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September 15, 2014

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, 2015 Through May 31, 2017; Docket No. P-2014-2418242**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission is the Main Brief of the Duquesne Industrial Intervenors ("DII") concerning the above-referenced proceeding.

As evidenced by the attached Certificate of Service, all parties to the proceeding are being served with copies of this document. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 
Teresa K. Schmittberger

Counsel to the Duquesne Industrial Intervenors

TKS/sar

Enclosure

c: Administrative Law Judge Katrina Dunderdale
Certificate of Service

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CERTIFICATE OF SERVICE

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

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Dated this 15th day of September, 2014, at Harrisburg, Pennsylvania

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of Duquesne Light Company for :
Approval of Default Service Plan for the : Docket No. P-2014-2418242
Period June 1, 2015 through May 31, 2017 :
:

**MAIN BRIEF OF THE
DUQUESNE INDUSTRIAL INTERVENORS**

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I. PROCEDURAL HISTORY

On April 24, 2014, Duquesne Light Company ("Duquesne" or "Company") filed with the Pennsylvania Public Utility Commission ("PUC" or "Commission") a Petition for approval of its upcoming default service plan ("DSP"). *Petition of Duquesne Light Company For Approval of Default Service Plan for the Period June 1, 2015 Through May 31, 2017*, Docket No. P-2014-2418242 (Apr. 24, 2014).

On May 27, 2014, the Duquesne Industrial Intervenors ("DII") filed a Petition to Intervene in this proceeding. The Office of Consumer Advocate ("OCA") filed an Answer to the Petition. In addition, the Office of Small Business Advocate ("OSBA") and the Bureau of Investigation and Enforcement ("I&E") each assumed an active role in this proceeding. A Prehearing Conference was held on June 2, 2014, before Administrative Law Judge ("ALJ") Katrina L. Dunderdale.

DII received the Company's Direct Testimony on April 24, 2014. Pursuant to the procedural schedule, on July 8, 2014, DII received Direct Testimony from the following parties: OCA; OSBA; I&E; the Retail Energy Supply Association ("RESA"); Exelon Generation Company, LLC ("ExGen"); Citizens for Pennsylvania's Future ("PennFuture"); and NextEra Energy Power Marketing, LLC ("NextEra"). On August 1, 2014, DII received Rebuttal Testimony from the following parties: the Company; OCA; OSBA; and RESA. On August 15, 2014, DII received Surrebuttal Testimony from the Company; OCA; OSBA; I&E; RESA; PennFuture; and NextEra. DII received the Company's Rejoinder Testimony on August 21, 2014.

An evidentiary hearing was held in this proceeding on August 25, 2014, 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. Certain issues in this proceeding have been partially settled. Accordingly, DII files this Main Brief to address the issues reserved for litigation.

II. SUMMARY OF ARGUMENT

The following Main Brief will address two topics of importance to DII: 1) the modification to the methodology for procurement of the Large Commercial and Industrial ("C&I") default service product proposed by RESA, and 2) the non-bypassable collection of transmission costs proposed by RESA and ExGen. DII opposes each of these proposals as discussed further herein.

First, RESA's proposal to modify the procurement of the Large C&I default service product must be rejected for conflicting with the Competition Act as RESA fails to provide consistent information related to the components within this product, in particular, the adder associated with this product. Without RESA showing that its proposed product satisfies the requirement for "least cost" over time default service, RESA's proposal for a third-party default service product must be rejected. *See* Section III.B.4., *infra*. Moreover, the current methodology is working well and is not inhibiting retail competition.

Second, RESA's and ExGen's proposal for a non-bypassable collection of transmission costs¹ by Duquesne should be rejected for the following reasons. Most importantly, identical proposals that the electric distribution company ("EDC") collect transmission costs from shopping customers instead of electric generation suppliers ("EGSs") have been set forth in numerous prior DSP proceedings and have been systematically rejected by the Commission.

¹ The transmission costs identified for non-bypassable collection include the following: Network Integration Transmission Service ("NITS") costs, Regional Transmission Expansion Plan ("RTEP") costs, Transmission Enhancement Charges ("TEC"), Generation Deactivation costs, and Unaccounted for Energy costs.

