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October 5, 2012

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2nd Floor  
Harrisburg, PA 17120

**VIA ELECTRONIC FILING**

**RE: Petition of Duquesne Light Company For Approval of Default Service Plan for the  
Period June 1, 2013 Through May 31, 2015; Docket No. P-2012-2301664**

Dear Secretary Chiavetta:

Enclosed please find for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") the original of the Main Brief of the Duquesne Industrial Intervenors ("DII"), in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served. Please date stamp the extra copy of this transmittal letter and Main Brief, and kindly return them for our filing purposes. Thank you.

Sincerely,

McNEES WALLACE & NURICK LLC

By   
Teresa K. Schmittberger

Counsel to Duquesne Industrial Intervenors

Enclosures

c: Administrative Law Judge Katrina L. Dunderdale (via E-mail and First Class Mail)  
Edward Berzonsky, TUS (via E-mail)  
Certificate of Service

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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Teresa K. Schmittberger

Counsel to Duquesne Industrial Intervenors

Dated this 5<sup>th</sup> day of October, 2012, at Harrisburg, Pennsylvania.

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Duquesne Light Company for :  
Approval of a Default Service Program and : Docket No. P-2012-2301664  
Procurement Plan for the Period June 1, :  
2013 through May 31, 2015 :

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**MAIN BRIEF OF THE  
DUQUESNE INDUSTRIAL INTERVENORS**

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## **I. PROCEDURAL HISTORY**

On April 27, 2012, the Duquesne Light Company (“Duquesne” or “Company”) filed with the Pennsylvania Public Utility Commission (“PUC” or “Commission”) a Petition to approve its upcoming default service plan (“DSP”). *Petition of Duquesne Light Company For Approval of Default Service Plan for the Period June 1, 2013 Through May 31, 2015*, Docket No. P-2012-2301664 (Apr. 27, 2012).

On June 4, 2012, the Duquesne Industrial Intervenors (“DII”) filed a Petition to Intervene in this proceeding. The Office of Consumer Advocate (“OCA”) and the Office of Small Business Advocate (“OSBA”) each filed an Answer to the Petition. In addition, the Bureau of Investigation and Enforcement (“I&E”) assumed an active role in this proceeding. A Prehearing Conference was held on June 8, 2012, before Administrative Law Judge (“ALJ”) Katrina L. Dunderdale.

DII received the Company’s Direct Testimony on April 27, 2012. Pursuant to the procedural schedule, on July 26, 2012, DII received Direct Testimony from the following parties: the OCA; the OSBA; the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (“CAUSE-PA”); the Retail Energy Supply Association (“RESA”); FirstEnergy Solutions (“FES”); Dominion Retail, Inc. (“Dominion”); and Constellation NewEnergy, Inc., and Exelon Generation Company, LLC (“CNE”). On August 24, 2012, DII received Rebuttal Testimony from the following parties: the Company; the OCA; the OSBA; RESA; FES; Dominion; and CNE. On September 7, 2012, DII received Surrebuttal Testimony from the Company; the OCA; the OSBA; CAUSE-PA; RESA; FES; Dominion; and CNE.

An evidentiary hearing was held in this proceeding on September 13, 2012, for the purposes of presenting testimony and stipulations into the record. After this hearing, Duquesne

submitted a common briefing outline to the ALJ and parties. Accordingly, DII files this Main Brief to address the following proposals by parties: (1) the collection of retail market enhancement (“RME”) program costs; and (2) the collection of a \$5.00 MWh adder; and (3) the collection of non-market based transmission (“NMB Transmission”) costs through a non-bypassable rider.

## **II. SUMMARY OF ARGUMENT**

DII has three concerns regarding other parties’ modifications to Duquesne’s DSP. First, DII supports Duquesne’s proposal to collect the costs associated with the implementation of RME programs, such as a customer referral program or opt-in auction, from EGSs. As discussed in Section C.3., *supra*, certain EGSs have alternatively recommended that RME costs should be recovered from customers. If the Commission accepts this recommendation, DII requests confirmation that these costs would only be remitted by those customers benefitting from the programs, *i.e.*, not from the majority of C&I customers. Similarly, in Section C.8., *supra*, DII opposes the collection of a \$5.00 per MWh adder to compensate Duquesne for RME and other unnamed default service costs.

Lastly, CNE and RESA each propose that Duquesne collect NMB Transmission costs from all customers through a non-bypassable rider. As addressed in greater detail in Section D.3., *supra*, this proposal takes several steps backwards with respect to the evolution of the competitive market by effectively re-bundling the transmission product with distribution, contrary to PUC laws and regulations. In addition, this proposal presents a number of transitional concerns that would not exist if an EGS continued to charge for these costs. Because this proposal conflicts with the Public Utility Code, regulations, and recent precedent, this CNE/RESA proposal must be denied.

