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December 5, 2012

**BY FED EX AND EMAIL**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, 2<sup>nd</sup> Floor North  
P. O. Box 3265  
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**Re: *Petition of Duquesne Light Company  
For a Default Service Plan for the Period June 1, 2013 through May 31,  
2015 - Docket No. P-2012-2301664***

Dear Secretary Chiavetta:

Enclosed please find the Retail Energy Supply Association's Exceptions to the Recommended Decision of Administrative Law Judge Katrina L. Dunderdale in the above referenced proceeding. Copies have been provided pursuant the attached Certificate of Service.

Please feel free to contact me should you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'B. Greene', is written over the word 'Sincerely,'.

Brian R. Greene

BRG/wcd  
Enclosures

c: Service List (see Certificate of Service)

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Duquesne Light Company  
for approval of Default Service Plan for           \*                           P-2012-2301664  
the Period June 1, 2013 through May               \*  
31, 2015   \*

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the Retail Energy Supply Association's Exceptions have been served upon the following persons, in the manner indicated, in accordance with the requirements of § 1.54 (relating to service by a participant).

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Brian R. Greene

Dated: December 5, 2012

**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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**EXCEPTIONS OF THE  
RETAIL ENERGY SUPPLY ASSOCIATION**

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## **I. INTRODUCTION**

In this proceeding, the Commission must determine whether the proposed default service procurement plan offered by Duquesne Light Company (“Duquesne”) meets the requirements of the Electricity Generation Customer Choice and Competition Act (“Competition Act”),<sup>1</sup> and is consistent with the Commission’s policy directives designed to produce a robust competitive retail electric market in the Duquesne service territory. The position of the Retail Energy Supply Association (“RESA”)<sup>2</sup> is that the November 15, 2012 Recommended Decision (“RD”) of Administrative Law Judge (“ALJ”) Katrina L. Dunderdale – which adopts virtually 100% of Duquesne’s default service plan (“DSP”) as filed – does not satisfy these requirements. Adopting the RD would negatively impact Duquesne’s approximate 584,000 electricity customers because it would be a significant set-back for competition for a number a reasons.

First, the ALJ’s recommendations are inconsistent with the Competition Act and recent Commission directives to create and foster a sustainable, long-term competitive market. The ALJ recommends the adoption of a procurement plan that is unlikely to result in default service rates that are market-reflective at and throughout the time of delivery. As the Commission has recognized and as is explained below, default service pricing needs to be rationally related to the market price for energy at the time of delivery or else retail competition will not develop nor can it be sustained. Moreover, the ALJ ignored the charge from the Competition Act to create competitive markets by stating that increasing the number of competitors in the Duquesne

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<sup>1</sup> 66 Pa. C.S. § 2801, et. seq.

<sup>2</sup> RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant; Stream Energy; TransCanada Power

service area should be the “secondary” goal of Duquesne’s DSP<sup>3</sup> when, in fact, the only way to attain a competitive market is to attract numerous EGSs that will offer various products and services. Further, the ALJ dismissed the view that a functional competitive retail market (which can only result from a properly structured DSP) will achieve the goals of the Competition Act and will result in the best outcome for consumers. Rather than adhere to existing law and Commission directives, the ALJ, without valid legal or practical reasons, simply adopts Duquesne’s positions on nearly every issue in this case and rejects almost every recommendation to improve the state of the competitive electric market in the Duquesne service area.

Second, many of the ALJ’s recommendations relating to retail market enhancement (“RME”) programs are substantially inconsistent with the nature and structure of those programs as directed by the Commission in its *Intermediate Work Plan Final Order*<sup>4</sup> and expounded upon in the recent orders involving the FirstEnergy<sup>5</sup> and PECO<sup>6</sup> default service plans. The *FirstEnergy Default Service Order* and the *PECO Default Service Order* were issued during the pendency of this case and addressed proposed RMEs similar, if not identical, to the ones at issue in this case. RESA’s testimony included proposals on how to properly implement RME successful programs in the Duquesne territory consistent with the *FE* and *PECO* decisions. Yet, the ALJ would have the Commission adopt virtually every one of Duquesne’s recommendations and reject RESA’s recommendations. RESA demonstrated where deviations from these orders

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Marketing Ltd.; and TriEagle Energy, L.P. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

<sup>3</sup> RD 217.

<sup>4</sup> *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Tentative Order entered March 2, 2012 (“*Intermediate Work Plan Final Order*” or “*IWPFO*”).

<sup>5</sup> *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 entered August 16, 2012 (“*FirstEnergy Default Service Order*” or “*FE decision*”).

<sup>6</sup> *Petition of PECO Energy Company for Approval Of Its Default Service Program*, Docket No. P-2012-2283641, Opinion and Order entered October 12, 2012 (“*PECO Default Service Order*” or “*PECO decision*”).

were appropriate to make the competitive enhancements more likely to succeed. Unfortunately, the ALJ rejected RESA's recommendations.

RESA respectfully requests that the Commission reject the ALJ's recommendations and continue its pro-competition approach regarding default service procurement plans and competitive RME initiatives. Such a result is critical if there is to be a long-term, sustainable, robust, competitive retail market in the Duquesne service territory.

## II. EXCEPTIONS

### A. **RESA TAKES EXCEPTION TO THE ALJ'S RECOMMENDATIONS REGARDING DUQUESNE'S PROCUREMENT OF DEFAULT SERVICE SUPPLY CONTRACTS.**

1. **Exception No. 1: The ALJ erred in rejecting RESA's proposal to replace Duquesne's proposed residential portfolio of 100% 12-month contracts with 50% 12-month contracts and 50% 3-month contracts to ensure more market reflective default service pricing. (RD 28-29).**

For residential customers, Duquesne proposed to procure default service supply using 100% 12-month contracts with concomitant annual changes to the PTC. RESA recommended that Duquesne procure default service supply using a blend of 50% 12-month contracts and 50% 3-month contracts, with quarterly PTC changes. The ALJ adopted Duquesne's proposal, claiming that Duquesne's plan "allows for more stability in the default service rate," "provides the least amount of risk to consumers in the current market," and that "the typical consumer is not willing to spend precious time away from family, work and interests to repeatedly check on the lowest price to compare."<sup>7</sup> The ALJ's recommendation is wrong for several reasons.

*First*, from a legal perspective, the ALJ misapplied the statutory standard applicable to deciding whether to approve a default service plan. The ALJ's adoption of Duquesne's plan places the concept of "price stability" ahead of the specific statutory elements relating to the

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<sup>7</sup> RD 28-29.

provision of default service. Those statutory elements, including in the Competition Act as amended by Act 129, do not include “price stability.”

The stated purpose of the Act is, obviously, to create competitive retail electricity markets pursuant the legislative finding that “competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.”<sup>8</sup> The General Assembly desired to “permit retail customers to obtain direct access to a competitive generation market” in an effort to “benefit all classes of customers and to protect this Commonwealth’s ability to compete in the national and international marketplace for industry and jobs.”<sup>9</sup> To accomplish this, the Act requires default service providers such as Duquesne to acquire electric energy through a “prudent mix” of resources designed: (i) to provide adequate and reliable service; (ii) to provide the least cost to customers over time; and, (iii) to achieve these results through competitive processes which includes auctions, requests for proposals and/or bilateral agreements.<sup>10</sup> The ALJ seems to recognize all of this, especially that fostering a competitive market is a fundamental policy underlying the Competition Act.<sup>11</sup> Where the ALJ goes astray, however, is in the way she layers “price stability” on top of these statutory requirements to conclude that the default service plan must provide price stability without consideration of the impact on the competitive market or on the resulting default service rate.

The concept of price stability was referenced in the preamble to Act 129, which was not incorporated into the text of the Competition Act. The Commission has addressed the relationship between the language in the Competition Act’s statutory text and the language in the preamble to Act 129 (which, again, is not in the statutory text) in the context of reviewing default

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<sup>8</sup> 66 Pa. C.S.A. § 2802(5).

<sup>9</sup> 66 Pa. C.S.A § 2802(3) and (7).

<sup>10</sup> RD 8 (citing 66 Pa. C.S.A. §§2807(e)(3.1) and 2807(e)(3.4)).

<sup>11</sup> RD 8-9 (citations and quotations omitted).

service plans. In *Pike County*,<sup>12</sup> the Office of Consumer Advocate (“OCA”) offered a modification to the proposed default service plan which would have resulted in a higher default service rate but, in OCA’s opinion, would have provided “price stability.” In reviewing the applicable standard, the Commission correctly recognized that:

[t]he rules of statutory construction dictate that the findings and declarations found in the Preamble of a statute *do not take precedence over the specific statutory provisions contained in the law*, but the rules of statutory construction provide that the Preamble may be considered in the construction of a statute.<sup>13</sup>

In applying this standard, the Commission concluded that “the ALJ relied too heavily upon the Preamble to Act 129 in recommending [adoption of OCA’s proposal].”<sup>14</sup>

Like the *Pike County* case, adopting the procurement plan recommended by Duquesne and endorsed by the ALJ here will have the effect of elevating the preamble policy objectives over the express statutory requirements. This is because the primary, if not the sole, basis upon which the ALJ dismisses RESA’s proposed modifications is her conclusion that Duquesne’s proposal allows for more price stability. The proposal that offers “more stability” than another proposal is not sufficient under the statute on that basis alone. The inescapable conclusion is that the ALJ has elevated the preamble policy standard over the statutory requirements, thereby rendering the statutory requirements virtually non-existent.