Petition of Duquesne Light Company For Approval of Default Service Plan For The Period of June 1, 2013 Through May 31, 2015, Opinion and Order, Docket No. P-2012-2301664 (Jan. 25, 2013), p. 222; *Petition of PECO Energy Company For Approval of its Default Service Program II*, Order and Opinion, Docket No. P-2012-2283641 (Sept. 27, 2012), p. 60; *Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. P-2012-2302074 (Jan. 24, 2013), p. 85; *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company For Approval of Their Default Service Programs*, Opinion and Order, Docket Nos. P-2011-2273650, *et al.* (Aug. 16, 2012), p. 83. *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of their Default Service Programs*, Opinion and Order, Docket Nos. P-2013-2391368, *et al.* (July 24, 2014), p. 31. RESA and ExGen fail to provide sufficient evidence to meet their burden of proof to overcome these Orders and the rationales for rejection of a non-bypassable collection of transmission costs therein. *See* Section III.E.2.c., *infra*.

In addition, a non-bypassable collection of transmission costs would raise significant competitive market and contractual issues, especially for Large C&I customers, who could not only lose competitive market product options, but also face double collection of these costs. *See* Section III.E.2.d. and III.E.2.e., *infra*. Moreover, neither of the parties have presented any information regarding the implementation of a non-bypassable rider, including the terms of rate allocation and cost collection, thereby raising significant concerns of subsidization within the Large C&I class and the potential for inconsistency with cost causation principles. *See* Section III.E.2.f., *infra*. For these reasons, any proposal to implement a non-bypassable rider collection of transmission costs should be rejected.

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. 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." 66 Pa. C.S. § 2807(e)(3.7).

B. DEFAULT SUPPLY PROCUREMENT ISSUES

1. Residential Procurement Issues

DII takes no position on this issue.

2. Small C&I Procurement Issues

DII takes no position on this issue.

3. Medium C&I Procurement Issues

DII takes no position on this issue.

4. Large C&I Procurement Issues

In this proceeding, RESA is recommending that Duquesne bid out its hourly-priced default product for Large C&I customers. Direct Testimony of Richard J. Hudson, Jr., on behalf of RESA ("RESA St. No. 1"), p. 20. DII is concerned regarding RESA's proposal, due to its failure to adequately identify the components that would be included in this third-party product. In addition, based on this lack of transparency, it is unclear what administrative adder RESA is proposing to include within this product. To the extent this third-party product would include an administrative adder in excess of the adder associated with Duquesne's current in-house product for Large C&I customers, DII opposes RESA's recommendation as inconsistent with the requirements of the Competition Act. 66 Pa. C.S. §§ 2801, *et seq.* Finally, the current procurement process is working adequately and is not impeding retail competition.

The Competition Act requires that default service be provided to customers at the "least cost" over time. 66 Pa. C.S. § 2807(e)(3.7). If an EDC is choosing between two default service designs, all other things being equal, the EDC should choose the option that will result in the least cost to customers. This "least cost" requirement is especially important for Pennsylvania businesses, *i.e.*, Large C&I customers, because their ability to compete on a broad scale is facilitated by lowered electric costs. *See* 66 Pa. C.S. § 2802(7).

As RESA's proposed third-party default service for Large C&I customers fails to identify what components would be included in this product, including the level of the adder associated with this product, RESA's proposal fails to meet this "least cost" requirement in the Competition Act. RESA provides conflicting accounts in testimony and discovery responses to DII related to the components that would be included in a third-party product. *See* Rejoinder Testimony of Neil S. Fisher on behalf of Duquesne ("Duquesne St. No. 3-RJ"), p. 3. Most importantly, RESA fails to provide any indication regarding the level of the adder associated with its proposed product. As a result of this lack of transparency and the potential for an unjust and unreasonable default service adder, RESA's proposed third-party procurement of the Large C&I default service product violates the Competition Act.

Moreover, although RESA contends that its proposed third-party procurement of the Large C&I default service product would advance the competitive market, RESA's proposal fails to address the key objective of electric restructuring to reduce costs for customers to position the Commonwealth and its businesses to be competitive through policies that reduced electric costs. *See* 66 Pa. C.S. § 2802(7). Increasing electric costs for Large C&I customers to an unclear, unjust, and unreasonable level would directly conflict with this section of the Act. As RESA

fails to specifically identify the components within its proposed product for Large C&I customers, RESA's proposal likewise violates this section of the Competition Act.

Finally, the existing methodology has been used for multiple DSPs and is known to customers. Retail shopping remains very strong in the Large C&I class, which demonstrates that the current method of in-house procurement does not impede retail competition. No valid reason exists to change the *status quo*. RESA provides insufficient support for modifying Duquesne's current hourly-priced default service product. Because RESA fails to provide consistent evidence regarding the components of this product or the adder associated with this product, RESA's proposal cannot qualify as "least cost" over time default service. As RESA's proposal violates the Competition Act, Duquesne should continue to procure the hourly product in-house, and RESA's proposal should be rejected.