### **III. ARGUMENT**

#### **A. LEGAL STANDARDS**

##### **1. Burden of Proof**

The Public Utility Code provides the following with respect to burden of proof: “[e]xcept as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.” 66 Pa. C.S. § 332(a). Under Section 315, “[i]n any proceeding...involving any proposed or existing rate of any public utility...the burden of proof to show that the rate involved is just and reasonable shall be upon the utility.” *Id.* § 315(a).

According to the PUC, the “party seeking a rule or order from the Commission has the burden of proof” in a proceeding. *Pa. Pub. Util. Comm’n v. Jackson Sewer Corp.*, Docket No. R-00005997, Opinion and Order (Nov. 13, 2001), p. 389. In carrying this burden, a complainant must establish a case before an administrative tribunal using a preponderance of evidence as the requisite degree of proof. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600, 602 (Pa. Commw. Ct. 1990). The standard of preponderance of the evidence is defined as the greater weight of the evidence, in view of all of the facts and circumstances of the case. *See Se-Lin Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 n.1 (Pa. 1950).

##### **2. Legal Standards Applicable to Default Service**

The Electric Generation Customer Choice and Competition Act (“Competition Act”) of 66 Pa. C.S. §§ 2801, *et seq.*, required electric distribution companies (“EDCs”) to unbundle transmission, distribution, and generation rates and services for retail customers. As part of this unbundling, all retail customers were given the opportunity to choose competitive service with an electric generation supplier (“EGS”) or default service with their EDC. 66 Pa. C.S. §§ 2802(14) and (16).

As default service provider, the EDC is responsible for acquiring and delivering electricity for their customers. Because the EDC is a regulated entity, all rates and terms of default service must be just and reasonable. 66 Pa. C.S. § 1301. More specifically, default service provided by EDCs must qualify as “least cost over time,” a standard that “balances the concerns of ‘least cost’ with energy stability and minimizing volatility.” *Implementation of Act 129 of October 15, 2008; Default Service and Retail Electric Markets*, Docket No. L-2009-2095604, Final Rulemaking Order (Oct. 4, 2011) p. 38 (hereinafter “Act 129 Rulemaking Order”); *see also* 66 Pa. C.S. § 2807(e)(4).

**B. DEFAULT SUPPLY PROCUREMENT ISSUES**

**1. Residential Procurement Issues**

DII has no position on this issue.

**2. Small C&I Procurement Issues**

DII has no position on this issue.

**3. Medium C&I Procurement Issues**

DII has no position on this issue.

**4. Large C&I Procurement Issues**

Initially, DII was concerned regarding the level of the administrative adder associated with Duquesne’s hourly-priced default service. As part of this proceeding, Duquesne provided a chart quantifying the costs incorporated within the adder. *See* DII Cross-Examination Exhibit No. 2. After review of this data, DII no longer opposes this adder.

**5. Default Supply Load CAP Issues**

DII has no position on this issue.

**6. Procurements for Delivery Beyond May 31, 2015**

DII has no position on this issue.

**7. Miscellaneous Procurement Issues**

DII has no additional procurement issues.

**C. MARKET ENHANCEMENT PROGRAMS**

**1. Retail Opt-In Program**

DII has no position on this issue.

**a) Auction vs. ROI Program**

DII has no position on this issue.

**b) Term of Offer**

DII has no position on this issue.

**c) Discount Percentage**

DII has no position on this issue.

**d) \$50 Bonus Payment**

DII has no position on this issue.

**e) Guaranteed Savings**

DII has no position on this issue.

**f) Customer Participation Cap**

DII has no position on this issue.

**g) Supplier Load Cap**

DII has no position on this issue.

**h) Enrollment Process**

DII has no position on this issue.

**i) Mailings and Communications**

DII has no position on this issue.

**j) Opt-In Electric Generation Supplier Service Program Request for Proposals and Agreement Between Duquesne Light and EGSs**

DII has no position on this issue.

**2. Standard Offer Program**

DII has no position on this issue.

**a) Term of Offer**

DII has no position on this issue.

**b) Discount Percentage**

DII has no position on this issue.

**c) Guaranteed Savings**

DII has no position on this issue.

**d) Program Start Date**

DII has no position on this issue.

**e) Program Suspension**

DII has no position on this issue.

**f) High Bill Callers**

DII has no position on this issue.

**g) Choice Referral Team**

DII has no position on this issue.

**h) Standard Offer Customer Referral Program Rules and Supplier Agreement Between Duquesne Light and EGSs**

DII has no position on this issue.

