

**PENNSYLVANIA  
PUBLIC UTILITY COMMISSION  
Harrisburg, PA 17105-3265**

Public Meeting held July 24, 2014

Commissioners Present:

Robert F. Powelson, Chairman  
John F. Coleman, Jr., Vice Chairman  
James H. Cawley  
Pamela A. Witmer  
Gladys M. Brown, Statement

Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company for Approval of their Default Service Programs	P-2013-2391368 P-2013-2391372 P-2013-2391375 P-2 013-2391378
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**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of Metropolitan Edison Company (Met-Ed), Pennsylvania Electric Company (Penelec), Pennsylvania Power Company (Penn Power) and West Penn Power Company (West Penn) (collectively, FirstEnergy or the Companies), the Retail Energy Supply Association (RESA), FirstEnergy Solutions Corporation (FES), Exelon Generation Company, LLC (Exelon) and the Met-Ed

Industrial Users Group (MEIUG), Penelec Industrial Customer Alliance (PICA), Penn Power Users Group (PPUG) and West Penn Power Industrial Intervenors (WPPII) (collectively, the Industrial Users Groups or IUG) filed on May 27, 2014, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Susan D. Colwell, issued on May 6, 2014, relative to the above-captioned proceeding. Replies to Exceptions were filed by the Companies, the Industrial Users Group, Exelon and FES on June 6, 2014.

## **I. History of the Proceeding**

On November 4, 2013, FirstEnergy filed a Joint Petition for Approval of their Default Service Programs (DSPs) for the period of June 1, 2015 through May 31, 2017, with the Commission.

The Companies served the Petition on the public advocates and the electric generation suppliers (EGSs) doing business in their territories. On November 16, 2013, notice of the Joint Petition was published in the *Pennsylvania Bulletin*, 43 *Pa. B.* 6856 (Met Ed and Penelec), and 43 *Pa. B.* 6857 (Penn Power and West Penn), along with notice of the prehearing conference scheduled for December 4, 2013. The deadline for filing interventions and protests was set for December 2, 2013.

A Notice of Appearance was filed by the Commission's Bureau of Investigation and Enforcement (I&E) on November 19, 2013. A Notice of Intervention and Answer was filed by the Office of Consumer Advocate (OCA) on December 2, 2013, and by the Office of Small Business Advocate (OSBA) on November 27, 2013. The Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) also filed an Answer and a Petition to Intervene on December 2, 2013.

Timely Petitions to Intervene were also filed by: Direct Energy Services (Direct Energy), Dominion Retail, Inc. d/b/a Dominion Energy Solutions (Dominion Retail), and Interstate Gas Supply (IGS), Duquesne Light Energy LLC, (Duquesne), FES, RESA, NextEra Energy Services PA LLC and NextEra Energy Power Marketing LLC (collectively, NextEra), Washington Gas Energy Services, Inc. (WGES), and the Industrial Users Groups. Exelon filed its Petition to Intervene on December 3, 2013, a day after the deadline had passed.

A scheduling order (second prehearing order) was issued on December 10, 2013, which approved the Companies' Motion to Consolidate all four Companies' Petitions as unopposed and granted every petition to intervene. In addition, the Order adopted discovery modifications and set forth a litigation schedule.

On December 23, 2013, the Pennsylvania State University (PSU) filed a Petition to Intervene, alleging that PSU has a right or interest not already adequately represented by another party, which is sufficient to warrant intervention under 52 Pa. Code § 5.72. No Party filed a response to this Petition to Intervene. Therefore, the allegations regarding the justification for intervention were accepted as true and intervention was granted by the ALJ.

The Parties submitted direct, rebuttal and surrebuttal testimony, along with various exhibits, all of which were admitted into the record. At the time set for the evidentiary hearing, the Parties indicated that they had reached a full settlement of most of the issues and would waive cross-examination of nearly all of the witnesses. A transcript of seventy-one pages was generated.

On March 27, 2014, the Parties filed a Joint Petition for Partial Settlement (Partial Settlement) in conjunction with their Statements in Support. On March 27, 2014,

Main Briefs on the one issue that was not settled were filed by the Companies, Exelon, FES, RESA and the Industrial Users Groups.

The Partial Settlement was signed by FirstEnergy, the OCA, the OSBA, the Industrial Users Groups, I&E, RESA, CAUSE-PA, Exelon, and FES, and statements in support were attached to the Partial Settlement.

Letters of non-opposition to the Settlement were filed by Duquesne, Interstate Gas Supply, Inc. and Dominion Retail, and PSU. The following Parties filed letters indicating that they were not filing a Main Brief: I&E, Duquesne, WGES, PSU, Interstate Gas Supply, Inc. and Dominion Retail, the OSBA, and FES. The Partial Settlement indicates that FirstEnergy is authorized to represent that, in addition to those Parties who filed letters of non-opposition to the Partial Settlement, NextEra also does not oppose the Partial Settlement.

Reply Briefs were filed on April 10, 2014, by FirstEnergy, FES, RESA, Exelon and the Industrial Users Groups.

The record closed upon receipt of the Reply Briefs on April 10, 2014. In a Recommended Decision issued on May 6, 2014, ALJ Colwell recommended, *inter alia*, approval of the Partial Settlement without modification and denial of the proposal to include Network Integration Transmission Services (NITS) in the Companies' Default Service Supply Rider (DSSR). R.D. at 43, 44.

As noted, Exceptions were filed by the Companies, FES, Exelon, RESA and IUG on May 27, 2014. On June 6, 2014, the Companies, FES, Exelon and the IUG filed Replies to Exceptions.

## **II. Discussion of the Partial Settlement**

### **A. Terms and Conditions of the Partial Settlement**

The Settling Parties agreed to the Partial Settlement covering all issues, except for one issue related to which entity should have the responsibility for the collection of NITS charges from the PJM Interconnection L.L.C. (PJM) for all customer load (shopping and non-shopping customers) and whether recovery of those costs should be accomplished on a non-bypassable basis. Within the Partial Settlement, the Joint Petitioners were able to agree to revised default service programs consistent with the Companies' DSP III Petition.

The Partial Settlement consists of the Joint Petition containing the terms and conditions of the Partial Settlement, numerous Exhibits and the Statements in Support of the Joint Petition. Statements A through I represent the Statements in Support filed by the Companies, I&E, the OCA, the OSBA, Cause-PA, Exelon Generation, FES, IUG and RESA, respectively.

The essential terms and conditions of the Partial Settlement are set forth in Section II. Partial Settlement ¶¶ 12-69 at 5-19. The Settling Parties agreed to the following terms and conditions:

#### **A. Procurement And Implementation Plans**

##### **(1) Term**

12. The Companies' Revised DSP Programs shall each have a term of two years, beginning June 1, 2015 and ending May 31, 2017 ("DSP III Term").

13. In the event of the passage of legislation that has the effect of fundamentally changing the provision of default service in Pennsylvania in a manner that materially impacts

the remainder of the Revised DSP Programs, the Companies will, within fifteen business days of the enactment of such legislation, confer with the Joint Petitioners.

14. After obtaining the Joint Petitioners' input, the Companies will, if necessary to comply with such legislation, petition the Commission for authorization to suspend or modify any procurement solicitation events scheduled, but not yet conducted, under the Revised DSP Programs, or seek such other declaratory guidance as deemed appropriate, in order to implement the new default service policy consistent with the directives of the legislation. In such event, the Companies will seek input and approval from the Commission on the provision of default service for the remainder of the Revised DSP Programs. Nothing within this paragraph creates any additional rights in the parties to petition to modify or terminate contracts that have been executed prior to the enactment of such legislation.

## **(2) Procurement Groups**

15. The Companies' default service customers shall be divided into three classes for purposes of default service procurement: the residential class, the commercial class, and the industrial class.

16. The Companies will maintain the same residential and commercial class definitions that were approved by the Commission in the DSP II Proceeding.

17. Met-Ed, Penelec and Penn Power will maintain the same industrial class definitions that were approved by the Commission in the DSP II Proceeding.

18. The Joint Petitioners agree that the West Penn industrial class definition that was approved by the Commission in its DSP II Proceeding is reasonable, subject to the following revision. The West Penn industrial class shall include customers with interval meters that are served under Rate Schedule GS-30 and have billing demands that are equal to or exceed 400 kW. Administrative costs associated with expansion of the West Penn industrial class will be included in the default service rates established pursuant to West Penn's Hourly Pricing Default Service Rider ("HPS Rider").

19. Attached as Exhibit A is a revised West Penn Rate Schedule GS-30 to reflect the expansion of the industrial procurement class set forth in this Settlement. Exhibit A has been reviewed and found acceptable by the Joint Petitioners.

**(3) Residential And Commercial Class Procurement**

20. The Companies will procure 100% of the supply required to serve residential and commercial default service customers during the DSP III Term through a descending clock auction (“DCA”) for full requirements service. Winning suppliers will bid on “tranches” corresponding to a percentage of the actual residential and commercial default service customer load and be responsible for fulfilling all the associated requirements of a load serving entity (“LSE”) under their agreements with PJM, including energy, capacity, transmission,<sup>1</sup> ancillary services, PJM administrative expenses, as well as providing all necessary alternative energy credits described in Paragraphs 33 and 34, *infra*, for compliance with Pennsylvania’s Alternative Energy Portfolio Standards (“AEPS”) Act. 73 P.S. § 1648.1 *et seq.*

21. Winning suppliers will schedule the delivery of these products to the Met-Ed Zone [PJM designation “METED”] for Met-Ed products, the Penelec Zone [PJM designation “PENELEC”] for Penelec products, the Penn Power Zone [PJM designation “Penn Power Aggregate”] for Penn Power products and the West Penn Zone [PJM designation “APS”] for West Penn products in PJM. A winning supplier must be a LSE within PJM and comply with all regulations, business rules, scheduling protocols and all other aspects of doing business within PJM.

22. The Joint Petitioners agree to the rules for the DCA attached to the Joint Petition as Exhibit B. Exhibit B is a revised version of Companies’ Exhibit RBR-2 to reflect the procurement plan and products set forth in this Settlement.

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<sup>1</sup> These transmission requirements exclude Regional Transmission Expansion Plan (“RTEP”) charges, Expansion Cost Recovery Charges (“ECRCs”), Reliability Must Run (“RMR”) charges and other charges associated with generation deactivation.