*Second*, the ALJ’s recommendation ignores the evidentiary record in this proceeding. RESA presented evidence that the inclusion of quarterly procurements will result in default service rates that more accurately reflect the underlying wholesale cost of electricity and, in turn,

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<sup>12</sup> *Petition of Pike County Light & Power Company for Approval of Its Default Service Implementation Plan*, Docket No. P-2011-2252042, Opinion and Order entered May 24, 2012. On June 22, 2012, OCA filed an appeal of this order to the Commonwealth Court. *Irwin A. Popowsky v. Pennsylvania Public Utility Commission*, Case No. 1179 C.D. 2012.

<sup>13</sup> *Id.* at 29 (emphasis added).

<sup>14</sup> *Id.*

enable customers to reap the benefits of a more competitive retail market.<sup>15</sup> RESA showed that market reflective default service prices are necessary to facilitate the development of a robust *sustainable* competitive retail market devoid of “boom/bust” cycles and that will provide the myriad of product and service offerings – including those that offer various levels of price certainty and predictability – from which customers can choose.<sup>16</sup> Yet, the ALJ in her disposition makes no reference to the statutory necessity to develop a sustainable, robust competitive market; rather, she simply opines that current default service customers may have their own reasons for not shopping, or may be too busy to bother with shopping for electricity, and that those customers should have the least risk and most stable prices available.

Not only would the ALJ’s recommendations not lead to a competitive market, but even assuming that the ALJ is correct that customer interest in shopping is tempered by equally-competing interests such as tending to gardens and home needs, etc., denying RESA’s procurement proposal on those grounds ignores the Competition Act’s mandate to create a competitive electricity market. In other words, whether those individuals choose to shop or not, the Commission’s responsibility under the Competition Act is to create a competitive market. The ALJ’s reasoning allows for the status quo to prevail during a time in which the Commission is moving towards a more market reflective default service end state and is concerned that the “development of the retail market will continue to lag behind our expectations until we effectively address the fact that the currently-structured default service product remains highly regulated and does not reflect current market conditions.”<sup>17</sup> The ALJ’s recommendation should

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<sup>15</sup> RD 20.

<sup>16</sup> RD 21; RESA St. No. 1-SR at 6.

<sup>17</sup> *Investigation of Pennsylvania's Retail Electricity Market: Intermediate Work Plan*, Docket No. I-2011-2237952, Tentative Order at 10; Entered Nov. 8, 2012 (“November 2012 Tentative Order”).

be rejected because it ignores the evidence that RESA's proposal will result in the further development of the competitive market.

Along those lines, the importance of market reflective rates and the long-term impact on the development of competition cannot be understated. The ALJ, perhaps blinded by Duquesne's relatively high residential shopping statistics, recommends Duquesne's proposal in part based on the "transparency" of the current 29-month fixed default service rate and the "confidence in the retail market" that Duquesne's current proposal would purportedly provide. RESA's proposal would likewise result in transparent rates. Furthermore, longer-term procurement contracts such as what the ALJ recommends result in less, not more, confidence in the market. This is because while the 29-month fixed default service rate might have led to increased shopping, it did so primarily because it is not market reflective and is now well above market.<sup>18</sup> The Duquesne service area is currently experiencing a "boom" cycle of competition that, if it goes "bust," could see EGSs leave the market to the long-term detriment of customers. Thus, the ALJ's recommended residential procurement plan does not instill market confidence.

*Third*, the ALJ relies in part on unsupported, backwards reasoning. She states that RESA's proposal for quarterly and annual contracts will compromise price stability "too far, resulting in customers who refuse to shop due to the lack of predictability beyond the three months and the need for almost constant monitoring of retail market rates." The ALJ's first mistake here is that she assumes that all switching is based on price, and RESA presented evidence that such is not the case.<sup>19</sup> The ALJ's second mistake is that if a customer deems a

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<sup>18</sup> RESA St. No. 1-SR at 6. OCA also recognizes that the current Duquesne default service rate is significantly above market. OCA Main Brief at 39. Also, Commissioner Cawley has recognized that Duquesne's 29-month "static price has turned out to be well above market prices," and that "many suppliers logically entered the market, providing much lower, more market-based pricing to residential customers." *RMI Investigation*, Docket No. 1-2011-2237952, Concurring and Dissenting Statement of Commissioner Cawley at 2 (Sept. 27, 2012).

<sup>19</sup> See, e.g., RESA St. No. 1 at 9; RESA St. No. 1-SR at 6.

default service rate to be too stable or unstable, then he or she will shop for a product from an EGS that better meets his or her needs and desires. The ALJ, however, concludes that a rate that changes four times per year will result in customer paralysis – a conclusion that is nowhere in the evidentiary record in this case and which is divorced from reality. In fact, RESA has testified that the opposite is true because the rate will better reflect market prices and lead to a sustainable competitive market place with numerous EGSs offering a myriad of products and services.

*Fourth*, the ALJ incorrectly recommends Duquesne’s plan on the premise that the plan ensures the “least amount of risk to consumers in the current market.” The Competition Act does not say anything about a plan being the “least risk” to consumers. This appears to be a criteria advanced by the ALJ that simply does not exist in either the statute or other applicable regulations or orders. Moreover, to the extent that customers deem RESA’s quarterly/annual procurement proposal as too risky, they will have a competitive marketplace from which to choose products and services that meet their needs and desires. This is consistent with the Competition Act’s legislative finding that competition leads to lower generation costs.<sup>20</sup>

*Fifth*, RESA’s residential procurement proposal is consistent with the Commission’s now-stated goal for the default service end state. As articulated in its *November 2012 Tentative Order* at 17, the residential and small commercial (below 100 kW) default service supply would be procured via 100% fixed, quarterly contracts. RESA’s blend of 50% 12-month and 50% 3-month contracts would provide a reasonable transition to such an end state. Moreover, to the extent that the ALJ and others deem quarterly default service price changes as too unstable, the Commission, by issuing the *November 2012 Tentative Order*, would appear to disagree, as the Commission envisions an end state that would allow 100% of the residential default service rate to change every three months. RESA’s proposal would impact 50% of the rate every three

months and therefore would provide sufficient rate protection to those who remain on default service, while at the same time allowing the market to further develop. Finally with respect to the *November 2012 Tentative Order*, it should be noted that, regardless of the procurements envisioned by the Commission, the intent was, and remains, to address the problem that default service rates in the various service areas do not reflect market conditions.<sup>21</sup> As RESA has testified and as the Commission has held, default service rates that bear a closer resemblance to market conditions will encourage further EGS investment in Pennsylvania’s retail market and also “will move the Commonwealth towards a robust competitive market, where consumers enjoy a wide array of generation supply products and offerings from which to choose.”<sup>22</sup>

2. **Exception No. 2: The ALJ erred in approving Duquesne’s proposal to have back-to-back 12-month residential products procured at the same time, and in rejecting RESA’s proposal to shorten the time between procurement of default service supply contracts and delivery to no more than 60 days. (RD 33-34).**

Duquesne proposed a procurement schedule that includes at least two residential default supply contracts procured 14 months in advance of delivery.<sup>23</sup> RESA proposed a procurement plan that provides for lead times of no more than two (2) months for each procurement.<sup>24</sup> The ALJ recommended adoption of Duquesne’s proposal, mistakenly determining that procuring back-to-back 12-month products at the same time properly balances the need for market responsive rates while still providing customers with a hedge against unexpected energy price increases.<sup>25</sup> The ALJ’s recommendation is inconsistent with the record evidence and Commission precedent.

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<sup>20</sup> 66 Pa C.S.A. § 2802(5).

<sup>21</sup> *November 2012 Tentative Order* at 10.

<sup>22</sup> *Id.*; RD 20-21; RESA St. No. 1-SR at 6.

<sup>23</sup> RD 29-30; Duquesne St. No. 8-R at 47-48.

<sup>24</sup> RESA St. No. 1 at 16, RESA Exhibit AW-1.

<sup>25</sup> RD 33.

RESA's proposal is consistent with the *FirstEnergy Default Service Order*, in which the Commission reaffirmed the benefits of shorter procurement lead times, stating that, "[w]e concur with RESA that shortening the procurement lag time will increase the probability that default service rates are more reflective of current market rates."<sup>26</sup> Consistent with that Order, RESA testified in this case that the longer the lag between procurement and delivery, the more likely the default service rate will not be market reflective.<sup>27</sup> That is exactly what the ALJ recommends, however, because Duquesne proposes to procure contracts 14 months ahead of delivery. Duquesne makes the head-scratching argument that procurements 14 months prior to delivery will nonetheless result in default service rates in each year that will "better reflect contemporaneous market prices...."<sup>28</sup> Neither Duquesne nor anyone else, however, has any way of knowing what prices will be 14 months in advance and therefore cannot state with any certainty that a contract procured that far in advance will reflect actual market prices leading up to, and during, the time of delivery.