C. ALTERNATIVE ENERGY CREDIT PROCUREMENT ISSUES

D. STANDARD OFFER PROGRAM

1. Continuation of the SOP

DII takes no position on this issue.

2. SOP Collaborative

DII takes no position on this issue.

3. Use of a Third-Party Vendor to Enroll SOP Customers

DII takes no position on this issue.

4. SOP Scripting

DII takes no position on this issue.

5. SOP Cost-Recovery

DII takes no position on this issue.

6. SOP Analysis and Customer Surveys

DII takes no position on this issue.

7. Miscellaneous SOP Issues

DII takes no position on this issue.

E. RATE DESIGN

1. Default Service Cost Unbundling Issues

DII takes no position on this issue.

2. 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).

Because a central purpose of the Competition Act was to allow customers the ability to negotiate for energy service, 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. *Joint Petition of Metropolitan Edison Company, Pennsylvania*

Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of their Default Service Programs, Opinion and Order (July 24, 2014), p. 42 ("July 24, 2014, Order"); *see also* Rebuttal Testimony of William V. Pfrommer on behalf of Duquesne ("Duquesne St. No. 4-R"), pp. 20-21. 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 demand, which would be preferable to customers more capable of managing transmission cost risk. July 24, 2014, Order, p. 42. 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. *Id.* Large C&I customers benefit from these various competitive arrangements because they may choose the optimal rate design and contracting conditions for their particular business needs.

As described above, pursuant to the Competition Act, EDCs such as Duquesne 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. While Duquesne is not proposing any modifications to this current methodology, which generally remains in line with the intention of the Competition Act, RESA, as part of this proceeding, is proposing to significantly alter the market developments that have occurred since the passage of the Competition Act. RESA inappropriately requests that Duquesne adopt a non-bypassable rider through which all customers, both shopping and non-shopping, would collect the following transmission costs: Network Integration Transmission Service ("NITS") costs, Regional Transmission Expansion Plan ("RTEP") costs, Transmission Enhancement Charges

("TEC"), Generation Deactivation costs, and Unaccounted for Energy costs (collectively, "Non-Market Based Transmission Costs" or "NMB Transmission Costs"). RESA St. No. 1, pp. 21-22. In direct testimony, ExGen similarly proposes such a non-bypassable collection. *See* Direct Testimony of Lael E. Campbell on behalf of ExGen ("ExGen St. No. 1"), p. 4.

As the proponents of this non-bypassable proposal, which Duquesne likewise rejects, RESA and ExGen have the burden of proof with respect to this proposal. As discussed further herein, RESA and ExGen fail to meet this burden of proof based on the evidence submitted in this proceeding. Importantly, RESA submitted identical evidence in the recent FirstEnergy DSP proceeding, which the Commission rejected as insufficient to support a non-bypassable transmission cost collection. July 24, 2014, Order, p. 31. In addition, this proposal has been repeatedly rejected by the Commission, and in particular, within Duquesne's last DSP proceeding. As recognized by the PUC on numerous prior occasions, this proposal presents a number of serious problems that warrant its rejection, including rate design and transitional issues that could result in current shopping customers being double charged for these costs. For all the foregoing reasons, the proposed non-bypassable collection of NMB Transmission costs must be denied.

b) RESA and ExGen fail to establish their burden of proof that a non-bypassable collection of NMB Transmission costs is just and reasonable.

As the parties presenting the proposed modification to the collection of NMB Transmission costs, RESA and ExGen bear the burden of proof in this proceeding. As set forth herein, RESA and ExGen fail to provide a preponderance of evidence that supports a non-bypassable collection of NMB Transmission costs by Duquesne as the EDC. Accordingly, because insufficient evidence has been provided, the RESA and ExGen proposals for Duquesne

to collect NMB Transmission costs from shopping and non-shopping customers must be firmly rejected.

Section 332(a) of the Public Utility Code requires 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). 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, at 5-7 (Nov. 13, 2001). 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. 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).