23. Each residential class tranche is a full requirements, load-following product that consists of a 95% fixed price portion and a 5% variable price spot portion. The 5% spot portion will be priced at the hourly PJM real-time zonal locational marginal price (“LMP”) for each Company plus a \$20 per megawatt-hour (“MWh”) adder to cover the costs of other supply components associated with serving the contracted load, including capacity, ancillary services, AEPS compliance, and other costs. The fixed price portion will be established through the Companies’ DCA.

24. Contracts for 50% of the residential class load will have terms of twelve months, and contracts for the remaining 50% will have terms of twenty-four months.

25. The full requirements contracts for the commercial class will include a fixed price for 100% of the supply and will be procured through DCAs in the same manner and at the same time as the residential class.

26. The commercial class full requirements product mix will be comprised of three month contracts (28%), twelve month contracts (36%) and twenty-four month contracts (36%).

27. The procurement terms and schedule for the residential and customer class contracts are set forth in Exhibit C.

#### **(4) Industrial Class Procurement**

28. The industrial class product is an hourly-priced service product based upon PJM real-time zonal hourly market prices. Suppliers will bid for the right to serve a portion of the hourly-priced service load for twelve-month terms (commencing on either June 1, 2015 or June 1, 2016). Winning suppliers will be paid the winning price bid in the hourly-priced auction, the hourly PJM real time zonal LMP, and a fixed adder of \$4/MWh to capture the estimated costs of other supply components, including capacity, ancillary services, AEPS compliance and other costs.

29. The Companies will procure default service supply for the industrial class load through two separate auctions for twelve-month contracts in January 2015 and January 2016.



## **B. Supplier Master Agreement**

30. Attached as Exhibit D to the Joint Petition is the form of the Supplier Master Agreement (“SMA”) that each Company will execute with wholesale suppliers that are successful bidders in the Companies’ default service supply procurements. The SMA is based on the latest draft of the uniform supplier master agreement developed by the Commission’s Office of Competitive Market Oversight (“OCMO”) procurement collaboration working group.

31. Residential and Commercial SMAs will include provisions that adjust the price paid to default service suppliers for each MWh of load by a seasonal billing factor. One factor applies in the summer months (June-August) and the other seasonal billing factor applies in the non-summer months (September-May). The seasonal billing factors do not apply to three-month products. The seasonal billing factors set forth in the Residential and Commercial SMAs shall be updated to reflect the average energy price differential across all four Companies’ PJM Zones for the twelve month period ending August 31, 2014. If the non-summer average energy price is equal to or greater than the summer average, the seasonal billing factors will be set equal to 1.0.

32. Exhibit D is a revised version of the Companies’ Exhibit KMS-1 to reflect clarifications to the seasonal billing factors and reduction in the fixed adder for hourly-priced service set forth in this Settlement. Exhibit D has been reviewed and found acceptable by the Joint Petitioners.

## **C. Alternative Energy Portfolio Standards Act**

33. For all customer classes, the Companies’ non-solar AEPS requirements will be fulfilled by default service suppliers through the full-requirements contracts. Winning full requirements suppliers in the Met-Ed, Penelec and Penn Power service territories will be required to supply alternative energy credits (“AECs”) to satisfy all Tier I (except solar photovoltaic) and Tier II AEPS requirements associated with the load they serve, including the increasing annual percentage requirements. In the West Penn service territory, default service suppliers will be responsible for all Tier I and Tier II AEPS requirements (including solar photovoltaic requirements) less any AECs that are allocated to the

suppliers on a load-ratio basis from existing long-term purchases made by West Penn. All other AEPS requirements shall be those in effect at the time the SMAs are executed for that load.

34. Met-Ed, Penelec and Penn Power will conduct a request for proposals (“RFP”), consistent with the procurement process approved in the DSP II Proceeding, to solicit bids for the provision of a fixed number of solar photovoltaic alternative energy credits (“SPAECs”) based on each Company’s most recent distribution load forecasts. The Joint Petitioners agree to the use of the RFP rules for SPAEC procurements and the agreement, which each winning supplier in the Met-Ed, Penelec and Penn Power service territories will be required to execute, set forth in Companies’ Exhibit RBR-4.

#### **D. Contingency Plans**

##### **(1) Full Requirements**

35. The Joint Petitioners agree that the Companies will continue utilizing the contingency plans approved in the DSP II Proceeding. Specifically, in the event that the default service load for any class is not fully subscribed or if the Commission rejects the bid results from a solicitation, the Companies will rebid the unfilled tranches in the next scheduled procurement for which there is sufficient calendar time to include the tranches. For any unfilled tranches still remaining, the Companies will purchase the necessary physical supply for the remaining tranches for that class through PJM-administered markets. The Companies will not enter into hedging transactions to attempt to mitigate the associated price or volume risks to serve such unfilled tranches.

36. The Joint Petitioners agree that, in the event a winning bidder defaults prior to the start of or during the delivery period, the Companies will offer the unfilled tranches to the other qualified suppliers. If this is unsuccessful and a minimum of thirty calendar days exists prior to the start of the delivery period, the tranches will be bid out in a separate solicitation. If insufficient time exists to conduct an additional solicitation, or if the supplemental solicitation is

unsuccessful, the Companies will supply the tranches using PJM-administered real-time markets.

**(2) AEPS Requirements**

37. The Joint Petitioners agree that in the event that a SPAEC solicitation held by Met-Ed, Penelec or Penn Power is not fully subscribed, the Commission rejects the bid results from a solicitation, or any winning supplier defaults before or during a delivery period, Met-Ed, Penelec or Penn Power will conduct short-term procurements at market prices to ensure AEPS compliance until such time as the Commission approves an alternative mechanism.

**E. Independent Evaluators**

38. The Joint Petitioners agree to the appointment of CRA International, Inc. d/b/a/ Charles River Associates (“CRA”) as the independent third-party evaluator for the Companies’ default service procurements.

39. The Joint Petitioners agree to the appointment of The Brattle Group as the independent third-party evaluator for SPAEC procurements.

**F. Rate Design And Cost Recovery**

**(1) Price To Compare Default Service Rate Rider**

40. The Companies will continue to recover the cost of default service for the residential and commercial classes through their Price to Compare Default Service Rate Riders (“PTC Riders”) approved by the Commission in the DSP II Proceeding. Default service rates established pursuant to the PTC Riders will continue to consist of a single per-kWh energy charge, which changes quarterly. These rates will continue to recover: (1) generation costs, transmission costs (excluding RTEP charges, ECRCs and other non-market based (“NMB”) costs described in Paragraph 48, *infra*), and ancillary service costs; (2) supply management and administrative costs, as provided in 52 Pa. Code § 69.1808; and (3) applicable taxes. In addition, the default service rates will include a quarterly reconciliation component, or “E factor,” to recoup or refund, as applicable, under or over-collections from prior periods.

41. The time for filing PTC Rider rates with the Commission will be changed from thirty days prior to the effective date of such rate changes to the later of forty-five days prior to the effective date or seven days after the last supply auction.

42. The Joint Petitioners agree that the Companies shall be permitted to file the PTC Riders set forth in Exhibits E-1 through E-4 to the Joint Petition to become effective as of June 1, 2015, subject to resolution of the issue related to NITS.<sup>2</sup>

**(2) Hourly Pricing Default Service Rider**

43. The Companies will continue to use the HPS Rider approved by the Commission in the DSP II Proceeding to recover the cost of default service for industrial class customers. The HPS Rider may also be elected, on a voluntary basis, by qualifying commercial customers that have interval metering in place. Default service rates established pursuant to the HPS Rider will continue to be based upon the PJM hourly LMP for each Company's respective PJM-designated transmission zone plus associated costs, such as capacity, ancillary services, PJM administrative expenses and costs to comply with AEPS requirements that are incurred to provide HPS. The default service rates also will include an E-factor to reconcile costs and revenues on a quarterly basis.

44. The definition of  $HP_{Anc}$  shall be renamed  $HP_{Oth}$  and will represent an estimate of the cost to default service suppliers in providing ancillary services and other supply components.  $HP_{Oth}$  will be set equal to \$0.004 per kWh and will be adjusted for losses.

45. The time for filing HPS Rider rates with the Commission will be changed from thirty days prior to the effective date of such rate changes to the later of forty-five

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<sup>2</sup> The electric service tariff riders and supplier tariffs attached to this Joint Petition do not change the Companies' current treatment of PJM charges for NITS. For default service, these costs are embedded in the Companies' Price-to-Compare ("PTC"). EGSs serving shopping customers, as LSEs, bear these costs. The Companies will address any Commission determinations regarding NITS in a subsequent compliance filing.

days prior to the effective date or seven days after the last supply auction.

46. The Joint Petitioners agree that the Companies shall be permitted to file the HPS Riders set forth in Exhibits F-1 through F-5 to the Joint Petition to become effective as of June 1, 2015, subject to resolution of the issue related to NITS.

### **(3) Default Service Support Rider**

47. Each Company's tariff will include a Default Service Supply Rider ("DSSR") that imposes non-bypassable charges to recover the same categories of costs approved by the Commission in the DSP II Proceeding, with the modifications described below. The Joint Petitioners agree that the Companies shall be permitted to file the DSSRs set forth in Exhibits G-1 through G-5 to the Joint Petition to become effective as of June 1, 2015, subject to resolution of the issue related to NITS.

#### **(a) Non-Market Based ("NMB") Charges**

48. The NMB transmission charge component of the DSSR shall be revised to include the following costs (collectively, "New NMB Charges"): (1) PJM charges associated with reliability must run ("RMR") unit declarations and deactivation of plants for which charges are set after the approval of the Revised DSP Programs by the Commission; (2) historical out of market tie line, generation and retail customer meter adjustments; and (3) unaccounted for energy.

49. Wholesale default service suppliers and EGSs, however, will continue to be responsible for PJM charges associated with RMR generating unit declarations and deactivation of plants designated before the Commission's approval of the Revised DSP Programs, as those charges may change over time.

50. The Joint Petitioners agree that the New NMB Charges will no longer be recovered through the default service rates established pursuant to the PTC and HPS Riders and, instead, will be recovered through the Companies' non-bypassable

DSSRs. The New NMB Charges will be allocated based on the customer class aggregate Net System Peak Load (“NPSL”) and will be charged to residential and commercial customers on an energy basis and to industrial customers on a demand basis.