In addition, Duquesne's argument that contracting 14 months in advance will act as a hedge is misplaced and, in reality, results in the procurement of 2-year contracts. Duquesne admits that, with these procurements, supply is "locked up for the entire two-year period at the same time."<sup>29</sup> Yet, Duquesne adamantly opposed OCA's proposal for 2-year contracts in this proceeding, arguing that OCA's proposal should be rejected because it "equates to market speculation, in an effort to 'second guess,' 'time,' or 'beat the market.'"<sup>30</sup> With this attack on OCA, Duquesne cannot legitimately or consistently argue that its proposed timing for procurements would provide a hedge against uncertain future market prices, and the ALJ was

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<sup>26</sup> *FirstEnergy Default Service Order* at 26.

<sup>27</sup> RESA St. No. 1 at 9-10; RESA St. No. 1-SR at 13.

<sup>28</sup> Duquesne St. No. 8-R at 48, 49.

<sup>29</sup> Duquesne St. No. 8-R at 48.

wrong to rely on such evidence. The ALJ's recommendation should be rejected and RESA's proposal for shorter lag times should be adopted.

**3. Exception No. 3: The ALJ erred in rejecting RESA's proposal to replace Duquesne's proposed small C&I portfolio of 100% 12-month contracts with 50% 12-month contracts and 50% 3-month contracts to ensure more market reflective default service pricing. (RD 43).**

For small C&I customers, Duquesne proposed to procure 12-month laddered contracts, with 50% of the default service supply being bid out at a time.<sup>31</sup> The retail PTC would be re-set twice per year, in contrast to the current once per year. In response to Duquesne's proposal, RESA recommended that Duquesne be directed to modify its small C&I proposal to be the same as its proposal for residential customers: 50% 12-month contracts, 50% quarterly contracts, with the PTC being adjusted quarterly.<sup>32</sup> This recommendation makes sense in light of the fact that a large number of Duquesne's small C&I customers (30.4%, representing 39% of the load, as of May, 2012) have switched to EGSs.<sup>33</sup> As of May 2012, 46 EGSs are actively serving small C&I load in Duquesne's service territory.<sup>34</sup>

The ALJ recommended adoption of Duquesne's proposal, stating only that it will "provide price stability while moving this load towards greater market responsiveness."<sup>35</sup> For the reasons stated above relating to residential customers, the ALJ's rejection of RESA's small C&I proposal on the basis of price stability is incorrect both legally and factually, and RESA's proposal provides the better transition to the proposed default service end state for small C&I

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<sup>30</sup> Duquesne St. No. 8-R at 30.

<sup>31</sup> Duquesne St. No. 2 at 11 and Exh. JEW-5. The exception to the 12-month procurements would occur at the onset of the new default service plan period, as Duquesne proposes to utilize 6-month contracts representing 50% of the default service supply for the June 2013 through November 2013 period (procured in November 2012) to begin the cycle of 12-month overlapping contracts.

<sup>32</sup> RESA St. No. 1 at 14, 22; Exh. AW-1.

<sup>33</sup> RESA St. No. 1 at 13.

<sup>34</sup> RESA St. No. 1 at 13.

<sup>35</sup> RD 43.

customers. Moreover, Duquesne's proposal does not go far enough towards establishing market reflective default service rates to attain the goal of a robust, sustainable, competitive market.<sup>36</sup>

RESA's recommendations are designed to enhance the market responsiveness of the underlying supply mix which better supports sustainable retail competition and ultimately benefits consumers. A robust, sustainable retail model is the sole mechanism that will ensure all customers are afforded the opportunity to individually determine which electricity product and pricing attributes are most important to him/her and make purchasing decisions based on those personal determinations. RESA's small C&I proposal offers sufficient rate stability in that it blends 3-month and 12-month contracts. To the extent consumers want pricing that offers more or less "stability" than the default service rate, they will be able to choose that product in a more robust sustainable competitive retail electricity market.<sup>37</sup>

Finally, like RESA's recommendations for residential procurements, RESA's small C&I recommendations makes sense because of the Commission's recent *November 2012 Tentative Order* that describes an end state for default service that includes quarterly default service contracts for small commercial customers. RESA's proposed plan for small commercial customers provides a reasonable transition – 50% quarterly contracts – to that end state.

**4. Exception No. 4: The ALJ erred in rejecting RESA's proposal to replace Duquesne's proposed medium C&I portfolio of 100% 6-month contracts with 100% 3-month contracts. (RD 48).**

Duquesne proposed to procure 100% of the default service supply for its medium C&I class via 6-month full requirements contracts.<sup>38</sup> RESA proposed to modify Duquesne's proposal such that medium C&I customers would be served through quarterly procurements, in which

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<sup>36</sup> RESA St. No. 1 at 12.

<sup>37</sup> RESA St. No. 1 at 18; RESA St. No. 1-R at 6.

<sup>38</sup> Duquesne St. No. 2 at 14. The exception to the 6-month procurements is a 12-month contract that Duquesne procured in November 2012 that will extend six months into the upcoming DSP period. *Id.*

100% of the load is bid out every three months. As of May 2012, 57.6% of Duquesne's medium C&I customers, representing 67.5% of the medium C&I load, purchased their electricity supply from one of 46 EGSs.<sup>39</sup>

The ALJ recommended adoption of Duquesne's proposal for two reasons, both wrong. First, she states that default service customers might examine available EGS products and elect to remain on default service, and those customers "should not be burdened with a volatile rate."<sup>40</sup> Second, she concludes, somehow, that RESA's proposal would "force 100% participation in shopping ...." and "may result in precipitous drops in shopping due to lessened price stability."<sup>41</sup> The record does not support these findings.

First, no medium C&I customer is, or will be, "burdened" with a default service rate they do not want, because currently there are 46 EGSs from which to choose.<sup>42</sup> There is no reason not to move forward with quarterly procurements when 57.6% of medium C&I customers and 67.5% of the load has already shopped.<sup>43</sup> At the same time, no customer will be "forced" to shop. If a customer finds an offer that entices him to switch – either because it is a price that is more or less stable than the default service rate, or because the offer includes other products and services unrelated to price – then he can switch; otherwise, he can remain on default service.

Second, the ALJ's conclusions are inconsistent with each other. On one hand, she concludes, as she did with RESA's residential proposal, that RESA's plan may result in less switching for medium C&I customers. On the other hand, she concludes that RESA's plan would result in 100% forced shopping. Thus, in the same paragraph, the ALJ finds that RESA's proposal could result in less shopping and 100% shopping, two results which obviously cannot

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<sup>39</sup> RD 4, ¶ 11; RESA St. No. 1 at 19.

<sup>40</sup> RD 48.

<sup>41</sup> RD 48.

<sup>42</sup> RD 4, ¶ 11.

co-exist..<sup>44</sup> RESA's testimony was very clear that medium C&I customers have proven to be sophisticated and not shy about taking advantage of market opportunities, and the time is right to transition these customers to quarterly procurements.<sup>45</sup>

Finally, the ALJ's recommendation was inconsistent with the *November 2012 Tentative Order*. For customers between 25 kW and 100 kW, the envisioned end state is quarterly default service pricing, which is RESA's proposal in this case. The record reflects that 54% of Duquesne's customers between 25 kW and less than 100 kW, representing 60% of that sized load, had shopped for electricity as of May 2012.<sup>46</sup> For customers with demands of 100 kW or greater, the *November 2012 Tentative Order* envisions hourly pricing.<sup>47</sup> The record reflects that approximately 73% of Duquesne's customers 100 kW to less than 300 kW, representing almost 76% of that sized load, had shopped as of May 2012.<sup>48</sup> These customers are ready for quarterly default service pricing, which will also provide a smooth transition to the envisioned end state.

**5. Exception No. 5: The ALJ erred in rejecting RESA's proposal to eliminate Duquesne's proposed procurement of residential and small C&I default service supply contracts that extend beyond May 31, 2015. (RD 56-57).**

Duquesne's residential and small C&I procurement proposals included contracts that would extend beyond the end of the default service plan period of May 31, 2015. For residential, Duquesne proposes to procure 25% of its supply in April 2014 for delivery beginning June 1, 2015 through May 31, 2016, an entire year past the end of the plan period.<sup>49</sup> For small C&I, Duquesne proposes to procure 50% of its supply in November 2014 for delivery beginning

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<sup>43</sup> *Id.*

<sup>44</sup> RD 48.

<sup>45</sup> RESA St. No. 1 at 19.

<sup>46</sup> RESA St. No. 1 at 19, fn. 7; RESA St. No. 2 at Exh. CK-1 (Duquesne Response to OSBA Set 1, No. 3).

<sup>47</sup> *November 2012 Tentative Order* at 16.

<sup>48</sup> RESA St. No. 2 at Exh. CK-1 (Duquesne Response to OSBA Set 1, No. 3).

<sup>49</sup> RD 16, 53.

December 2014 through November 30, 2015, six months past the plan period.<sup>50</sup> RESA proposed to eliminate these “overhang” contracts and allow Duquesne (and the Commission) to transition smoothly into Duquesne’s next DSP in 2015. The ALJ recommended approval of Duquesne’s “overhang” proposal, concluding that it “provides for rate stability benefits yet the time frame is far enough into the future that DSP VI can be re-designed, should future conditions require changes.”<sup>51</sup> The ALJ’s recommendation should be rejected.