RESA and ExGen fail to meet this burden of proof for numerous reasons. As a threshold matter, a non-bypassable collection of NMB Transmission costs is directly contrary to recent Commission precedent, as well as the Commission's Order in Duquesne's last DSP proceeding. In fact, the only evidence submitted by RESA and ExGen to support its position has recently been rejected by the Commission in FirstEnergy's DSP proceeding. In addition, RESA's and ExGen's proposal to shift responsibility for NMB Transmission costs from the competitive retail market to a regulated service also represent a direct violation of the Competition Act and a step backward in the evolution of Pennsylvania's retail market. Equally troubling, these proposals present a concrete risk that customers could be subject to a rate design that is inconsistent with cost causation principles or face a double collection of NMB Transmission costs by both their

EGS and EDC. Because RESA and ExGen fail to provide sufficient evidence to overcome these logistical challenges and this adverse legal precedent, RESA and ExGen fail to meet their burden of proof, and the *status quo* collection of NMB Transmission costs must be retained.

c) RESA's and ExGen's proposed non-bypassable transmission cost collection, as well as supporting evidence, violates relevant law and Commission precedent and must be denied.

When major EDCs across Pennsylvania filed for new default service plans between 2011 and 2012, multiple EGSs made a similar proposal to require EDCs to begin collecting NMB Transmission costs via non-bypassable riders. In each of these cases, including Duquesne's last DSP proceeding, the Commission rejected this proposal. This rejection is supported by relevant law, as well as the Commission's regulations, which provide for generation and transmission costs to be charged by the same entity – the EGS for shopping customers. In addition, in the latest DSP proceeding filed by the FirstEnergy Companies, the Commission rejected the specific arguments set forth by RESA and ExGen in support of their position in the instant proceeding. In light of this precedent, RESA's and ExGen's position in this proceeding, that the recent Fixed Price Order and purported volatility of transmission costs support a non-bypassable collection of NMB Transmission costs, is clearly erroneous. Due to directly contrary law and Commission precedent, the RESA/ExGen proposal to collect NMB Transmission costs via a non-bypassable rider must be rejected.

Although proposals to collect NMB Transmission costs from all customers were set forth in various manners during each of the major EDC's last DSP proceedings, the Commission repeatedly opposed such a non-bypassable collection. Of particular relevance, in Duquesne's last DSP proceeding, the Commission held that the current collection of NMB Transmission costs by EGSs is "consistent with the Commonwealth's continued migration to a more competitive retail

market, and that RESA's proposal would be a step backward because it would result in the rebundling of transmission costs with distribution rates." *Petition of Duquesne Light Company For Approval of Default Service Plan For The Period of June 1, 2013 Through May 31, 2015*, Opinion and Order, Docket No. P-2012-2301664 (Jan. 25, 2013), p. 222.

Similarly, in PECO's last DSP proceeding, the Commission held that NMB Transmission costs should continue to be collected by EGSs rather than by PECO via a non-bypassable rider. *Petition of PECO Energy Company For Approval of its Default Service Program II*, Order and Opinion, Docket No. P-2012-2283641 (Sept. 27, 2012), p. 60. Specifically, the Commission noted that because EGSs are load serving entities ("LSEs") for shopping customers, in the same way EDCs are LSEs for default service customers, the EGSs must be responsible for collecting all NMB Transmission costs from customers. *Id.* In addition, the Commission found that RESA was unable to provide sufficient evidence that, "absent a NMB Rider, price distortions will occur and that supply costs will increase due to risk premium add-ons...." *Id.* Finally, in PPL's previous DSP proceeding, the Commission opposed a non-bypassable NMB Transmission cost collection, noting the forced renegotiation of shopping contracts and increased likelihood of double cost collection by EDCs and EGSs. *Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. P-2012-2302074 (Jan. 24, 2013), p. 85. Considering this repeated rejection of non-bypassable collections of NMB Transmission costs in EDCs' previous DSP proceedings on a variety of different grounds, Commission precedent clearly establishes that a non-bypassable collection of NMB Transmission costs is inappropriate.

Rejection of a non-bypassable NMB Transmission cost collection is similarly justified by public utility law and Commission regulations. To allow for EGS participation in Pennsylvania,

the Competition Act unbundled generation, transmission, and distribution services, which had previously been offered as a bundled product by EDCs. *Id.* § 2802(13); *see also id.* § 2804(3). Since this unbundling, EGSs have offered customers generation and transmission services, while EDCs have offered customers distribution services. The Commission's regulations reinforce this arrangement, explaining 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)*, Final Rulemaking Order, Docket No. L-00040169 (May 10, 2007). If a default service provider's PTC includes generation and transmission, then an EGS must also be providing its customers with both generation and transmission. The Commission elaborates that transmission, similar to generation, is a "default service cost element," which indicates that the Commission envisioned that shopping customers would be charged for transmission by an EGS. *See* 52 Pa. Code § 54.187(e). As a result of this language, the Commission's repeated rejection of a non-bypassable collection of NMB Transmission costs is reinforced by law and Commission regulations.