**(b) Uncollectible Expense**

51. Effective June 1, 2015, the uncollectible expense associated with the provision of hourly-priced service to industrial customers will no longer be recovered through the DSSR and will instead be recovered under the default service rates established pursuant to the HPS Riders.

52. At the time of West Penn’s next base rate case, the Companies commit to propose the unbundling of all default service-related uncollectible accounts expense and uncollectible accounts expense associated with the West Penn Purchase of Receivables program in a manner substantially similar to the unbundling of those expenses for Met-Ed, Penelec and Penn Power.

**(4) Solar Photovoltaic Requirements Charge Rider**

53. To recover the costs attributable to complying with solar AEPS requirements, the Companies will continue to use the non-bypassable Solar Photovoltaic Requirements Charge Rider (“SPVRC Rider”) approved by the Commission in the Companies’ DSP II Proceeding.

**(5) Reconciliation**

54. The Companies will maintain the same E-factor reconciliation mechanisms that were approved by the Commission in their DSP II Proceeding.

**(6) Allocation Of Default Service Administrative Costs**

55. The Companies’ default service administrative costs (i.e., primarily the costs of conducting procurement auctions and RFPs, as well as the regulatory costs associated with these proceedings) will be allocated to and recovered from the various customer classes in accordance with each class’ percentage of non-shopping load (in kWhs) provided in Companies’ Exhibit KMS-2R.

**(7) Time-of-Use Rates**

56. The Companies currently offer an optional time-of-use (“TOU”) pricing rate to residential customers and will continue to do so in the manner approved by the Commission in the Companies’ DSP II Proceeding.

57. The Joint Petitioners agree that Penn Power and West Penn will continue to use their TOU Riders approved by the Commission in the Companies’ DSP II Proceeding.

**(8) Supplier Tariff Changes**

58. As shown on Exhibits H-1 through H-4 to this Joint Petition, the treatment of the New NMB Charges has been clarified and an appendix listing PJM billing line items, indicating whether they are the responsibility of the EDC or the EGS, will be added to each Company’s Supplier Tariff.

**G. Customer Referral Program**

**(1) Program Administration**

59. The currently-effective Customer Referral Program (“CRP”) as set forth in Companies’ Exhibit KMS-16, including the cost recovery mechanisms approved by the Commission in the Companies’ DSP II Proceeding, will continue until the earlier of: (1) six months following a Commission Order modifying the CRP as a result of a settlement reached through the stakeholder process outlined in Paragraphs 63-65 below; (2) a Commission Order modifying the CRP as a result of a statewide investigation of standard offer customer referral programs; or (3) May 31, 2017.

60. The Companies will establish a CRP-dedicated webpage providing information to suppliers about the program, frequently asked questions and the current CRP prices.

61. Within ninety days of the Commission’s approval of the Settlement, the Companies will add the following messages and disclosures to all customer service representative scripts and written documents regarding the CRP:

- The initial discount of 7% is based on the current PTC;
- The PTC will change quarterly with the next change in [month];
- The percentage savings a customer will experience will vary as the PTC changes; and
- The CRP rate may be higher or lower than the next PTC.

## (2) Stakeholder Process

62. The Companies will convene a stakeholder process and will hold at least three stakeholder meetings during the period November 2014 through January 2015.

63. To facilitate discussion at the stakeholder meetings, the Companies will provide participants the following information: (1) CRP scripts; (2) customer enrollment figures and CRP prices for the period August 1, 2013 to July 31, 2014; (3) statistics regarding EGS participation in the CRP from inception through the enrollment period beginning December 1, 2014; (4) a report of all informal or formal complaints related to the CRP filed with the Commission during the period August 1, 2013 through November 30, 2014; and (5) retention rates of the Companies' customers acquired by EGSs through the CRP.

64. The stakeholder meetings will address, at a minimum, the following issues:

- EGS recommendations that would improve administration of the CRP;
- EGS proposed changes to the CRP product composition that might improve the customer experience as well as increase EGS participation; and
- The OCA's and CAUSE-PA's recommended changes to the CRP scripts, administrative process and product composition that might improve the customer experience as well as increase EGS participation.



65. Any changes or modifications agreed upon by all parties at the stakeholder meetings will be presented to the Commission by the Companies in a petition to modify the CRP, and the Companies shall implement the modifications contained therein within six months of final approval of such petition by the Commission.

### **(3) Cost Recovery**

66. The Joint Petitioners agree that the Companies continue to have the right to full and current cost recovery for all costs associated with the CRP.

### **H. Affiliate Relations**

67. Pursuant to Section 2807(e)(3.1)(iii)(B) of the Public Utility Code, the Joint Petitioners request that the Commission approve the SMAs as affiliated interest agreements as required under 66 Pa.C.S. § 2102.

### **I. Request For Waivers**

68. The Commission's regulations (52 Pa. Code § 54.187) and Policy Statement (52 Pa. Code § 69.1805) provide that default service providers should design procurement classes based upon peak loads of 0-25 kW, 25-500 kW, and 500 kW and greater, but default service providers may propose to depart from these specific ranges, including to "preserve existing customer classes." If necessary, the Joint Petitioners respectfully request that the Commission grant the Companies a waiver of 52 Pa. Code § 54.187 to allow their customer grouping to be as delineated in Section II.A.2, *supra*.

69. To the extent necessary, the Joint Petitioners also respectfully request that the Commission grant the Companies a waiver of 52 Pa. Code §§ 54.182 and 54.187 with regard to inclusion of certain transmission-related costs in the PTC so that they may recover RTEP, ECRC, and the New NMB Charges through the Companies' non-bypassable DSSR rather than the PTC as explained in Section II.F, *supra*.

In addition to the specific terms to which the Settling Parties have agreed, the Partial Settlement contains certain general, miscellaneous terms. The Partial

Settlement is conditioned upon the Commission's approval of the terms and conditions without modification. The Partial Settlement establishes the procedure by which any of the Settling Parties may withdraw from the Partial Settlement and proceed to litigate this case, if the Commission should act to modify the Partial Settlement. Partial Settlement ¶ 74 at 21. In addition, the Partial Settlement states that it does not constitute an admission against, or prejudice to any position which any of the Settling Parties might adopt during subsequent litigation of this case or any other case. Partial Settlement ¶ 73 at 21.

Further, the Partial Settlement provides that approval of the Partial Settlement does not preclude the Settling Parties from filing Exceptions with respect to any modifications to the terms and conditions of this Partial Settlement, or any additional matters proposed by the ALJ, including the separately briefed issue concerning the collection of NITS charges. Partial Settlement ¶ 75 at 21.

The Settling Parties respectfully request that the ALJ and the Commission approve the Partial Settlement, without modification, subject to the resolution of the issue reserved for briefing. Partial Settlement at 22.

## **B. Legal Standards**

The policy of the Commission is to encourage settlements, and the Commission has stated that settlement rates are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code §§ 5.231, 69.401. A full settlement of all the issues in a proceeding eliminates the time, effort and expense that otherwise would have been used in litigating the proceeding, while a partial settlement may significantly reduce the time, effort and expense of litigating a case. A settlement, whether whole or partial, benefits not only the named parties directly, but, indirectly, all customers of the public utility involved in the case.

Regulatory proceedings are expensive to litigate, and the reasonable cost of such litigation is an operating expense recovered in the rates approved by the Commission. Partial or full settlements allow the parties to avoid the substantial costs of preparing and serving testimony and the cross-examination of witnesses in lengthy hearings, the preparation and service of briefs, reply briefs, exceptions and replies to exceptions, together with the briefs and reply briefs necessitated by any appeal of the Commission's decision, yielding significant expense savings for the company's customers. For this and other sound reasons, settlements are encouraged by long-standing Commission policy.

Despite the policy favoring settlements, the Commission does not simply rubber stamp settlements without further inquiry. In order to accept a settlement such as that proposed here, the Commission must determine that the proposed terms and conditions are in the public interest. *Pa. PUC v. York Water Co.*, Docket No. R-00049165 (Order entered October 4, 2004); *Pa. PUC v. C. S. Water and Sewer Assoc.*, 74 Pa. P.U.C. 767 (1991).

The Companies have the burden of proof in this proceeding to establish that they are entitled to the relief they are seeking. 66 Pa. C.S. § 332(a). The Companies must establish their cases by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pennsylvania Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 602 A.2d 863 (Pa. 1992) To meet their burden of proof, the Companies must present evidence more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950). In this case, the Companies request that the Commission approve the joint filing establishing the proposed DSPs. The Settling Parties have reached an accord on many of the issues and claims that arose in this proceeding and submitted the Partial Settlement. The Settling Parties have the burden to prove that the Partial Settlement is in the public interest.

The ALJ found that the proposed Partial Settlement is in the public interest and recommended that it be approved without modification. The proposed Partial Settlement was not opposed by any Party. R.D. at 27.

### **C. Standards for Default Service**

The requirements of a default service plan appear in Section 2807(e) of the Public Utility Code (Code),<sup>3</sup> 66 Pa. C.S. § 2807(e). The requirements include that the default service provider follow a Commission-approved competitive procurement plan, that the competitive procurement plan include auctions, requests for proposal, and/or bilateral agreements, that the plan include a prudent mix of spot market purchases, short-term contracts, and long-term purchase contracts designed to ensure adequate and reliable service at the least cost to customers over time, and shall offer a time-of-use program for customers who have smart meter technology. 66 Pa. C.S. §§ 2807(e), 2807(f).

The Competition Act also mandates that customers have direct access to a competitive retail generation market. 66 Pa.C.S. § 2802(3). This mandate is based on the legislative finding that “competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.”

66 Pa.C.S. § 2802(5). *See, Green Mountain Energy Company v. Pa. PUC*, 812 A.2d 740, 742 (Pa.Cmwlth. 2002). Thus, a fundamental policy underlying the Competition Act is that competition is more effective than economic regulation in controlling the costs of generating electricity. 66 Pa. C.S. § 2802(5).

*Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company For Approval of Their*

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<sup>3</sup> *Electricity Generation Customer Choice and Competition Act*, Act 138 of 1996, (Competition Act) as amended by Act 129 of 2008, codified at 66 Pa. C.S. § 2801, *et seq.*

*Default Service Programs*, Docket Nos. P-2011-2273650, P-2011-2273668, P-2011-2273669, and P-2011-2273670, at 7-8 (Order entered August 16, 2012) (*DSP II*).