**3. Market Enhancement Program Cost Recovery**

Duquesne proposes to recover RME costs from EGSs, either specifically from EGSs participating in a program or generally through a discount on EGS purchase of receivables

(“POR”). Direct Testimony of Neil S. Fisher on behalf of Duquesne (hereinafter “Duquesne St. No. 3”), pp. 32, 45. DII agrees with Duquesne that RME programs primarily benefit EGSs and that EGSs should accordingly assume responsibility for the program costs. As part of the retail markets investigation, the Commission, encouraging EDCs to implement the RME programs, has recognized that costs of the program should be borne by EGSs and specifically identified a POR discount as a permissible and equitable recovery mechanism for such costs. *Investigation of Pennsylvania’s Retail Electricity Market Intermediate Work Plan*, Docket No. 1-2011-2237952, Order (Mar. 2, 2012), pp. 32, 78 (hereinafter “RMI Order”). Moreover, the Commission recently held that EGSs should remit the costs for both a customer referral and aggregation program. See *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, *et. al.*, Opinion and Order (Aug. 16, 2012), p. 136 (hereinafter “Aug. 16, 2012, Order”).

Although DII concludes that Duquesne’s proposed cost recovery mechanism complies with the specific guidance provided in the Commission’s RMI Order, some EGSs oppose Duquesne’s proposal to recover RME costs through a POR discount. Of initial concern, RESA, FES, and Dominion suggested that Duquesne recover costs for RME programs from “all customers.” Direct Testimony of Christopher H. Kallaher on behalf of RESA (hereinafter “RESA St. No. 2”), p. 26; Direct Testimony of Tony C. Banks on behalf of FES (hereinafter “FES St. No. 1”), p. 18; Direct Testimony of Thomas J. Butler on behalf of Dominion/IGS, p. 8. Contrary to the implication of such cost recovery proposals, Duquesne’s RME program descriptions generally exclude C&I customers from participation. Duquesne St. No. 3, p. 4. In addition, no party to the proceeding envisions Large C&I customer eligibility for RME

programs. Accordingly, RESA, FES, and Dominion each subsequently acknowledged that Large C&I customers are ineligible for Duquesne's proposed RME programs. Rebuttal Testimony of Christopher H. Kallaher on behalf of RESA (hereinafter "RESA St. No. 2-R"), p. 17; FES St. No. 1, p. 18; Stipulation of DII and Dominion/IGS. As evidenced by the plain language of Duquesne's RME proposals and the clarifications offered by CNE, FES, and Dominion, Large C&I customers are ineligible for participation in Duquesne's proposed RME programs.

If the Commission should decline to approve Duquesne's proposal to recover RME program costs through a POR discount, the PUC must ensure that any approved mechanism for recovering RME program costs complies with the Public Utility Code and principles of cost causation. Because Large C&I customers are ineligible for RME programs, they must not be charged these costs. *See, e.g.*, Stipulation of DII and OSBA. It would be unjust, unreasonable, and inconsistent with cost causation principles for DII to recover costs from customers that are ineligible to participate in such programs.

In addition to eligibility exclusions, Large C&I customers have already achieved significant shopping levels obviating the need for RME programs. DII Cross-Examination Exhibit No. 1. The Commission recommended that EDCs implement RME programs as a measure to develop robust competitive markets. *See* RMI Order, p. 3. As indicated by their shopping statistics, Large C&I customers are sophisticated and informed buyers of competitive generation supply who are already shopping in large measure. DII Cross-Examination Exhibit No. 1. Contrary to the circumstances of residential customers, Large C&I customers have not resisted shopping. *See* RESA Exhibit CK-1; *see also* DII Cross-Examination Exhibit No. 1. Large C&I customers would receive no additional benefits from Duquesne's RME programs.

Large C&I customers are ineligible to participate in RME programs and would receive no corresponding benefits from these programs. Shopping statistics reflect that any additional incentives for Large C&I shopping are unnecessary. Therefore, the Commission should reject any proposal to collect RME program costs from ineligible customer classes, particularly Large C&I customers.

**4. CAP Customer Participation in Market Enhancement Programs**

DII has no position on this issue.

**5. Shopping Customer Participation in Market Enhancement Programs**

DII has no position on this issue.

**6. Small C&I Customer Participation in Market Enhancement Programs**

DII has no position on this issue.

**7. Customer Status at the End of the Market Enhancement Product**

DII has no position on this issue.

**8. Miscellaneous Market Enhancement Program Issues**

RESA proposes to charge default service customers a \$5.00 per MWh adder (“Adder”) to recover RME as well as any other unexplained costs incurred by Duquesne in the provision of default service. RESA St. No. 2, p. 27. Under the terms of RESA’s proposal, Duquesne would be permitted to retain up to 10% of the funds collected, with any remaining funds returned to all ratepayers. *Id.* DII opposes RESA’s request and concurs with Duquesne and OCA that RESA’s proposal would recover excess costs from default service customers, artificially inflate the PTC, and inappropriately refund costs recovered from default service customers to all customers. *See* Rebuttal Testimony of Neil S. Fisher on behalf of Duquesne, p. 82; *see also* Rebuttal Testimony of Steven L. Estomin of OCA, (hereinafter “OCA St. No. 1-R”), pp. 11-12.

