

Phone: (215) 569-5794
Fax: (215) 832-5794
Email: Sharp@Blankrome.com

June 15, 2010

VIA ELECTRONIC FILING

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

**Re: Implementation of Act 129 of October 15, 2008; Default Service
Docket No. L-2009-2095604**

**Proposed Policy Statement Regarding Default Service and
Retail Electric Markets, Docket No. M-2009-2140580**

Dear Secretary Chiavetta:

On behalf of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., please see enclosed an original and fifteen copies of Reply Comments in the above two proceedings submitted per the Notice published in the Pennsylvania Bulletin on May, 1, 2010 at 40 Pa.B. 2289.

Respectfully,



Christopher Sharp

CS/scc
Enclosure

Comments, the Commission will find detailed answers to each of the 16 issues that the Commission presented to parties in the Proposed Order,⁴ including, but not limited to, explanations of how the Commission should consider each of the requirements of Act 129 with respect to electric distribution companies' ("EDCs") Default Service plans, support for continued reliance on regional solutions to address electric reliability needs, and clear reasons why a full requirements approach is superior to any form of managed portfolio approach for procuring Default Service requirements.

As Constellation has already addressed these issues in depth in this proceeding and many others which consider the specific Default Service plans of individual utilities, Constellation herein provides its Reply Comments, consistent with the schedule established in these proceedings, addressing only a broad policy issue raised by the Office of Small Business Advocate ("OSBA") in its initial comments.⁵ Specifically, Constellation takes issue with the OSBA Comments that call into question whether the Commonwealth, under the changes ordered by Act 129, must change its policies with respect to retail competition. Constellation emphasizes that retail electric competition has provided tremendous benefits to Pennsylvania consumers and the Pennsylvania economy, and that the retail choice policies that have been and continue to be promoted by the Commission and the Commonwealth, in general, will serve to further promote these and many other benefits over time.

[mode=2&contentid=http://pubcontent.state.pa.us/publishedcontent/publish/global/news_releases/governor_s_office/news_releases/governor_rendell_signs_energy_conservation_bill_to_save_consumers_millions_on_electricity_urges_legislature_to_pass_rate_mitigation_bill.html](http://pubcontent.state.pa.us/publishedcontent/publish/global/news_releases/governor_s_office/news_releases/governor_rendell_signs_energy_conservation_bill_to_save_consumers_millions_on_electricity_urges_legislature_to_pass_rate_mitigation_bill.html)

⁴ Proposed Order at *Additional Issues*.

⁵ See *Initial Comments of the Office of Small Business Advocate*, Commission Docket Nos. L-2009-2095604 and M-2009-2140580 (filed June 1, 2009) ("OSBA Comments").

II. CONSTELLATION REPLY COMMENTS

A. Nothing in Act 129 Repeals the Commonwealth's Goal and the Commission's Obligation to Promote Retail Electric Choice.

The OSBA Comments specifically state that:

One thing that may have to change . . . is the Commission's commitment to retail competition.

The Commission has not yet explicitly decided the extent to which the replacement of the "prevailing market prices" standard [by Act 129's "least cost to customers over time" standard] means a de-emphasis on the goal of promoting a robust retail market. Nevertheless, the Commission's decision in a case involving [West Penn Power Company dba Allegheny Power ("Allegheny-West Penn")] appears to indicate acceptance of the argument that the repeal of the "prevailing market prices" standard means that obtaining electricity at the "least cost to customers over time" is more important than aligning [D]efault [S]ervice rates with market prices, *i.e.*, more important than promoting retail competition.⁶

OSBA suggests that, (a) because the Commission approved a request by Allegheny-West Penn to move-up certain of its Default Service plan's procurements for its residential customers to procure power earlier in time, and (b) because the Commission supported such decision in part by reciting Act 129's requirement to procure the least cost to customers over time, then (c) it must be the case that the Commission was, in effect, overruling the promotion of retail competition.⁷ OSBA itself notes, however, that the Commission in that case ruled that Act 129's terms were not applicable to the substance of previously-approved Allegheny-West Penn's Default Service plan, which was not subject to the newly enacted Commonwealth Law.⁸

⁶ OSBA Comments at p.11.