Also applicable are the Commission's default service Regulations, 52 Pa. Code §§ 54.181-54.189, and a Policy Statement addressing default service plans, 52 Pa. Code §§ 69.1802-69.1817. The Commission has directed that EDCs consider the incorporation of certain market enhancement programs into their DSPs in order to foster a more robust retail competitive market. *Investigation of Pennsylvania's Retail Electricity Market: Recommendations Regarding Upcoming Default Service Plans*, Docket No. I-2011-2237952 (Order entered December 16, 2011), and *Intermediate Work Plan* (Final Order entered March 2, 2012) (IWP Order).

### **C. Disposition of the Partial Settlement**

As noted above, a Partial Settlement in principle of the majority of issues was reached prior to the hearing dates, thereby negating the need for the scheduled evidentiary hearings on the settled issues. Cross-examination of nearly all of the witnesses were waived. However, during the evidentiary hearings, certain Parties were cross-examined only on the one litigated issue, concerning the recovery of NITS costs. As such, during the hearings, the Parties' respective testimony and exhibits were admitted into the record. The Settlement was not signed by all the Parties, but it was also unopposed by any Party.

According to the ALJ, the Settlement of this proceeding was the result of compromise and represents the positions of the Parties who participated, including representatives of residential, commercial and industrial customers, low-income customers and EGSs. The ALJ concluded that the Partial Settlement is not opposed, and its terms comply with applicable law and policies of the Commission, and, therefore, it was in the public interest. R.D. at 27.

Based on our review of the Partial Settlement, we find that there are a number of settled issues within the Settlement that are beneficial to customers. Among these provisions are: (1) substantial litigation and associated costs were avoided; (2) the inclusion of Revised DSPs consistent with the Companies' original proposal and existing DSP II; (3) the elimination of three-month and forty-eight-month contracts from the residential product mix; (4) the inclusion of seasonal billing factors in the residential and commercial SMAs, which adjust the price paid to default service suppliers for each MWh of load to reflect anticipated seasonal differences in energy prices; (5) the expansion of the West Penn industrial class to include customers with interval meters that are served under rate schedule GS-30 and have billing demands that are equal to or exceed 400 kW instead of the current 500 kW; (6) the agreement on a form supplier master agreement and related documents to implement the Revised DSPs; (7) the agreement on procedures for the acquisition and use of alternative energy credits (AECs); (8) the agreement on contingency plans in the event of failure to fully subscribe the default service load for any class, or for Commission rejection of the bid results for any procurement, or supplier default; (9) the appointment of CRA International, Inc. d/b/a Charles River Associates as the independent third-party evaluator of the Companies' auctions; (10) the appointment of the Brattle Group as the independent third-party evaluator of the Companies' separate solar photovoltaic AEPS procurements; (11) the agreement upon tariff and rate design changes to implement the Revised DSPs; (12) the agreement that default service suppliers and electric generation suppliers will no longer be responsible for certain additional non-market based (NMB) transmission charges; (13) the continuance of the Companies' Commission-approved Customer Referral Program (CRP) as well as the revision of CRP call center scripts to clarify the nature of the CRP's discounted price; and (14) the agreement to convene a stakeholder process to review potential improvements to the administration of the CRP that may enhance the customer experience and/or increase EGS participation.

We find that these many beneficial aspects within the Partial Settlement all support a finding that the Joint Petition for Partial Settlement is in the public interest. The Settlement resolves the majority of the issues impacting residential consumers, small business customers, large business customers and the public interest at large. The benefits of the Settlement are numerous and will result in significant savings of time and expenses for all Parties involved by avoiding the necessity of further administrative proceedings, as well as possible appellate court proceedings. For the reasons stated herein and in the Joint Petitioners' Statements in Support, we agree with the ALJ's conclusion that the Joint Petition for Partial Settlement is in the public interest. Accordingly, we shall adopt the ALJ's recommendation to grant the Joint Petition for Partial Settlement and approve the Partial Settlement without modification.

### **III. Discussion of Contested Issue**

The only remaining issue in this proceeding is whether the Companies should assume responsibility for PJM charges for NITS for all customer load, both shopping and non-shopping customers, and recover those costs through their non-bypassable DSSRs. This issue arose as a result of a proposal made by RESA and FES (NITS Proposal) and was briefed by the Companies, RESA, the Industrial Users Groups, Exelon and FES. Of these five Parties, only the Industrial Users Groups opposed the inclusion of NITS in the NMB Services Transmission Charge component of the Companies' DSSRs as a non-bypassable charge imposed on a competitively neutral basis on all shopping and non-shopping customers.

The Company explained that NITS charges consist of the following PJM billing line items:

1. 1100 and 2100: Network Integration Transmission Service

2. 1101 and 2101: Low-Voltage Network Integration Transmission Service
3. 1102 and 2102: Network Integration Transmission Service (exempt)
4. 1104 and 2104: Network Integration Transmission Service Offset
5. 1106 and 2106: Non-Zone Network Integration Transmission Service

Partial Settlement at 2, footnote 2; Companies' M.B. at 6.

The Companies explained further:

NITS charges, like the RTEP component of NMB transmission charges approved for DSSR recovery in the Companies' DSP II Proceeding, are embedded, cost-of-service rates that are imposed on the basis of an electric distribution company's total native load, regardless of the source of the generation used to serve that load. In other words, the way NITS charges are imposed does not differentiate between EDC load served by default generation suppliers and load served by EGSs. For that reason, the Companies support the proposal of RESA and FES to collect NITS on a competitively-neutral basis from all customers.

RESA and FES assert that default service generation suppliers and EGSs cannot financially hedge NITS because, like RTEP, ECRC, RMR and UFE, they are not market-based. The Companies agree. Accordingly, allowing the Companies to recover PJM charges for NITS like other similar NMB charges, on a non-bypassable basis, will lower the risk profile for both default service generation suppliers that bid in the Companies' supply auctions and EGSs offering competitive products because, given the difficulty of financially hedging such cost, both default suppliers and EGSs need to include in their prices a premium for the uncertainty of these costs. If the Commission accepts the recommendations of RESA and FES to allow the Companies to assume responsibility for NITS on behalf of default service suppliers and EGSs in their service territories, the Companies propose to collect those costs through their DSSRs as part of



line item NMBc as shown on Companies' Exhibits KMS-3R through KMS-7R.

Companies' M.B. at 6-7 (references omitted).

As we proceed in our review of the various positions espoused in this proceeding, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Moreover, any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

**A. Whether RESA/FES have sustained their burden of proof**

**1. Positions of the Parties**

According to IUG, the Companies proposed to collect NITS in the DSP II case, and the Commission held that NITS must continue to be collected by EGSs instead of being collected for all customers through the DSSR, stating, "Consistent with the Commonwealth's continued migration to a more competitive retail market, we believe that these supply-related costs should remain with the EGSs." *DSP II*, Docket No. P-2011-2273650 (October 11, 2012 Order on Reconsideration), at 10 (affirming its August 16, 2012 Order, at 83, which states, "We concur with the Industrials. NITS costs are directly related to the transmission service offered to customers and should continue to be collected by the EGSs instead of being collected for all customers through the DSS Rider, as proposed by the Companies.").

Recognizing that the Commission has already ruled on this issue, in the prior DSP II case for FirstEnergy, FES averred that there has been a change of circumstances significant enough to justify revisiting this issue. FES M.B. at 8.

In its prior decision, FES stated that the Commission relied at least in part upon the predictability of NITS charges. However, FES testified that two fundamental circumstances have changed since the Commission's DSP II decision. First, according to FES, the Commission has issued recent guidance diminishing retail suppliers' ability to pass-through unanticipated costs, some of which are unhedgeable, to smaller customers on certain contracts labeled as "fixed price." Second, FES stated that recent experience has demonstrated that NITS costs can be very volatile and, thus, pose a significant challenge to both default service bidders as well as to effective retail competition that enables customers to maximize savings. FES St. 1 at 7; FES M.B. at 9.

FES stated that the Commission's Final Order on *Guidelines for Use of Fixed Price Labels for Products With a Pass-Through Clause*, Docket No. M-2013-2362961 (Final Order entered November 14, 2013) (*Fixed Price Order*), created a change in circumstances. According to FES, this directive created the risk that an EGS must either absorb the costs, attempt to obtain customer consent to a price increase at the risk of losing customers, or price any such costs attributable to those customer classes into the fixed price at the outset of the contract, resulting in higher prices than necessary if a forecasted NITS increase does not occur. FES opined that the removal of these uncertain costs and allowing the Companies to collect them through the non-bypassable DSSR charge for both shopping and non-shopping customers would allow suppliers to continue to offer a variety of longer term fixed price contracts, as anticipated in the *Fixed Price Order*. FES St. 1 at 7; *see also* RESA St. 1 at 23; FES M.B. at 9-10.

Second, FES averred that, since the issuance of the DSP II Order, suppliers have experienced significant swings in NITS costs in the PJM territory due to increased transmission investment. FES cited to a recent example which occurred in the service territory of Public Service Electric & Gas (PSE&G), where NITS prices nearly doubled from year end 2012 to the beginning of 2014, going from \$35,717 per MW-year in 2012 to \$53,953 per MW-year in January of 2013, and jumping to \$71,187 per MW-year in

January of 2014. According to FES, on a kWh basis this translates to an increase of one-half cent per kWh, which it considers a very large increase. FES maintained that this inordinate increase in NITS was non-market based and unhedgeable. FES stated that the PSE&G experience demonstrates that the NITS charge is capable of extreme volatility. FES St. 1 at 8. According to FES, the Commission's DSP II Order relied upon a finding of fact that NITS costs are predictable. That assumption has since been proven not to be true in the opinion of FES. Accordingly, FES opined that it is now appropriate for the Commission to reconsider its prior position and to treat NMB NITS costs as a charge that should be recovered through a competitively-neutral, non-bypassable charge by the EDC to all customers. FES M.B. at 10.

IUG argued that FES has failed "to establish that new circumstances justify a proposal that is inconsistent with public utility law and has been repeatedly rejected by the Commission in prior DSP proceedings." IUG M.B. at 3. According to IUG, the purpose of the *Fixed Price Order* was to provide transparency regarding EGSs' fixed and pass-through products to customers and does not address whether NITS should be included in the EGS contracts. Also, IUG averred that no evidence of volatility of transmission costs in Pennsylvania was submitted. Finally, even with fluctuating transmission costs, IUG stated that EGSs are capable of offering competitive products which include those costs. IUG M.B. at 4.

