



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

TEL 717 237 6000
FAX 717 237 6019
www.eckertseamans.com

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

June 1, 2010

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

On behalf of the Retail Energy Supply Association ("RESA") enclosed for filing please find the original of its Comments along with the electronic filing confirmation with regard to the above-referenced matter.

Sincerely yours,

Deanne M. O'Dell, Esq.

DMO/lww

Enclosure

cc: Elizabeth Barnes, w/enc. (via email only)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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
	:	

**COMMENTS OF
THE RETAIL ENERGY SUPPLY ASSOCIATION**

Daniel Clearfield, Esquire
(Pa. Attorney ID No. 26183)
Deanne M. O'Dell, Esquire
(Pa. Attorney ID No. 81064)
Eckert Seamans Cherin & Mellot, LLC
213 Market Street, 8th Fl.
Harrisburg, PA 17108-1248
717 237 6000

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I. INTRODUCTION

In 1997, the legislature concluded that the Commonwealth’s residents and businesses should be given the opportunity to free themselves from their decades long need to rely exclusively on the electric distribution company (“EDC”) for their electricity generation service.¹ The reason for transitioning away from the traditional monopoly supply approach was clear – “competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.”² The legislature implicitly recognized that a well functioning, robust competitive market is the best way to provide the most innovative products and services at the most reasonable prices. Recognizing that breaking the well established monopoly would take time, the Electricity Generation Customer Choice and Competition Act (“Choice Act”) set forth a transition plan which the Commission has been dutifully interpreting and implementing for over a decade now – including a significant proceeding to finalize the currently effective default service regulations and policy statement which became effective in 2007.³

Likewise, the legislature has subsequently offered refinements and clarifications regarding how to transition from monopoly EDC-provided generation service to a competitive retail electricity market. The most recent guidance was offered in 2008 pursuant to amendments referred to as “Act 129” and through which the legislature addressed how to structure default generation service for those customers who choose not to receive generation from a competitive supplier or those for whom service is not delivered.⁴ In these two proceedings the Commission seeks to incorporate the guidance provided by Act 129 into its currently effective regulations and

¹ 66 Pa. C.S. § 2806(a).

² 66 Pa. C.S. § 2802(5).

³ 52 Pa. Code §§ 54.181-55.189; 52 Pa. Code §§ 69.1801-69.1817.

⁴ 66 Pa. C.S. § 2807(e)(3.1).

policy statement. Importantly, nothing in Act 129 changed the goal of the Commonwealth to rely on competition and economic forces to control the costs of electricity and to promote direct access by customers to the competitive market for retail electric generation service. In implementing any regulatory changes or issuing any policy statements interpreting the Choice Act, this purpose of the statute must always maintain its rightful preeminence.

The Retail Energy Supply Association⁵ (“RESA”) is a trade organization of electricity generation suppliers (“EGSs”) who are positioned to give consumers the benefit of the end-state goal of the Choice Act – generation supplied by the competitive market. In fact, many of RESA’s members are currently providing competitive alternatives in those markets where rate caps have already expired and where the Commission has adopted policies and rules – consistent with the existing regulations and policy statement – which foster the development of the competitive market.

In this proceeding, RESA urges the Commission to stay the course in adopting regulations and policies which foster the continued development of the competitive market, as mandated by the Choice Act and Act 129. As explained below, the goal of the Choice Act – to foster a competitive market – as well as the newly identified standard of implementing default service plans that provide the “least cost to customers over time” are interrelated and complementary. Robust competition will lead to least cost over time for consumers and robust competition will be stimulated through default service plans that are properly structured to be market-reflective, market-responsive and to include all the costs of providing default service.

