18-19.

92 FE PA St. No. 1 (Corrected) at 21-22; FE PA Exh. DMY-13.

evidence consists of aggregate counts of complaints broadly categorized as involving "competition issues," including multiple types of complaints. None of those datasets, standing alone, establishes that above-PTC pricing caused the other observed differences.

The proponents did offer a theory connecting them. FirstEnergy argued that higher uncollectibles, termination rates and complaints involving shopping customers demonstrate harms arising under the existing shopping protocols despite current notices and POR protections, while CAUSE-PA attributed the termination and uncollectible disparities to a process that permits customers to remain with an EGS at a changed price without renewed affirmative consent.[93] The RD accepts that interpretation. The question presented by this Exception is whether the underlying data actually establish those causal propositions.

Uncollectibles. The uncollectible evidence provides a concrete example of the causal problem RESA raised. The RD relies on disparities between shopping and default-service customers and on the allocation of generation-related uncollectible expense to purchased EGS receivables.[94] RESA demonstrated, however, that FirstEnergy's generation-related uncollectible figures include accounting allocations based upon billed revenues rather than actual supplier-specific write-offs and that FirstEnergy maintains different customer-payment datasets measuring different things.[95] FirstEnergy responded that RESA's methodological criticisms do not eliminate the observed disparity and emphasized that opponents supplied no alternative calculations undermining the comparative results; the RD accepts the proponents' interpretation. But accepting the existence of a disparity is different from establishing its cause. RESA's objection was not that the Commission must disregard the underlying data; it was that selecting

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93 *See* RD at 176-178, 198-200; FE PA R.B. at 35-38; CAUSE-PA St. No. 1-R at 17-18.
94 RD at 166-167.
95 RESA M.B. at 58-60.

particular metrics and observing correlations among them does not, without further analysis, establish that above-PTC EGS pricing caused the customer outcomes attributed to it.[96]

Complaints. The complaint data illustrate the same preserved causation problem particularly clearly. The RD relies on FirstEnergy's report that formal and informal complaints "related to competition issues, including slamming and high EGS prices" increased approximately 50% from 2024 to 2025.[97] The proponents rely on that increase as corroborating evidence of shopping-related harm, and the RD accepts it as part of the asserted "direct nexus." But the cited record does not identify what portion of the increase involved high EGS prices rather than slamming or other competition issues, much less establish that above-PTC pricing caused the increase.[98] The aggregate complaint count therefore precisely illustrates the analytical gap RESA identified: the existence of an observed relationship does not, without further analysis, establish the asserted causal relationship.[99]

Terminations. The termination data present the same problem. The RD relies on evidence that shopping customers were terminated at materially higher rates than default-service customers, including rates as high as 22% for shopping customers compared with 3% for default-service customers.[100] RESA's preserved objection was precisely that the proponents had not supplied the analysis necessary to move from observed correlations among selected metrics to the causal conclusion attributed to them.[101] CAUSE-PA expressly attributed those disparities to the existing renewal process, arguing that customers are passively rolled onto supplier-selected

96 RESA M.B. at 58-60; RESA R.B. at 7-8.
97 RD at 166-167; FE PA St. No. 1 (Corrected) at 22.
98 RD at 198-200.
99 RESA M.B. at 31-63; RESA R.B. at 7-8.
100 RD at 166-167.
101 RESA M.B. at 31-63; RESA R.B. at 7-8.

rates without renewed informed consent, and the RD credits that theory in finding a "direct nexus."[102] But the termination figures themselves establish an observed difference between customer populations; they do not establish why that difference exists or that above-PTC EGS pricing caused it. The RD does not identify additional analysis controlling for differences between the populations or otherwise demonstrating that the price differential caused the termination differential.

The RD also accepts the proponents' argument that this evidence distinguishes PECO DSP VI and PPL DSP V because those decisions identified evidence of resulting customer harm as missing from the prior records. But those decisions did not establish an evidentiary checklist under which the presence of complaint counts, termination rates, uncollectible allocations or pricing comparisons automatically establishes customer harm. In PPL DSP V, the Commission rejected a materially similar proposal for lack of substantial evidence of resulting harm, stated that new evidence could be considered de novo in a future DSP, and separately required a showing that no reasonable alternative existed.[103] PECO DSP VI applied the same framework in rejecting an automatic-transfer proposal.[104]

The RD therefore errs by treating the observed disparities as supplying the substantial evidence missing from those prior records without first establishing the causal propositions for which those disparities are relied upon. PPL DSP V contemplated future evidence demonstrating harm, not automatic acceptance of particular categories of data as proof of harm.