## **2. ALJ's Recommendation**

In her Recommended Decision, the ALJ found that NITS charges, like the RTEP component of NMB transmission charges approved for DSSR recovery in the Companies' DSP II Proceeding, are embedded, cost-of-service rates that are imposed on the basis of an electric distribution company's total native load, regardless of the source of the generation used to serve that load. According to the ALJ, the way NITS charges are imposed does not differentiate between EDC load served by default generation

suppliers and load served by EGSs. As a result, the ALJ concluded that FES, RESA, Exelon and the Companies provided sufficient evidence to support a finding that NITS can reasonably be included in an EDC's DSSR, should the Commission wish to include them. R.D. at 32.

### **3. Exceptions and Replies**

In its first Exception, IUG states that the ALJ erred in concluding FES *et al.* established their burden of proof in this proceeding. According to IUG, the ALJ cited to two pieces of purported evidence offered by FES to justify the establishment of a non-bypassable transmission cost collection. IUG points out that the ALJ utilized the Commission's *Fixed Price Order*, which is limited to discussing the nomenclature to be used by EGSs in describing electricity procurement contracts, and the volatility of unrelated transmission costs in areas completely unrelated to the Companies' service territories. IUG avers that in actuality, neither the *Fixed Price Order* nor the volatility of unrelated transmission costs constitute changes of circumstances that warrant a non-bypassable transmission cost collection. IUG opines that because an inapplicable Order and inappropriate facts are the only evidence proffered by FES to support a fundamental change to transmission cost collection, FES failed to meet their burden of proof, and the ALJ's finding should be rejected. IUG Exc. at 2-3.

IUG asserts that in the *Fixed Price Order*, the Commission focuses solely on the nomenclature that EGSs must use when labeling their contracts as either "fixed-price" or "pass-through" contracts in order to minimize shopping confusion among residential and small commercial customers. IUG maintains that this Order does not address transmission cost collection at all and certainly does not provide any indication of a baseline decision that electric distribution companies should begin collecting transmission costs from shopping customers, as compared to the current process of having EGSs collecting these costs from shopping customers. According to IUG,

because of the overwhelming inapplicability of the *Fixed Price Order* to any type of determination regarding whether collection of transmission costs should be by EGSs versus EDCs, the *Fixed Price Order* may not stand as evidence in support of a non-bypassable transmission cost collection. *Id.* at 3-4.

Additionally, IUG states that FES provided no evidence that transmission cost volatility is an issue with respect to the Companies' service territories as the sole evidence provided by FES relates to transmission cost levels of PSE&G, which is not a certificated utility in Pennsylvania. IUG maintains that the volatility of transmission costs in another jurisdiction provides no evidence that the volatility of transmission costs in Pennsylvania, or in the Companies' service territories, warrants a change to the transmission cost collection methodology of the Companies. *Id.* at 4.

In its reply, FES avers that it, RESA, Exelon and the Companies presented substantial evidence that the NITS proposal should be adopted, satisfying their burden of proof. FES states that this evidence includes the Commission's *Fixed Price Order*, which includes guidance diminishing retail suppliers' ability to pass-through unanticipated costs, some of which are unhedgeable, to smaller customers on certain contracts labeled as "fixed price." According to FES, removing NITS costs from the responsibility of suppliers and designating the Companies to be responsible for these services for both shopping and non-shopping customers is important to enabling suppliers to continue to offer a variety of longer term fixed price contracts in the years to come as envisioned by the *Fixed Price Order*, and will ultimately result in lower prices to customers. FES R. Exc. at 2-3.

FES also states that the Commission's DSP II Order relied upon a finding of fact that NITS costs are predictable, an assumption that has since been proven not to be true. FES asserts that to the contrary, since the DSP II Order, suppliers have experienced significant swings in NITS charges in the PJM territory due to increased

transmission investment. FES refers to the fact it provided the rapid doubling in PSE&G's NITS costs in 2013 as one example of an inordinate increase in NITS that is non-market based and unhedgeable, and cause for concern for Pennsylvania's developing competitive retail electric market. According to FES, IUG cannot credibly deny that substantially increased transmission investment is a development across PJM. *Id.* at 3-4.

In its Replies to Exceptions, Exelon states that the *Fixed Price Order* in fact has important relevance to discussion of the NITS Proposal and, on balance, supports reconsideration of the NITS Proposal at this time. Exelon alleges that IUG has misrepresented the Parties' arguments which cite to the *Fixed Price Order*, incorrectly stating that FES and others believe that the *Fixed Price Order* in and of itself justifies a non-bypassable NITS collection. According to Exelon, in fact, the *Fixed Price Order* does not justify the NITS Proposal; rather, it provides part of the basis for which the Commission should reconsider its decisions regarding similar proposals in the past. Exelon admits that no party to this proceeding argues that the Commission has not rejected similar proposals in the past. Exelon avers that its position is that it is now appropriate for the Commission to reconsider its prior position and to treat NITS costs as a charge that should be recovered through a competitively-neutral, non-bypassable charge by the EDC to all customers. Exelon R. Exc. at 3-5.

With regard to the volatility issue, Exelon states that Pennsylvania and New Jersey both reside in the PJM footprint and that transmission costs are largely determined at the PJM level and components that cause volatility in other states within PJM are likely to be able to cause similar volatility in Pennsylvania. Exelon opines that the IUG argument to the contrary represents a baseless red-herring, and therefore, should be ignored. *Id.* at 5.

In its reply, FirstEnergy states that IUG overlooks the impact of the *Fixed Price Order's* new labeling requirements on the recovery of NITS costs. FirstEnergy

claims that the *Fixed Price Order* limits an EGS' ability to automatically pass through unpredictable and unhedgeable NITS costs to residential or small business customers who have contracted for products labeled as "variable price." See *Fixed Price Order* at 24-25. FirstEnergy asserts that this directive creates additional risk that EGSs will include premiums in the fixed price at the outset of their contracts to address unanticipated NITS costs. FirstEnergy R. Exc. at 3-4.

With regard to the volatility of NITS costs, FirstEnergy avers that the predictability of NITS costs remitted to PJM on an annual basis was a key finding relied upon by the Commission in its decision to carve-out those costs from DSSR recovery in the DSP II Order. FirstEnergy states that the evidence of the volatility in NITS charges imposed by PJM on PSEG demonstrates that NITS costs are not predictable for EDCs with service territories in PJM. *Id.* at 4-5.

#### **4. Disposition**

Upon our consideration of the evidence of record, as well as the Exceptions of IUG and Replies thereto, we are persuaded by the arguments proffered by IUG that the evidence presented by FES *et al.* is insufficient to meet their burden of proof that the Commission should alter our decision within FirstEnergy's DSP II proceeding that NITS costs should not be collected through the Companies' DSSR rider mechanism. We find that neither our *Fixed Price Order*, entered in November of 2013, nor the single, alleged incident of volatile NITS costs in a neighboring jurisdiction amount to "changed circumstances" which would warrant the requested non-bypassable collection of NITS costs as proposed by FES *et al.* We further conclude that the FES *et al.* arguments as to the volatility issue are simply unconvincing as only one, single instance was offered as evidence. We do not agree that this one instance of volatility would lead to the inference that all NITS costs are now unpredictable and should be collected via the EDCs' non-

bypassable DSSR. Accordingly, we shall adopt the Exceptions of the Industrial Users Groups and reject the recommendation of the ALJ on this issue.

**B. Whether Inclusion of the NITS in the Companies' DSSR Would Constitute a Violation of Applicable Law**

**1. Positions of the Parties**

The IUGs argued that the proposal to shift the collection of NITS from EGSs to the EDCs must be rejected as an unjust and unreasonable proposition that would violate the Competition Act, the Code, and the PUC's Regulations. The sections that the IUGs refer to are as follows:

**§ 2802. Declaration of Policy**

The General Assembly finds and declares as follows:

\* \* \*

(16) It is in the public interest for the transmission and distribution of electricity to continue to be regulated as a natural monopoly subject to the jurisdiction and active supervision of the commission. Electric distribution companies should continue to be the provider of last resort in order to ensure the availability of universal electric service in this Commonwealth unless another provider of last resort is approved by the commission.

66 Pa. C.S. § 2802(16).

**§ 2804. Standards for restructuring of electric industry**

The following interdependent standards shall govern the commission's assessment and approval of each public utility's restructuring plan, oversight of the transition process and regulation of the restructured electric utility industry:



\* \* \*

(3) The commission shall require the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation, transmission and distribution. The commission may require the unbundling of other services.

66 Pa. C.S. § 2804(3).

The IUGs also cite 52 Pa. Code § 54.182, which is the definitions section of the Default Service section of the Commission's Regulations, and 52 Pa. Code § 54.187(d), which reads:

**§ 54.187. Default service rate design and the recovery of reasonable costs.**

\* \* \*

(d) The rates charged for default service may not decline with the increase in kilowatt hours of electricity used by a default service customer in a billing period.

52 Pa. Code § 54.187(d).

FES explained that NITS costs are NMB charges that are assessed by PJM. FES averred that by moving NMB charges to the DSS Riders, which are reconciled, default service customers and shopping customers alike are spared the financial premium charged by default service bidders and EGSs for the unhedgeable risk associated with NITS costs. FES M.B. at 3-4.

According to FES, NITS costs are not capable of being accurately predicted at the time that wholesale supply bidders would bid on default auction products and EGSs enter into fixed price retail supply contracts. FES asserted that, as such, they cannot be financially hedged and because they cannot be financially hedged, bid prices for default

supply and retail service offers must include a risk premium to address these charges, so their inclusion in the default supply auction product and retail supplier responsibility artificially drives up default service bids and competitive retail offers alike. FES opined that as NITS costs are incurred for the benefit of all customers, it is appropriate that they be assessed on a competitively-neutral, non-bypassable basis through the Companies' DSSR. FES M.B. at 4-5.