⁵ RESA’s members include ConEd Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Gexa Energy; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; PPL EnergyPlus; Sempra Energy Solutions LLC. The comments

Any changes to the Commission's regulations and, to the extent necessary, its policy statement, therefore, should be clear that only those default service plans that are structured to produce market-reflective and market-responsive rates which incorporate all the costs to provide the service will be approved. The Commission should refrain from setting any specific "bright-line" rules in its regulations or policy statement as to what this structure (i.e. the "prudent mix" of contracts) should look like for each and every default service plan due to the differences among EDCs and the continuously evolving markets. Rather, the Commission's regulations and policy statement should recognize the goal of the default service plan which is to be structured so as to stimulate competition, view each plan holistically in terms of the contract mix and allocation among classes and decide whether that specific plan for that specific territory is reasonably likely to result in default service rates against which competitors can compete.

These comments are divided into three sections. The first section provides an analysis about the impact of Act 129 and how the newly identified standards of Act 129 are achieved through default service plans that are market-reflective, market-responsive and include all the costs of providing default service. The second section provides answers to the Commission's sixteen questions set forth in its rulemaking docket. The final section comments address the specific regulatory changes identified by the Commission for both its regulations and its policy statement.

expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

II. GENERAL COMMENTS REGARDING THE INTEGRATION OF ACT 129 INTO THE CHOICE ACT

A. The Purpose of the Choice Act Is To Develop A Competitive Retail Electric Market

Prior to the Electricity Generation Customer Choice and Competition Act (“Choice Act”), the generation, transmission and distribution of electricity was managed and provided by the electric distribution companies (“EDCs”). Through the Choice Act, however, the legislature determined that “competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.”⁶ The Commission too has recognized that “customers will receive the lowest rates when multiple EGSs are competing for their business, as is the case for any good or service that consumers need.”⁷ To transition to this end state, the Choice Act set forth a plan to restructure the prior monopolistic electric industry where EDCs had (and still continue to have) all of the generation customers.

First, the Choice Act removes the authority of the Commission to economically regulate the rate for generation service after an EDC’s rate caps expire.⁸ Second, the statute mandates that all retail customers be provided with “direct access” to the competitive retail market so that they are given the “opportunity to purchase electricity from their choice of electric generation suppliers.”⁹ To enforce its goal of ending the monopoly stronghold of the EDC over electric

⁶ 66 Pa. C.S. § 2802(5).

⁷ *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 entered May 10, 2007 (“*Default Service Final Rulemaking Order*”) at 33.

⁸ 66 Pa. C.S. §2806(a).

⁹ 66 Pa. C.S. §§ 2802(3), (12), 2804(2); 2806(a)

generation service, the Choice Act gives the Commission broad power to ensure that EDCs do not engage in anticompetitive, discriminatory conduct, or unlawful exercises of market power.¹⁰

Finally, for those consumers who either choose not to receive generation from an alternative electric generation supplier (“EGS”) or for whom electric energy is not delivered pursuant to an agreed-to contract, the Choice Act requires the EDCs, or a Commission-approved alternative supplier, to provide “default service” to that consumer as the default service provider (“DSP”).¹¹ In other words, default generation service is a “back-stop” to the competitive market and – unless the Commission determines otherwise – the EDC continues to maintain the responsibility to provide default service for those customers who do not select another competitive option.¹² The Commission is charged with oversight of the DSP’s procurement of generation supply for this default service and was directed by the Choice Act to promulgate regulations to define the obligations of the EDC to provide default service.¹³

In interpreting the Choice Act, the Commission has concluded that it has been given “broad authority [by the Legislature] to ensure that customers will have the ability to make meaningful choices among competing suppliers of electricity.”¹⁴ Further, the Commission has determined that the means to accomplish the goals of the Choice Act is through developing a

¹⁰ 66 Pa. C.S. §§2806(a); 2811(a),(b), (d).

¹¹ 66 Pa. C.S. § 2807(3)(e), *deleted and replaced by* 66 Pa. C.S. § 2807(e)(3.1).

¹² 66 Pa. C.S. § 2807(e)(3); 52 Pa. Code § 54.183(b).

¹³ *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, Advanced Notice of Final Rulemaking Order entered February 9, 2007 at 2.