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[102] *See* RD at 176-178, 198-200; CAUSE-PA St. No. 1-R at 17-18.

[103] *PPL Electric Utilities Corp. DSP V,* Docket No. P-2020-3019356, Opinion and Order at 95-99 (Pa. P.U.C. entered Dec. 17, 2020).

[104] *PECO DSP VI,* Order at 78-81; RESA R.B. at 7-8.

The RD thus collapses distinct analytical steps: it accepts the proponents' interpretation of disparate datasets and observed relationships as establishing causation, treats that asserted causation as establishing customer harm, and then relies upon that harm to justify the challenged restrictions. The Commission must determine what the data establish, whether the causal inferences drawn from them are supported by substantial evidence, and whether any demonstrated harm supports the regulatory response adopted.

Accordingly, the Commission must reject FOFs 85-89, 98-100 and 103-105 and COLs 34, 42 and 45-46 to the extent they rest upon the RD's unsupported causal and remedial conclusions, decline to adopt the affected portions of Ordering Paragraphs 1, 4, 8 and 9, and reject the corresponding Settlement provisions.

E. EXCEPTION NO. 5: The RD Errs in Approving the NITS and CPP Risk Transfers and in Applying Inconsistent Principles When Evaluating the Resulting Default-Service Price Against Competitive Supply. RD at 60–86, 240–246; FOFs 14–15, 23–24, 31–36, 94; COLs 13–16, 42.

1. The RD Mistakes a Transfer of Wholesale Risk for a Reduction in Customer Cost.

The Competition Act requires default-service procurement to use a prudent mix designed to ensure "the least cost to customers over time," not merely the lowest apparent price at a particular moment.[105] The Commission has emphasized that least cost over time is a multi-faceted standard incorporating competitive procurement, prudent mix, rate stability and adequate and reliable service.[106]

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105 66 Pa. C.S. § 2807(e)(3.4), (3.7); Popowsky, 71 A.3d at 1117-18.

106 *Implementation of Act 129 of October 15, 2008; Default Service and Retail Electric Markets*, Docket No. L-2009-2095604, Final Rulemaking Order at 10-12 (Pa. P.U.C. entered Oct. 4, 2011).

The RD approves removing Network Integration Transmission Service ("NITS") from wholesale default-service supplier responsibility because requiring those suppliers to price uncertain future NITS costs produces risk premiums that are reflected in the PTC. It likewise continues the Capacity Proxy Price ("CPP") mechanism, which relieves wholesale default-service suppliers of the risk associated with unknown future PJM capacity prices by reconciling proxy prices to actual capacity costs after the applicable Base Residual Auction.[107]

The RD accepts the proponents' response that the underlying costs remain but concludes that customers are better off paying those actual costs rather than paying wholesale suppliers to assume the uncertainty through risk premiums.[108] That answer does not resolve RESA's objection. Removing the supplier's pricing obligation does not eliminate the underlying risk; it changes who bears it and how customers pay for it. Under FirstEnergy's proposal, default-service customers become responsible for the actual costs rather than paying sophisticated wholesale suppliers to assume and manage the uncertainty. Mr. Lacey explained that, under the existing NITS structure, wholesale suppliers forecast those costs, incorporate that risk into their bids, and bear the consequences if their forecasts prove wrong; under FirstEnergy's proposal, default-service customers instead "will pay no matter what" and bear the full actual NITS increase.[109] That transfer is not disputed. OCA witness Ogur expressly acknowledged that the proposal shifts NITS cost risk "from suppliers to customers" in exchange for eliminating supplier risk premiums.[110] And the Commission itself previously recognized that changing the allocation

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107 RD at 63-75, 85-86.
108 *Id*.
109 RESA St. No. 1 at 39-40; RESA M.B. at 16-19.
110 RESA Exh. FL-26.

of wholesale-market responsibilities does not eliminate the associated risks and costs; it changes whether suppliers or customers bear them.[111]

COL 15, therefore, cannot be reconciled with either the record or the reasoning the RD elsewhere adopts. The RD accepts the proponents' position that suppliers are being relieved of uncertain costs so customers can pay the actual costs instead, yet COL 15 concludes that the change does not transfer risks to customers. OCA witness Ogur described it as precisely that transfer. The real question is not whether the risk moves; but whether customers will be better off over time bearing the actual uncertain costs rather than paying wholesale suppliers to assume and manage that risk. The RD does not perform that least-cost-over-time analysis.