To begin with, the ALJ’s finding that there will be sufficient time for the Commission to redesign Duquesne’s next DSP prior to June 2015 and still avoid the proposed overhang contracts is not fully supported. As stated above, Duquesne proposes to procure 25% of its residential supply in April 2014 – 14 months in advance of the June 2015 delivery date. Assuming the April 2014 procurement is not pushed back in time as RESA has requested, the Commission would need to act before then to address what the ALJ describes as “future conditions.” Moreover, under the *November 2012 Tentative Order*, Duquesne would file its next DSP by July 1, 2014, and the Commission would take action on the filing within six months.<sup>52</sup> Thus, 25% of its residential supply would already be locked up before Duquesne even filed its next DSP. And, the Commission would need to act to delay the November 2014 small C&I procurement during the pendency of the DSP VI plan. This timeline does not support the ALJ’s finding that there is sufficient time for the Commission to redesign these procurements.

Nor should the Commission be placed in the position of having to redesign procurements that were addressed as part of this DSP. The record is devoid of any evidence to suggest that Duquesne cannot make a timely filing, or that the Commission cannot rule on time, to establish a new DSP beginning in June 2015. By that time, the stakeholders will likely have the benefit of

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<sup>50</sup> RD 40, 53.

<sup>51</sup> RD 56.

additional decisions from the Commission relating to the provision and end state of default service, allowing the Commission to implement changes in 2015 without restriction.

Furthermore, there is no evidence that RESA's proposal would result in price instability at the end of the DSP, as the ALJ suggests. There is only a fear that prices might rise more than two years from now, and the Duquesne proposal would lock in default service contracts that, by June 2015, could have diverged from market prices. There is no need to go down that road.

RESA's proposal for a "hard stop" is not a new issue for this Commission. In the *FirstEnergy Default Service Order*, the Commission rejected a similar proposal by OCA and others in favor of "overhand" contracts, holding that "utilize[ing] shorter, more frequent procurements should ensure a smoother transition into the next procurement period without requiring that procurements extend beyond May 2015."<sup>53</sup> The ALJ's recommendation is directly contrary to the Commission's objectives outlined in its *RMI Default Service Order*<sup>54</sup> and reaffirmed in the *FirstEnergy Default Service Order*.

**B. RESA TAKES EXCEPTION TO THE ALJ'S RECOMMENDATIONS REGARDING THE RETAIL OPT-IN ("ROI") PROGRAM.**

**1. Exception No. 6: The ALJ erred in recommending approval of Duquesne's ROI Auction program and rejecting RESA's proposed ROI Aggregation program. (RD 65-66).**

Duquesne proposed to fashion an ROI program in the form of an auction. RESA's direct testimony, filed July 26, 2012, focused on Duquesne's auction proposal and made

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<sup>52</sup> *November 2012 Tentative Order* at 18.

<sup>53</sup> *FirstEnergy Default Service Order* at 26-27. The Commission accepted the use of "overhang" contracts in the *PECO Default Service Order* at 31. In the *PECO* case, however, PECO had proposed laddered contracts of various durations, which the Commission held it could redesign if necessary. *Id.* Duquesne's residential proposal does not include laddered contracts. Moreover, Duquesne's argument to distance itself from the *FE* decision lacks merit. Duquesne testified that PECO had proposed overhang contracts, while the *FE* Companies did not, and therefore it was appropriate to approve Duquesne's model. Overhang contracts should be rejected regardless of who proposes them.

<sup>54</sup> *RMI Default Service Order* at 19.

recommendations as to how to improve it.<sup>55</sup> On August 2, 2012, the Commission issued the *FirstEnergy Default Service Order*, directing the FE Companies to implement an ROI aggregation program in lieu of an ROI auction. Specifically, the Commission directed the Companies to implement an “ROI Aggregation Program consisting of a one-year product comprised of five percent off the PTC at the time of enrollment for four months, a fixed price for the remaining eight months and the inclusion of a fifty dollar bonus.”<sup>56</sup> The Commission stated its belief that this revised program would attract EGS support and participation and noted that there is no need for an auction under the revised opt-in program because the new opt-in product would be a standardized one consisting of the pre-determined 5% introductory discount for four months followed by a fixed price for eight months. On September 27, 2012, the Commission issued the binding poll in the *PECO* default service case, confirming the policy pronouncement in favor of an ROI aggregation program.<sup>57</sup> On October 12, 2012, the Commission entered the *PECO Default Service Order*. With these decisions, the Commission has decided that opt-in aggregation should be among the elements for the RMEs that it will follow.

With that background, RESA, in its surrebuttal testimony filed September 7, 2012, provided a direct assessment of the aggregation program as approved in the *FirstEnergy Default Service Order*, and provided details necessary to implement such a program. RESA explained at least four benefits that an ROI aggregation program would provide to customers and EGSs.<sup>58</sup> Assuming the details were as RESA suggested in its testimony, then “RESA supports [an opt-in aggregation] program and would like to see it adopted on a uniform basis in the service

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<sup>55</sup> RESA St. No. 2 at 6-15.

<sup>56</sup> *FirstEnergy Default Service Order* at 131.

<sup>57</sup> See Motion of Commissioner Witmer (Issues 14, 26, 27) entered on September 27, 2012 (which changed PECO’s opt-in competitive offer program to align it with the retail opt-in aggregation program set forth in the *FirstEnergy Default Service Order*).

<sup>58</sup> See RD 60-61.

territories of all the EDCs with default service plans pending before the Commission.”<sup>59</sup> For the most part, rather than implement the Commission’s desire for an aggregation program and design RME programs that work together, the other parties in this case either avoided taking positions on issues or continued to stick with their original positions and sought to avoid the recent *FE* and *PECO* decisions.

The ALJ recommended that the Commission adopt Duquesne’s auction program and not an aggregation program.<sup>60</sup> She cites four reasons for her recommendation, all of which are flawed and should be rejected. First, the ALJ determined that Duquesne has experienced a higher level of shopping relative to other Pennsylvania utilities, so much so that Duquesne now has a “mature market” (although she does not explain when a market becomes “mature”), and apparently this supports an auction program although she does not say why. Second, the ALJ found that RESA’s aggregation proposal will result in lower customer participation and is “contrary to the primary goal in default service planning at this time.” Third, the ALJ agreed with Duquesne that an aggregation program must be “fleshed out” more fully. Fourth, the ALJ agreed with OCA that the parties were not afforded the due process opportunity to respond to RESA’s aggregation proposal. RESA responds below to these findings.<sup>61</sup>

First, there is no rational reason to suggest that Duquesne should adopt an auction program simply because it has experienced higher residential shopping than the other Pennsylvania utilities. Even though 42.9% of Duquesne’s residential customers had shopped as of November 21, 2012,<sup>62</sup> there are still approximately 300,000 customers on default service.<sup>63</sup> Not only is that a significant number of customers, but it also is a larger number than some of the

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<sup>59</sup> RESA St. No. 2-SR at 19.

<sup>60</sup> RD 65-66.

<sup>61</sup> *Id.*

<sup>62</sup> See <http://extranet.papowerswitch.com/stats/PAPowerSwitch-Stats.pdf?/download/PAPowerSwitch-Stats.pdf>.

other utilities to which the ALJ compared Duquesne. There is no evidence that remotely suggests that a higher shopping percentage lends itself to an auction as opposed to aggregation. In fact, the evidence shows that there are a substantial number of customers eligible for the ROI program, and that an aggregation program will do more to entice both customers and EGSs to participate. RESA submits that the ALJ erred in making this finding.

Second, the record does not support the ALJ's finding that an aggregation program will experience lower participation than an auction. Although it is not clear from the RD, the ALJ may have based this finding on her recommendations relating to the appropriate discount rate, bonus payment, and guaranteed savings. These issues are discussed below. On the basis of simply comparing an aggregation structure to an auction structure, however, the evidence showed that a properly constructed aggregation program would encourage EGSs participation, promote competition, and dovetail nicely with the standard offer referral program.

*Third*, the ALJ cites to page 21 of Duquesne's Reply Brief as concerns that would need to be addressed before implementing an aggregation program but that it was not possible to address those concerns in this proceeding.<sup>64</sup> The ALJ is wrong, as RESA's testimony addressed these concerns.<sup>65</sup> For example, Duquesne questions whether EGSs would sign up to provide service to a specific number of customers and, if so, whether the program would be terminated when the sum of the customers that EGSs had agreed to serve equals the number that have elected to participate. In response, RESA stated in its Reply Brief that it would support an outcome similar to the Commission's decision in the *FirstEnergy Default Service Order*, in which the Commission directed the Companies and EGSs to update their proposals for customer notification, opt-in enrollment and customer assignment to coordinate with the revised ROI

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<sup>63</sup> RESA St. No. 2 at Exh. CK-1 (Duquesne Response to RESA Set 1, No. 1).

