



**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Duquesne Light Company for :  
Approval of Default Service Plan for the :                   Docket No. P-2020-3019522  
Period June 1, 2021 Through May 31, 2025 :  
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**REPLY OF NATURAL RESOURCES DEFENSE COUNCIL TO THE EXCEPTIONS OF  
INTERSTATE GAS SUPPLY, INC., SHIPLEY CHOICE, LLC, NRG ENERGY, INC.,  
VISTRA ENERGY CORP., ENGIE RESOURCES LLC, WGL ENERGY SERVICES,  
INC., AND DIRECT ENERGY SERVICES, LLC**

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DATE: November 30, 2020

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## INTRODUCTION

The Natural Resources Defense Council (“NRDC”) files this reply in response to the first of three exceptions lodged by the Interstate Gas Supply, Inc., Shipley Choice LLC, NRG Energy, Inc., Vistra Energy Corp., Engie Resources LLC, WGL Energy Services, Inc., and Direct Energy Services, LLC (collectively, the “EGS Parties”) to the November 12, 2020 Recommended Decision of the Honorable Mark A. Hoyer.<sup>1</sup> The EGS Parties take issue with the Recommended Decision’s approval of the Duquesne Light Company’s (“Duquesne” or “the Company”) proposed Electric Vehicle Time of Use (“EV-TOU”) rate offering to default service customers.<sup>2</sup> Despite the EGS Parties’ objection, the decision to approve the EV-TOU rate was supported both by a robust evidentiary record establishing the myriad benefits of EV-TOU rates, as well as the statutory commands and policy prescriptions of Act 129 of 2008.<sup>3</sup> Indeed, no party to this proceeding contests the benefits of increasing EV penetration in the Commonwealth, nor with EV-TOU rate structures in principle.<sup>4</sup> Moreover, there is no dispute that precisely zero TOU rate offerings are currently available to EV users within the Company’s service area.<sup>5</sup> Rather, as Judge Hoyer perceptively noted, the EGS Parties object to the rate because they “seek to reserve a potential market for EGSs [while] they decide whether to participate in that market.”<sup>6</sup> Because this desire both contravenes the clear statutory mandates of Act 129 and is unjustified in view of the thin evidentiary support for the competitive barriers envisaged by the EGS Parties, the EGS Parties’ first exception should be overruled.

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<sup>1</sup> Recommended Decision (November 12, 2020) (hereinafter “RD”).

<sup>2</sup> EGS Parties Except. 1-2.

<sup>3</sup> Act of Oct. 15, 2008, P.L. 1592, No. 129.

<sup>4</sup> See EGS Parties’ Stmt. 1 (Dir. Test. Of Christopher Kallaher). 20:21-22 (noting “no one disputes” the “case for EVs generally”); see also EGS Parties’ Stmt 1-R (Rebuttal Test. Of Charles Kallaher) 8:3-5.

<sup>5</sup> See Ex. KAH-106 (Resp. of Chris Kallaher to DLC Interrog. 1).

<sup>6</sup> RD at 41.

## ARGUMENT

**I. Response to EGS Parties' Exception No. 1 – The evidence and applicable law overwhelmingly support adoption of the Company's proposed EV-TOU rate, as modified by the Joint EV-TOU Stipulation.**

NRDC incorporates by reference the Recommended Decision's recitation of the history of the proceeding and the evidence relating to the Company's proposed EV-TOU rate.<sup>7</sup> Additionally, NRDC incorporates by reference the procedural history, recitation of evidence, and arguments contained in the Main and Reply Briefs filed by NRDC as well as the Main and Reply Briefs filed by Duquesne.<sup>8</sup> For all of the reasons articulated therein, it is submitted that Judge Hoyer's recommended approval of the Company's proposed EV-TOU rate offering, as modified by the Joint EV-TOU Stipulation, is clearly supported by substantial evidence and is consistent with the statutory mandates and policy goals of the Choice Act.<sup>9</sup>

The Recommended Decision makes several Findings of Fact noting the benefits of the Company's proposed EV-TOU rate to both participating customers and ratepayers as a whole.<sup>10</sup> For instance, Judge Hoyer found that the rate "has the potential to benefit EV customers by lowering the cost of owning and operating an EV."<sup>11</sup> Moreover, the Recommended Decision noted that the rate stands to "benefit Duquesne Light's customers by increasing the usage of the Company's existing electric grid during non-peak periods, thereby producing increased revenues

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<sup>7</sup> RD 1-6, 36-41.