¹⁴ *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271, Tentative Order entered May 15, 2009.

robust competitive market and not through administrative regulation.¹⁵ In May 2009, the Commission promulgated final regulations pertaining to an EDC's obligation to serve retail customers at the conclusion of the restructuring transition period.¹⁶ These regulations were adopted as result of a five year process that involved over forty parties filing numerous comments on all aspects of the regulations. In the end, the Commission properly concluded that "customers will receive the lowest rates when multiple EGSs are competing for their business, as is the case for any good or service that consumers need."¹⁷ The Commission also recognized "that there were practical limits to its regulation of large, complex energy markets" and that "[r]equirements that might seem very appropriate today could be rendered obsolete by changes in markets, applicable law, or advances in technology."¹⁸ Therefore, the Commission chose to adopt a policy statement to provide "guidance to the industry as opposed to strict rules," with the intent that such guidance could be reevaluated and reshaped as markets changed and developed.¹⁹ Since the implementation of the regulations and policy statement, the Commission has approved default service plans for several EDCs including Allegheny Power, PPL, PECO,

¹⁵ *Request for Proposals Compliance Filing for Fixed Price Service to Large Commercial and Industrial Customer for the Period June 1, 2006 through May 31, 2007*; RE: *Duquesne Light Company*, Docket No. P-00032071, Order entered August 23, 2004, at 7.

¹⁶ 52 Pa. Code § 54.181, et. seq.; *Default Service Final Rulemaking Order* at 1.

¹⁷ 66 Pa. C.S. § 2807(e)(2), *deleted* by 2008, Oct. 15, P.L. 1592, No. 129, § 3, effective Nov. 14, 2008; 52 Pa. Code § 69.1801, et. seq.; *Default Service and Retail Electric Markets*, Final Policy Statement, Docket No. M-00072009 entered May 10, 2007 ("*Default Service Policy Statement*") at 33.

¹⁸ *Default Service Policy Statement* at 2.

¹⁹ 52 Pa. Code § 69.1802; *Default Service Policy Statement* at 2, 4.

Met-Ed, Penelec, and Duquesne.²⁰ All of these plans, with the exception of Allegheny were also adopted after the enactment of Act 129.

B. Act 129 Confirms That Default Service Is Intended to Be A Back-stop To the Competitive Market And Provides Guidance On How To Structure Default Service

A year and a half after the Commission implemented its final regulations and policy statement regarding implementation of the Choice Act, the legislature amended the Choice Act through “Act 129” which made the following changes:

- removed Section 2807(e)(2) (requiring Commission to promulgate regulations);
- revised Section 2807(e)(3) (relating to an EDC’s procurement of supply);
- added Section 2807(e)(6)(relating to pre-Act 129 default service plans);
- added Section 2807(f) (related to smart meter technology and time of use rates);
- added Section 2807(g) (defining smart meter technology).

As a result of the statutory changes implemented by Act 129, the Commission initiated this proceeding to address how to incorporate the new statutory directives into both the Commission’s regulations and final policy statement.²¹ Act 129 deleted the prior Section

²⁰ *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Retail Electric Default Service Program and Competitive Procurement Plan for Service at the Conclusion of the Restructuring Transition Period*, Docket No. P-000723342, Opinion and Order entered July 25, 2008; *Petition of PPL Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period January 1, 2011 Through May 31, 2014*, Docket No. P-2008-2060309, Opinion and Order entered June 30, 2009; *Petition of PECO Energy Company for Approval of its Default Service Program and Rate Mitigation Plan*, Docket No. P-2008-2062739, Order entered June 2, 2009; *Joint Petition of Metropolitan Edison Company and Pennsylvania Electric Company for Approval of their Default Service Programs*, Docket Nos. P-2009-2093053 and P-2009-2093054, Order entered November 6, 2009; and, *Re: Petition of Duquesne Light Company for Approval Of Default Service Plan for the Period January 1, 2011 Through May 31, 2013*, Docket No. P-2009-2135500, Plan approved at Public Meeting of May 20, 2010, *order pending*.