In spite of the contradictory law and Commission precedent, RESA and ExGen argue that a single Commission Order, the Fixed Price Order, issued on November 18, 2013, should cause the Commission to revisit its rejection of a non-bypassable NMB Transmission cost collection. RESA St. 1, p. 25; ExGen St. 1, p. 5; *See Guidelines for Use of Fixed Price Labels for Products with a Pass-Through Clause*, Final Order, Docket No. M-2013-2362961 (Nov. 14, 2013) ("Fixed Price Order"). As discussed more fully below, the Fixed Price Order actually does nothing more

than direct EGSs to provide additional clarity regarding the labeling of a contract as either "fixed" or "pass-through." At no time in the Fixed Price Order does the Commission suggest that distribution and transmission should be rebundled, dictate that EGSs should not be permitted to collect transmission costs, or require EDCs to collect transmission costs from all customers. As a result, any attempt by RESA and ExGen to refer to the Fixed Price Order to justify a non-bypassable NMB Transmission cost collection is wholly without merit.

In the Fixed Price Order, the Commission finds that customers, specifically residential and small commercial customers, may be deceived by a fixed price contract that includes variable price components or regulatory-out clauses. Fixed Price Order, pp. 21-23 ("It is simply unrealistic to expect the average residential consumer to understand electric markets to this level of granularity, with many of them still struggling with the basic distinctions of generation, transmission, and distribution."). As a result, the Commission holds that the price of any contract labeled as a fixed price contract must not change for the duration of the contract. *Id.* at 24. The only way to avoid a variable priced contract designation is to include a regulatory-out clause in the contract that would allow for new contract terms upon affirmative consent by the customer. *Id.* at 26. Importantly, the conclusions of this Order specifically did not apply to Large C&I customers. *Id.* at 30.

RESA's and ExGen's arguments regarding the Fixed Price Order's applicability to the collection of NMB Transmission costs are fundamentally flawed. The Fixed Price Order provides no insight regarding whether EGSs or EDCs should collect NMB Transmission costs. *See* Duquesne St. No. 4-R, p. 22. Instead, this Order merely provides transparency to residential and small commercial customers regarding whether a contract price is variable or fixed. *See* Fixed Price Order, p. 24. The EGS must clearly explain whether transmission and other cost

elements are fixed or whether changes can be passed along through a retail price change. The options to choose a fixed transmission product or a variable (*i.e.*, passthrough) product remains with the customers.

Moreover, if an EGS is concerned regarding the level of risk premiums it would need to include within a fixed price contract, that EGS is perfectly allowed under this Order to offer variable price contracts to avoid this risk. By contrast, other EGSs may prefer to continue to offer fixed price contracts that include risk premiums, particularly because, pursuant to this Order, they would be permitted to include regulatory-out provisions that would allow for renegotiation if absolutely necessary. *See* Duquesne St. No. 4-R, p. 22. At no point, however, does this Order authorize EGSs to modify the products they offer shopping customers.

RESA further contends that the Commission should reconsider its prior rejections of non-bypassable NMB Transmission cost collection based on the volatility of certain NMB Transmission costs. Surrebuttal Testimony of Richard J. Hudson, Jr., on behalf of RESA (RESA St. No. 1-SR"), pp. 23-24. Despite this broad assertion regarding NMB Transmission costs, however, RESA fails to provide sufficient evidence of the purported volatility of these costs. The only examples provided by RESA show that RTEP costs are sometimes significant and that NITS costs recently increased by 9% in the Duquesne service territory. *Id.* Neither of these examples proves that these costs are volatile nor provides any insight into the level of other NMB Transmission costs. Moreover, to the extent EGSs are concerned about the volatility of any cost, EGSs are permitted to pass through these costs rather than offer fixed prices for these costs, which would eliminate any concern related to volatility. RESA simply does not provide sufficient evidence of volatility to warrant the Commission's reversal of repeated holdings that reject a non-bypassable NMB Transmission cost collection.

Moreover, in the latest FirstEnergy DSP proceeding, the Commission held that neither the Fixed Price Order nor the alleged volatility of transmission costs provide sufficient evidence for EGSs to meet their burden of proof that a non-bypassable collection of NMB Transmission costs should be permitted. July 24, 2014, Order, p. 31. Although RESA suggests that this FirstEnergy Order should not be considered because it only addressed one NMB Transmission cost, *i.e.*, NITS, the same reasoning within this Order applies by analogy to all NMB Transmission costs. While DII acknowledges that FirstEnergy, as a result of settlement and other procedural circumstances, collects certain NMB Transmission costs via a non-bypassable rider, Commission precedent with respect to every other EDC in Pennsylvania unanimously rejects the non-bypassable collection of all NMB Transmission costs.² *See* Rejoinder Testimony of William V. Pfrommer on behalf of Duquesne ("Duquesne St. No. 4-RJ"), p. 5. Neither DII nor Duquesne agree to the movement of any costs into a non-bypassable rider, which places the burden of proof on RESA and ExGen. As a result, the conclusions within the recent FirstEnergy Order that the evidence submitted by RESA and ExGen is insufficient to support a non-bypassable NMB Transmission collection should apply with respect to all NMB Transmission costs.³