⁷ *See, generally*, OSBA Comments at pp.11-14.

⁸ OSBA Comments at p.12 (explaining that OSBA argued at that time that Allegheny-West Penn "was seeking to amend an approved [D]efault [S]ervice plan and, therefore, Act 129 applied," but that "the Commission concluded that the acceleration was permitted under the [D]efault [S]ervice plan" that the Commission had previously approved, that was not subject to Act 129's requirements.

Moreover, OSBA ignores the fact that the Commission did not enter into an in-depth analysis of what Act 129 requires at the time of its decision in that case.⁹

As made clear through a step-by-step analysis in Constellation's Initial Comments, Act 129 already includes *within its explicit provisions* an explanation of how the Commission must determine whether a Default Service plan's procurements overall will produce the "least cost to customers over time." Constellation will not recite this analysis again in these Reply Comments.

In its Initial Comments, Constellation also points out that it is important to recognize that, as this analysis of Act 129's explicit terms makes clear, Act 129's requirements have not been developed and passed by the Commonwealth in a vacuum; they occur and must be implemented in concert with the requirements of the *Electricity Generation Customer Choice and Competition Act* ("Competition Act").¹⁰ The Competition Act today continues to require that the Commonwealth:

transition from regulation to greater competition . . . to benefit all classes of customers and to protect this Commonwealth's ability to compete in the national and international marketplace for industry and jobs.¹¹

Thus, while the explicit language of Act 129 provides for a specific method through which the Commission must consider whether each DSP – for the full course of its term – meets the statutory definition of "least cost to customers over time," the Competition Act provides a

⁹ See *Order in re: Petition of West Penn Power Company d/b/a Allegheny Power for Acceleration of its Competitive Procurement Plan and Request for Expedited Consideration*, Commission Docket No. P-00072342 (entered March 20, 2009) at pp.15-16 (the Commission simply restates without Act 129's specific required analysis and findings the general Act 129 standard that Default Service plans should be "designed to ensure . . . the least cost to customers over time").

OSBA Comments at p.12 (explaining that OSBA argued at that time that Allegheny-West Penn "was seeking to amend an approved [D]efault [S]ervice plan and, therefore, Act 129 applied," but that "the Commission concluded that the acceleration was permitted under the [D]efault [S]ervice plan" that the Commission had previously approved, that was not subject to Act 129's requirements.

¹⁰ 66 Pa.C.S. § 2802(14).

¹¹ 66 Pa.C.S. § 2802(7).

broader directive as a measuring stick for the results of the Commission's and EDCs' actions and structures "over time" – i.e., they must "benefit all classes" by transitioning to "greater competition." OSBA fails to take into account that Commonwealth Law has not changed regarding this important overarching goal underlying *all* electric market policies, including those of Act 129 – i.e., the goal of promoting retail choice.

B. Retail Choice Has and Will Continue to Provide Benefits to the Commonwealth, by Providing the Ability for Retail Suppliers to Offer Well-Tailored Options to EDCs' Customers, to Meet Their Individual Characteristics, Needs and Goals.

In well-functioning competitive markets, competitive retail suppliers have contracts with customers of all sizes, ranging from individual homeowners to major steel plants. It is common for competitive suppliers to have contracts with electric customers that have various terms of duration, including month-to-month, three-month, six-months, one-year, 18-month, two-year, three-year-, and even longer term contracts. In addition, there exist an ever-increasing number of service options available from competitive suppliers to meet customers' needs, resources, budget requirements, environmental or sustainability initiatives, and price-hedging strategies. These products can be individually customized to meet the business goals, risk appetite, and needs for each individual consumer.

If customers are interested in budget certainty and avoidance of market volatility, competitive suppliers can offer them fixed price contracts. For customers that are willing to accept some market volatility, competitive suppliers can fix a portion of their energy needs, and leave another portion variable based upon an index. For customers that want to follow a market index or pay rates that vary every hour, they can select such a product. Other options include

setting a strike price where a fixed price is set once the market price achieves a certain pre-determined price.

