BEFORE THE PENNSYLVANIA
HOUSE CONSUMER AFFAIRS COMMITTEE

Testimony of

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Regarding
Municipal Aggregation

House Bill 2619

Harrisburg, Pennsylvania
November 17, 2010

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Chairman Preston, Chairman Godshall
and Members of the House Consumer Affairs Committee

My name is Sonny Popowsky. I have served as the Consumer Advocate of Pennsylvania since 1990, and I have worked at the Office of Consumer Advocate since 1979. Thank you for inviting me to testify before this Committee once again on the issue of municipal aggregation and House Bill 2619.

I previously testified before this Committee on this legislation at a hearing in Bethlehem on September 9, 2010. Before that, I testified regarding a draft version of the legislation at a hearing in Harrisburg on March 3, 2010. As I did at those prior hearings, I would like to commend Chairman Preston, Chairman Godshall and the members and staff of this Committee for the proactive and careful approach that you have taken on this issue. I am particularly grateful that several of the concerns that were raised by me and a number of other witnesses at those prior hearings were addressed in the amendments to the Bill that emerged from this Committee when it voted to approve the legislation on September 14, 2010. Although the Bill that resulted from the Committee process was not voted upon by the entire House, I believe that it sets forth the appropriate framework for municipal aggregation legislation in the upcoming session of the General Assembly and I look forward to continuing to work with the Committee as this issue progresses.

Indeed, the importance of addressing this issue in the General Assembly has taken on an even greater urgency in the last several weeks because one unregulated electric generation supplier – FirstEnergy Solutions – has begun to promote and market opt-out municipal aggregation programs in the regions served by two of its affiliated FirstEnergy electric distribution companies, Penelec and Penn Power. According to FirstEnergy Solutions, this type

of opt-out municipal aggregation is permitted in Home Rule and Optional Plan municipalities in Pennsylvania even in the absence of legislation such as HB 2619. I strongly disagree with that conclusion, but in any case, I do not believe that such programs should go forward without the types of consumer and competitive protections that this Committee has included in HB 2619.

First of all, as I testified at the hearing on September 9 of this year, it must be recognized that under opt-out aggregation, customers are switched to an alternative generation supplier without their prior affirmative consent. Customers are automatically switched to the unregulated supplier that has been selected by their municipality unless they take affirmative action to be excluded from that contract. That is why, I believe, HB 2619 (PN 4406, at page 24, lines 10-16), specifically exempts municipal aggregators from the "anti-slamming" provision of the 1996 electric competition law. Under Section 2807(d)(1) of the original 1996 Act, the General Assembly stated that consumers could not be switched by an electric distribution company to an alternative supplier "without direct oral confirmation from the customer of record or written evidence of the customer's consent to a change of supplier." Without the exemption contained in HB 2619, opt-out municipal aggregation would violate the anti-slamming provision of the Public Utility Code.

As a matter of public policy, I believe the General Assembly may choose to exempt municipalities from the anti-slamming law on the theory that municipal aggregation is authorized by elected public officials for the benefit of their constituents, not for their own profit or private gain. The General Assembly could properly conclude that these elected municipal officials would only enter into contracts that would benefit their constituents through lower prices or some other direct benefit, and, as such, the General Assembly may well determine that this exception to the general anti-slamming rule in the original electric choice law is justified. But

that is a matter that must be decided by the General Assembly before individual municipalities – even Home Rule municipalities – can take actions that are inconsistent with the Public Utility Code. Indeed, HB 2619, by its own terms, would apply to all Pennsylvania municipalities, including those that are "subject to the former act of April 13, 1972 (P.L. 184, No. 62), known as the Home Rule Charter and Optional Plans Law" (PN 4406 at page 7, lines 9-12).

Importantly, while allowing opt-out aggregation by municipalities, HB 2619 would permit such programs only under a carefully articulated set of standards that are designed to protect consumers and support competition. For example, in contracting for electric generation services under HB 2619, a municipal aggregator must use "a competitive procurement or request-for-proposal process to select the electric generation supplier from the lowest responsible qualified bidder" (PN 4406 at page 11, lines 17-23). Such contracts must be filed with the Public Utility Commission and must include a consumer education plan and appropriate notice to customers. Municipal aggregation plans under HB 2619 may not exceed three years and must permit customers to switch out of the municipal aggregation plan at any time "without penalty, cancellation fees or other restrictions" (PN 4406 at page 13, lines 3-12).

In addition, under HB 2619, the Commission must promulgate regulations and take any other actions that are "necessary to coordinate the implementation of municipal aggregation programs with commission approval of electric distribution company default supply procurement plans" (PN 4406 at page 23, lines 26-29). To the extent that a municipal aggregator seeks to enter into a contract during the term of a default service procurement plan that had already been approved by the PUC as of the effective date of this legislation, such a contract must be specifically "authorized by the commission" (PN 4406 at page 22, lines 7-13). These provisions are necessary and appropriate in order to prevent opt-out municipal aggregation programs from

increasing the costs of default service to customers who are not covered by a municipal aggregation program.