²¹ *Implementation of Act 129 of October 15, 2008; Default Service*, Docket No. L-2009-2095604, Proposed Rulemaking Order entered January 19, 2010 (“*Act 129 Proposed Rulemaking Order*”); *Proposed Policy Statement Regarding Default Service and Retail Electric Markets*, Docket No. M-2009-2140580, Proposed Policy Statement entered January 19, 2010 (“*Act 129 Proposed Policy Statement*”).

2807(e)(3) requiring EDCs to acquire electric energy at “prevailing market prices.”²² In its place, however, new Section 2807(e)(3.1) confirms that default service is a back-stop to the competitive market:

“ ... if a customer contracts for electric generation supply service and the chosen electric generation supplier does not provide the service or if a customer does not choose an alternative electric generation supplier, the default service provider shall provide electric generation supply service to that customer pursuant to a commission-approved competitive procurement plan.”²³

Thus, the statute continues to make clear, the competitive market is the preferred choice for electricity supply, over default service. The Commission has a duty to ensure that retail electricity customers in the Commonwealth have properly functioning and workable competitive retail electricity markets.²⁴ The Commission is mindful of this obligation and has stated that it is:

²² In both the *Act 129 Proposed Rulemaking Order* and the *Act 129 Proposed Policy Statement*, the Commission states that “Act 129 explicitly repealed the prevailing market prices standard, and declared instead that the utilities’ generation purchases must be designed to ensure adequate and reliable service at the least cost to customers over time. 66 Pa. C.S. § 2807(e)(3.6).” *Act 129 Proposed Rulemaking Order* at 4; *Act 129 Proposed Policy Statement* at 3. RESA respectfully asserts that this is not accurately stated. Act 129 is an amendatory statute that neither explicitly nor impliedly repealed any statute or statutory language. Act 129 does not even contain a generic general repealer, which nonetheless “is not typically considered an implied repeal.” *HSP Gaming, L.P. v. City of Philadelphia*, 954 A.2d 1156, 1176 (Pa. 2008). “[An implied repeal of a legislative enactment] can arise only where the language used in the later statute necessarily discloses an irreconcilable repugnancy between its provisions and those of the earlier statute so inconsistent as to not admit of any fair consonant construction of the two.” *Id.*, quoting *Pennsylvania Turnpike Commission v. Sanders & Thomas, Inc.*, 336 A.2d 609, 614 (Pa. 1975). As set forth in these comments, the change in statutory language from “prevailing market prices” to “least cost to customers over time” does not divorce default service procurement from prevailing market prices but ensures that default service procurement will result in rates that are as close as possible to the market price of energy available for default service customers. Clearly, there is no “irreconcilable repugnancy” between these two standards, as they both provide the means to the same end.

²³ 66 Pa. C.S. § 2807(e)(3.1).

²⁴ 66 Pa. C.S. § 2811(a), (b).

“ . . . charged with providing standards and procedures necessary to accommodate the creation of a competitive electric generation market, ensuring that the safety and reliability of the electric system for all parties is maintained during the transition to a competitive market, and preventing anticompetitive or discriminatory conduct and the unlawful exercise of market power that will prevent customers from obtaining the benefits of a properly functioning and workable market.”²⁵

In addition to confirming the role of default service in the restructured electricity market, Act 129 provided guidance, in nine new subsections, regarding how DSPs must procure energy to provide default service that would fulfill the goals of the Choice Act. Specifically, Act 129 requires DSPs to enter into a “prudent mix of contracts” designed to ensure (i) adequate and reliable service, (ii) the least cost to customers over time; and, (iii) compliance with the requirements of paragraph (3.1)(requiring a competitive procurement process).²⁶ Interpretation and implementation of these requirements is the focus of this current proceeding.