<sup>64</sup> RD 65.

aggregation program.<sup>66</sup> RESA also proposed that the program be fashioned in such a way that Duquesne make public the number of customers participating in the program before EGSs must decide whether they want to participate. Furthermore, EGSs should be allowed to place a cap on the number of customer they desire to serve in the program and, if they exceed that cap, those additional customers would be assigned pro rata to other participating EGSs.<sup>67</sup> RESA also presented evidence relating to which EGSs would be able to participate in an ROI aggregation program and how customers would be assigned.<sup>68</sup>

Finally with respect to this issue, Duquesne posed the question of whether EGSs should be required to post collateral to ensure that they can pay the \$50 bonus payments. That concern is easily addressed. Under Duquesne's auction proposal, an EGS need only "certify" that it can make the \$50 bonus payments.<sup>69</sup> There is no reason for a different solution simply because the ROI program is an aggregation program rather than an auction program. And, in any event, none of these are the types of issues that should cause the Commission to deviate from its policy in favor of aggregation.

*Fourth*, the ALJ incorrectly found that parties were deprived of due process by not being able to respond to RESA's surrebuttal testimony. Any party could have cross examined RESA's witness at the hearings, or sought to file rejoinder or have its own witness address the issue at the hearing, but no party elected to do so even after receiving RESA's surrebuttal testimony. Moreover, should the parties have ignored the *FE* and *PECO* decisions on virtually identical issues and continued to litigate the case as though the decisions never happened? In RESA's

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<sup>65</sup> RESA St. No. 2-SR at 18; RESA Reply Brief at 26-27.

<sup>66</sup> *FirstEnergy Default Service Order* at 109.

<sup>67</sup> RESA Reply Brief at 26.

<sup>68</sup> RESA St. No. 2-SR at 18.

<sup>69</sup> Duquesne St. No. 3, Exh. NSF-2 at 4-4, § 3.2(b). *See also* the Bidder Application Form, included within Exh. NSF-2.

view, that would not have been the proper course, but apparently other parties elected to do so, potentially at their peril and with the risks in plain view. Claims of due process lack merit.

For these reasons, RESA requests that the Commission adopt RESA's ROI aggregation proposal, with the details set forth below.

**2. Exception No. 7: The ALJ erred in recommending approval of Duquesne's proposal for the ROI program to include a 12-month fixed price guaranteed savings, with a bonus to be paid after three months. (RD 72, 75, 78-79, 82).**

Regarding the details of the ROI program, Duquesne proposed that its auction program include a one-year fixed price with guaranteed savings of at least 5% for the entire one-year period, and EGSs would pay a \$50 bonus to their customers after three billing cycles.<sup>70</sup> The ALJ adopted Duquesne's proposal. RESA had proposed a one-year duration, with guaranteed savings for the initial four-month period followed by an eight-month period in which the EGS would offer its customer a fixed rate communicated in advance per Commission regulations.<sup>71</sup> RESA's proposal is consistent with the Commission's recent determinations in the *FE* and *PECO* cases. The ALJ's recommendation to require Duquesne to establish a program that is not consistent with the *FE* and *PECO* programs should be rejected.

With respect to the one-year duration of the program and the duration of the discount, the ALJ rejected RESA's proposals for two reasons. First, the ALJ cited to Duquesne's relatively high residential shopping percentages and justification for deviating from the *FE* and *PECO* decisions.<sup>72</sup> However, as explained above, Duquesne is currently experiencing a "boom" shopping cycle which could reverse itself in the future. Also as explained above, a significant number of residential customers remain on default service. The percentage of shopping

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<sup>70</sup> RD 72 (term of offer); RD 75 (5% discount); RD 78-79 (\$50 bonus); RD 82 (guaranteed savings).

<sup>71</sup> RD 69; RESA St. No. 2-SR at 19.

<sup>72</sup> RD 72.

customers, while higher than other Pennsylvania EDCs, simply does not justify deviating from the *FE* and *PECO* decisions.

Second, the ALJ stated that customers have become accustomed to the 29-month fixed default service rate and will be less inclined to participate if their price will change after four months.<sup>73</sup> As a threshold issue, RESA's direct testimony did not oppose Duquesne's "at least 5%" discount proposal for an auction, although RESA would guarantee the discount for four months, not twelve. After the Commission twice noted its preference for aggregation, RESA stated in surrebuttal testimony that the administratively-determined discount and term for the aggregation program should be the same percentage as the discount established for the standard offer referral program.<sup>74</sup> This will ensure consistency between the two programs, mitigate customer confusion, and result in greater customer and EGS participation.<sup>75</sup>

The ALJ's recommendation fails to properly consider that an effective ROI program must balance customers' desires for savings with EGSs' willingness to participate in the ROI program. The ALJ's recommendation will not maximize EGS participation in the program and leans too heavily towards guaranteeing customer savings over a longer period of time. As RESA testified, the initial four-month price is in line with RESA's procurement proposal for residential customers, which includes a PTC that changes every quarter. This is important because an offer with a 12-month term that guarantees a 5% savings off of the PTC (as Duquesne has proposed in this case<sup>76</sup>), even if the PTC changes during the contract term, is unlikely to produce the best price for the customer because it exposes EGSs to an unreasonable level of risk.<sup>77</sup> EGSs are

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<sup>73</sup> RD 72, 82.

<sup>74</sup> RESA St. No. 2-SR at 22. RESA recommended that the discount and term for both programs be 5% for four months, followed by the eight-month period. *Id.*

<sup>75</sup> RESA St. No. 2-SR at 19-23.

<sup>76</sup> Duquesne St. No. 3 at 14.

<sup>77</sup> RESA St. No. 2-R at 8.

generally comfortable providing a fixed 12-month price, as such offers can be hedged at the time they are made.<sup>78</sup> EGSs generally are not comfortable offering a mandated guaranteed savings against a price that might change over time in an unforeseeable manner.<sup>79</sup>

Moreover, the ALJ's concern about the final eight months of the one-year duration is misplaced. The Commission in the *FE* and *PECO* decisions held that "participating EGSs shall provide the terms and conditions of the eight-month fixed-price offering for the Commission to review."<sup>80</sup> The Commission recently clarified the timing of when EGSs must file their terms and conditions:

... our intent regarding the EGS filing of the terms and conditions of its eight-month product offering is that such filing be made at least forty five days before the offers for the *eight-month fixed price product* are extended to customers. An EGS that elects to participate in the Retail Opt-In Program may submit its filing in advance of that deadline (including the submission of its filing before its initial customer offer letter is mailed), but will not be required to do so.<sup>81</sup>

In this recent clarification, the Commission rejected arguments that the 45-day requirement was too short and would cause confusion, frustration, and a bad impression of the retail competition.<sup>82</sup> There should be no concern over the non-standard prices used by the EGSs in the eight-month period.

Regarding the \$50 bonus, RESA proposed that the bonus be payable after four billing cycles (not three as the ALJ recommended), which is consistent with the Commission's decisions in the *FE* and *PECO* cases. The ALJ concluded that a bonus paid after three-months will better encourage customer participation, but the Commission in the *PECO* decision rejected this same

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<sup>78</sup> RESA St. No. 2-R at 8.

<sup>79</sup> RESA St. No. 2-R at 8-9.

<sup>80</sup> *FirstEnergy Default Service Order* at 18; *PECO Default Service Order* at 90-91.

<sup>81</sup> *Petition of PECO Energy Company for Approval of its Default Service Program*, Docket No. P-2012-2283641, Opinion and Order at 27 (entered Nov. 21, 2012)(emphasis in original).

<sup>82</sup> *Id.* at 26-27.

argument in favor of a four-month bonus.<sup>83</sup> The ALJ also concluded that a bonus paid after four months could confuse the customer.<sup>84</sup> The Commission has rejected this same argument in the *FE* proceeding.<sup>85</sup> With proper notice to the customer as recommended by RESA,<sup>86</sup> a customer should be able to distinguish between the bonus and the need to decide whether to remain with the EGS for an additional eight months.

For these reasons, the ALJ's recommendations relating to the details of the ROI program should be rejected, and the Commission should direct Duquesne to implement an ROI program consistent with the ROI aggregation programs it has directed in the *FE* and *PECO* cases and ensure that the ROI and standard offer referral programs operate in harmony. In the event, however, that the Commission accepts the ALJ's auction recommendation, RESA recommends that the auction program, for the reasons stated above, include a discount of at least 5% off the PTC for four months, followed by an eight month fixed price period, as RESA recommended.<sup>87</sup>

**3. Exception No. 8: The ALJ erred in rejecting RESA's proposal to require customers to opt-in to the ROI program before the auction occurs. (RD 97).**

If the auction adopted an auction program, RESA proposed to enroll customers into the ROI program before the auction occurs. The ALJ adopted Duquesne's proposal to conduct the auction before customer enrollment.<sup>88</sup> The ALJ concluded that Duquesne's proposal should realize a robust level of enrollment since customers will know the price and the actual savings should they enroll.<sup>89</sup>

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<sup>83</sup> *Petition of POC Energy Company for Approval of its Default Service Program II*, Docket No. P-2012-2283641, Motion of Commissioner Pamela A. Witmer at 3 (Sept. 27, 2012).

<sup>84</sup> RD 79.

<sup>85</sup> *FirstEnergy Default Service Order* at 118-121.

<sup>86</sup> RESA St. No. 2-SR at 19.

<sup>87</sup> *See, e.g.*, RESA St. No. 2-SR at 8.

<sup>88</sup> RD 97.