Duquesne is designated by the Commission as a default service provider because an alternative default service supplier has not been approved by the Commission in the Duquesne's service territories. As such, Duquesne is permitted to recover the costs of procurement pursuant to the terms of its procurement plans; however, such costs may only be collected if they are "reasonable." 66 Pa. C.S. § 2807(e)(3.9); *see also* 66 Pa. C.S. § 1307(a). Accordingly, the Adder, which would be collected by Duquesne through an automatic adjustment mechanism, can only be approved by the Commission if it is just, reasonable, and otherwise consistent with the Public Utility Code. *See id.*

RESA's proposal for Duquesne to collect \$5.00 per MWh from default service customers, including a 10% profit, with no additional benefits to customers related to adequacy or reliability of Duquesne's service, confirms that the Adder falls outside of the parameters of the Public Utility Code. *See* 66 Pa. C.S. § 2807(e); *see also* Act 129 Rulemaking Order, p. 12 (holding that "least cost over time" is not equivalent to the lowest cost at a particular time, but instead a consideration of affordability, in conjunction with adequacy and reliability). As such, inclusion of the Adder to Duquesne's default service costs is diametrically opposed to the statutory requirement that an EDC must utilize a "least cost over time" procurement methodology.

Moreover, contrary to RESA's proposal, there is no evidence that Duquesne currently incurs costs that are not recovered from customers. *Contra* RESA St. No. 2, p. 27. Duquesne explains that the amount of the Adder, \$5.00 per MWh, "does not align in any way with the administrative costs of providing default service or Duquesne Light's proposal retail market initiatives." Duquesne St. No. 3-R, p. 82. Duquesne estimates that the MAC would result in an over collection that is ten times the estimated RME costs. *Id.* In fact, the Commission recently

denied a similar mechanism where the proponents of the proposal could not prove the existence of default service costs that the EDC was not recovering. August 16, 2012, Order, p. 62. Applying this recent Commission precedent to the circumstances of this case, the instant Adder must be rejected.

The Commission has found that a fully competitive market must include a default service option “designed to avoid distortions in the market.” *See 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, Proposed Rulemaking Order (Dec. 16, 2004), p. 3. An arbitrary increase to the default service price to encourage shopping certainly creates a distorted market, in which increased customer shopping and EGS presence would be based on artificially-inflated prices. *See OCA St. No. 1-R*, p. 11. In addition, the presence of the Adder could trigger EGSs, who compare their prices to default service prices, to offer higher prices to shopping customers, ensuring that the Adder’s negative consequences would be pervasive throughout the competitive market. *See id.*

Finally, the proposal to recover the costs of the Adder from default service customers and then recoup any refunds to Duquesne and all customers flatly contradicts cost causation principles and must be rejected. Implementation of RESA’s proposed Adder is counter to the Commission’s commitment to cost-based rates, and would reverse the cost causation principles established by *Lloyd v. Pa. PUC*, 904 A.2d 1010 (Pa. Commw. Ct. 2006).

CNE’s proposed Adder is directly contrary to the Public Utility Code. It is unjust, unreasonable, and precisely the opposite of a “least cost over time” procurement process. The Adder inappropriately encourages competition through market distortion at the expense of all customers. Accordingly, the Adder must be denied by the Commission.

## **D. RATE DESIGN**

### **1. Reconciliation Issues**

DII has no position on this issue.

### **2. Price to Compare Calculation Date**

DII has no position on this issue.

### **3. Non-Bypassable Charge To Recover PJM Charges**

#### **a) Introduction**

In 1996, Pennsylvania adopted the Competition Act to encourage more affordable, safe, and reliable electric service, as well as promote business and industry throughout the Commonwealth. *See generally* 66 Pa. C.S. § 2802. In order to allow EGSs to sell electricity directly to customers in the Commonwealth, the Competition Act provided for an unbundling of generation, transmission, and distribution services, which had previously been offered as a bundled product by EDCs. *Id.* § 2802(13); *see also id.* § 2804(3). As a result of this unbundling, customers could negotiate with EGSs who would provide such “shopping” customers with both generation and transmission service, while the customer would continue to receive distribution service from the EDC. Conversely, “non-shopping” customers, who chose to remain with the EDC, would receive generation, transmission, and distribution service under the EDC’s “provider of last resort” default service. *See id.* § 2802(16). Moreover, the PUC adopted regulations, consistent with the Competition Act, that assign responsibility for generation and transmission service to the same entity, *i.e.*, the EDC as the default service provider must provide generation and transmission service for non-shopping customers, and the EGS must provide generation and transmission service for shopping customers. 52 Pa. Code § 54.182; *see also id.* § 54.187(d). This is appropriate and consistent with how PJM treats these costs.