C. Transition to the End State Goals of the Choice Act

As noted, the implementation of Act 129 did not change the “end state” goal of the Choice Act which is consumers receiving their generation services from the competitive market with little to no reliance on default service (whether provided by an EDC or a Commission-approved alternative generation supplier).²⁷ Act 129 did provide more specific guidance about the DSP’s provisioning of default service in the interim period by requiring the Commission to ensure that the DSP procures a “prudent mix” of resources through a competitive process that seeks to ensure (1) adequate and reliable service and (2) the least cost to customers over time.²⁸

²⁵ *Petition for Approval of PECO Energy Company’s Market Share Threshold Bidding/Assignment Process*, Docket No. P-00021984, Opinion and Order entered May 1, 2003 at 12.

²⁶ 66 Pa. C.S. §§ 2807(e)(3.1) – (3.9).

²⁷ 66 Pa. C.S. § 2807(e)(3.1).

²⁸ 66 Pa. C.S. § 2807(e)(3.4).

As evidenced by the Commission’s questions, two significant issues arising from Act 129 are the meanings of: (1) “least cost to customers over time;” and, (2) a “prudent mix” of contracts.

For a variety of reasons, ensuring that the default service plan will promote the development of a fully competitive market should be viewed as the primary way of achieving the goal of providing “least cost” generation service for customers. First, competition is the way to ensure least cost service for individual customer situations in the long term because competition enables customers to shop for products and services that best meet their individual needs. As the Commission has noted, “competition among utilities and independent suppliers of generation is the best means available to keep the cost of electricity down.”²⁹ This is because many suppliers will be competing to serve the same customers and their presence will – over the long term – drive prices as low as possible. There are numerous studies which demonstrate the economic benefits of competition.³⁰ Relying on competition as the best way to provide least cost service is consistent with the goals of the Choice Act to develop retail competition and the Commission’s “duty to establish reasonable conditions to support a competitive retail market for generation.”³¹ It is further consistent with the Choice Act’s clearly stated preference that default service should be a back-stop to the competitive market as its entire purpose is to fulfill the supply needs for consumers who are otherwise unable (or not willing) to obtain supply from a competitive provider.³²

²⁹ *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271, Opinion and Order entered August 11, 2009 at 1.

³⁰ Studies conducted on behalf of the Alliance for Retail Markets have shown that retail competition in Texas has applied downward pressure on the price of electricity for residential customers. See <http://allianceforretailmarkets.com/studies-reports>

³¹ *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271, Opinion and Order entered August 11, 2009 at 4.

³² 66 Pa. C.S. 2807(e)(3.1)

Second, only the individual customers themselves can best decide what constitutes the “least cost” for the electric generation product or service that best suits their particular needs. For example, the least cost for someone valuing green energy may be different than someone who is mostly concerned about price. Individual customers are also best suited to take into account any benefits of price stability in comparing a variety of competitive offers. Customers have varying risk tolerance levels and value different things when shopping for goods and services, including electricity. The “least cost” for a customer that highly values environmental responsibility may be quite different from the “least cost” for a customer that is only concerned about the bottom line price. Similarly one customer may be more willing to pay more for a stable fixed priced electric rate, while another may accept more volatility in exchange for the chance to save money. Because default service, by its very nature, is a “one-size only” product, it alone cannot ensure “least cost” service while accounting for diversity in customer situations, usage patterns and preferences. Thus, the best way to ensure least cost service is to implement a default service procurement plan that will enable and sustain a vibrant competitive retail market, empowering customers to decide for themselves what constitutes the “least cost” for the customer’s specific needs and circumstances.

Additionally, the end product of a default service plan, the default service rate, cannot possibly represent the lowest absolute cost for each and every individual customer because the default service rate results from an average of the cost to procure supply needed to serve the broader customer group. For example, a customer with an attractive load shape can likely find a better price by being served individually rather than as a part of a broad default service procurement group. Because of this reality, the competitive market is the best place for that customer to find the lowest priced offer and the focus of approving default service plans should

be on evaluating whether or not the proposed plan will encourage development of the competitive market.