The Companies stated that the Industrials' interpretation on this issue is inconsistent with the intent of the Commission's Regulations. According to the Companies, the point of Section 54.187(d), like the comparable definition of the PTC in Section 54.182, is to level the playing field for default service and competitive EGS products. The Companies asserted that a level playing field is established by assuring that the costs EGSs bear to purchase generation for delivery to an EDC's load zone mirror the "default service costs" the EDC includes in its PTC. In that way, the Companies maintained that an accurate comparison can be made between the prices for competitive service offerings and the PTC. The Companies claimed that the NITS Proposal accomplishes the level playing field envisioned by the Commission's default service regulations by recovering PJM-imposed NITS charges through the Companies' DSSRs. Companies R.B. at 5-6.

Exelon argued that including NITS among those charges collected through the DSSR for all customers will encourage greater competition by reducing risks for default service suppliers, which in turn will promote procurement of the least cost generation supply contracts. Exelon averred that this creates a more competitive backstop service against which EGSs can compete in order to serve shopping customers at the lowest competitive cost. Exelon opined that the collection of costs through the DSSR for all customers will allow for EGSs to more effectively compete on an apples-to-apples basis against default service. Exelon M.B. at 10.

Exelon explained that the “plain language” of the Competition Act does not prohibit the NITS Proposal as the focus of the Act is on competition for the generation, not transmission, of electricity. *See*, 66 Pa. C.S. § 2802(13); Exelon R.B. at 8. Exelon opined that there is no prohibition anywhere in the Act. With regard to the IUG’s reliance on the statutory section that requires unbundling to separate the charges for generation, transmission and distribution, 66 Pa. C.S. § 2804(3), Exelon responded that under IUG’s reading of these sections, if transmission costs are no longer allowed to be collected and charged by EDCs, then the EDCs must also be prohibited from collecting and charging for distribution costs, since both of these charges are included, along with generation, in the list of those subject to “unbundling.” According to Exelon, the language more correctly requires that the Commission ensure that costs for these three components appear unbundled on customers’ bills and the EDCs’ tariffs, which would in fact continue to be the case under the NITS Proposal. Exelon explained that NITS charges would be separate from distribution and generation charges as part of the DSS Riders’ NMB charges. Exelon R.B. at 9.

## **2. ALJ’s Recommendation**

In her Recommended Decision, the ALJ stated that circumstances have changed enough to justify revisiting the issue. According to the ALJ, the passage of time, coupled with the issuance of several relevant Commission Orders affecting the EGSs’ ability to pass through costs, will support a change in Commission directives concerning the NITS. In addition, the ALJ found that none of the statutory sections or Regulations cited definitively support denial of the proposal, which has as its main appeal the fact that the NITS cannot be financially hedged, resulting in inclusion of a risk premium in bid prices for default supply and retail service offers so their inclusion in the default supply auction product and retail supplier responsibility artificially drives up default service bids and competitive retail offers alike. The ALJ concluded that as NITS charges are incurred

for the benefit of all customers, it is appropriate that they be assessed on a competitively-neutral, non-bypassable basis through the Companies' DSSR. R.D. at 36.

### **3. Exceptions and Replies**

In its Exceptions, IUG asserts that the language and intent of the Competition Act, as well as the Commission Regulations, favor EGSs' continued offering of both generation and transmission products to shopping customers. IUG also asserts that Commission precedent repeatedly has denied proposals for non-bypassable collections of transmission costs from customers. IUG opines that FES offered insufficient legal authority to support overriding this unanimous rejection by the Commission to remove transmission costs from the competitive market. IUG notes that transmission costs have been collected by shopping customers' EGSs in the service territories of all Pennsylvania EDCs since the dawn of restructuring, which began with passage of the Competition Act. IUG Exc. at 5.

IUG avers that since the Competition Act was adopted and implemented, distribution costs have been collected by shopping customers' EDCs, while generation and transmission costs have been collected by shopping customers' EGSs. According to IUG, the Commission's Regulations reflect this division of responsibilities among EDCs and EGSs, explaining that the PTC 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. As a result, IUG opines that a non-bypassable transmission cost collection, which would require EDCs to collect transmission costs for both shopping and non-shopping customers, would violate the Competition Act and the Commission's Regulations. *Id.* at 5-6.

In reply, FES states that the Competition Act is indifferent at best as to who charges for transmission service. FES notes that Section 2802(16) of the Competition

Act states that “it is the public interest for the transmission and distribution of electricity to continue to be regulated as a natural monopoly subject to the jurisdiction and active supervision of the Commission.” FES also states that the NITS Proposal does not violate the unbundling requirement of the Competition Act at 66 Pa. C.S. §§ 2802(14) and 2804(3) as nothing is being “re-bundled” as IUG suggests, and that the only change under the NITS Proposal is that NITS charges would be recovered through different avenues than they currently are. Further, FES avers that IUG’s suggestion that transmission is a competitive service and must remain that way to further the purposes of the Competition Act is also incorrect. FES opines that the NITS Proposal will actually help the competitive retail market in furtherance of the Competition Act’s goals. According to FES, the retail market is subject to highly unpredictable wholesale market forces, and making things more predictable for retail suppliers will assure their decisions to enter or stay in the Pennsylvania market. FES R. Exc. at 5-6.

In its Replies to Exceptions, Exelon notes that while the PTC that an EDC includes on retail customers’ bills must include generation and transmission, there is no requirement that EGSs must supply to their customers both generation and transmission. Exelon asserts that IUG has clearly misconstrued the nature of the PTC Regulations and has no basis in the Regulations to support the notion that an EGS must supply both generation and transmission. According to Exelon, the NITS proposal can and will operate appropriately within the Commission’s existing PTC Regulations. Exelon R. Exc. at 6-10.

Next, Exelon explains that it cannot be said that the Competition Act prohibits the NITS proposal as the primary focus of the Competition Act is to encourage competition specifically for generation supplied to Pennsylvania’s customers. Exelon opines that nowhere in the Competition Act is the Commission required to prohibit EDCs from collecting transmission costs from customers, nor is the Commission prohibited from requiring EDCs to in fact collect transmission costs on behalf of customers.

According to Exelon, the NITS Proposal may, in fact, be considered more consistent with the intent of the Competition Act, in that generation and its related products for which competitive hedging markets exist will be the primary focus of competitive offers from EGSs. *Id.* at 11-13.

In its Replies to Exceptions, FirstEnergy also asserts that IUG completely ignores the plain language of the Competition Act and misconstrues the Commission's default service regulations. According to FirstEnergy, NITS charges are administratively determined, cost of service rates imposed by PJM and approved by the Federal Energy Regulatory Commission for services that are not provided on a competitive basis. FirstEnergy R. Exc. at 5-7.

#### **4. Disposition**

Based upon our consideration of the record evidence, and while we have previously concluded that FES *et al.* did not meet their burden of proof in this proceeding, we disagree with IUG that the NITS Proposal would violate the Competition Act, the Public Utility Code or our Regulations. We find that IUG's arguments on these points are without merit, as neither the Competition Act nor the Code preclude the implementation of the NITS proposal, if we had determined that changed circumstances caused us to reconsider our prior decisions on this issue. Accordingly, we shall deny the Exceptions of IUG and adopt the ALJ's recommendation, in part, on this issue.

**C. WHETHER THE PROPOSAL CARRIES AN UNACCEPTABLE RISK FOR DOUBLE-BILLING?**

**1. Positions of the Parties**

Regarding IUGs' argument that there is a significant risk of customers having to pay twice for NITS, once through the existing EGS contracts and again through the Companies' bills, the other Parties claimed that there is a single instance where this might occur. Exelon pointed out that there are mitigating factors to take into consideration in such an instance. According to Exelon, its own EGS affiliate, for example, indicated to its own customers that, for those customers whose contracts included fixed prices for RTEP and TEC costs, the EGS would credit the contract amounts related to those costs as a new line item on their invoices through the remaining term of the contract. Exelon R.B. at 18. In addition, Exelon averred that for the customer in question here, the current EGS contract ends January 1, 2015, some six months prior to the effective date of the DSP III plan, with both time and opportunity to prevent double payment. Exelon R.B. at 19.

**2. ALJ's Recommendation**

The ALJ concluded that, as the effective date of the DSP III is so far into the future, and the customer in question has the opportunity to renegotiate his contract prior to that date, there was no real risk of double-billing. R.D. at 37.

**3. Exceptions and Replies**

In its Exceptions, IUG states that the ALJ erred as she failed to consider the shopping contracts with expiration dates farther into the future, such as those that may be subject to renegotiation during the course of the instant DSP proceeding, and will include

transmission costs for periods beyond June 1, 2015. According to IUG, for these customers, particularly those under fixed-price contracts, double collection is a significant concern that justifies rejection of the proposed non-bypassable collection of transmission costs. IUG maintains that the ALJ's assumption, that double collection will not occur because the Companies' next DSPs will not begin until June 1, 2015, ignores that all contracts for competitive supply presently provide for the collection of transmission costs from shopping customers either via a pass-through or fixed-price arrangement. According to IUG, the Companies' DSP implementation on June 1, 2015, will not preclude the risk of double collection of transmission costs that may occur as a result of this non-bypassable proposal. IUG Exc. at 10.

Next, IUG asserts that double collection is of significant concern to the Industrials because certain members with fixed-price contracts experienced a double collection of RTEP costs and TECs after the Companies began collecting these costs at the beginning of the Companies' current DSPs on June 1, 2013. IUG avers that although certain EGSs proactively removed RTEP and TEC costs from shopping contracts, other EGSs failed to do so. As transmission costs are substantially larger than RTEP and TEC costs, this double collection creates concern that future double collection will occur with respect to transmission costs. Furthermore, IUG notes that considering that RESA, an organization that represents EGSs, argues that transmission costs need not be removed from fixed-price contracts if this non-bypassable collection is approved, Industrials' double collection concern appears real for numerous shopping customers. *Id.* at 11-12.

In reply, FES states that the IUG position was predicated on alleged experiences with a supply contract that expires in January 2015, well before this DSP will begin and in plenty of time to negotiate the removal of NITS from the EGS contract before the DSP in this proceeding goes into effect in June of 2015. FES further notes that the IUG position is based on an overly-simplistic view of how supplier contracts are



priced. Therefore, according to FES, the alleged risk of double collection is speculative and overstated and should be denied. FES R. Exc. at 7.

