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November 14, 2014

BY E-FILING

Rosemary Ciavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P. O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Ms. Ciavetta:

Enclosed for filing in the above matter please find the Exceptions of the Retail Energy Supply Association. Copies have been provided pursuant the attached Certificate of Service.

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

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 the Period June 1, 2015 through May 31, 2017	* * *	P-2014-2418242

CERTIFICATE OF SERVICE

I certify that true and correct copies of the *Exceptions of the Retail Energy Supply Association* 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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Dated: November 14, 2014

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

EXCEPTIONS OF 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"),[1] and is consistent with the Commission's policy directives designed to produce a robust competitive retail electric market in the Duquesne service territory.

On October 28, 2014, Administrative Law Judge ("ALJ") Katrina L. Dunderdale issued a Recommended Decision ("RD") which recommended: (1) approval of a partial settlement to which the Retail Energy Supply Association ("RESA")[2] is a party; and (2) adoption of virtually 100% of the remaining elements of Duquesne's default service plan ("DSP") as filed. RESA agrees with the recommendation to approve the settlement, which is in public interest and which RESA signed and continues to support. RESA disagrees with and objects to the ALJ's recommendations in the RD relating to the appropriate default service procurement portfolio for each of Duquesne's three non-residential classes: small commercial and industrial ("Small C&I"), medium commercial and industrial ("Medium C&I"), and large commercial and industrial ("Large C&I"). It is RESA's view that the ALJ's recommendations on these issues do not satisfy the requirements in the Competition Act nor are they consistent with Commission policy directives, and adopting the RD would negatively impact Duquesne's approximate

[1] 66 Pa. C.S. § 2801 *et. seq*.

[2] RESA's members include: AEP Energy, Inc.; Champion Energy Services, LLC; Consolidated Edison Solutions, Inc.; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services; Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL EnergyPlus, LLC; Stream Energy; TransCanada Power Marketing Ltd. and TriEagle Energy, L.P. The comments expressed in this filing represent only those of RESA as an organization and not necessarily the views of each particular RESA member.

584,000 electricity customers because doing so would be a significant set-back for competition for a number a reasons.

The ALJ's recommendations are inconsistent with the Competition Act and recent Commission directives, including the *End State Order*,[3] to create and foster a sustainable, long-term competitive market. 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. For each non-residential customer class, RESA has presented proposals consistent with the Competition Act and the Commission's policy directives and that would build upon the current portfolios by moving them towards default service rates that are more market reflective than those in existence today. For the Small C&I class, RESA proposes to move closer to the Commissions' desired end state. For the Medium and Large C&I classes, RESA proposes to reach the desired end state in adherence to the *End State Order*.

Moreover, the ALJ ignored the charge from the Competition Act to create competitive markets by, in many of her recommendations, essentially concluding that there are already a sufficient number of customers shopping. Not only is this conclusion inconsistent with the Competition Act and the End State Order, but a truly competitive market is not evident solely by comparing shopping statistics. Instead, a truly competitive market includes innovative products and services from which customers can choose from which customers can choose, including price and non-price competition. That is the end state for which RESA advocates and which served as the premise for RESA's recommendations to bring the benefits of competition to customers. Rather than adhere to existing law and Commission directives, the ALJ, without

[3] *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. 1-2011-2237952, Final Order entered February 15, 2013 ("*End State Order*").

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.

In addition, RESA disagrees with and objects to the ALJ's recommendation to allow Duquesne to continue to recover certain PJM Interconnection ("PJM") charges from default service customers. RESA had proposed that Duquesne assume the cost responsibility for these PJM Charges for all load (default service and shopping) and recover the costs from all customers through a non-bypassable charge:

- Transmission Enhancement and Expansion Cost Recovery Charges ("TEC/ECRC)" sometimes also referred to a Regional Transmission Expansion Plan charges or "RTEP");
- Generation Deactivation Charges (also referred to as Reliability Must Run Unit charges or "RMR");
- Network Integration Transmission Services ("NITS");
- Unaccounted For Energy ("UFE"); and,
- Historical out of market tie line and retail customer meter adjustments.[4]

Addressing the cost assignment and cost recovery issues related to these non-market based charges ("NMB Charges") is an important component of developing a functional competitive retail market because the result impacts how much risk premium a customer will be required to bear as well as the customer's ability to accurately compare competitive prices to default service rates. Requiring Duquesne to assume the cost responsibility for these charges for all load and recover the costs from all customers through a non-bypassable charge is the most reasonable way to ensure that: (1) customers pay only the actual costs of these charges rather than the cost of additional risk premiums; (2) a competitive advantage for default service is not created; and, (3) that EGSs have equal and nondiscriminatory access to the EDC's own use of its system.

[4] RESA Exhibit RJH-9 sets forth the specific cost components included in these charges.

II. EXCEPTIONS

A. EXCEPTION NO. 1: For the Small C&I default service supply portfolio, the ALJ erred in rejecting RESA's proposal to incorporate 3-month and 6-month default service supply contracts into Duquesne's proposed portfolio of solely 12-month supply contracts. (RD at 22-23; COL # 12; Ordering ¶ 3).

For Small C&I customers, Duquesne proposed to procure default service supply using 100% 12-month laddered contracts. RESA recommended that the Commission not merely continue the status quo of laddered 12-month contracts but instead approve a portfolio that consists of a blend of 12-month, 6-month, and 3-month procurement contracts. Such a blended portfolio represents progress towards market-reflective rates as endorsed by the Commission.

The ALJ gave three reasons for recommending Duquesne's proposal. First, she desired to continue the same procurement plan currently in effect for Small C&I customers.[5] Second, she relied upon Duquesne's and OSBA's arguments that Duquesne's plan offers more rate stability than RESA's plan.[6] Third, she claimed that 3-month and 6-month supply contracts are not necessary to support sustainable retail competition.[7] These reasons are flawed for the following reasons.

1. Duquesne's proposed Small C&I portfolio represents no progress towards default service rates that are market responsive.

There was considerable hand-wringing by Duquesne over RESA's position that Duquesne's proposal represented a "step backwards" in providing market reflective rates for Small C&I customers. In testimony, RESA pointed out that the Commission in DSP VI approved a Small C&I portfolio that included a 6-month contract at the end of the plan period.

[5] RD at 22.
[6] RD at 22-23.
[7] RD at 23.

Thus, the portfolio as approved in DSP VI included a 6-month contract. Duquesne's proposal for DSP VII, however, would be comprised solely of 12-month contracts, which RESA views as a step backwards in terms of promoting market responsiveness. Duquesne countered that in September 2014, the Commission granted Duquesne's request to replace the 6-month contract in DSP VI with a 12-month contract such that it would extend into the DSP VII plan period. Because of this 12-month replacement contract, Duquesne argues that its current proposal is merely an extension of the status quo, because it is keeping with 12-month contracts. The ALJ agreed with Duquesne, but all of this is really a distinction without a difference.