Finally, the Commission explicitly holds within the Fixed Price Order that the Order does not apply to Large C&I customers. Fixed Price Order, p. 30. By finding that the Fixed Price

² The Commission is well aware of the limited precedential value of settlements. *See, e.g.* Petition of Duquesne Light Company for Approval of Default Service Plan for Period June 1, 2015 through May 31, 2017, Stipulation, Docket No. P-2014-2418242 (Sept. 15, 2014), p. 6 ("The Parties agree that this Stipulation shall not constitute or be cited as precedent in any other proceeding, except to the extent required to implement this Stipulation.").

³ In addition, RESA submits that the Fixed Price Order and evidence of volatility support a non-bypassable collection of NMB Transmission costs to avoid EGSs including a large risk premium in their prices to customers. Nevertheless, in the last round of DSP proceedings, the Commission was unconvinced that EGSs would be forced to include prohibitively large risk premiums as part of their fixed prices as a result of NMB Transmission costs, particularly when EGSs are permitted to offer both pass-through and fixed price products to customers. *Petition of PECO Energy Company For Approval of its Default Service Program II*, Order and Opinion, Docket No. P-2012-2283641 (Sept. 27, 2012), 60.

Order should not apply to Large C&I customers, the Commission continues to sanction the pursuit by Large C&I customers for products in the competitive market that do not meet precise fixed or variable price definitions. As a result, to the extent the Commission gives any weight to the Fixed Price Order in the context of this proceeding, the Fixed Price Order provides no support whatsoever for removing competitive transmission products from Large C&I customers.⁴

Both Commission law and precedent explicitly provide that EGSs should continue to charge shopping customers for NMB Transmission costs. In recent DSP proceedings, the Commission has acknowledged the importance of EGSs continuing to collect NMB Transmission costs from shopping customers. Moreover, although relied upon by RESA and ExGen, the Commission's recent Fixed Price Order and purported volatility of NMB Transmission costs provide no support for a non-bypassable collection of NMB Transmission costs in the Duquesne service territory. As a result, the RESA/ExGen proposal, which conflicts with these important aspects of both Commission precedent and law, should be denied.

- d) RESA/ExGen's proposed NMB Transmission cost collection represents a step backwards in the evolution of the retail market by removing transmission service from the competitive retail market.**

RESA/ExGen's proposed NMB Transmission cost collection would limit the competitive options available to Duquesne's shopping customers in the currently unbundled retail electricity

⁴ Assuming *arguendo*, that the PUC determines that a non-bypassable collection should be approved for the residential and small commercial customer classes, DII submits that a carve-out should apply for Large C&I customers. Specifically, carving out Large C&I customers would alleviate several of the concerns raised herein, including apprehension related to interference with the competitive market, contractual issues, and double-collection of costs. The Commission acknowledges these differences between Large C&I customers and smaller customer classes in multiple Orders. *See, e.g.*, July 24, 2014, Order, p. 42; *see* Fixed Price Order, pp. 28, 30. Based on Large C&I customers' unique participation in the competitive market, each of these issues would be particularly devastating for the Large C&I class if a non-bypassable collection of transmission costs is approved. As a result, if a non-bypassable collection of NMB Transmission costs is in any way approved, DII submits that the PUC should allow for a carve-out of Large C&I customers.

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. The proposed removal of transmission from the competitive retail market 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. 19. 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 id.*; July 24, 2014, Order, p. 42. 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.*; *see also* Duquesne St. No. 4-R, pp. 20-21. 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, RESA/ExGen's proposal to re-bundle transmission and

distribution service diminishes customer choice. *See* Duquesne St. No. 4-R, p. 19. 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 RESA portrays as a competitive impediment. *See* RESA St. No. 1, p. 25. What RESA fails to acknowledge is that some customers willingly enter into fixed price contracts, which include premiums to stabilize their NMB Transmission costs, that would not be available under RESA's non-bypassable NMB Transmission cost collection proposal. *See* Duquesne St. No. 4-R, pp. 20-21. 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, RESA/ExGen's proposal for Duquesne to collect these costs would eliminate options for customers to choose from the various cost collection methods for NMB Transmission costs currently applied by EGSs, contrary to the principles championed by the Competition Act. *See* Duquesne St. No. 4-R, pp. 20-21; July 24, 2014, Order, p. 42.