<sup>89</sup> RD 97.

In the *FirstEnergy Default Service Order*, the Commission determined that the issue of the timing of the auction vis-à-vis customer enrollment “is now moot” because the auction was eliminated in favor of an aggregation program.<sup>90</sup> As explained below, however, the timing of the enrollment vis-à-vis the auction or aggregation could impact EGSs’ desire to participate in the program, which could affect cost recovery.

The ALJ’s recommendation should be rejected for at least two reasons. First, under RESA’s proposal, customers would have sufficient information about the product before they opt in. For example, customers would know that, if they opted in, they would get a product that: (1) was at least 5% less than the then-current default service price; (2) included a \$50 bonus after the initial four months; and (3) could be canceled at any time without penalty.<sup>91</sup> With that knowledge and perhaps the disclosure of more terms relating to the product as the Commission may dictate, customers would be able to make a judgment about their interest in the program.

Second, placing the price-setting auction before customer enrollment would force EGSs to consider whether they are willing to incur material transaction costs and commit to actual pricing in the auction without having any idea how many customers are even available for acquisition through the auction.<sup>92</sup> Leaving unknown the number of customers available until after both the price has been set and EGSs have incurred costs to participate in the auction will have a negative impact on those EGS perceptions.<sup>93</sup> The same concept applies were the Commission to direct an aggregation program – EGSs must know the number of customers

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<sup>90</sup> *FirstEnergy Default Service Order* at 108-109.

<sup>91</sup> RESA St. No. 2 at 8.

<sup>92</sup> RESA St. No. 2 at 7.

<sup>93</sup> RESA St. No. 2 at 8.

opting in and the PTC before they are required to give notice of their participation in the program. For these reasons, the ALJ's recommendation on this issue should be rejected.<sup>94</sup>

**4. Exception No. 9: The ALJ erred in rejecting RESA's proposals regarding communications and mailings relating to the ROI program. (RD 102).**

With respect to mailings before the auction or opt-in for aggregation, RESA recommended an initial mailing to eligible customers before the opt-in period, which would come from the Commission and describe the program and alert eligible customers to the co-branded mailing they would be receiving shortly that will be the actual opportunity to enroll.<sup>95</sup> In support of this proposal, RESA presented unrefuted evidence of focus group results that showed customers' desire to hear from both the Commission and their EDC.<sup>96</sup> The ALJ found that there was no need for such a mailing and, if sent, EGSs should pay for it.<sup>97</sup> The ALJ's recommendation on this issue is not supported by the evidence and should be rejected.

The ALJ also erred in recommending approval of OCA's proposal for a third mailing to customers prior to the end of the program. The additional, third mailing would come 90 days before the end of the program, from Duquesne (in addition to the two from EGSs) and EGSs would pay for it.<sup>98</sup> RESA opposed this proposal and it should be rejected. RESA supports customer awareness, but this third mailing would be "expensive and onerous" and there is no reason to add notice requirements to this program that differ from those imposed on marketers

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<sup>94</sup> RESA acknowledges that its recommendation on this issue deviates from the Commission's *Intermediate Work Plan Final Order*. That said, RESA continues to believe that its proposal on this issue is reasonable and appropriate, and that good cause exists for the Commission to adopt RESA's proposal.

<sup>95</sup> RESA St. No. 2 at 4, 9.

<sup>96</sup> RESA St. No. 2 at 9.

<sup>97</sup> RD 102.

<sup>98</sup> RD 102.

generally and which could confuse customers.<sup>99</sup> Moreover, in the *FE* and *PECO* decisions, the Commission rejected demands for additional notices.<sup>100</sup>

**5. Exception No. 10: The ALJ erred in recommending approval of Duquesne's proposal to require EGSs to the sign the Opt-In Electric Generation Supplier Service Program Request for Proposals and Agreement. (RD 105).**

Duquesne proposed that EGSs desiring to participate in the ROI auction program be required to execute an Opt-In Electric Generation Supplier Service Program Request for Proposals and Agreement (“ROI Agreement”). RESA’s testimony indicated that the proposed ROI Agreement is unnecessary and unreasonable.<sup>101</sup> This was basically the conclusion reached in the *FE* decision on virtually identical issues.<sup>102</sup> RESA recommended in this case that the Commission follow the precedent established in the *FE* and *PECO* decisions and establish a collaborative for the parties to address issues relating to the terms and conditions surrounding EGS participation in the ROI program.<sup>103</sup> The Commission recently concluded that “the EGS applications and form agreements relating to the RME Programs are dependent upon overall program design decisions, including cost recovery for the RME Programs.”<sup>104</sup> Thus, the ALJ’s recommendation should be rejected and RESA’s proposal should be accepted.

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<sup>99</sup> RESA St. No. 2-R at 10.

<sup>100</sup> See *FirstEnergy Default Service Order* at 129; *PECO Default Service Order* at 100.

<sup>101</sup> RESA MB at 48-49; RESA Reply Brief at 34.

<sup>102</sup> *FirstEnergy Default Service Order* at 124.

<sup>103</sup> RESA Reply Brief at 34; *FirstEnergy Default Service Order* at 124; *PECO Default Service Order* at 106-107.

<sup>104</sup> *Petition of PECO Energy Company for Approval of its Default Service Program*, Docket No. P-2012-2283641, Opinion and Order at 28 (entered Nov. 21, 2012).

**C. RESA TAKES EXCEPTION TO THE ALJ'S RECOMMENDATIONS REGARDING THE STANDARD OFFER PROGRAM.**

- 1. Exception No. 11: The ALJ erred in recommending approval of Duquesne's proposal for the standard offer program to include a 12-month fixed price product with guaranteed savings for the entire 12-month period. (RD 111, 115, 120).**

The ALJ agreed with Duquesne's proposal that the standard offer program include a 7% discount off the PTC at the time of the offer and remain fixed for the entire 12-month period.<sup>105</sup> RESA has consistently taken the position that the standard offer program should be a true introductory program, with a discount provided for a 4-month period, followed either by the EGS moving to a month-to-month variable rate or a fixed price for the remaining eight months of the initial term. The 4-month/8-month structure is now the Commission's apparent policy preference per the *FE* and *PECO* decisions, and there is no viable reason to treat Duquesne differently from those EDCs. Thus, RESA objects to the ALJ's recommendation to adopt a 12-month fixed price for the standard offer program.

RESA's recommendation balances consumer value with a program in which EGSs will be willing to participate.<sup>106</sup> It is also a reasonable approach, especially considering that customers are not "locked in." A shorter period of true "guaranteed savings" following by a fixed price term would be more acceptable to both EGSs and customers than a 12-month product with a potentially shifting relationship to the then-current PTC.<sup>107</sup>

Furthermore, such a structure would also dovetail nicely with an ROI aggregation program of similar duration and terms.<sup>108</sup> Thus, the Commission should recognize the need to coordinate the offer to be made via an ROI aggregation program and the offer to be extended as

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<sup>105</sup> RD at 111.

<sup>106</sup> RESA St. No. 2-SR at 30.

<sup>107</sup> RESA St. No. 2-R at 20.

<sup>108</sup> RESA St. No. 2-SR at 21-23.

part of the standard offer program. The two offers should be as consistent as possible.<sup>109</sup>

Specifically, if the ROI aggregation offer is to be a 5% discount from the then-current PTC with a \$50 bonus after four months, then the Commission should consider making the standard offer program a 5% discount for four months (but without a bonus).

**2. Exception No. 12: The ALJ erred in recommending that Duquesne implement its standard offer program effective June 1, 2014 and not June 1, 2013 as proposed by RESA. (RD 128).**

Duquesne proposed, and the ALJ recommended, to implement the standard offer referral program by June 1, 2014,<sup>110</sup> and RESA proposed that the program be implemented by June 1, 2013. The Commission, in the *FE* and *PECO* decisions, directed those EDCs to implement their standard offer programs by June 1, 2013.<sup>111</sup> In this case, RESA and FES presented evidence that a June 1, 2013 start date is neither impossible nor insurmountable.<sup>112</sup> The evidence showed, among other things, that Duquesne should be able to accommodate a switch that occurs through the standard offer program just as it has accommodated switches for the past several years.

The ALJ had three reasons for recommending the later start date. First, she agreed with Duquesne that it is not feasible to implement the program in June 2013. That is simply incorrect, however, because as stated above there is no reason why Duquesne cannot continue to enroll customers under the standard offer referral program just as they do today. Second, the ALJ claims that customers will be confused if the ROI and standard offer programs are rolled out simultaneously. RESA not only disagreed with Duquesne (and OCA) on this issue, but pointed out that the two programs should be accompanied by substantial customer education efforts to mitigate confusion. RESA also pointed out that harmonizing the standard offer program with an

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<sup>109</sup> RESA St. No. 2-SR at 21-23.

<sup>110</sup> RD 128-129.

<sup>111</sup> *FirstEnergy Default Service Order* at 150; *PECO Default Service Order* at 121.

<sup>112</sup> RESA Main Brief at 52-56; FES Main Brief at 36.