Because a central purpose of the Competition Act was to allow customers the ability to negotiate for energy service, and the Commission's regulations state that EGSs should charge shopping customers for both generation and transmission, Large C&I shopping customers generally have two options with respect to transmission costs: (1) a pass-through transmission arrangement, or (2) a fixed-price transmission arrangement. *See* Stipulation of DII and RESA; *see also* Stipulation of DII and CNE. Under a pass-through transmission arrangement, the EGS directly flows through to the customer its actual transmission costs incurred by the customer based upon the individual customer's one coincident peak ("1-CP") transmission obligation determined by PJM Interconnection, LLC ("PJM"). *See* Stipulation of DII and CNE. By contrast, under a fixed-price transmission product, the customer would receive a single combined price for generation and transmission that remains steady over the course of the entire contract, thereby allowing the customer the ability to budget for a set energy price over the term of the contract. *See* Stipulation of DII and RESA.

As described above, the Competition Act requires EDCs such as Duquesne to recover generation and transmission costs separately from distribution charges. Duquesne customers utilizing an EGS for competitive supply pay Duquesne for distribution service and secure a fixed-price or pass-through contractual arrangement with an EGS for generation and transmission. Similarly, a customer taking default service from Duquesne pays traditional tariff rates for distribution service, but pays for generation and transmission services through separate pass-through riders. Duquesne's Large C&I default service customers pay for generation and transmission-related services through the Day-Ahead Hourly Priced Service and Transmission Service Charge ("TSC") riders, respectively. Supplement No. 10 to Tariff – Electric Pa. P.U.C.

No. 24, pp. 89, 113. Duquesne does not offer a fixed-price rate to Large C&I customers for generation or transmission-related service.

While Duquesne is not proposing any modifications to this current methodology, which generally remains in line with the intention of the Competition Act, CNE, as part of this proceeding, is proposing to significantly alter the market developments that have occurred since the passage of the Competition Act. Contrary to the load-following structure developed through the Competition Act and the Commission's regulations, CNE inappropriately requests that Duquesne be required to convert its TSC into a non-bypassable rider through which all customers, both shopping and non-shopping, would collect the following charges: Network Integration Transmission Service ("NITS") costs, Regional Transmission Expansion Plan ("RTEP") costs, Transmission Expansion costs, Generation Deactivation costs, and Economic Load Response ("ELR") costs. Direct Testimony of Stephen E. Bennett on behalf of CNE (hereinafter "CNE St. No. 1"), p. 30. Moreover, RESA similarly proposes such a non-bypassable collection of transmission costs, excluding NITS costs.<sup>1</sup> Direct Testimony of Aundrea Williams on behalf of RESA (hereinafter, "RESA St. No. 1, p. 4").

As recognized in the PUC's recent FirstEnergy Orders, this proposal presents a number of serious problems that warrant its rejection. Initially, by proposing that Duquesne collect NMB Transmission costs for both shopping and non-shopping customers, this proposal is inconsistent with the plain language of the Competition Act. Moreover, the transitional issues associated with this proposal could result in current shopping customers being double charged for these costs.

Because Duquesne rejects the adoption of a non-bypassable rider for NMB Transmission costs, CNE and RESA, as the proponents of this proposal, have the burden of proof in this

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<sup>1</sup> The proponents of the NMB Transmission proposal will collectively be referred to as CNE/RESA.

proceeding. As a result, CNE/RESA has the obligation of showing, by a preponderance of evidence, that these proposed modifications are just, reasonable, and in the public interest. CNE/RESA fails to meet this burden, and for the reasons discussed herein, CNE/RESA's proposal must be denied.

**b) Duquesne's Rejection of the NMB Transmission Proposal, As Well As the Recent FirstEnergy Orders, Warrant Rejection of the Instant Proposal.**

Both the Commission and Duquesne reject the collection of NMB Transmission costs via a non-bypassable rider. As demonstrated in this brief, CNE/RESA provide insufficient justification to overcome this opposition. As a result, the NMB Transmission proposal should be rejected.