For customers that are interested in demand response and energy efficiency measures, desire to select renewable energy resources, or wish to support the building of new renewable energy power plants, for instance, competitive suppliers can offer green power products (wind solar, biomass, hydro, tidal, geothermal), the purchase of alternative energy certificates, demand response programs, carbon offset products, and other varieties of products and services.

Competitive retail and wholesale markets are the best way to ensure that the Commonwealth's consumers receive reliable electric power and have access to innovative products and services from a broad pool of suppliers that may best meet each customer's individual needs. Competition will keep costs as low as possible for the products that customers desire, and will produce the following benefits that customers and policymakers are seeking across the United States:

- *Advancements in reliability, conservation, renewable energy development, and the ability of customers to purchase green power products.* With growing concerns regarding global warming, there is a market for conscientious consumers who wish to use only renewable green energy for their business or home. By protecting and promoting choice, individual consumers are given the opportunity to help Pennsylvania reach the Governor's alternative energy goals. In addition, a competitive market model will allow the marketplace to respond to any future (Federal or State) climate regulation in the most cost competitive manner. Without such competitive forces, customers will be forced to bear the entire burden of costly climate change regulation.

- *A platform to promote demand response and energy efficiency that is superior to traditional cost-of-service regulation.* Demand response refers to mechanisms that provide the tools and incentives for electricity customers to reduce their consumption at critical times or in response to market prices. In cases where consumers do not pay actual market prices, they have little or no incentive to reduce consumption during times when production costs are significantly higher (or defer consumption to periods in which there is lower system demand). Since costs may be substantially higher at these times, the potential for savings should not be overlooked. Moreover, these programs provide relatively low-cost means of guarding system reliability.
- *The ability and information to make decisions and have choices regarding their electric power needs.* Customers desire to have choices, just as they do with the telecommunications, natural gas, and airlines industries, which were previously under a monopoly system of regulation.
- *Promotion of Investment and Innovation.* Allowing competitive markets to work will promote private investment in clean energy generation and green jobs, allowing innovative solutions to meet electricity needs and environmental objectives.
- *The confidence that those that choose not to shop will nevertheless benefit from competitively-set Default Service rates.* Customers – even those that do not shop – must receive reliable electricity at rates that are the result of downward competitive pressure through a process to obtain the lowest competitive costs for electricity supply from winning bidders in a pool of qualified suppliers active in

the regional transmission systems serving Pennsylvania, as well as broader wholesale markets.

History shows that the former system of relying upon monopolistic policies leads to inefficiency, wasted resources, unreliable power supplies, and pollution.

For all of the above reasons, the Commonwealth adopted and should continue to support policies and practices that support competitive retail electric markets, including through retail market enhancements (such as those promoted in the Commission's *Opinion and Order* regarding the PPL Electric Utilities Corp.'s retail electric markets)¹² and active monitoring for and removal of barriers to the continued development of customer choice and competition. Encouraging retail choice in this way will only serve to benefit consumers throughout the Commonwealth, especially at a time of constantly changing challenges affecting and rapidly evolving solutions addressing our energy future.

V. CONCLUSION

As explained in the Constellation Initial Comments and supported in these Reply Comments, because the Commission must balance Act 129 against the broader goal of retail choice, the costs to customers must be weighed against the benefits to such customers, with the goal that, *over time*, the policies and programs approved and implemented by the Commission must promote and lead to greater wholesale and retail competition.

Constellation appreciates this opportunity to submit its Reply Comments to the Commission. Constellation is confident that its recommendations will promote continued

¹² *Opinion and Order*, Commission Docket No. M-2009-2104271 (issued Aug. 6, 2009).

development of the Commonwealth's competitive retail markets, for the ultimate benefit of Pennsylvania's consumers.

Respectfully submitted,



Divesh Gupta
Senior Counsel
Constellation Energy
111 Market Place, Suite 500
Baltimore, MD 21202
410-470-3158
divesh.gupta@constellation.com

Christopher A. Lewis
Christopher R. Sharp
Blank Rome, LLP
One Logan Square
Philadelphia, PA 19103
(215) 569-5793
lewis@blankrome.com
sharp@blankrome.com

*On Behalf of Constellation NewEnergy, Inc. and
Constellation Energy Commodities Group, Inc.*

DATED: June 15, 2010