ROI aggregation program would also mitigate the likelihood of confusion. Finally, the Commission in the *FirstEnergy Default Service Order* rejected a similar, if not identical, argument relating to customer confusion.<sup>113</sup>

Third, the ALJ recommended that the start date be delayed to allow the parties to more easily measure the costs and benefits of the ROI and standard offer programs. There is no basis for this recommendation. The costs of the two programs are separate, and there was no evidence of any costs that could get confused. On the benefits side, the number of customer that enroll in the ROI and standard offer programs will be clear, so the benefits can be easily calculated.<sup>114</sup> RESA's proposed June 2013 start date should be accepted.

**3. Exception No. 13: The ALJ erred in recommending rejection of the Choice Referral Team and in recommending that EGSs pay for the Team. (RD 139).**

The ALJ recommended denying Duquesne's proposal to create a Choice Referral Team ("CRT") to discuss the standard offer program with customers. She also recommended that EGSs should pay all the costs associated with any CRT that is created. RESA objects to the latter recommendation, as it would be counterproductive if the costs to EGSs for these programs were so high that it discouraged EGS participation. Moreover, this would be an issue relating to cost recovery, and RESA has set forth specific cost recovery proposals for the Commission's consideration. Finally, RESA has requested that the Commission direct the parties to participate in a collaborative to discuss cost recovery. Cost recovery issues are discussed below.

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<sup>113</sup> *FirstEnergy Default Service Order* at 150.

<sup>114</sup> RD 125.

4. **Exception No. 14: The ALJ erred in recommending approval of Duquesne’s proposal to require EGSs to sign the Standard Offer Customer Referral Program Rules and Supplier Agreement (“Standard Offer Agreement”). (RD 142).**

The ALJ recommended that EGSs be required to execute the Standard Offer Agreement to participate in the standard offer referral program.<sup>115</sup> For the same reasons expressed above with respect to the ROI Agreement, RESA recommends that the ALJ’s recommendation be rejected and that a collaborative be instituted to discuss the governing documents.<sup>116</sup>

**D. RESA TAKES EXCEPTION TO THE ALJ’S RECOMMENDATIONS REGARDING COST RECOVERY, CAP CUSTOMERS, AND SHOPPING CUSTOMERS.**

1. **Exception No. 15: The ALJ erred in recommending that EGSs be solely responsible for all costs associated with the RME programs. (RD 152).**

RESA proposed to recover the costs of the RMEs from default service customers or, alternatively, through a non-bypassable charge applied to all customers. The ALJ recommended that all costs be recovered from EGSs and none from customers, “consistent with prior Commission direction specifying that EGSs be responsible” for these costs.<sup>117</sup>

RESA agrees with the ALJ that the “issue of how to organize the structure of RME Program cost recovery is still under consideration with the Commission.”<sup>118</sup> However, RESA objects to the ALJ’s legal conclusion that Commission precedent dictates that all of the costs should be recovered from EGSs, and to her factual conclusion that RESA’s proposal is intended to punish non-shopping customers.

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<sup>115</sup> RD 142.

<sup>116</sup> See also *PECO Default Service Order* at 124.

<sup>117</sup> RD 152.

<sup>118</sup> RD 152.

The Commission recently issued an order in the *PECO* proceeding in which it made clear that EGSs as well as customers may bear the costs of the RME programs. As the parties discuss in a collaborative the appropriate cost recovery, the Commission ruled that:

we intend that any discussion among the interested Parties regarding the development of a plan to address RME Program cost recovery include consideration of the possibility that customers as well as EGSs may be responsible for some program costs.<sup>119</sup>

Thus, the ALJ's legal conclusion that EGSs must be solely responsible for RME costs is incorrect. RESA recommends that the Commission rule upon the parameters of Duquesne's RME programs and, at the same time, direct the parties to meet and discuss cost recovery. At that point, the parties will have a better understanding of the structure and costs of the programs, and will have been assisted by the Commission's recent guidance relating to cost recovery.

Absent a collaborative, RESA continues to believe that customers should pay for RME program costs. First, the RME programs are designed to promote greater participation in the market by customers who are remaining on default service and have been reluctant to explore competitive alternatives.<sup>120</sup> Therefore, the question is whether default service customers or EGSs' customers caused the costs of these programs, and whether default service customers (through their default service rates) or EGS customers (through their EGS contract prices) should therefore bear the costs.<sup>121</sup> Viewed in this proper light, recovery of these costs from default service customers is the optimal way to pay for these programs because RME programs target default service customers to incent them to participate in the competitive market.<sup>122</sup> EGSs did not cause these costs to incur; rather, it is the persistence of the dominant position of default

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<sup>119</sup> *Petition of PECO Energy Company for Approval of its Default Service Program*, Docket No. P-2012-2283641, Opinion and Order at 15 (entered November 21, 2012).

<sup>120</sup> RESA St. No. 2 at 23.

<sup>121</sup> RESA St. No. 2 at 24; RESA St. No. 2-SR at 15.

<sup>122</sup> RESA St. No. 2 at 24.

service in a system that has caused the need for these programs.<sup>123</sup> Any on-going costs of the programs may be reasonably assessed upon customers who remain on default service and who remain the target audience for these programs.<sup>124</sup>

Second, maximizing total customer value will require a robust response from both EGSs and customers.<sup>125</sup> Assuming Duquesne's proposal to enroll customers prior to the ROI program is accepted, Duquesne's cost recovery proposal will impose costs solely on the EGSs before the EGSs know the number of customers at stake.<sup>126</sup> For some EGSs, this cost recovery mechanism will be a barrier to participation and could discourage EGSs from participating in the program.<sup>127</sup>

RESA recommends that if the Commission is inclined to rule absent a collaborative, then it is just and reasonable for the costs of RME to be paid only by default service customers. One of the principal purposes of the auction/aggregation is to provide a way to encourage "sticky" default service customers to take their first venture into the competitive market.<sup>128</sup> In fact, in terms of traditional cost allocation, the costs of the RMEs RESA advocates are caused by the existence of default service, without which customers would all be on competitive supply, eliminating the need for measures to encourage them to move away from the utility.<sup>129</sup> Thus, it is appropriate that the cost be collected from default service customers, and RESA has proposed a 5 mils/kWh charge, which is discussed below in these Exceptions.

Alternatively, it is just and reasonable for the costs of these market enhancements to be borne by all customers through non-bypassable charges.<sup>130</sup> These market enhancements are intended to move Pennsylvania closer to what the Commission may consider to be an optimal

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<sup>123</sup> RESA St. No. 2 at 24; RESA St. No. 2-SR at 15.

<sup>124</sup> RESA St. No. 2 at 24.

<sup>125</sup> RESA St. No. 2 at 23.

<sup>126</sup> RESA St. No. 2 at 7-8.

<sup>127</sup> RESA St. No. 2 at 7-8.

<sup>128</sup> RESA St. No. 2 at 26.

<sup>129</sup> RESA St. No. 2 at 26.

structure.<sup>131</sup> This process can be viewed as a natural continuation of the transition to restructured markets that began in the late '90s – where all costs of initially opening retail markets were recovered from all electric customers.<sup>132</sup>

**2. Exception No. 16: The ALJ appears to have adopted Duquesne's initial position of precluding CAP customers from participating in the RME programs. If that is true, then RESA objects. (RD 158).**

Initially, Duquesne proposed to exclude CAP customers from the RME programs, and RESA recommended that they be included. Duquesne later acknowledged the *FE* and *PECO* decisions directing the EDCs to include CAP customers.<sup>133</sup> Duquesne stated that it would work with Staff and the parties to develop a plan to allow CAP benefits to be portable by January 1, 2014, consistent with Commissioner Witmer's motion in the *PECO* case (and subsequently the *PECO Default Service Order*).<sup>134</sup> Although unclear from the RD, despite the Commission's two prior orders and Duquesne's willingness to make CAP benefits portable, the ALJ seems to reject this position as "imprudent and inappropriate."<sup>135</sup> If that is the ALJ's recommendation, RESA objects because it is inconsistent with the *FE* and *PECO* decisions, and there is no evidence to suggest that Duquesne should be treated differently from the FE Companies or PECO. CAP customers are no different from other customers in their need to manage their electricity consumption, and the competitive market gives them options they would not otherwise have if they remained captive to default service.<sup>136</sup>

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<sup>130</sup> RESA St. No. 2 at 26-27.

<sup>131</sup> RESA St. No. 2 at 26.

<sup>132</sup> RESA St. No. 2 at 26.

<sup>133</sup> Duquesne Main Brief at 72.

<sup>134</sup> *PECO Default Service Order* at 131-132.

<sup>135</sup> RD 159.

<sup>136</sup> RESA St. No. 2 at 24-25.

**3. Exception No. 17: The ALJ erred in recommending that shopping customers be allowed to participate in the RME programs. (RD 163).**

The ALJ agreed with Duquesne's proposal to allow shopping customers to participate in the standard offer program, but that the target market would be non-shopping customers.<sup>137</sup>

RESA agreed with Duquesne's proposal that shopping customers should not be presented with the terms of the program unless they ask about the offer. But, RESA would go further: it is not appropriate to allow existing shopping customers to participate in the RME programs.