On August 16, 2012, the Commission held that NMB Transmission costs should not be collected via non-bypassable riders because such a collection would create competitive market and transitional issues that could not be resolved, as further discussed in Sections D.3.c. through D.3.e., *infra*. August 16, 2012, Order, pp. 63-86. In addition, in a subsequent Order denying reconsideration and rehearing of the non-bypassable collection of generation deactivation costs, the Commission held as follows: "Consistent with the Commonwealth's continued migration to a more competitive retail market, we believe that these supply-related costs should remain with the EGS." *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, *et. al.*, Opinion and Order (Sept. 27, 2012), p. 10 (hereinafter, "Sept. 27, 2012, Order"). Considering this Commission precedent, the CNE/RESA proposal should be summarily rejected in the instant proceeding.

The only significant difference between the FirstEnergy proceeding and the instant proceeding is that Duquesne, unlike FirstEnergy, opposes the NMB Transmission proposal.

Duquesne explains that a non-bypassable collection of NMB Transmission costs “would contradict the design of Customer Choice,” because the Competition Act calls for the unbundling of transmission costs. Rebuttal Testimony of William V. Pfrommer on behalf of Duquesne (hereinafter “Duquesne St. No. 4-R”), p. 23. Duquesne also contends that if the TSC became non-bypassable, customers could become confused and shopping customers in particular could be subject to double transmission charges. *Id.* For the foregoing reasons, Duquesne opposes any non-bypassable collection of NMB Transmission costs.

Standing alone, the recent Commission Orders in the FirstEnergy proceeding warrant the rejection of the NMB Transmission proposal. Combined with Duquesne’s opposition to the proposal, there is simply no legal or evidentiary justification for adoption of a non-bypassable rider. As discussed further discussed herein, this CNE/RESA proposal must be rejected.

**c) CNE/RESA’s Proposed NMB Transmission Collection Represents a Step Backwards in the Evolution of the Retail Market by Re-Bundling Transmission with Distribution Service.**

CNE/RESA’s proposed NMB Transmission collection would limit the competitive options available to Duquesne’s shopping customers in the currently unbundled retail electricity market. The Competition Act provides for “the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation, transmission and distribution.” 66 Pa. C.S. § 2802(13); *see also id.* § 2804(3). The purpose of this unbundling was to stimulate increased retail competition among the component parts of electric service, with the goal of spurring innovation and efficiencies. *See generally id.* § 2802. In the instant proceeding, CNE/RESA undertakes the remarkable step of proposing to re-bundle transmission and distribution. The proposed re-bundling of distribution and transmission is contrary to the Competition Act, harmful to Large C&I customers, and must be rejected.

“Customer Choice was designed such that the transmission component of the rates was unbundled and ‘potable.’” Duquesne St. No. 4-R, p. 23. The framers of the Competition Act understood that benefits could accrue to customers if they have the right to negotiate with their EGSs on the terms and conditions under which they receive transmission service. Large C&I customers are currently able to make business decisions to tailor the terms and conditions under which they purchase transmission service by negotiating with an EGS. *See* Stipulation of DII and CNE. With respect to transmission, a customer can structure an arrangement under which its EGS passes-through the costs of transmission service based on the customer’s own transmission obligation. *See id.* The benefit of this approach is that a customer would be charged the then-current transmission rate based on the customer’s own contribution to the cost of the transmission system. Alternately, an EGS may offer a fixed price for electric service, including both generation and transmission service, that does not vary. *See id.* A Large C&I customer may prefer this approach for stable budgeting purposes.

Where the Competition Act unbundled generation, transmission, and distribution services to stimulate and expand customer choice, CNE/RESA’s proposal to re-bundle transmission and distribution service diminishes customer choice. *See* Duquesne St. No. 4-R, p. 23. Under the current system, EGSs may add premiums to supply contracts in order to account for the risk of variable costs, including NMB Transmission costs, which CNE portrays as a competitive impediment. CNE St. No. 1, p. 31. What CNE/RESA fails to acknowledge is that some Large C&I customers willingly enter into fixed-price contracts, which include premiums to stabilize their NMB Transmission costs, that would not be available under the CNE/RESA proposal. *See* Stipulation of DII and CNE. As the default supplier under the terms of the Competition Act, Duquesne does not offer an array of customizable supply options to current default service

customers. *See* 66 Pa. C.S. § 2807(e)(3.1). As a result, CNE/RESA’s proposal for Duquesne to collect these costs “would eliminate options for Large C&I customers to choose from the various cost collection methods for NMB Transmission Charges currently applied by EGSs,” contrary to the principles championed by the Competition Act. *See* Stipulation of DII and CNE; *see also* 66 Pa. C.S. § 2807(e)(3.4).

In summary, the plain language of the Competition Act calls for unbundling of generation, transmission, and distribution services. CNE/RESA’s NMB Transmission proposal would, if approved, effectively re-bundle transmission and distribution, circumscribing customers’ options in the retail market. For this reason, CNE/RESA’s NMB Transmission proposal violates the Competition Act and should be denied.