The problem with Duquesne's argument, and the ALJ's recommendation, is that no matter how you couch it – whether it is a portfolio that replaces a 6-month contract with a 12-month contract, or whether it is simply a continuation of the current procurement model – the proposed Small C&I portfolio does not represent progress towards a portfolio that advances the Commission's desire for default service rates that more closely resemble underlying market prices.

The ALJ's failure to recommend a portfolio that is more market reflective than the portfolio currently in existence runs counter to the Commission's explicit directive in the *End State Order,* which was entered February 15, 2013 (one month after the Commission approved Duquesne's DSP VI plan). The *End State Order* set forth the Commission's "proposed model for default service."[8] Specifically, the Commission stated that it recommended "fundamentally changing the default service product so that it more closely resembles market conditions" and made clear that it was committed to effectuating these changes on June 1, 2015.[9] With respect to Small C&I procurements, the Commission indicated a preference for 3-month supply contracts

[8] *End State Order* at 3.
[9] *Id.* at 15-16.

but was concerned that statutory changes "may" be required to employ quarterly contracts. ***The Commission was also clear, however, that "[s]hould legislative efforts fall short, we will consider an alternative shorter-term product that is more reflective of market conditions than the currently-offered default service products."***[10] Thus, Duquesne's proposal for Small C&I procurements to include solely 12-month contracts, which merely preserve the status quo, is inconsistent with the Commission's desires expressed unambiguously in the *End State Order*. RESA's proposal is more reflective of market conditions than the current DSP VI plan and reasonably transitions Small C&I customers towards the Commission's desired end state but does not rely upon the exclusive use of 3-month procurement contracts.[11] The ALJ's recommendation makes no effort to adhere to the Commission's directives set forth in the *End State Order*.

2. The ALJ over-emphasizes default service "rate instability" in recommending Duquesne's Small C&I portfolio.

The ALJ incorrectly determined that RESA's proposal to include 3-month and 6-month contracts would inject "unnecessary rate instability" into the default service rate. More specifically, the ALJ objected to RESA's proposal because it would include two "hard stops" where 100% of the supply would be procured at one time, and also because Duquesne presented testimony that purported to show that RESA's plan would "double rate instability as compared to the Company's plan."[12] These are not reasons to reject RESA's recommended portfolio.

First and foremost, the ALJ, in finding that RESA's proposal would inject too much price volatility into rates, misses the point in that RESA's proposal would allow for default service

[10] *Id.* at 51; RESA St. No. 1-SR at 11.

[11] In fact, under RESA's proposal, the 3-month supply contracts would not begin until the last six months of DSP VI. *See* RESA Exhibit RJH-6, which RESA's proposed procurement schedule for Small C&I default service supply.

[12] RD at 22.

rates that are more market-reflective than those in effect today, consistent with the express directives of the Commission. During the last six months of the plan period, RESA's proposal would permit 50% of the underlying commodity price to move up or down on a quarterly basis, consistent with the market price.[13] In contrast, Duquesne's proposed reliance on laddered 12-month contracts, which results in a blended price, would not permit the underlying commodity price to change quarterly consistent with the market price. Moreover, while RESA does not necessarily dispute that some customers may value price stability – even if that stable price is higher than the market price – the role of default service is not to provide that one particular product type.

The Commission has already rejected the notion that 3-month procurement contracts would create too much price instability.[14] Also, the Commission has recognized the negative impacts on the retail market when default service prices become divorced from current market prices, and the potential for such a situation to result in a "boom" or "bust" business cycle.[15] Despite these unambiguous prior Commission rulings and also testimony from RESA that market reflective default service rates foster retail competition, the ALJ has recommended a "status quo" proposal. Even worse, the ALJ's finding that RESA's proposal would have a chilling effect on shopping and that "the incentive to shop would be *lessened* due to price instability"[16] is simply unsupported by the record evidence and is wholly inconsistent with Pennsylvania law and Commission directives favoring the establishment of competitive retail markets. The Commission has recommended a progression to a more market responsive default service product – namely, transition to 100% quarterly contracts – and RESA is the only party in

[13] RESA St. No. 1-R at 7-8.
[14] *End State Order* at 23-24.
[15] *Id.* at 14-15.
[16] RD at 23 (emphasis added).

this proceeding that has proposed a Small C&I portfolio that will transition to the Commission's recommended portfolio.

The inclusion of "hard stops" is not a reason to reject RESA's proposal. In fact, "hard stops" would not be a new circumstance, as Duquesne bid out 100% of its supply twice in the recent past – in DSP VI, 100% of the Residential default service procurement contracts began in June 2013 and expired in May 2014, when new contracts began.[17] While no one can predict where energy prices will be at any specific moment in time, it is incorrect to imply that a "hard stop" will automatically result in price shock.

Moreover, one of RESA's two hard stops in its proposed portfolio would come at the conclusion of the DSP VII period. In Duquesne's DSP VI proceeding, the Commission rejected Duquesne's plan to procure contracts that extended beyond the end of the plan period and allowed for a hard stop at the conclusion of the plan period. The Commission held that "Duquesne's DSP can be revisited in the event that there are no significant changes to Duquesne's default service responsibilities as the end of the DSP period approaches."[18] The Commission allowed Duquesne the option to request approval of "overhang" contracts closer to the end of the plan period, which Duquesne did. RESA recommends that the Commission take a similar course in this proceeding by not approving overhang contracts at this time. The process of allowing Duquesne to come in and request a modification of its final procurement contract of the DSP period worked well with respect to DSP VI and should be continued to DSP VII.

The Commission should not rely upon Duquesne's rate analysis, which purports to demonstrate that RESA's procurement plan would double rate instability as compared to

[17] RESA St. No. 1-R at 5.

[18] *See Petition of Duquesne Light Company for Approval of a Default Service Program and Procurement Plan for the Period June I, 2013 through May 31, 2015,* Case No. P-2012-2301664, Opinion and Order at 80 (Order entered Jan. 25, 2013).

Duquesne's plan, as a reason to reject RESA's proposal. Contrary to Duquesne's math, RESA presented the recent 12-month procurement history from Maryland's procurements of 90-day contracts for Type II customers. The Type II 90-day procurements have not resulted in the type of extreme price volatility that Duquesne and OSBA would have this Commission believe, and the recent history included procurements during the Polar Vortex.[19]

For example, the recent Type II price changes for Baltimore Gas and Electric Company ("BGE") are shown below.[20] Although the 3-month contracts for the March to May 2014 period *were procured in the very middle of the Polar Vortex*, the resulting price change (11.3%) compared to the immediately previous pricing period was relatively modest given the extremely anomalous market conditions occurring at the time.