In its Replies to Exceptions, Exelon states that the ALJ correctly determined that the revised DSP's effective date is far enough into the future to allow the one customer in question ample time to renegotiate his contract, if necessary. Exelon maintains that it is undeniable that IUG's arguments on this issue are based only on a single anecdote of the IUG witness, an employee of Knouse Foods Cooperative (Knouse). According to Exelon, in that situation, Knouse had to bear a double collection of RTEP and TEC costs in order to avoid additional costs arbitrarily imposed by its EGS as part of an illegal unwinding of Knouse's contract. Exelon claims that other active and prominent EGSs in this proceeding have demonstrated that this is not the experience that they as EGSs provide to their customers. Exelon opines that for this reason, as well as the potential for additional mitigation measures, the Commission should confirm the ALJ's finding that the NITS Proposal will present no real risk of double-billing. Exelon R. Exc. at 13-14.

FirstEnergy also states that the ALJ properly determined that there is no real risk of double collection of NITS costs. FirstEnergy asserts that the only customer that submitted testimony complaining it was "double charged" for NMB transmission-related costs was Knouse. FirstEnergy points out that, in contrast, at least one EGS proactively reached out to its customers whose contracts included fixed prices for other NMB transmission-related costs following Commission approval of those costs for DSSR recovery in the DSP II Proceeding and made appropriate credit adjustments for the remaining terms of those contracts. According to FirstEnergy, IUG presented no credible evidence that customers may face the dilemma of choosing between experiencing "double-billing" of NITS costs with respect to EGS contracts extending beyond June 1, 2015, or agreeing to retroactively unwind the fixed price in those contracts. FirstEnergy R. Exc. at 7-8.

#### **4. Disposition**

Since we have previously determined that FES *et al.* failed to meet their burden of proof that the NITS cost collection methodology should be revised, we conclude that this issue is moot, as the perceived possibility of the double-collection of NITS costs is not a concern. We further find that if the Commission would have implemented this revised collection of NITS costs within FirstEnergy's DSSR, there is merit in the concerns expressed by IUG with regard to a possible double-collection. However, since we are not adopting the NITS Proposal, the Exceptions of IUG are moot.

#### **D. WHETHER, IF THE PROPOSAL IS ADOPTED, A LARGE C&I CARVE-OUT SHOULD ALSO BE ADOPTED**

##### **1. Positions of the Parties**

IUG argued that the Large C&I customers' unique involvement in Pennsylvania's retail electric market warrants divergent treatment with respect to transmission costs, as the market provides the opportunity to craft their contract terms to their own needs. According to IUG, for example, Large C&I customers might prefer a shopping contract with more pass-through elements based on the customer's ability to manage risk and willingness to negotiate with EGSs on a number of different pricing components. IUG claimed that by contrast, Large C&I customers who are expected to provide accurate projections of their monthly energy expenses for budgeting and forecasting purposes may prefer the predictability of more fixed price components. IUG opined that as a result of the unique manner in which Large C&I customers participate in the competitive market, the Commission should not prohibit Large C&I customers from continuing to pursue competitive products including transmission costs. IUG M.B. at 23.

Exelon argued against a carve-out, stating that all of the reasons in support of the NITS Proposal included in its Initial Brief apply equally to both small customers

and Large C&I consumers. Exelon claimed that the NITS Proposal will, for all sizes of consumers, help to “create a structure where the market drives prices charged by EGSs, where EGSs expand their investment in Pennsylvania due to certainty and a more level playing field, and where consumers enjoy competitive prices and a wide variety of innovative product offerings.” In Exelon’s opinion, with existing mitigating factors and/or with any single or combination of the new mechanisms proposed herein, any perceived potential double collection risk will be appropriately addressed regardless of the size of customer. For this reason, Exelon averred that the Commission should reject IUG’s proposed alternative carve-out, and approve the NITS Proposal for all customer classes. Exelon R.B. at 20.

RESA averred that the inclusion of RMR costs and the current inclusion of RTEPs and expansion costs, in a non-bypassable default service rider would reduce the risk premiums embedded in EGS fixed price products and would reduce the likelihood of an EGS needing to trigger a regulatory change or cost pass through clause to recoup the unhedgeable costs created by these charges. According to RESA, the inclusion of NITS in the DSSR would enhance the competitive market and would not compromise the ability of the industrial customers to secure favorable contracts for electric service. RESA R.B. at 5-6.

## **2. ALJ’s Recommendation**

The ALJ recommended that for the reasons spelled out by the EGS Parties, should the Commission decide to approve the NITS Proposal to include these costs in the DSSR, there was no need to include a Large C&I carve-out. R.D. at 38.

### 3. Exceptions and Replies

IUG states that the ALJ erred in failing to acknowledge the benefits of a Large C&I carve-out from a non-bypassable transmission cost collection. IUG asserts that the impacts of a non-bypassable collection of transmission costs would be particularly devastating for Large C&I customers who incur significant transmission costs and would, thus, be the most negatively impacted by this proposal. Therefore, IUG requests that if the Commission holds that a non-bypassable transmission cost collection is approved, the Commission should likewise hold that a Large C&I carve-out is required as well. IUG Exc. at 12.

IUG maintains that the FES proposal for a non-bypassable collection of transmission costs would present significant cost and logistical challenges for Large C&I customers, as opposed to other customer classes. IUG opines that the FES proposal, as applied to Large C&I customers, would limit competitive market opportunities and prevent customers from structuring competitive products in the most beneficial manner for those customers. IUG explains that Large C&I customers engage in the most sophisticated level of contract drafting and negotiation, which is unique to this class, which receives a great deal of benefit from its ability to negotiate many individual components within contracts, including transmission and transmission-related costs. According to IUG, due to the unique manner in which Large C&I customers engage with their EGSs and participate in the retail market, a non-bypassable transmission cost collection would prevent negotiation of competitive transmission products to the detriment of Large C&I customers. *Id.* at 12-13.

In its Replies to Exceptions, FES states that there is no substantive, credible evidence of record that would justify such discriminatory treatment on behalf of Large C&I customers. Instead, FES asserts that the evidence suggests that all of the reasons in support of the NITS Proposal apply equally to both small customers and large customers.

According to FES, the adoption of the NITS Proposal will fairly distribute an unpredictable cost among all customers by the actual NITS costs being assessed through the Companies' DSSRs. As such, FES opines that a "carve-out" should be rejected. FES R. Exc. at 7-8.

In its reply, Exelon asserts that Large C&I customers would not be precluded from negotiating with EGSs for products which provide price certainty for NITS or for any other component of energy service. Exelon maintains that the NITS Proposal will, for all sizes of consumers, help to create a structure where the market drives prices charged by EGSs, where EGSs expand their investment in Pennsylvania due to certainty and a more level playing field, and where consumers enjoy competitive prices and a wide variety of innovative product offerings. Moreover, Exelon claims that with existing mitigating factors such as the time lag before implementation, EGSs' inherent incentives to work with customers and Commission oversight of EGS practices, any perceived potential double collection risk will be appropriately addressed, regardless of the size of the customer. Exelon R. Exc. at 14-15.

In its Replies to Exceptions, FirstEnergy states that there is no basis for such a carve-out because IUG did not present any evidence that they would be adversely affected in terms of either financial impact or limitations on competitive market opportunities if NITS costs were to be recovered on a non-bypassable basis. FirstEnergy R. Exc. at 8.

#### **4. Disposition**

Since we have previously determined that FES *et al.* have failed to meet their burden of proof that the NITS cost collection methodology should be revised, we conclude that this issue is also moot as the necessity of a Large C&I carve-out is no longer a concern. We further find that if the Commission would have implemented this

revised collection of NITS costs within FirstEnergy's DSSR, there is merit in the concerns expressed by IUG. However, since we are not adopting the NITS Proposal, the Exceptions of IUG are moot.

## **E. Overall Recommendation Concerning NITS**

### **1. ALJ's Recommendation**

The ALJ concluded that while there was sufficient evidence to support a finding that inclusion of the NITS in the DSSR was now justified, should the Commission choose to reconsider, as of the date of this Recommended Decision, the Commission's holding in the DSP II case is still its last holding on this issue. Accordingly, the ALJ recommended that under existing Commission precedent, the proposal to include the NITS in the non-bypassable DSSR should be denied. R.D. at 38.

### **2. Exceptions and Replies**

FES, RESA, Exelon and FirstEnergy filed Exceptions to the ALJ's conclusion that the proposal to include NITS in the non-bypassable DSSR be denied due to existing precedent based solely on the Commission's finding in the Companies' previous DSP II proceeding.

FES asserts that the substantial evidence of record in the instant proceeding supports the NITS Proposal and the Commission's reconsideration of its prior policy position regarding recovery of NITS costs through the Companies' DSSRs. FES avers that based on changed circumstances, the Commission should now adopt the NITS proposal and reverse its prior policy position in order to realize further the objectives of the Competition Act. According to FES, while the Commission is bound by the precedent of the Pennsylvania appellate courts, it is not bound by the precedent of its own

prior decisions. FES cites to two fundamental circumstances that have substantially changed since the Commission's DSP II decision: the Commission's *Fixed Price Order* and the current unpredictability of NITS costs. Furthermore, FES asserts that NITS costs are NMB charges that benefit all customer loads, are unhedgeable and are most appropriately recovered from all users on a competitively-neutral non-bypassable basis through the DSSRs of the EDCs. FES Exc. at 1-11.

RESA states that the ALJ's conclusion ignores the fact that there is no requirement that an ALJ strictly adhere to precedent in a Recommended Decision. As such, RESA maintains that the ALJ is not prevented from looking at the issue of NITS in this proceeding in a new light and based on the record evidence for this proceeding. RESA also avers that strict adherence to precedent is not necessary where the record and circumstances render the issue presented as separate and distinct from the issue previously addressed by the Commission. RESA opines that given the evolution of the market in the FirstEnergy service territories, the ALJ's review of the market realities and experiences on the treatment of NITS demonstrates that a static decision at the Commission would not further the Commission's goals. RESA is of the opinion that acceptance of the ALJ's recommendation would not serve to enhance the retail market in Pennsylvania nor recognize the evolution of this market. According to RESA, allowing NITS costs to be assumed by the Companies for all customers will improve not only the ability of customers to accurately compare the prices of EGSs against the default service rate, but also enhance the competitive market. RESA Exc. at 2-4.