CPP presents the same unresolved question. FirstEnergy and OCA responded that capacity uncertainty is difficult to hedge, that requiring suppliers to price an unknown capacity period causes conservative risk premiums, and that CPP allows customers instead to pay the actual PJM capacity cost once established. The RD accepts that rationale and also credits FirstEnergy's reliance on prior Commission approvals of CPP.[112] The RD therefore establishes why CPP may lower the initial supplier bid; it does not establish that shifting the underlying capacity-price uncertainty to customers produces least cost to customers over time which is the required statutory showing.

2. The RD Uses Regulatory Risk Reallocation to Produce a Preferred Default-Service Price Rather Than Allowing Competitive Procurement to Price the Risk.

The proponents' stated reason for these wholesale cost reallocations is straightforward: removing uncertain costs from supplier responsibility is expected to reduce the risk premiums

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111 *Implementation of Act 129*, Final Rulemaking Order at 48-56.
112 RD at 78-86.

reflected in default-service bids and thereby lower default-service procurement costs. The RD expressly accepts that rationale.[113] But the Competition Act does not direct the Commission to construct the lowest possible apparent PTC by administratively deciding which wholesale risks default service suppliers need not price in their bids. It requires competitive procurement designed to obtain least-cost service over time.[114]

The record presented the competing consideration that competitive procurement itself prices risk-management expertise. FirstEnergy's own witness described successful wholesale suppliers as the "most efficient risk managers," and the RD recounts RESA's evidence that NITS has been successfully included in prior FirstEnergy auctions.[115] The RD nevertheless accepts the proponents' view that the NITS risk premium is unnecessary because customers can instead pay actual costs. What the RD does not establish is why removing that risk from the competitive procurement product produces least cost to customers over time rather than merely a lower supplier bid. Under FirstEnergy's longstanding NITS structure, wholesale suppliers bore the consequences if their forecasts proved wrong; EGSs likewise must forecast and price NITS risk into competitive retail products. The proposed structure instead guarantees that default-service customers bear the actual NITS cost.

The Commission unquestionably has authority to approve the structure of default-service procurement. But that authority must be exercised within the statutory framework requiring competitive procurement and least cost to customers over time. The Commission cannot treat a lower bid produced by removing wholesale risks from the competitive procurement product as sufficient evidence of lower customer cost over time when those same costs remain payable by

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113 RD at 63-75.

114 66 Pa. C.S. § 2807(e)(3.1)-(3.4), (3.7).

115 RESA M.B. at 20-24; RESA St. No. 1 at 39-44; RESA St. No. 1-R at 30-31.

customers outside the bid. Nor can it use procurement design to produce a preferred apparent PTC and then treat that PTC as the regulatory measure of competitive generation prices. Doing so substitutes regulatory judgment about which risks should be reflected in the default-service price for the competitive price formation the Competition Act requires.

3. The Risk Reallocation Breaks Longstanding Competitive Parity and Magnifies the Consequences of the RD's PTC-Based Retail Restrictions.

For more than a decade, FirstEnergy's DSPs have consistently required wholesale suppliers to manage transmission risk: DSP II and DSP III specifically rejected proposals to reallocate NITS risk, and DSP IV through DSP VI continued the existing structure.[116] It is only now, in DSP VII, that FirstEnergy is proposing to change that allocation.