Recent Price Changes for BGE's Schedule G Type II SOS Customers			
December 2013 to February 2014 (procured on October 28, 2013)	March 2014 to May 2014 (procured on January 27, 2014)	June 2014 to August 2014 (procured on April 21, 2014)	September 2014 to November 2014 (procured on June 9, 2014)
8.554 cents/kWh	9.523 cents/kWh	9.618 cents/kWh	7.968 cents/kWh

Thus, the ALJ's finding that RESA's proposal adds an unacceptable level of price volatility to the default service rate, which the Commission has already rejected anyway in the *End State Order*, is incorrect. This is consistent with Chairman Powelson's and Vice Chairman Coleman's statement at the time of the *End State Order* that they believed the 3-month default

[19] RESA St. No. 1-SR at 9.
[20] The chart is taken from RESA St. No. 1-SR at 9.

service product would "likely *decrease* the volatility felt by customers."[21] They also believed that the use of procurement contracts that result in default service rates that are more market-responsive than those in effect now will not harm customers, and that "customers wanting price stability have every opportunity to purchase such a product from a competitive supplier in the form of a fixed-price product."[22]

Finally, the ALJ's reference to "market disruptions, such as the recent 'Polar Vortex'"[23] as a reason to stay away from 3-month contracts is misguided. First, the price volatility experienced during the Polar Vortex primarily manifested in significant increases in wholesale spot market energy prices (LMPs) and related ancillary services in the PJM administered markets. RESA is not recommending spot market pricing for Small C&I customers, nor is RESA recommending 100% 3-month, full requirements contracts for these customers. The ALJ's finding with respect to the impact of market disruptions on default service prices is flawed because volatility in the wholesale LMPs does not mean that customers who receive default service procured through the use of shorter term, full requirements fixed price contracts, such as the 3-month and 6-month contracts that RESA recommends, will experience rate volatility typically seen with LMP pricing. The ALJ – and Duquesne and OSBA – are comparing apples to oranges.

Second, market-disrupting events such as the Polar Vortex support the use of more, not less, market responsive contracts.[24] There is always a risk that a solicitation will occur during a

[21] *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service*, Docket No. I-2011-2237952, Joint Statement of Chairman Robert F. Powelson and Vice Chairman John F. Coleman, Jr. (Feb. 14, 2013)(emphasis in original)("*Joint Statement*").

[22] *Joint Statement* at 4. Duquesne acknowledged that customers can manage price volatility by contracting with EGSs for fixed-price contracts. Duquesne St. No. 3-RJ at 16-17.

[23] RD at 23.

[24] RESA St. No. 1-SR at 9-10.

period of unusual market conditions. If that happens, customers are better off with shorter term contracts that will allow prices to moderate as market conditions normalize. Longer term contracts would lock in the resulting higher market prices for a longer period of time with longer lasting impacts to customers. The Type II Maryland SOS prices referenced above show that prices increased during the March 2014 to May 2014 period, but there was a fairly significant decrease for the most recent pricing period with prices dropping 17 percent.[25] Had that been a longer-term contract, Maryland's Type II SOS customers would be paying higher prices for a longer duration of time.

The fundamental policy question being raised is how "fixed" should the default service price be for Small C&I customers. The Commission has answered this question.[26] The Commission has expressed on several occasions its concern with relying too heavily on longer term products. The Commission has recognized the negative impacts on the retail market when default service prices become divorced from current market prices, and the potential for such a situation to result in a "boom" or "bust" business cycle.[27] Yet, Duquesne in particular dedicated significant testimony in this case in apparent disregard for the Commission's prior decisions. The Commission has rightfully recommended a progression to a more market responsive default service product – namely, transition to 100% quarterly contracts – and RESA is the only party in this proceeding that has proposed a Small C&I portfolio that will transition to the Commission's recommended portfolio.

[25] RESA St. No. 1-SR at 10.
[26] *End State Order* at 23-24.
[27] *Id.* at 14-15.

3. Reliance on shopping statistics is misplaced and overstated.

The ALJ's reliance on shopping statistics for the Small C&I customer class as a reason for rejecting RESA's proposed portfolio is misplaced. Adopting RESA's proposal for Small C&I procurements is consistent with the Commission's expressed intent in the *End State Order*, as explained above, and in the best interest of these customers as they will have an even better opportunity to participate in the competitive market. Slightly more than 50% of Duquesne's Small C&I customers remain on default service,[28] which is a high amount (regardless of the ALJ's and Duquesne's claims to the contrary). Nowhere in the Competition Act or elsewhere is it stated or even implied that a less-than-50% shopping rate is "good enough." Moreover, the simple shopping statistics on which the ALJ relied do not reflect the types of products and services available in the market in which they are participating. A truly competitive retail electricity market will include not just price competition, but also other products such as renewables, energy efficiency, affinity programs and products, dual fuel, and other value-added products and services.

For these reasons, RESA supports a blend of 12-month, 6-month, and 3-month procurement contracts for Small C&I customers, which will reasonably transition them to 100% 3-month contracts in the next plan period.

B. <u>EXCEPTION NO. 2:</u> For the Medium C&I default service supply portfolio, the ALJ erred in rejecting RESA's proposal to incorporate: (1) hourly-priced default service for customers between 100 kW and 300 kW; and (2) 3-month default service supply contracts for customers 25 kW to 100 kW. (RD at 25-25; COL # 12; Ordering ¶ 3).

For Medium C&I customers, Duquesne recommended that default service load be procured through 100% 3-month, full requirements supply contracts without laddering. OSBA

[28] RD at 21; Duquesne Exhibit NSF-1.

recommended the status quo, keeping the current 100% 6-month full requirements procurement model. RESA recommended 3-month contracts for customers between 25 kW and 100 kW peak demands. RESA also recommended that customers above 100 kW, up to the Medium C&I ceiling of 300 kW, all of whom have fully-deployed interval meters, be incorporated into the Large C&I class and receive hourly default service pricing.

It is not clear whether the ALJ recommends Duquesne's 3-month model or OSBA's proposal to continue the current 6-month model. The ALJ did not recommend RESA's proposal for three reasons. First, she claims that hourly default service for this subset of customers runs counter to the *End State Order*'s preference for legislative amendments to the Competition Act prior to implementing hourly service. Second, she found that hourly service for these customers is premature because the record does not indicate a preference by these customers for an hourly default service product. Third, similar to her flawed findings regarding RESA's Small C&I proposal, she found that RESA's Medium C&I proposal is not necessary given the high shopping rates and it would lead to insufficient rate stability. Fourth, the ALJ found that RESA's proposal, if adopted, would remove a significant amount of load from the Medium C&I class and risk decreasing the attractiveness of the wholesale bids for the 3-month supply contracts needed to serve customers in the 25 kW to 100 kW range. For the reasons explained below, RESA recommends that the Commission reject the ALJ's recommendation and accept RESA's proposal.

In RESA's view, Duquesne's Medium C&I proposal (100% 3-month supply contracts) is a step in the right direction but does not go far enough towards market reflective pricing for this class and in satisfying the Commission's end state objectives for default service. Duquesne proposes that Medium C&I default service load be procured through 3-month contracts even

though all customers in that class between 100 kW and 300 kW have interval meters. OSBA's proposal to continue the status quo – 100% full requirements 6-month wholesale supply contracts – does not move the dial towards more market reflective default service rates and should be rejected.