In summary, the plain language of the Competition Act calls for unbundling of generation, transmission, and distribution services. RESA/ExGen's NMB Transmission proposal would, if approved, remove the transmission product from the competitive retail market, circumscribing customers' shopping options. For this reason, RESA/ExGen's NMB Transmission proposal is contrary to the intent of the Competition Act and should be denied.

- e) **Contrary to the requirements of the Competition Act, RESA/ExGen's NMB Transmission proposal fails to address important transitional issues fairly, risking customers being overcharged for transmission.**

RESA/ExGen's NMB Transmission proposal also raises fundamental transitional issues for numerous customers that have competitive supply contracts, particularly fixed price contracts. If RESA/ExGen's proposal were adopted, all such customers would be at risk of being

charged twice for transmission services based on the potential that NMB Transmission costs would be applied by both Duquesne and their EGSs. The Commission has previously acknowledged that concerns related to such transitional issues have merit and justify rejection of this proposal.

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). Shopping customers, particularly those subject to fixed price arrangements, would face added competitive market confusion and the potential for doubled transmission costs if RESA/ExGen's proposal is adopted. *See* Duquesne St. No. 4-R, p. 20. Because shopping customers could experience market confusion, as well as be charged twice for transmission service, under RESA/ExGen's proposal, the transition to a non-bypassable transmission cost collection would prevent customers from the fair transition required by the Competition Act.

The Commission has repeatedly held that a non-bypassable NMB Transmission cost collection presents a risk for double collection that justifies rejection of the RESA/ExGen proposal. Upon adoption of a non-bypassable transmission cost collection, 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 Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company For Approval of Their Default Service Programs*, Opinion and Order, Docket Nos. P-2011-2273650, *et al.* (Aug. 16, 2012), p. 81 ("Aug. 16, 2012, Order"). 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." *See id.* In addition, after FirstEnergy began collecting limited NMB Transmission costs from its customers via a non-bypassable rider, as anticipated, certain customers experienced such a double collection of these costs. July 24, 2014, Order, p. 40. As a result of these apparent double collections, the Commission once again found merit in the potential for double collection of these costs. *Id.* at 42. 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.

Any implementation of RESA/ExGen's proposed non-bypassable collection of NMB Transmission costs would risk overcharging customers for NMB Transmission costs and creating competitive market confusion. Such a proposal conflicts with both Commission precedent, as well as the Competition Act. Considering the potential for double charging and increasing risk for current shopping customers, RESA/ExGen's NMB Transmission proposal should be denied.

f) RESA/ExGen fail to provide adequate information regarding the rate allocation and collection of these costs.

Although both RESA and ExGen have proposed a non-bypassable rider for the collection of certain NMB Transmission costs, neither party has presented any detail regarding the actual implementation of such a non-bypassable rider. Specifically, neither party has presented any details regarding the means by which these costs would be allocated among the rate classes; the methodology that would be used to collect these costs from customers; or a rider example providing the applicable language governing the implementation of such a mechanism. Because of the lack of specificity regarding this proposal, it must be denied by the Commission.

For example, because RESA and ExGen both fail to specify a cost collection methodology, current shopping customers cannot determine whether the proposed non-

bypassable rider would continue utilizing the cost collection methodology included in Duquesne's Transmission Service Charge ("TSC") rider or adopt an alternative methodology. *See* Duquesne St. No. 4-R, p. 20. Large C&I shopping customers currently are in a position to work with their EGSs to design an appropriate structure by which they may be charged for transmission service, *i.e.*, pass-through or fixed price structures. Under one option, a Large C&I customer may choose to be charged for transmission on a pass-through basis based on the customer's individual transmission obligation. *See id.*; July 24, 2014, Order, p. 42. If, under the RESA/ExGen proposal, the non-bypassable rider were to allocate NMB Transmission costs among Large C&I customers based on a customer's previous month's peak demand, a Large C&I customer would no longer have the choice to be allocated its own individual transmission obligation, but rather, would be allocated a portion of the Large C&I class transmission obligation in a manner that is not consistent with how cost responsibility for the transmission system is established. Similarly, a cost collection methodology that would utilize a customer's monthly kWh usage would result in cross-subsidization within the Large C&I class. Accordingly, without clarity regarding the cost collection methodology for NMB Transmission costs, it is impossible to assess whether this proposal is just, reasonable, and consistent with cost causation principles.⁵

Because of the lack of transparency regarding these proposals, combined with the significant problems that could arise related to an unknown cost causation methodology, RESA's and ExGen's proposal for a non-bypassable NMB Transmission cost collection must be rejected.