As I explained in my testimony on September 9, it is important to ensure that the establishment and timing of a municipal aggregation program does not undermine the ability of our existing electric distribution companies to provide least cost service to those customers whose municipalities do **not** participate in an aggregation program. The Pennsylvania electric restructuring law was amended by Act 129 of 2008 to require our utilities to acquire a mix of generation resources to provide default service at "the least cost to customers over time." That task will be complicated, however, if the electric distribution company does not know whether or not some or all of the municipalities in its service territory will be effectively pulling out of its generation service program en masse through an opt-out aggregation program **after** the company had developed an approved generation plan and begun to secure generation to serve the customers in those municipalities.

The fact is that after an extensive litigation and negotiation process before the Commission, we now have in place approved default service procurement plans for every major electric distribution company in Pennsylvania for the period from January 2011 to June 2013. Our utilities and their wholesale generation suppliers are already in the process of entering into contracts for generation service to be provided during that period. While our current default service plans were all litigated and negotiated with the understanding that retail customers would be free to shop and voluntarily switch away from default service at any time, there was nothing in the Pennsylvania law at that time to suggest that entire municipalities full of customers could be removed from the customer base without individual customer consent. The concern I expressed at the prior hearing was that this change in the rules in the middle of the game could

impose additional costs on the electric distribution companies and the wholesale generation providers from whom they purchase default service supplies, and that these costs would in turn be passed on to the utility's remaining default service customers now and in the future.

A possible solution to this problem that I suggested in the prior hearing was to amend HB 2619 to prevent the commencement of any opt-out aggregation programs until June 2013, when the previously approved default service plans of all of our major electric distribution companies are scheduled to be reopened. In its subsequent deliberations after the September 9 hearing, this Committee decided instead to allow such opt-out aggregation to go forward, but only with specific authorization by the Commission, and only subject to the promulgation of regulations by the Commission to ensure that such programs are coordinated with the electric distribution companies' default service plans. I believe this is a reasonable legislative compromise. But I do not believe that it is either lawful or appropriate for companies like FirstEnergy Solutions to begin to market and implement such programs without explicit legislative authority and without prior Commission approval.

There are currently pending before the Commission two Petitions by competitive marketers -- Dominion Retail and the Retail Energy Supply Association (RESA) – challenging the legality of opt-out aggregation, and one Petition filed by FirstEnergy Solutions urging the Commission to declare that such programs are permitted for Home Rule and Optional Plan municipalities under current law. My Office will be filing Answers to those three Petitions in the next week. Based on our Office's research to date, I believe that Dominion and RESA have the better of the argument. That is, contrary to the position of FirstEnergy Solutions, the type of opt-out aggregation that it is trying to market to Home Rule and Optional Plan municipalities in its affiliated utility service territories is not permitted under current state law.

Having stated that conclusion under current law, however, I still support the efforts of this Committee to develop legislation that would permit opt-out municipal aggregation in a manner that would protect consumers (including default service customers) as well as support competition. It is clear from the response that we have seen from the municipalities who have been offered this program in Western Pennsylvania, as well as the popularity of these programs in states like Ohio and Massachusetts, that there can be a benefit to having this type of service available as part of our overall electricity market structure. That benefit can only be achieved in my view, however, if it is a result of an orderly legislative and regulatory process that establishes the rules of the road **before** the programs are implemented.

As the members of this Committee are well aware, by the end of this year, the last of the generation rate caps that have protected Pennsylvania electric consumers for the past decade will have expired. Through Act 129 of 2008, however, I believe that the General Assembly has established a strong framework that will continue to protect electric consumers from unwarranted generation rate increases in the future through a combination of regulation of utility default service suppliers through "least cost" wholesale procurement processes, and competition for individual customers who choose to purchase service from unregulated generation marketers. In my view, a properly structured municipal aggregation program could create a third path for residential and small commercial customers to secure the benefits of competitive generation markets. At the same time, however, I believe that municipal aggregation must be implemented in a manner that complements the existing choices for customers under our electric competition law and does not increase costs for those customers who do not participate in municipal aggregation programs. House Bill 2619, as approved by this Committee, goes a long way toward meeting those goals, and I look forward to working with the Committee on improving the Bill

even further in an effort to make this option available to Pennsylvania municipalities on a lawful and reasonable basis.

Thank you again for the opportunity to testify at this hearing and for continuing to seek consumer input on this legislation. I would be happy to answer any questions you may have and I will certainly continue to work with the members and staff of this Committee as you consider the merits of this important issue.

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