**d) Contrary to the Requirements of the Competition Act, CNE/RESA’s NMB Transmission Proposal Fails to Address Important Transitional Issues Fairly, Risking Customers Being Overcharged for Transmission.**

CNE/RESA’s NMB Transmission proposal also raises fundamental transitional issues for numerous customers that have competitive supply contracts, which include a transmission component, extending beyond the June 1, 2013, the effective date of Duquesne’s proposed DSP. If CNE/RESA’s proposal were adopted, all such customers would be at risk of being overcharged for transmission-related services and would thus need to negotiate with their EGSs so that they would be charged NMB Transmission costs only once.

The Competition Act requires that the transitional issues that arise as the competitive market evolves must be resolved “in a manner that is fair” to all customers. 66 Pa. C.S. § 2802(8). With the risk of shopping customers being overcharged for transmission under CNE/RESA’s proposal, the Commission must ensure that shopping customers are fairly treated, including not being overcharged for transmission.

Customers under either fixed-price arrangements or pass-through arrangements would face forced renegotiation and added competitive market confusion if CNE/RESA's proposal is adopted. *See* Duquesne St. No. 4-R, pp. 23-24. Customers would have to attempt to renegotiate their shopping contracts with their EGSs to avoid a double collection of the NMB Transmission costs, especially when these costs are embedded in their fixed-price contracts, spending time and resources to remove the costs from their contracts. *See* Aug. 16, 2012, Order, p. 81; *see also* Duquesne St. No. 4-R, pp. 23-24. For shopping customers, this proposal could increase their confusion with respect to the competitive market and have long-standing effects on their shopping contracts. Duquesne St. No. 4-R, pp. 23-24. As succinctly stated by the Commission, "these proposals would increase the likelihood of double cost collection by the Companies and EGSs while increasing the risk for customers." *Id.* With such documented risks, fundamental principles of fairness dictate that the Commission reject a proposal that would have such negative effects on shopping customers, including being forced to renegotiate contracts and assume the risk of double-collection.

This heightened risk is magnified for shopping customers currently under fixed-price arrangements that may be incapable of removing NMB Transmission costs from their current contracts. Because fixed-price contracts include a single price representing generation, transmission, ancillary services, and a profit/risk premium, it may be difficult or impossible to discern what portion of the price represents NMB Transmission costs. *See* Stipulation of DII and RESA. Under such circumstances, no amount of renegotiation could ensure that the customer would not be overcharged for NMB Transmission costs.

Any implementation of CNE/RESA's proposed collection of NMB Transmission costs would risk overcharging Large C&I customers for NMB Transmission costs. Both customers

under pass-through and fixed-price arrangements with EGSs would be subject to transitional difficulties if Duquesne begins collecting these costs. Considering the potential for double charging and increasing risk for current shopping customers, CNE/RESA's NMB Transmission proposal should be denied.

e) **CNE/RESA Fails to Provide Any Evidence that the Proposed NMB Transmission Collection Is Just, Reasonable, or In the Public Interest.**

As noted previously, CNE/RESA carries the burden of proving, by a preponderance of evidence, that its proposal to modify the means by which Duquesne currently collects costs from both its shopping and non-shopping customers should be modified. The record shows that CNE/RESA has failed to carry its burden. Throughout the course of this proceeding, each of the arguments presented in favor of this proposal fail to establish that the proposed NMB Transmission collection is just, reasonable, or in the public interest.

CNE claims that default service wholesale suppliers are not responsible for NMB Transmission costs and therefore possess a competitive advantage over EGSs. CNE St. No. 1, p. 31. CNE's argument, however, amounts to a proverbial "apples to oranges" comparison.

While the Competition Act provided EGSs with direct access to retail end-use customers, wholesale default service suppliers contract solely with Duquesne. This market structure dates back to the passage of the Competition Act, when the Commission initially developed regulations to implement the provisions of the Competition Act. 52 Pa. Code § 54.181, *et seq.* To illustrate the relationship between competitive rates and default service rates, the Commission found that the price-to-compare ("PTC"), the line item on a default service customer's bill that the customer may compare to the price offered by an EGS, should be "equal to the sum of all unbundled generation and transmission-related charges to a default service customer for that month of service." 52 Pa. Code § 54.182; *see also 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 (May 10, 2007). The intention of this regulation is to specify that the default service provider, as well as the EGS, should charge their customers for both generation and transmission. As the designated default service supplier, it is Duquesne, and not the wholesale default service suppliers, that must charge default service customers for generation and transmission services. Therefore, CNE's attempt to analogize EGS cost responsibility to that of wholesale default service suppliers is unfounded and must be disregarded.