<sup>8</sup> NRDC's Main Br. 1-8, 9-28; NRDC's Reply Br. 1-6; DLC Main Br. 2-7, 16-24; DLC Reply Br. 5-7.

<sup>9</sup> Act of De. 3, 1996, P.L. 802, No. 138, Electric Generation Customer Choice and Competition Act ("Choice Act"), as amended 66 Pa. C.S. §§ 2801-2815.

<sup>10</sup> RD 9-11.

<sup>11</sup> *Id.* at 9.

to offset existing grid costs and reducing the need to build new facilities to serve EV load.”<sup>12</sup> Additional knock-on benefits include the rate’s “potential to benefit the general public by reducing greenhouse gas (GHG) emissions.”<sup>13</sup> Notably, the EGS Parties’ exceptions do not specifically dispute any of these factual findings.<sup>14</sup>

Rather, EGS Parties lodge their exception on the grounds that the Company, in proposing the EV-TOU rate, intends “to create and own a nascent market.”<sup>15</sup> The EGS Parties assert that the EV-TOU offering “will clearly compete in the marketplace” and “will clearly either keep competitors out of the marketplace or unfairly compete against them with utility brand.”<sup>16</sup> The EGS Parties continue that “there is simply no ‘need’ for the rate [because] suppliers are the logical entities to provide such rates if a need ever arises that will make the rate profitable[.]” EGS Parties conclude that the EV-TOU rate offering should be rejected because Duquesne is “acting like a competitor in the energy market rather than a supplier of last resort.”<sup>17</sup>

In so arguing, the EGS Parties do not refer to or dispute the considerable evidence presented to the contrary. Citing to the Company’s testimony, Judge Hoyer specifically found that the EV-TOU rate “does not prevent an EGS from designing and offering its own EV-TOU rates, including different on-peak and off-peak periods that may benefit specific customers.”<sup>18</sup> NRDC previously noted that “the EGS Parties offer no concrete reasons why the existence of default service TOU rates prevents EGSs from developing their own EV-TOU products,” and that “no evidence in this proceeding indicates that the generation supply market has been

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<sup>12</sup> *Id.* at 9-10.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> EGS Parties’ Except. (Nov. 23, 2020) 1-2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> RD 11, 41 (citing DLC Stmt. No. 5-R, 22-23, and DLC Stmt. No. 2-R, 6-7).

hampered in other parts of the country where EV-TOU rates have been implemented.”<sup>19</sup> As the Company astutely points out, “The Company is not attempting to compete with EGSs[,]” principally because there “is no EGS offer to compete with.”<sup>20</sup> Nothing in the EGS Parties’ exceptions warrants ignoring the substantial evidentiary support for the Recommended Decision’s approval of the EV-TOU rate.

Additionally, the EGS Parties’ arguments fail because they ignore the plain commands of Act 129, which mandates that “a default service provider shall submit to the commission one or more proposed time-of-use rates and real-time price plans[,]” and that the “default service provider shall offer the time-of-use rates and real-time price plan to all customers that have been provided with smart meter technology[.]”<sup>21</sup> The Commonwealth Court has clarified that a default service provider itself must provide this TOU rate, and that a default service provider may not fulfill this obligation by relying on EGSs to offer TOU products.<sup>22</sup> Accordingly, the EGS Parties’ assertion that a default service provider should ideally step aside from making any TOU rate offering for the benefit of EGSs is plainly wrong, because, to the contrary, a default service provider is *obligated* to provide such rates.<sup>23</sup>

The EGS Parties attempt to elide this clearly contrary authority by arguing that an “EV-TOU program is not ‘required’ of the Company,” because “there is no mandate to provide a rate *tailored to electric vehicles.*”<sup>24</sup> However, that a default service TOU rate can permissibly be “tailored” to EVs (or, indeed, to any other subset of ratepayer) is clearly contemplated by the statute’s indication that a provider must make available “one *or more*” TOU rates to default

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<sup>19</sup> NRDC Main Br., 21 (citing NRDC Stmt. 2).

<sup>20</sup> DLC Reply Br., (Oct. 13, 2020), 6.

<sup>21</sup> 66 Pa. C.S. § 2807(f)(5).