1. Default service load for the 25 kW to 100 kW customers should be procured through 100% 3-month full requirements supply contracts.

For customers without interval meters – in this case, Duquesne's 25 kW to 100 kW customers – the next logical step from the current 6-month default service pricing structure is quarterly priced default service. Not only is that outcome consistent with the Competition Act and *End State Order*, but it is also consistent with the *DSP VI Order*, in which the Commission approved the current 6-month contracts because they represented "a more market responsive DSP plan than that which currently is in place."[29] Here, quarterly contracts for customers without interval meters is a more market responsive default service plan than the current 6-month contracts. Moreover, as explained above, the volatility that OSBA and Duquesne warn accompanies 3-month contracts has not been shown to exist in Maryland's Type II SOS and, if there were an incident that caused market prices to rise at the same time as a solicitation, the lasting effect of that solicitation would be three months shorter with 3-month contracts than with 6-month contracts. Finally, 3-month contracts for these customers is a reasonable procurement plan to transition them to an hourly pricing default service model when they have interval meters.

[29] *DSP VI Order* at 67.

2. Medium C&I customers with interval meters should be incorporated into the Large C&I class and receive hourly priced default service.

In the *End State Order*, the Commission directed that "in the next round of default service plans that begin on June 1, 2015, we expect that EDCs will offer only hourly LMP to medium and large C&I customers with interval meters."[30] The Commission also directed that EDCs continue to move these customers to the hourly pricing group "as interval meters are deployed."[31] The ALJ's recommendation for either 3-month or 6-month contracts (whichever the case may be) for interval metered Medium C&I customers is inconsistent with this directive.

a. Legislative changes are not necessary to implement hourly pricing for Medium C&I interval-metered customers.

The ALJ found that, under the *End State Order*, the Commission stated that transition to hourly pricing "may raise legal questions about compliance with the Competition Act" and that it "prefers to pursue legislative amendments to provide for such authority before mandating an hourly priced product for Medium C&I customers."[32]

The ALJ's finding that the Commission concluded in the *End State Order* that legislative changes were a necessary precondition to moving Medium C&I customers into the hourly priced group is too narrowly focused. In the *End State Order*, the Commission makes clear its view that "spot market approaches in specific situations <u>are appropriate</u>" but that it would "<u>prefer</u> to pursue legislative amendments that clearly provide the authority."[33] Nothing in the *End State Order* prohibits the movement of Medium C&I customers to the hourly priced procurement group or requires awaiting legislative changes. Notably, following the *End State Order*, the Commission's decision to rely on a 100% spot market procurement plan for Pike County Power

[30] *End State Order* at 29; RESA St. No. 1 at 18.
[31] *Id.* at 31-32.
[32] RD at 26.
[33] *Id.* at 45 (emphasis added).

& Light was upheld by the Commonwealth Court with the Supreme Court declining to review.[34] Thus, the Commission's authority pursuant to the Competition Act – as it is written – to move Medium C&I customers to the hourly priced procurement class (or to adopt 3-month contracts for smaller customers) is clear.

The recent DSP cases of PPL Electric Utilities Corporation ("PPL") further support RESA's position. There, PPL committed to reduce the peak demand for its Small C&I customer class from 500 kW to 100 kW in its next DSP plan filing. In July 2013, the Commission adopted PPL's commitment in the DSP II proceeding.[35] Consistent with its Commission-approved commitment, PPL proposed in its pending DSP proceeding to reduce the peak demand limitation for its Small C&I Customer class from 500 kW to 100 kW.[36] These customers have interval meters and would receive hourly priced default service. The fact that the Commission approved PPL's prior commitment and that another EDC in Pennsylvania is arguing in favor of reducing the threshold to 100 kW interval-metered customers supports RESA's position that the 100 kW hourly threshold is consistent with the Competition Act, the *End State Order*, and will benefit customers by enhancing competition.

Finally, even if one were to accept the ALJ's legal conclusion, it should be noted that the ALJ's recommended procurement plan for the Medium C&I class – whether it be 3-month contracts or 6-month contracts – seemingly would not survive the ALJ's own legal standard.

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[34] *Petition of Pike County Light & Power Company for Approval of its Default Service Implementation Plan*, 2012 Pa. PUC LEXIS 832 (Opinion and Order entered May 24, 2012), *aff'd Popowsky v. Pennsylvania Pub. Util. Comm'n*, 71 A.3d 1112 (Pa. Commw. Ct. 2013)(Petition for Allowance of Appeal Denied December 31, 2013, Docket No. 641 MAL 2013).

[35] *See Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. Docket No. P-2012-2302074, Slip Op. pp. 62-63 (Opinion and Order entered July 24, 2013).

[36] *Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2015 through May 31, 2017*, Docket No. P-2014-2417907, PPL Main Brief at 12-15 (filed Sept. 12, 2014).

The ALJ's legal conclusion is that the Commission requires legislative authority to move to hourly pricing for over-100 kW customers. The only theoretical rationale to support this view, however, is that the existing statutory standards require a "prudent mix" of contracts notwithstanding the fact that the ALJ recommends 100% 3-month or 6-month contracts, whichever is her recommendation.[37] Similar to RESA's proposal, the ALJ recommends a procurement plan that employs 100% of a single product type. Consequently, the ALJ is attempting to have it both ways. If a procurement plan that relies on 100% 3-month or 6-month contracts is consistent with statutory standards, then so too is a plan that relies on 100% spot market supply. As explained previously, the Commission and the courts have determined that this "prudent mix" standard need not include every type of contract (spot market, short term and long term). Accordingly, RESA recommends that the Commission reject the ALJ's legal conclusion regarding the legality of hourly pricing for Medium C&I interval metered customers.

b. Medium C&I customers have proven to be sophisticated customers who are well-equipped to manage their supply costs in the marketplace.

The ALJ refuses to adopt hourly pricing for Medium C&I interval-metered customers in part because of the current high shopping rate for this class and also because of the apparent insufficient rate stability associated with hourly pricing.[38] The ALJ is correct that a significant number of 100 kW to 300 kW customers are shopping (EGSs serve 77.4% of these customers and 78.3% of the kWhs). It therefore is clear that Medium C&I customers with a demand of 100 kW or greater generally are well-equipped and educated to manage their commodity costs in an hourly spot market default service environment.

[37] OSBA St. No. 1 at 6-7.
[38] RD at 26.