CNE also attempts to justify its utilization of a non-bypassable rider for the remittance of NMB Transmission costs because similar mechanisms were adopted in Ohio and New York. Stephen E. Bennett on behalf of CNE (hereinafter "CNE St. No. 1-SR"), pp. 13-14. These states are not Pennsylvania, however, and the evolution of these retail electric markets were structured and developed separately from that of Pennsylvania. In these states, for example, there are no regulations that provide for generation and transmission to be charged by the same entity. *But cf.* 52 Pa. Code § 52.182 and § 52.187(d). Moreover, the Commission has held that a non-bypassable NMB Transmission collection must be rejected. *See generally* Aug. 16, 2012, Order. This conflicting regulatory law and structure, as well as market circumstances that may be entirely different from Pennsylvania, render these analogies irrelevant to the instant proceeding.

Similarly, each of CNE's arguments in surrebuttal testimony arguing for the inclusion of NITS, generation deactivation, and ELR costs within a non-bypassable rider have been refuted by the Commission in the FirstEnergy proceeding. CNE St. No. 1-SR, pp. 5-13. As explained by the Commission in its Sept. 27., 2012, Order, "[c]onsistent with the Commonwealth's continued migration to a more competitive retail market, we believe that these supply-related

costs should remain with the EGSs.” Sept. 27, 2012, Order, p. 10. Although this principle specifically applied to generation deactivation costs, it is equally applicable to NITS and ELR costs. *See* Aug. 16, 2012, Order, pp. 82, 85. As a result, it is improper for these costs to be collected by Duquesne from shopping customers.

Finally, RESA proposes a modified version of the NMB Transmission proposal, which would require Duquesne to collect all costs other than NITS via a non-bypassable rider. RESA St. No. 1, p. 4.<sup>2</sup> Although DII commends RESA’s acknowledgement that NITS costs should remain an EGS responsibility, this modified proposal does not solve the above-stated competitive market or transitional problems associated with all NMB Transmission costs. Moreover, with respect to this proposal, Duquesne correctly explains that NMB Transmission costs are appropriately recovered by EGSs, because they are the load serving entities (“LSEs”) billed for these costs by PJM: “This is a fair and reasonable methodology because it creates the proper incentives for all LSEs to respond to PJM rules and reduce their respective transmission obligations in response to market conditions.” Surrebuttal Testimony of William V. Pfrommer on behalf of Duquesne, pp. 2-3. Because this proposal would still require Duquesne to collect transmission-related costs from shopping customers, this modified NMB Transmission proposal must be denied.

The record in this proceeding offers little in the way of credible support for CNE/RESA’s proposal. CNE/RESA has failed to demonstrate a modicum of customer benefit flowing from its proposal. To the contrary, Large C&I customers may incur significant transitional overcharges upon implementation of the proposal. The one-sided benefits associated with CNE/RESA’s proposal hardly justify a paradigm shift from the unbundled regulatory structure in place since

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<sup>2</sup> OSBA supports this proposal, agreeing that NITS costs should continue to be collected by EGSs. Rebuttal Testimony of Brian Kalcic on behalf of OSBA, pp. 5, 11.

the passing of the Competition Act and the Commission's adoption of default service regulations.

**f) Conclusion**

CNE's proposal to implement a non-bypassable rider to collect NMB Transmission costs from all customers, regardless of their shopping status, must be denied by the Commission. As the party bearing the burden of proof, CNE has failed to produce evidence supporting its proposal. CNE's proposal is unjust, unreasonable and in violation of the Competition Act, the Commission's default service regulations, and recent Commission precedent in the FirstEnergy proceeding. The proposed NMB Transmission collection would re-bundle transmission and distribution services, while eliminating competitive transmission products. Further, the proposal imposes risks for Large C&I customers with competitive supply agreements, particularly fixed-price arrangements, which extend beyond the effective date of the DSP. CNE's proffered evidence to support its proposal does not satisfy its burden of proof in this proceeding. Accordingly, CNE's proposal to implement a non-bypassable rider for collection of NMB Transmission costs should be rejected.

**4. Time-of-Use program**

DII has no position on this issue.

**5. Supply Master Agreement Issues**

DII has no position on this issue.

**6. Data/EGS Coordination Issues**

DII has no position on this issue.

**7. General Miscellaneous Issues**

DII has no additional issues.

**IV. CONCLUSION**

**WHEREFORE**, the Duquesne Industrial Intervenors respectfully request that the Pennsylvania Public Utility Commission:

- (1) Deny the collection of retail market enhancement costs from all customers not eligible for participation in retail market enhancement programs; and
- (2) Deny the collection of a \$5.00 per MWh Adder; and
- (3) Deny the collection of non-market based transmission costs through a non-bypassable rider; and
- (4) Grant any additional relief deemed appropriate and consistent with the above recommendations.

Respectfully submitted,

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