<sup>22</sup> *Dauphin County Indus. Dev. Authority v. Pennsylvania Pub. Util. Comm’n.*, 123, A.3d 1124, 1130-1136 (Pa. Cmwlth. 2015).

<sup>23</sup> *Id.*

<sup>24</sup> EGS Parties’ Except. 1-2. (emphasis added).

service customers.<sup>25</sup> Moreover, as NRDC has previously argued, there is no other TOU rate offering in the Company's instant DSP IX proposal that would fulfill the Company's obligation to provide TOU rates to all smart metered customers.<sup>26</sup> That the Company could offer some other TOU rate in order to fulfill § 2807(f)(5)'s requirements could be a worthwhile consideration in some other proceeding where other such TOU rate offerings are actually proposed, but that is not this case.

Relatedly, the EGS Parties argue, in passing, that the EV-TOU rate is inappropriate because 52 Pa. Code § 54.187(c) imposes a "limit [on] default service to a single rate offering." To the extent the EGS Parties argue that their relied-upon regulation prohibits default service TOU offerings, such a construction would clearly be at odds with 66 Pa. C.S. § 2807(f)(5), and it is axiomatic that an agency's regulations may not contradict the commands of the General Assembly.<sup>27</sup> In any event, it strains credulity to suggest that the text of 52 Pa. Code § 54.187(c) speaks to, much less precludes, the particular form that default service TOU rate structures should take.<sup>28</sup> Similarly, whatever value as a general matter there is to the EGS Parties' argument that "demand side management rates" may only be implemented "when the Commission 'mandates' such rates pursuant to the [AEPS Act]," it is clear that those requirements do not speak to, much less contradict, the specific requirements of § 2807(f)(5).<sup>29</sup> Accordingly, these arguments should be rejected.

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<sup>25</sup> 66 Pa. C.S. § 2807(f)(5) (emphasis added).

<sup>26</sup> NRDC Main Br., 15.

<sup>27</sup> *Hommrich v. Commonwealth*, 231 A.3d 1027, 1034-1035 (Pa.Comm.2020).

<sup>28</sup> *Cf.* 52 Pa. Code § 54.187(c) with 66 Pa. C.S. § 2807(f)(5).

<sup>29</sup> *See* EGS Parties' Except. 2. It should additionally be noted that this particular argument, not lodged at any point prior to the EGS Parties' Exceptions, is not supported by any specific citation to statute, regulation, or decisional authority. *Id.* Accordingly, this argument should be regarded as forfeited. *In re Estate of Johnson*, 2009 PA Super 54, ¶ 22, 970 A.2d 433, 440 (failure to cite any law in support of argument results in waiver).



At their core, the EGS Parties' arguments simply emphasize the policy goals of the Choice Act that they favor (*i.e.*, the establishment and expression of support for competitive retail generation supply markets) to the wholesale exclusion of any countervailing mandate or policy goal that is also embodied in the Act and, in particular, the 2008 amendments thereto (*e.g.*, the obligation that a default service provider provide electric service on a "least cost over time" basis).<sup>30</sup> Because the EGS Parties entirely fail to engage with the totality of the statutory framework at issue, and additionally ignore the substantial and credible evidence contradicting their bare assertions of anti-competitiveness, it is respectfully requested that the Commission leave intact Judge Hoyer's reasoned rulings on the propriety of the Company's proposed EV-TOU rate.

### **CONCLUSION**

For the foregoing reasons, it is respectfully submitted that the Commission should overrule the EGS Parties' first exception, leaving intact the Recommended Decision's approval of the Company's EV-TOU rate, subject to the modifications provided for in the Joint Stipulation of September 30, 2020.

Respectfully submitted this 30<sup>th</sup> day of November, 2020.

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<sup>30</sup> See *Joint Petition of Metropolitan Edison Company et al.*, P-2011-2273650, 2012 Pa. PUC LEXIS 937, \*16-17 (June 15, 2012) (Act 129 requires DSP to provide "least cost over time" to customers).

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## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of the foregoing *Reply of the Natural Resources Defense Council to the Exceptions of Interstate Gas Supply, Inc., Shipley Choice LLC, NRG Energy, Inc., Vistra Energy Corp., Engie Resources LLC, WGL Energy Services, Inc., and Direct Energy Services, LLC* upon the parties, listed below, in accordance with the requirements of 52 Pa. Code §§ 1.54:

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