Although approximately 384 customers with a demand between 100 kW and 300 kW remain on default service as of April 2014 and would be impacted by the proposed change,[39] these customers can still obtain fixed-price electric generation supply from the competitive market. When the Commission approves a default service plan that is reasonably calculated to produce a market reflective default service rate – which would occur here by moving these customers to hourly priced service – competitors will be encouraged to enter the market, resulting in a variety of products and services, which, in turn, enables each consumer to choose for him/herself which product best suits his/her own needs and desires. To the extent consumers desire a stable price, they will have the ability to select that option from the competitive market. As explained by the Commission, reducing the peak demand limitation for commercial and industrial customers is a "natural progression for the retail marketplace and . . . having EDCs offer hourly [locational marginal price] to these accounts will put EGSs on a level playing field for competing not only with the PTC but with each other."[40]

c. RESA's recommendation for hourly pricing should not be rejected for fear that adopting it will make RFPs for 3-month supply contracts for 25 kW to 100 kW customers less attractive to potential bidders.

One reason the ALJ denied RESA's recommended portfolio is that the remaining load to be bid out for 3-month supply contracts (needed to serve 25 kW to 100 kW Medium C&I customers) would be "relatively small and insufficient to attract potential RFP suppliers."[41] This should not be a reason to deny RESA's recommendation.

It is illogical for the Commission to refrain from implementing its desired end state of hourly pricing to attain the goal of a competitive retail market for fear that doing so might have a

[39] RESA Exhibit RJH-7.
[40] *End State Order* at 38-39.
[41] RD at 26.

negative impact on the default service bids needed to provide power to serve customers that remain on default service. If the goal of the Competition Act and the policy of the Commonwealth is to create and foster a competitive retail electricity market with products and services readily available to all customers, then it makes no sense to suppress the development of the market for all Medium C&I customers. RESA recommends that the Commission monitor the competiveness of the bids, as it does now, and react when appropriate to ensure the competitiveness of the wholesale bids.

d. The Commission should not be deterred by Duquesne's alleged technical challenges of implementing hourly pricing.

Although seemingly not a factor in the ALJ's recommendation, Duquesne has alleged during this proceeding that there are technical challenges to implementing hourly pricing. The total number of customers in the 100 kW to 299 kW groups is 1,702, all of whom have interval meters capable of recording hourly kWh usage.[42] Duquesne states that it could provide hourly priced service to these customers beginning in June 2015 by manually performing certain billing functions until an automated billing information technology solution is developed.[43] Notwithstanding this, Duquesne opposes moving Medium C&I customers at or above 100 kW to the Large C&I class procurement group during the DSP VII period and makes no commitment about when this movement might occur beyond the DSP VII period.

Duquesne should be directed to comply with the *End State Order* and implement hourly pricing for these customers by June 2015. Duquesne's concerns about needing to develop the back office systems to support hourly pricing are not a sufficient reason to justify the requested delay. Duquesne has had sufficient notice about this issue to make the necessary preparations as

[42] RESA St. No. 1-R at 7 and Exhibit RJH-7.

[43] *Id*.; Duquesne St. No. 4-SR at 2-3. Duquesne declines to give a timetable pursuant to which such a system could be developed, or the costs associated with its manual processes. *Id*.

part of its advanced metering deployment plans. The Commission's *End State Order* directing EDCs to make this change was issued in February 2013. This order followed the Retail Markets Investigation process that began in 2011. Therefore, RESA supports directing Duquesne to implement this customer move effective June 1, 2015. Alternatively, and only as a clear second choice, RESA would support a phased-in approach that would require Duquesne to shift its 200 kW to 300 kW customers to the Large C&I class by the end of 2015, and to shift its customers greater than 100 kW but less than 200 kW to the Large C&I class by June 2016. In the interim, all Medium C&I default service load would be served using quarterly contracts.[44] Duquesne's lack of planning and foresight to implement the Commission's objectives in the *End State Order* should not be reason for delay.

C. <u>EXCEPTION NO. 3</u>: For Large C&I default service, the ALJ erred in rejecting RESA's proposal for Duquesne to conduct an auction for the provision of hourly priced default service. (RD at 28; COL # 12; Ordering ¶ 3).

Duquesne did not propose any changes to its Large C&I hourly default service product. Currently, Duquesne obtains default supply for Large C&I customers at day ahead spot prices. RESA supports hourly pricing for the Large C&I customer class. However, RESA recommended two changes to the Large C&I procurement plan. First, the spot market service should be competitively bid out, which is how spot market service is procured for all of the other major Pennsylvania EDCs. Second, RESA recommended changes to the make-up of the hourly priced procurement group to incorporate those Medium C&I customers with interval meters, as discussed above.

The ALJ rejected RESA's proposal to bid out the hourly default product. She found that RESA's proposal is not clearly defined and had not been shown to benefit Large C&I customers

[44] RESA St. No. 1-SR at 12.

and would instead increase their costs.[45] She discounted RESA's proposal in part because RESA did not present evidence showing the specific potential or likely benefits that bidding would provide for these customers.[46] This finding should be rejected for at least five reasons.

First, the ALJ ignores applicable law, notably the *End State Order*, in which the Commission stated its preference for EDCs to bid out default hourly service:

> …the Commission prefers the model under which these services are auctioned to wholesale suppliers. Having the EDC providing these services and charging an administrative adder to large C&I customers entails a degree of involvement by the EDC that the Commission seeks to avoid with this group of customers in the robust competitive market we are seeking to promote.[47]

The ALJ also ignored the legislative finding that "competitive market forces are more effective than economic regulation in controlling the costs of generating electricity" which amounts to a fundamental policy underlying the Pennsylvania Code that competition is more effective than economic regulation in controlling the costs of generating electricity.[48]

In this regard, competitively bidding out the hourly priced service is the best way to ensure that the resulting rates are reflective of all of the costs and risk involved in providing default service to customers. Duquesne's existing model accurately tracks changes in wholesale market prices by passing through the day-ahead hourly LMP, capacity charges and ancillary services. However, other retail servicing costs are approximated through an administratively set adder of $4.49/MWh. This is essentially a proxy figure that was established through prior DSP cases and is not based on actual costs or bid prices.[49] For its part, Duquesne disagrees that a supplier could possibly offer a price lower than the current adder, but refuses to allow them the

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[45] RD at 28.

[46] RD at 28.

[47] *End State Order* at 30. In rendering this determination, the Commission specifically rejected the Industrials' argument that the EDCs should provide hourly default service. *Id*.

[48] 66 Pa. C.S. § 2802(5); RESA St. No. 1 at 6-7.

[49] RESA St. No. 1 at 20.

opportunity to try to do so. Competitively bidding out the hourly priced service would add a degree of objectivity to this retail adder.

Duquesne itself extolled the virtues of competitively bidding out default service as an efficient way to procure default service supplies. Duquesne noted that competitive solicitations are "…intended to rely on the skills of the most adept suppliers to achieve the least cost for customers."[50] Although this particular testimony was presumably discussing Duquesne's proposed procurements for fixed priced, full requirements supply products, the same arguments hold true for the procurement of hourly priced supply for the Large C&I class. Duquesne simply cannot credibly argue that competitive solicitations make sense for one product and not the other.

Second, neither RESA nor anyone else can present information on the level of the winning bid or adder, because it will be the result of an RFP.