The RD recounts FirstEnergy's response that circumstances have changed, that other Pennsylvania EDCs use procurement structures under which NITS is not included in the wholesale full-requirements product, and that EGSs and default-service suppliers do not face identical risks because EGSs may offer different products and contract structures.[117] Those points do not answer RESA's competitive-parity concern. RESA does not contend that FirstEnergy's procurement structure can never change or that wholesale and retail suppliers are identical. The point is that FirstEnergy's market has operated for successive DSPs under a structure in which both wholesale default-service suppliers and EGSs were required to forecast and price NITS risk, and market participants developed pricing and risk-management practices around that allocation. RESA M.B. at 16-24. Changing that longstanding allocation therefore changes the relative economics of default and competitive supply. That change would be

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116 RESA M.B. at 16-22 (discussing and collecting FirstEnergy DSP II-VI authorities).
117 RD at 72-75.

consequential standing alone. Its significance is magnified here because the RD simultaneously gives the resulting PTC regulatory consequences that make the difference in risk allocation matter directly to EGS participation in the retail market.

The approved NITS change breaks the relevant parity in risk allocation. Default-service suppliers would no longer price NITS risk, while EGSs must continue to forecast, hedge and price that risk into competitive retail offers without a corresponding after-the-fact recovery mechanism.[118] That changes the relative pricing structure in favor of EDC-provided default service: the PTC no longer reflects a NITS risk that EGSs must continue to incorporate into their prices, while default-service customers pay the actual cost separately through the Commission-approved recovery mechanism.[119]

That asymmetry is especially consequential in this proceeding because the RD simultaneously gives the resulting PTC regulatory significance. FOF 94 emphasizes that residential shopping customers paid more than the PTC, COL 42 finds restrictions necessary to address "above-PTC supplier pricing," and the POR proposal makes the PTC the threshold for continued access to a Commission-recognized market mechanism. RESA specifically raised the resulting comparison problem: once NITS is removed from default-service supplier pricing, the PTC and competitive EGS prices no longer reflect the same allocation of wholesale-market risk.[120] The RD accepts the proponents' risk-premium rationale for changing the default-service product, but does not account for that change when it later relies on above-PTC EGS pricing to justify retail-market restrictions.

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118 RESA M.B. at 22-24
119 *Id.*
120 RESA M.B. at 22-24; RESA R.B. at 9 n.21.

The Commission therefore cannot first restructure default service to remove wholesale risks from the price suppliers competitively bid, permit those actual costs to be recovered from default-service customers, and then treat the resulting PTC as economically equivalent to EGS prices that still must reflect those risks. Nor, for the reasons stated in Exception No. 1, may it use that Commission-structured PTC as the regulatory dividing line for competitive generation pricing through POR.

Accordingly, the Commission must reject COLs 15-16 and the RD's recommendations approving the NITS and CPP risk reallocations absent a supported determination that those reallocations satisfy the statutory least-cost-over-time standard; reject FOF 94 and COL 42 to the extent they treat the resulting PTC as an economically equivalent benchmark for competitive EGS prices; and reject use of that PTC as the regulatory threshold for POR eligibility.

III. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission grant these Exceptions, decline to approve the Non-Unanimous Settlement without modification, and reject the challenged Settlement provisions and corresponding FirstEnergy proposals. RESA further preserves the constitutional, statutory, jurisdictional, administrative-procedure and de facto rulemaking objections raised herein to the Commission's authority to approve the challenged provisions. Specifically, RESA requests that the Commission:

(1) reject the proposed restructuring of the Purchase of Receivables ("POR") program, including the PTC-based eligibility restriction, rate-ready billing requirement, phase-out of the existing clawback mechanism, and applicability to commercial customers;

(2) reject elimination of the Customer Referral Program ("CRP");

(3) reject the proposal to substitute EDC-provided default service for a residential customer's chosen EGS at contract expiration absent renewed affirmative customer action, and deny the requested waiver of 52 Pa. Code § 54.10(3);

(4) reject the quarterly affirmative-consent requirement for continued service under month-to-month variable-priced EGS contracts; and

(5) reject the proposed NITS and CPP changes that shift wholesale-market risks from default-service suppliers to customers without a supported determination that the resulting risk allocation produces least cost to customers over time.

The challenged provisions must be rejected on this record. Doing so neither disregards affordability concerns nor delays implementation of DSP VII on June 1, 2027; none is necessary for FirstEnergy to fulfill its default-service obligations. If broader review of Pennsylvania's retail market is warranted, it can proceed on an appropriate statewide record while DSP VII moves forward. The Commission can – and should – take current affordability concerns seriously, but it must do so within the competitive-market framework enacted by the General Assembly.

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