In crafting a default service procurement plan that will result in default service rates that encourage the development of the competitive market, the Commission is required to approve a “prudent mix” of competitively procured contracts. RESA submits that the “prudent mix” of contracts standard is satisfied when the proposed default service plan produces default service rates that are market-reflective and market-responsive, include all the costs of providing default service into the default service rate and, therefore, results in a sustainable competitive retail market. Because the Commonwealth is in its early stages of transitioning to a fully competitive retail market where reliance on default service is phased out, the Commission’s default service procurement policy must evolve over time to reflect the actual market. Thus, while the use of more fixed price, short to medium term contracts and some long term contracts in early default service plans may be appropriate in recognition of the fact that nearly all of the generation customers are receiving service from the EDC, such reliance should not be necessary as more and more customers receive generation service from the competitive market. In fact, a default service plan that may be “prudent” today may not be “prudent” in the future.

For these reasons, RESA urges the Commission to remain focused on the goals of the Choice Act, to ensure that the default service plans it approves are reasonably tailored to comply with those goals based on current market information and remain open to the need to be flexible regarding this process as the competitive market matures in the Commonwealth. RESA members look forward to continuing to be active members of the Pennsylvania market and appreciate this opportunity to provide their perspective in the context of this rulemaking.

III. COMMENTS ON QUESTIONS RAISED BY COMMISSION IN PROPOSED RULEMAKING ORDER

RESA appreciates the opportunity to comment on the questions asked by the Commission in its proposed rulemaking order.³³ However, to the extent the Commission decides to deviate from the regulatory language proposed in the *Proposed Rulemaking Order* based on answers it receives from interested parties to the identified questions, RESA suggests that the Commission provide an additional public comment period for interested parties to address any such proposed language changes. The basis for RESA's suggestion is the procedure under the Regulatory Review Act ("RRA"). The RRA requires the Independent Regulatory Review Commission ("IRRC") to provide its comments to a proposed rulemaking no later than thirty days after the close of the public comment period.³⁴ In the current proposed rulemaking, the Commission makes minor language changes to its regulations and asks interested parties to provide comments in response to sixteen questions. Since the RRA also requires the Commission to respond to all comments in its final form rulemaking,³⁵ the potential result of this process could be that IRRC and the parties are denied an opportunity to respond to the any future specific language changes the Commission may propose to make to its regulations after it reviews the parties' comments if the changes are submitted in a final form rulemaking. To avoid this result, the Commission should permit an additional public comment period to the extent it proposes to make significant language changes to its regulations after reviewing the comments received in response to its questions.

³³ *Act 129 Proposed Rulemaking Order* at 16-17.

³⁴ 71 P.S. § 745.5.

³⁵ 71 P.S. § 745a(a).

A. Goals of Default Service Plans

The purpose of the default service plan is to set forth how an EDC will procure energy to provide default service to customers who do not choose an alternative supplier in a manner consistent with the Choice Act and Act 129. In tackling this issue in the development of the current default service regulations, the Commission recognized that “there [was] relatively little consensus on most of the key issues” and opted to “craft[] a regulatory framework that d[id] not unreasonably advance one objective to the extent that it obstruct[ed] others.”³⁶

Now, Act 129 specifically requires EDCs to enter into contracts to procure energy which are designed to ensure: (i) adequate and reliable service; (ii) the least cost to customers over time; and, (iii) compliance with the requirements of paragraph (3.1)(requiring a default service provider to provide a back-stop, default service pursuant to a competitive procurement process).³⁷ By law, all of these standards must be equally assessed when analyzing a default service plan and RESA urges the Commission, as it did in the prior rulemaking proceeding, to ensure that its policies and final rules do not unreasonably advance one objective at the expense of or by obstructing others. Thus, for example, while “least cost to customers over time” is a stated standard of the default service plan, another stated standard is ensuring that default service remains a back-stop to the competitive market and not a replacement of the competitive market and that the contracts used to provide default service are competitively procured and reflect all the costs of providing service. Further, all of the stated standards must be read in context and reconciled with the original and unchanged purpose of the Choice Act which is to promote competition.

³⁶ *Default Service Final Rulemaking Order* at 7.

³⁷ 66 Pa. C.S. § 2807(e)(3.4).