Third, the ALJ's recommendation misconstrues the "least cost" standard as requiring the lowest absolute cost, which the Commission recognized in the *Act 129 Final Rulemaking Order* as incorrect. The appropriate test should not be whether the competitive bid approach might produce a higher or lower adder, but instead whether the final price is the result of a competitive process.

Fourth, the argument that RESA's proposal will lead to an unjust and unreasonable adder ignores the fact that all of the other major EDCs in Pennsylvania utilize the competitive bid approach.

Finally, the ALJ seemed persuaded by evidence that a fair and open competitive procurement process could produce a default service adder for the hourly priced service that is higher than Duquesne's current adder. Such a result, however, would be an indication that

[50] Duquesne St. No. 3 at 16.

Duquesne's current structure produces a subsidized default service rate. This would not be consistent with Commission policy which prohibits the cross subsidization of default service. Duquesne's current adder cannot be completely based on actual cost data because Duquesne utilizes employees, systems and resources that are funded through Duquesne's regulated distribution rates.[51]

For these reasons, the Large C&I supply should be procured through a competitive bid process and not unilaterally by Duquesne.

D. EXCEPTION NO. 4: The ALJ erred in rejecting RESA's proposal to require Duquesne to assume the cost responsibility for NMB Charges for all load and to recover the costs from all customers. (RD at 36).

The ALJ recommends rejection of RESA's proposal to require Duquesne to assume the cost responsibility for NMB Charges for all load (default and shopping) and recover its costs from all customers through a non-bypassable charge.

Currently, Duquesne assumes the cost responsibility on behalf of wholesale default service suppliers, and not for EGSs, for the following charges: (i) Network Integration Transmission Services, (ii) Transmission Expansion, and (iii) Generation Deactivation Charges.[52] Wholesale suppliers and EGSs assume responsibility for their own load for Unaccounted for Energy and historic out of market tie line and retail customer meter adjustments.[53] Under both scenarios, EGSs are required to assume the cost responsibility for

[51] Duquesne has not determined an appropriate methodology to use to calculate and allocate certain default service costs. Duquesne has not attempted to allocate its administrative default service related costs to default service rates. This would mean that Duquesne's distribution ratepayers, including shopping customers, are unfairly subsidizing default service. This would create competitive disparities by forcing EGSs to compete against an artificially low rate. RESA St. No. 1 at 21. This is one reason why the settlement agreement, which RESA supports, is in the public interest because it requires Duquesne to include in a future filing with the Commission an allocation of specific costs to default service.

[52] RESA St. No. 1 at RESA Exhibit RJH-2; RESA St. No. 1-SR at RESA Exhibit RJH-9.

[53] *Id.*

these charges on their own behalf. The costs for these NMB Charges are recovered from all customers. Duquesne recovers its NMB Charges for its default service load through the default service rate (i.e. the Price-to-Compare). EGSs recover them from shopping customers through their retail prices.

RESA recommends that Duquesne be required to assume the cost responsibility for all NMB Charges on behalf of both the wholesale default service suppliers and EGSs. Pursuant to RESA's recommendation, all customers would continue to be responsible for cost recovery (as they are today) but the mechanism for recovery would be through a non-bypassable charge assessed to all customers.[54] RESA's recommendation would reasonably and fairly spread the costs of NMB Charges to all customers in a competitively neutral manner without creating a competitive advantage for default service or denying EGSs equal access to the EDC's facilities.

1. The ALJ incorrectly determined that the current NMB Charge recovery methodology is not anti-competitive.

The ALJ erred in rejecting RESA's position that allowing Duquesne to assume the cost responsibility for only wholesale default service suppliers (versus for all load) unfairly shifts a competitive advantage to Duquesne's default service.

The evidence showed that the NMB Charges are all non-hedgeable wholesale cost obligations that all load serving entities are subject to in the wholesale market. These cost items are not market based because they are either fully regulated or quasi-regulated costs imposed at the wholesale level on all load serving entities. These costs are unpredictable and cannot be hedged by competitive retail suppliers or wholesale default service suppliers.[55]

[54] RESA St. No. 1 at 21-25.
[55] *Id*. at 22-23.

As an initial matter, the ALJ erred in failing to recognize the variable nature of NMB Charges. They are essentially fully regulated cost-of-service rates that are imposed on all LSEs based on each LSE's share of load served. RESA presented evidence explaining each of the specific NMB Charges and how each such cost can be unpredictable and subject to change.[56]

The ALJ seemed to hone in on the NITS costs and Duquesne's argument that NITS are fixed on a yearly basis from June 1 – May 31 of each year.[57] The ALJ apparently dismissed the significant evidence in the case showing the potential volatility of NITS charges.[58] Specifically, RESA presented a chart showing that nine of 20 illustrative PJM zones experienced NITS increases in June 2014, some as high as 29%.[59] The NITS rate for the PPL zone increased by 52% from January 1, 2013 to June 1, 2013.[60] While Duquesne "only" increased by 9%, the potential volatility in NITS costs is evident. In addition, because this is a FERC regulated rate, other rate changes may occur as a result of challenges to the charges.[61]

EGSs must factor the risk of these price swings into their prices that they offer their customers because EGSs are signing up customers for various contract durations on every day of the year, not merely on days the new NITS costs become effective. Adopting RESA's recommendation will ensure that customers only pay the actual cost of the NMB Charges while

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[56] *See* RESA Initial Brief at 25-27.

[57] RD at 36.

[58] *See* RESA Initial Brief at 27; RESA St. No. 1-SR at 24-25.

[59] RESA St. No. 1-SR at 24-25 (citing http://www.pjm.com/markets-and-operations/market-settlements/network-integration.aspx).

[60] *Id*.

[61] Recently, for example, FERC directed a wholly-owned subsidiary of FirstEnergy which owns and operates transmission facilities within the Penn Power service territory to create one NITS rate beginning January 1st 2015. The current practice differentiates NITS rates by transmission voltage levels using 138kv as a threshold (rate 1 - >138kv paid by all customers; rate 2 - <138kw paid only by customers using lower voltages). All LSEs – including EGSs who are required to assume the cost responsibility for Penn Power service territory, need to know the new rate (not posted). *See* FERC order in Docket Number EL11-54-002 available at: http://www.ferc.gov/CalendarFiles/20140908122402-EL11-54-002.pdf.

shielding them from the negative market impacts that would occur were NMB Charges to increase significantly and require cancellation of customer contracts or force EGSs out of business.

When Duquesne assumes responsibility on behalf of the wholesale default service suppliers, the wholesale default service suppliers no longer need to factor in the risk of future price increases in the NMB Charges into the bids for default service supply. Therefore, the resultant bid price (which forms the final default service rate charged) does not account for the risk of cost increases for NMB Charges. Instead, Duquesne will simply pass on the actual costs to default service customers at the currently applicable level. If this recovery mechanism is allowed to persist, EGSs will continue to be required to embed the costs of NMB Charges in their competitive prices. Duquesne's default service rate includes the current transmission rate, but it does not include any additional amount to account for the risk of future price increases to the NMB Charges. Duquesne does not need to include this additional cost factor because it is permitted to past through the customers the actual future rates. Essentially, there is no risk of non-recovery of actual NMB Charges for Duquesne.