Customers in Duquesne's service territory have been exposed to many, many offers and yet numerous default service customers have not taken advantage of these offers to save money or obtain other benefits. This presents a unique risk that a large number of shopping customers could leave their existing contracts to participate in the RMEs. Excluding shopping customers would ensure that "space" is available for default service customers in the programs. To further the objectives of the Competition Act and the success of the RMEs, it is reasonable to exclude shopping customers from RME participation.

**E. RESA TAKES EXCEPTION TO THE ALJ'S RECOMMENDATIONS REGARDING RATE DESIGN.**

**1. Exception No. 18: The ALJ erred in rejecting RESA's proposed 5 mills/kWh charge. (RD 179).**

RESA recommended that a new charge of 5 mills/kWh be added to the PTC that would apply only to default service, with the proceeds to be used as follows:

- Payment of any verifiable costs related to providing default service that have otherwise not been collected by the EDC;
- Payment of costs related to implementing and maintaining competitive market enhancements, such as the opt-in auction/aggregation, referral programs; and,
- Any balance remaining being carried forward up to some amount, with the remainder returned to all distribution customers.<sup>138</sup>

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<sup>137</sup> RD 163.

<sup>138</sup> RESA St. No. 2 at 27-29.

The ALJ rejected RESA's recommendation, concluding that it would result in a "wealth transfer from default service customers to shopping customers" unsupported by cost-causation principles.<sup>139</sup> The ALJ's conclusion is incorrect.<sup>140</sup>

There is a rational relationship between the proposed charge and the anticipated costs. The costs described above are legitimate costs. The ALJ, concerned about cross-subsidization, overlooks the fact that the purpose of the charge is to counter the subsidization by shopping customers of non-shopping customers that exists today in Pennsylvania's bundled electricity market. As RESA explained, generation, transmission and distribution costs continue to be bundled; therefore, all customers, including shopping customers, are paying the costs of default service.<sup>141</sup> Thus, default service customers do not pay 100% of the costs associated with Duquesne's provision of default service. The proposed 5 mils/kWh charge operates as a proxy for those costs to eliminate the current subsidization of default service rates. If RESA's proposal is not adopted and there is no full unbundling, all customers will continue to pay for some part of the costs of default service in their distribution rates.<sup>142</sup>

RESA's proposal attempts to recognize this inequity by adding a modest charge onto the default service rate and crediting any remaining amount after the proceeds are used back to all distribution customers. Without the imposition of this mechanism or a full unbundling, all customers will continue to pay for some part of the costs of default service in their distribution rates. RESA's proposal is an appropriate cost allocation based on cost causation unlike the current structure today whereby shopping customers subsidize some portion of default service

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<sup>139</sup> RD 179-180.

<sup>140</sup> RESA acknowledges that the Commission, in the *PECO Default Service Order* at 76, rejected a similar charge. RESA continues to believe that the charge is appropriate and supported by the record in this case.

<sup>141</sup> RESA St. No. 2 at 25.

<sup>142</sup> RESA St. No. 2 at 25.

through the distribution rates they pay. Finally, if it is determined that one or more of these costs elements is not appropriate, the Commission could adjust the mils/kWh charge.

**2. Exception No. 19: The ALJ erred in recommending approval of Duquesne's proposal to reconcile default service supply costs annually and by rejecting RESA's proposal to reconcile quarterly. (RD 183).**

Duquesne proposed, and the ALJ recommended, to reconcile costs for all procurement groups on an annual basis.<sup>143</sup> RESA proposed quarterly reconciliations consistent with its procurement proposals that call for quarterly changes to the PTC for residential, small C&I and medium C&I customers.<sup>144</sup> The ALJ's recommendation was based on her belief that the reconciliation period should coincide with the mix and timing of the default service supply products, which she believes should be procured annually for residential and small commercial customers as explained above. She recommends, however, that if, in future proceedings, Duquesne's plan is amended to reflect more frequent turn-over in the mix and timing, "there may be a need to reconcile more frequently."<sup>145</sup> Thus, the ALJ's recommendation relating to reconciliations is the result of her recommendation relating to procurements. If the Commission is inclined to adopt RESA's procurement proposals, then the Commission should also adopt RESA's reconciliation proposal.

**3. Exception No. 20: The ALJ erred in rejecting RESA's proposal for quarterly changes to the PTC and to require Duquesne to give earlier notice to EGSs of the upcoming PTC. (RD 187).**

With respect to the PTC, RESA proposed (1) to change the PTC quarterly, consistent with its procurement proposal, and (2) to require Duquesne to calculate the new PTC and file it with the Commission 45 days in advance of its effective date.<sup>146</sup> The ALJ rejected these

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<sup>143</sup> Duquesne St. No. 4 at 27; Exh. WVP-4; RD 183.

<sup>144</sup> RESA St. No. 1 at 20.

<sup>145</sup> RD 183.

<sup>146</sup> RESA St. No. 1 at 17.

recommendations, finding that (1) the PTCs should follow the procurement structure, and (2) Duquesne files its estimated PTC within seven days of the bid, the final PTC 15 days before the effective date, and is not able to post the final PTC 45 days in advance.<sup>147</sup> The ALJ's recommendations relating to the PTC warrant reversal.

First, under the ALJ's reasoning, if the Commission adopts RESA's procurement structure which includes 3-month contracts, then the PTC should change quarterly as well. Second, publishing the PTC only 15 days before the start of the effective period means that both customers and EGSs have very little time to react to the new and final PTC price signal.<sup>148</sup> Customers rely upon the PTC as a benchmark for price comparisons.<sup>149</sup> Publishing the PTC with more advance notice will better allow EGSs to educate customers about upcoming changes in the PTC and will allow customers to make better informed shopping decisions.<sup>150</sup> Duquesne has not indicated that any technological or operational barriers exist to modifying the existing PTC filing schedule to allow it to provide a final PTC 45 days in advance.<sup>151</sup>

Finally, RESA pointed out that Duquesne's ability to calculate and publish an updated final PTC will play a role in the implementation of the ROI program because, as explained above, EGSs need to know the default service rate before committing to the program, and EGSs generally cannot be expected to commit to provide a discount off of an unknown price. This is especially true in Duquesne's service territory, where the PTC is likely to come down as a result of a Duquesne's current 29-month fixed product which, as explained above, has resulted in above-market default service rates for residential customers.

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<sup>147</sup> RD 187.

<sup>148</sup> RESA St. No. 1-SR at 17.

<sup>149</sup> RESA St. No. 1-SR at 17.

<sup>150</sup> RESA St. No. 1-SR at 17.

<sup>151</sup> RESA St. No. 1-SR at 16-17. Duquesne posts an estimated PTC seven days after the bid that is "very close" to the final PTC. However, whether the estimated PTC is "very close" to the final PTC is neither here nor there considering that it remains only an estimated PTC that can change.

4. **Exception No. 21: The ALJ erred in rejecting RESA’s proposal relating to the recovery of PJM transmission, Generation Activation, and Economic Load Response charges. (RD 196).**

RESA recommended that Duquesne be required to recover various transmission, Generation Activation, and Economic Load Response charges through a non-bypassable rider as opposed to collecting those costs from EGSs. The ALJ rejected this recommendation, holding that the Competition Act intended for generation and transmission charges to be borne by the EGS if the EGS supplies that service or product.<sup>152</sup> RESA acknowledges that the Commission rejected its position in the *FE* and *PECO* decisions.<sup>153</sup> Suffice it to say, however, that RESA continues to believe that its position is correct and asks that the Commission adopt it.

The “Transmission Service Charges” – NITS, RTEP, and Expansion costs – are essentially embedded, cost-of-service rates that are imposed based on an EDC’s total native load, regardless of the source of the generation used to service that load.<sup>154</sup> RESA explained in its Main Brief that Duquesne’s recovery of these costs exclusively for default service customers creates a competitive advantage for default service over EGS-provided service and distorts the ability of consumers to compare the default service rate with prices offered by EGSs.<sup>155</sup>

Generation Deactivation Charges are assessed by PJM on certain entities to provide funding to generation owners who elect to operate units beyond their deactivation date pending completion of transmission upgrades.<sup>156</sup> New ELR charges are assessed by PJM to comply with a FERC order requiring it to implement a cost allocation methodology that allocates costs to those that benefit from demand reduction.<sup>157</sup> Because Duquesne requires wholesale default

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<sup>152</sup> RD 196.

<sup>153</sup> RESA Reply Brief at 44.

<sup>154</sup> RESA St. No. 1 at 22. These transmission costs are currently not paid by wholesale default service suppliers in Duquesne’s service territory. *Id.*

<sup>155</sup> RESA Main Brief at 78-82.

<sup>156</sup> RESA St. No. 1 at 22-23.

<sup>157</sup> RESA St. No. 1 at 25-26.

service suppliers to factor these unpredictable and difficult-to-quantify costs into their bids to provide default service supply, the end result is that the ultimate default service rate paid by customers is driven higher to account for this risk.<sup>158</sup> Directing Duquesne to take responsibility for Transmission Charges, Generation Deactivation, and New ELRP Charges is consistent with the Competition Act, and the ALJ's recommendation on this issue should be rejected.

### III. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission grant these exceptions and issue a consistent decision which substantially rejects the ALJ's November 15, 2012 Recommended Decision.

Respectfully submitted,



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Date: December 5, 2012

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<sup>158</sup> Constellation St. No. 1 at 26-27.