⁵ The Commission has previously acknowledged that the cost collection methodology for NMB Transmission costs must be consistent with cost causation principles, which is unclear within RESA/ExGen's proposal. Aug. 16, 2012, Order, pp. 77-78.

g) Conclusion

RESA/ExGen'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 parties bearing the burden of proof, RESA and ExGen failed to produce evidence supporting their proposal, particularly in light of the recent contradictory Commission precedent that addressed identical non-bypassable collections. RESA/ExGen's proposal is unjust, unreasonable and in violation of the Competition Act, the Commission's default service regulations, and significant Commission precedent. In addition, the proposed NMB Transmission collection would eliminate competitive transmission products to the detriment of the developing competitive retail market. Further, the proposal imposes risks for customers with competitive supply agreements, particularly fixed price arrangements, who may be charged twice for NMB Transmission costs by both their EDC and EGS. Moreover, neither RESA nor ExGen recommends a methodology for allocation or collection of NMB Transmission costs via a rider, which renders their proposal unjust, unreasonable, and impracticable. For all the foregoing reasons, RESA/ExGen's proposal to implement a non-bypassable collection of NMB Transmission costs should be rejected.

F. TIME-OF-USE PROGRAM

DII takes no position on this issue.

G. SUPPLY MASTER AGREEMENT ISSUES

DII takes no position on this issue.

H. REQUEST FOR PROPOSAL AND INDEPENDENT EVALUATOR PROCESS ISSUES

DII takes no position on this issue.

I. GENERAL MISCELLANEOUS ISSUES

DII takes no position on this issue.

IV. CONCLUSION

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

- (1) Deny the third-party procurement of Large C&I default service;
- (2) Deny the collection of non-market based transmission costs through a non-bypassable rider; and
- (3) Grant any additional relief deemed appropriate and consistent with the above recommendations.

Respectfully submitted,

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APPENDIX A

PROPOSED FINDINGS OF FACT

1. RESA and ExGen fail to show that the volatility of NMB Transmission costs warrants a non-bypassable collection, particularly when EGSs may offer pass-through products with respect to any costs they deem too volatile.
2. Large C&I customers derive benefits from the ability to negotiate for transmission service on terms and conditions that serve their business objectives.
3. In the instant proceeding, RESA and ExGen propose to remove transmission service from the competitive market by requiring Duquesne to collect NMB Transmissions costs from shopping customers through a non-bypassable rider.
4. Pass-through transmission provisions within shopping contracts permit shopping customers to be charged for their individual transmission obligation.
5. Fixed-price shopping contracts permit shopping customers to allocate the risk associated with transmission costs to their EGSs for budgeting purposes.
6. Because transmission costs are embedded within the single price of fixed price shopping contracts, there exists a risk that both EGSs and EDCs would collect NMB Transmission costs from certain shopping customers if a non-bypassable transmission cost collection is approved.
7. RESA's and ExGen's proposal for a non-bypassable collection of NMB Transmission costs fails to include a methodology for cost allocation or rate design within the proposed non-bypassable rider.
8. Large C&I customers, in particular, would experience significant hardship from RESA's and ExGen's proposal as a result of their unique participation in the competitive market of tailoring products to meet their business needs.

PROPOSED CONCLUSIONS OF LAW

1. RESA fails to show that its proposed third-party procurement of Large C&I default service would qualify as "least cost" over time.
2. Commission precedent rejecting non-bypassable NMB Transmission cost collections justify rejection of an identical proposal in the instant proceeding.
3. The Commission's Fixed Price Order has no impact and takes no position on whether a non-bypassable NMB Transmission cost collection is appropriate.
4. The collection of NMB Transmission costs through non-bypassable riders would eliminate competitive options for the pricing of transmission service in contravention of the Competition Act.
5. Because the non-bypassable collection of NMB Transmission costs could result in shopping customers being double charged for transmission, this proposed non-bypassable collection is inconsistent with the Competition Act.
6. Because RESA and ExGen fail to recommend a cost allocation or rate design for their proposed non-bypassable rider, this proposal is unjust and unreasonable.
7. RESA and ExGen have not met their burden of proof with respect to substantiating the appropriateness of their proposed collection of NMB Transmission costs through a non-bypassable rider.