On the other hand, the retail price offered by EGSs must account for the current transmission rate and take into consideration how to factor into their retail pricing the risk for potential future rate increases in the NMB Charges. The result is that shopping customers may be required to pay more if an EGS chooses to embed the risk premium into its pricing. This disparity (i.e. default service customers only pay the actual costs of the NMB Charges while shopping customers pay actual costs plus an EGS's specific calculation to account for potential future price increases in NMB Charges) is a bad result for customers and the development of the competitive market, yet the ALJ would allow it to continue in the Duquesne service territory.

2. There is no question regarding the legality of RESA's proposal that Duquesne assume full cost responsibility for NMB Charges.

From a legal standpoint – as the Commission has already correctly concluded – there is no legal bar to requiring Duquesne to assume the cost responsibility for NMB Charges for all load.[62] On the other hand, maintaining the status quo is contrary to the Competition Act which requires:

- that EDCs permit EGS "to utilize and interconnect with the electric transmission and distribution system on a nondiscriminatory basis at rates, terms and conditions of service comparable to the transmission and distribution companies' own use of the system . . ."[63]
- the EDCs "shall provide transmission and distribution service to all . . . [EGSs]. . . on rates, terms of access and conditions that are comparable to the utilities own use of its system."[64]

When an EDC assumes the cost responsibility for NMB Charges, it can advantage its right to full cost recovery of those charges to ensure that customers only pay the actual costs of the NMB Charges.[65] By requiring the EDC to assume the cost responsibility for the NMB Charges for both wholesale default service suppliers and EGSs, the result is that all LSEs receive nondiscriminatory access to the EDC's right of cost recovery and, therefore, the issue of including risk premiums into a retail price to account for NMB Charges is completely eliminated. If, however, the EDC assumes the cost responsibility for just one of the two entities that have the contractual requirement to supply the power to the customer (i.e. wholesale default service supplier) and not the other (i.e. EGS), then only the one entity gets the benefit of the EDC's right to full cost recovery for the PJM Charges. This is discriminatory access in violation

[62] *See Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of their Default Service Programs*, Docket Nos. P-2013-2391368, P-2013-2391372, P-2013-2391375, P-2013-2391378, Opinion and Order entered July 24, 2014 ("*FE DSP III Order"*).

[63] 66 Pa. C.S. § 2803(emphasis added).

[64] 66 Pa. C.S. § 2804(6).

[65] 66 Pa. C.S. § 2807(e)(3.9).

of the Competition Act. Moreover, as explained previously, any scenario whereby the EGS is required to assume the cost responsibility means that risk premiums may be factored into the retail prices paid by shopping customers to account for these charges.

The best way to satisfy the requirements of the Competition Act regarding equal and nondiscriminatory access is to require the EDC to assume the cost responsibility for both the wholesale default service suppliers and the EGSs because then all LSEs will be treated equally by the EDC. In lieu of this, however, the Commission cannot permit the EDC to assume the cost responsibility for any of the NMB Charges on behalf of the wholesale default service supplier only. Although this is the less preferable outcome for the customer in lieu of RESA's primary recommendation because it does not eliminate the issue of risk premiums for customers, at least it addresses the Competition Act's requirements for nondiscriminatory and equal access because neither the wholesale default service supplier nor the EGS are receiving the benefit of the EDC's right to cost recovery. Of course, though, this also means that the customers are not receiving this benefit either, but because both the wholesale default service supplier and the EGSs are required to determine how to factor risk premiums into their retail pricing, the retail rates paid by default service customers and shopping customers are more of an apples-to-apples comparison.[66]

RESA supports uniform statewide application of NMB Charge cost responsibility across all EDCs. Such is not the case in Pennsylvania today. Each EDC treats the specific charges in their own manner without regard for how the same charges are treated by another EDC. Even within each EDC, the assignment of cost responsibility can vary with respect to each charge.[67] The result of the varying treatment among EDCs and within each EDC creates difficulty for

[66] RESA St. No. 1-SR at 19.

[67] *See* RESA Exhibit RJH-9 for a comparison of the assignment of cost responsibility in the Duquesne service territory with the assignment of responsibility in the FirstEnergy company territories. References in the table to Duquesne's "DSP III" should reference Duquesne's "DSP VII."

competitive suppliers in assessing each market and determining whether or not they can enter that market.

While the Commission chose not to adopt RESA's preferred position for NITS for the FirstEnergy EDCs, maintaining the status quo here – as erroneously recommended by the ALJ – would treat most NMB Charges differently for Duquesne than they are treated for the FirstEnergy EDCs.[68] This is because the FirstEnergy EDCs do not assume the cost responsibility for NITS for wholesale default service suppliers.[69] While RESA maintains that the preferred approach whereby Duquesne would assume the cost responsibility for NMB Charges for all load can and should be adopted as the best approach both practically and legally; in lieu of that, the Commission should at least issue a decision consistent with how NMB Charges, including NITS, are treated by the FirstEnergy companies.[70] To achieve this result, the Commission would need to direct Duquesne to (1) assume cost responsibility for all load for TEC/ECRC, RMR, UFE, and Historic Out of Market Tie Line Generation and Retail Meter Adjustments; and (2) require wholesale default service suppliers to assume the cost responsibility for NITS (again, though, the Commission should do this only if it chooses to reject RESA's preferred approach which is by far the superior result for customers).[71]

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[68] *See* RESA Exhibit RJH-9.

[69] *See* Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company Default Service Supplier Master Agreement at Appendix D, available at: *http://www.fepaauction.com/Portals/0/Documents/SupplierDocuments/FEPA_DSPIII_SMA.pdf;* RESA Exhibit RJH-9.

[70] *See* RESA St. No. 1-SR, Exhibit RJH-9 at 2.

[71] *See id.* Further, this result would also be closer aligned to the Partial Settlement pending before the Commission in the PECO DSP III proceeding where PECO agreed to support RESA's recommended approach for the following charges: Transmission Enhancement charges (a/k/a Regional Transmission Expansion Plan "RTEP"); Expansion Cost Recovery charges ("TEC/ECRC"); and, Generation Deactivation/Reliability Must Run ("RMR") charges for which charges are set after the approval of PECO's Revised DSP III by the Commission; and, the parties reserved for litigation all issues related to the treatment of NITS. *Petition of PECO Energy Company for Approval of its Default Service Program*

3. The *Fixed Price Label Order* in combination with the unpredictability of NMB charges, directly impacts EGS's decisions about products and pricing that will be offered to customers.

The ALJ erred in rejecting RESA's position that the Commission's *Fixed Price Label Order*[72] supports requiring Duquesne to assume NMB cost responsibility. In the *Fixed Price Label Order*, the Commission prohibited suppliers from exercising regulatory change provisions in order to pass through certain wholesale cost changes to residential and small business customers on fixed price products. Rather, if an EGS is faced with one of these unpredictable price increases for the NMB Charges that cannot be absorbed through the contractual price, the *Fixed Price Label Order* requires the EGS to provide the customer notices of its intent to alter the contractual price and, if the customer does not affirmatively accept the new price, then the EGS must cancel the contract.[73] This further exacerbates the ability of EGS's competitive supply to fairly compete with default service because the EGS has no ability to ensure that only actual costs are recovered from its customers and then, when faced with an unpredictable rate increase for the NMB Charges, the EGS has to choose between receiving less than actual cost or not receiving anything at all. The evidence showed that requiring Duquesne to assume the cost responsibility for NMB Charges would eliminate this impossible situation and would have a direct impact on reducing the risk premiums embedded in EGS fixed price products, which would reduce the likelihood of an EGS needing to trigger a regulatory change or cost pass through clause or cancel an existing contract.[74] This would be a good result for consumers.

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for The Period From June 1, 2015 Through May 31, 2017, Docket No. P-2014-2409362, *Joint Petition for Partial Settlement* dated Aug. 28, 2014 at ¶ 48.

[72] *See, e.g., Fixed Price Label Order*; *Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices of Contract Renewal or Changes in Terms*, Docket No. L-2014-2409385, Final Order entered April 3, 2014.

[73] *Fixed Price Label Order* at 26.

[74] RESA St. No. 1 at 25; RESA St. No. 1-SR at 27-28.

The ALJ erred in finding that the Commission specifically rejected RESA's position regarding the applicability of the *Fixed Price Label Order* in the *FE DSP III Order*.[75] The Commission, in the *FE DSP III Order*, rejected RESA's position in large part because in that case RESA had not proven the volatility of the NMB Charges. In this case, RESA has presented additional evidence, explained above, showing the volatility of the charges. Given this additional evidence, it makes sense that the *Fixed Price Label Order* is all the more applicable because there is greater certainty that EGSs' pricing, including its risk premiums, will have difficulties competing with default service pricing.

RESA's views regarding the practical implications of the *Fixed Price Label Order* should be given significant weight. RESA is a trade association of EGSs whose members are and have been directly impacted by the *Fixed Price Label Order* and who actively enter into competitive generation supply contracts with all customer classes in Pennsylvania. The *Fixed Price Label Order* places practical constraints on the ability of EGSs to recover the costs of future rate increases in NMB Charges.[76] This is because – under the present process – there is only one way for an EGS to guarantee its ability to recover from customers the future, unpredictable rate changes in NMB Charges and that is to offer a variable priced product.[77] An EGS offering a fixed price product cannot adjust the contract during the term to recover the costs from

[75] RD at 36.

[76] RESA St. No. 1-SR at 27.

[77] Notably, the Commission has expressed "particular concern for customers receiving their electric supply service from an EGS under a contract with a monthly adjusted variable rate" and has undertaken numerous measures (including implementing new regulations) to help ensure that consumers are more informed about variable rate products. *See, e.g., Rulemaking to Amend the Provisions of 52 Pa. Code, Section 54.5 Regulations Regarding Disclosure Statement for Residential and Small Business Customers and to Add Section 54.10 Regulations Regarding the Provision of Notices to Contract Expiration or Changes in Terms for Residential and Small Business Customers*, Final-Omitted Rulemaking Order, Docket No. L-2014-2409385, Final-Omitted Rulemaking Order entered April 3, 2014 at 6-8 ("*Final-Omitted Rulemaking Order*").

customers for unpredictable rate changes to the NMB Charges – regardless of whether or not such right is reserved in the contract.[78] EGSs also cannot rely on a "regulatory out" clause in the contract to recover the cost from the fixed price customer because the *Fixed Price Label Order* requires an EGS dealing with an unpredicted rate increase in NMB Charges (that it did not already factor into the fixed price product) to provide the customer prior notice of the EGS's intent to pass on the charge to the customer. If the customer does not affirmatively agree to the price increase, then the EGS must cancel the contract.[79] The likely outcome of this action is for the EGS to lose the customer.

For all these reasons, the practical impact of the *Fixed Price Label Order* for the competitive market is that EGSs assessing how to deal with unpredictable future rate changes in NMB Charges need to determine whether to: (1) rely exclusively on variable contracts to recover these costs; or, (2) take on the risk of offering fixed price contracts knowing that the contracts will likely be cancelled if the EGS attempts to recover the costs from the customer. Neither result is good for customers because each limits the variety of potential competitive products and competitive pricing that could be offered. The Commission acknowledged this reality in the *Fixed Price Label Order* when it stated:

> We. . . understand that if EGSs are not able to recover costs that are imposed upon them, they may indeed limit the variety of long-term fixed price offers they make available. Additionally, such offers may have to include a substantial risk-premium that would increase customer costs.[80]

Thus, the *Fixed Price Label Order* has presented new practical obstacles to the ability of customers to have a variety of competitive products available to them. In the *Fixed Price Label*

[78] *Fixed Price Label Order* at 24 ("a 'fixed price' product must not change in price during the term of the agreement").
[79] *Id.* at 26.
[80] *Id.* at 25-26.

Order, the Commission noted that "there may be mechanisms to help address this concern that are more legally tenable than allowing a 'fixed' price to change."[81] RESA's recommendation here presents the Commission one of those more legally tenable alternate mechanisms because the end result would be to remove the need of EGSs to factor into their pricing and product decisions the risk of future unpredictable price increases related to NMB Charges, thereby giving them more flexibility to design a greater array of competitive products and pricing. The evidence in this case showing the unpredictable and volatile nature of the NMB Charges underscores the important role that the Fixed Price Label Order will play in EGSs' abilities to compete for customers in the future.

In sum, requiring Duquesne to assume the cost responsibility for all load would lead to significant positive impacts for customers especially given the practical effect of the *Fixed Price Label Order*. First, the resulting price paid by customers (whether default service customers or shopping customers) will not include any amount to account for the risk of future rate changes in the NMB Charges. Second, EGSs would have more flexibility to design their products and pricing without factoring in the risk of unpredictable increases in NMB Charges, which would benefit customers with a greater variety of competitive products. Finally, as RESA explained in its Initial Brief, the wholesale default service supplier and the EGS would have equal and non-discriminatory access to the EDC's ability to ensure that only actual costs of the NMB Charges are paid by all customers.

III. CONCLUSION

For the reasons set forth above, RESA respectfully requests that the Commission: (1) approve the settlement agreement in this matter; (2) grant these exceptions; and (3) issue a

[81] *Id.* at 26.

decision accepting in part and rejecting in part the ALJ's October 28, 2014 Recommended Decision, consistent with RESA's recommendations and proposals as explained herein.

Respectfully submitted,

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