Exelon states that despite making all of the correct findings, the ALJ erred by not requiring that FirstEnergy implement the NITS Proposal, on the basis of an old decision by the Commission in 2012. Exelon notes that the ALJ's decision not to do so is based only on the erroneous reasoning that prior Commission precedent prevents taking such action without an affirmative decision by the Commission itself, despite the fact that the ALJ herself finds that circumstances have changed since that prior Commission

precedent and such changes warrant an outcome in favor of the NITS Proposal. Exelon reiterates that it does not argue that the Commission has not rejected similar proposals in the past. Rather, Exelon supports the FES position that it is now appropriate for the Commission to reconsider its prior position and to treat NMB costs as a charge that should be recovered through a competitively-neutral, non-bypassable charge by the EDC to all customers. Exelon Exc. at 4-8.

In its Exceptions, FirstEnergy states that the DSP II Order does not constitute binding precedent and the record in this proceeding provides ample support for the Commission to revisit and reverse its previous determination. FirstEnergy asserts that the DSP II Order does not preclude the Commission from adopting the NITS Proposal here, as it is well-settled under Pennsylvania law that the Commission is not bound by the rule of *stare decisis* and, therefore, prior Commission Orders have no preclusive effect on the Commission from taking action on a previously addressed matter. According to FirstEnergy, the NITS Proposal accomplishes a level playing field for default service and competitive EGS products envisioned by the Competition Act and the Commission's default service regulations by recovering administratively determined, cost-of-service NITS charges through the Companies' DSSRs. FirstEnergy Exc. at 3-7.

In reply, IUG states that pursuant to Commission precedent, the Commission should accept the ultimate conclusion of the ALJ that a non-bypassable collection of transmission costs must be rejected. IUG points out that Commission precedent in the last round of DSP proceedings for all major EDCs unanimously rejected the NITS proposal for a non-bypassable transmission cost collection on a variety of legal and factual grounds. IUG opines that attempts by FES *et al.*, and the Companies to rehash arguments made in those proceedings should be disregarded by the Commission based on its prior findings. According to IUG, for all the reasons fully litigated and rejected by the Commission in the last round of DSP proceedings for all Pennsylvania



EDCs, a non-bypassable collection of transmission costs should once again be denied. IUG R. Exc. at 2.

IUG notes that in the last round of DSP proceedings, the Commission's systematic rejection of a non-bypassable collection of transmission costs was based on a number of different legal and factual findings, ranging from consistency with the Competition Act, proper development of a robust retail electric market and harm to competitive market participants. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company For Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, *et al.* (Order entered August 16, 2012), at 83; *Petition of PECO Energy Company For Approval of its Default Service Program II*, (Order entered September 27, 2012), at 60; *Petition of Duquesne Light Company For Approval of Default Service Plan For The Period of June 1, 2013 Through May 31, 2015*, Docket No. P-2012-2301664 (Order entered January 25, 2013), at 222; *Petition of PPL Electric Utilities Corporation For Approval of a Default Service Program and Procurement Plan*, Docket No. P-2012-2302074 (Order entered January 24, 2013), at 85. IUG states that each of these prior DSP proceedings contained extensive factual records, with arguments both in support and opposition of a non-bypassable transmission cost collection, that were fully considered by the Commission. According to IUG, despite the Commission's previous rejection of this non-bypassable collection and reasons in support of the collection, FES *et al.*, and the Companies rehash arguments that have already been fully considered and rejected by the Commission. *Id.* at 2-3.

Additionally, IUG asserts that because no circumstances have changed since the Companies' last DSP proceeding, the doctrine of issue preclusion warrants the rejection of a non-bypassable transmission cost collection. IUG states that RESA mistakenly alleges that the doctrine of issue preclusion is inapplicable to the instant

situation. IUG explains that the Commission provided the following definition for issue preclusion:

Issue preclusion, formerly collateral estoppel, prevents the re-litigation of an issue of fact or law which was actually litigated in a prior proceeding and was necessary to the original judgment.

Issue preclusion does not require an identity of the parties, but does require: (1) the issue(s) decided by a prior final judgment is identical with the one(s) presented in the later action; (2) the issue(s) was actually litigated; (3) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior litigation; and (4) the determination of the issue(s) was essential to the prior final judgment.

*Pa. PUC*, 1993 Pa. PUC Lexis 78 at \*5-6 (October 1, 1993); *see also*, *Pa. PUC v. T.W. Phillips Gas and Oil Co.*, 76 Pa. P.U.C. 593, 607 (1992). "Where [the doctrine of issue preclusion] applies, issue preclusion 'precludes review' of and eliminates the 'jurisdiction to address' the subject fact or legal determination." *See*, RESA Exc. at 5. IUG R. Exc. at 6-7.

According to IUG, because the Commission has previously held that a non-bypassable transmission cost collection should be rejected as part of the Companies' last DSP proceeding, the doctrine of issue preclusion applies in the instant case. First, IUG claims that the issue decided by the Commission Order in the last DSP proceeding was identical to the issue in the instant DSP proceeding, *i.e.*, the non-bypassable collection of transmission costs. *See, Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company For Approval of Their Default Service Programs*, Docket Nos. P-2011-2273650, *et al.* (Order entered August 16, 2012), at 83. Second, IUG states that the issue of non-bypassable transmission cost collection was fully litigated in both the prior and current DSP

proceedings. *Id.* Third, IUG explains that FES *et. al.* and the Companies were Parties in both the prior and current DSP proceedings. *Id.* at 1. Finally, according to IUG, the determination of the issue of non-bypassable transmission cost collection was an essential aspect of the Commission’s Order in the prior DSP proceeding. *Id.* IUG opines that all elements of the doctrine of issue preclusion inarguably apply with respect to a proposed non-bypassable transmission cost collection. Under these circumstances, IUG asserts that issue preclusion precludes another review of a non-bypassable transmission cost collection, and the instant proposal for a non-bypassable transmission cost collection must be denied. IUG R. Exc. at 7.

IUG claims that RESA acknowledges the applicability of the elements of issue preclusion to the instant situation and only challenges its applicability by contending that the issue of non-bypassable transmission cost has been modified from the last DSP proceeding. IUG notes that to support this position, RESA refers to (1) the Commission’s *Fixed Price Order*; and (2) recent volatility of transmission costs in another service territory, as purported evidence that the issue of non-bypassable transmission cost collection has somehow changed. However, IUG claims that neither the *Fixed Price Order* nor the alleged volatility has any bearing on, or changes any circumstances related to, the non-bypassable collection of transmission costs in the Companies’ service territories. *Id.* at 8.

IUG maintains that the *Fixed Price Order* never refers at any point to a non-bypassable transmission cost collection. Instead, IUG claims that the *Fixed Price Order* focuses on appropriate EGS terminology when labeling their contracts as either “fixed-price” or “pass-through” contracts to increase transparency and minimize shopping confusion among residential and small commercial customers. *See, Fixed Price Order* at 24; Industrials M.B. at 14; Industrials R.B. at 4. IUG states that they are at a loss for how an Order related to increased shopping transparency may stand for legal precedent that calls for a non-bypassable collection of transmission costs. According to

IUG, the *Fixed Price Order* fails even to express a preference for fixed-price versus pass-through contracts, and by its very existence, assumes that both types of contracts will continue to exist.<sup>4</sup> See, Industrials M.B. at 14; Industrials R.B. at 4. IUG opines that because of the overwhelming inapplicability of the *Fixed Price Order* to non-bypassable transmission cost collection, the *Fixed Price Order* provides no change in relevant precedent or circumstances from the time of the Companies' last DSP proceeding. *Id.* at 8-9.

Next, IUG states that RESA's alleged volatility of transmission costs also has no bearing on transmission cost collection in the Companies' service territories, because the only noted volatility occurred in an entirely separate jurisdiction. See, Industrials M.B. at 16; Industrials R.B. at 4. IUG points out that this "evidence" of volatility referred to by RESA relates to transmission cost levels of PSE&G, which is neither a FirstEnergy company, nor a certificated utility in Pennsylvania. FES M.B. at 10. IUG avers that changing transmission costs in another jurisdiction provides no indication of transmission cost levels in Pennsylvania, let alone in the Companies' service territories. Because this purported volatility of transmission costs is irrelevant to transmission cost levels in the Companies' service territories, IUG avers that no new or changing evidence exists that allows for reversal of Commission precedent with respect to the Companies. *Id.* at 9.

Therefore, IUG states that as neither the *Fixed Price Order* nor the alleged volatility of transmission costs provides any relevant change in law or circumstances from the last DSP proceeding, the doctrine of issue preclusion applies. As a result, IUG opines that the Commission is bound by its earlier decision that a non-bypassable transmission cost collection by the Companies must be rejected. For this reason, IUG

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<sup>4</sup> By contrast, IUG claims that if a non-bypassable transmission cost collection is adopted, fixed-prices for transmission costs would be eliminated.

claims that the Commission must affirm the ALJ's holding that a non-bypassable transmission cost collection is denied. *Id.*

### 3. Disposition

We have previously concluded that FES *et al.* have not met their burden of proof in this proceeding to establish the need for a revision in the Commission approved NITS cost recovery methodology for FirstEnergy. Therefore, we shall reject the recommendation of the ALJ that there was sufficient evidence provided to support a finding that inclusion of NITS costs in the DSSR was now justified.

However, we shall adopt the ALJ's recommendation that under existing Commission precedent, the proposal to include NITS in the non-bypassable DSSR should be denied. We acknowledge that, while we are not bound by the rule of *stare decisis*, we must render consistent opinions and should either follow, distinguish, or overrule our precedent. *See, Bell Atlantic – Pennsylvania, Inc. v. Pa. PUC*, 672 A.2d 352, 354 (Pa. Cmwlth. 1995). In this case, we determined that it was appropriate to follow our precedent. Accordingly, based upon the evidence of record, we shall deny the Exceptions filed by FES, RESA and FirstEnergy on this issue.

Additionally, although we are rejecting the ALJ's recommendation that there was sufficient evidence to justify inclusion of NITS costs in the DSSR, we note parenthetically that the doctrine of issue preclusion does not apply to prevent us from considering the proposal to include the NITS in the non-bypassable DSSR.<sup>5</sup> Based on our review of the record, we conclude that the issues in this proceeding are not identical to the issues in the prior DSP proceeding.

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<sup>5</sup> Initially, we note that an issue preclusion claim would be more appropriately raised in the context of a motion for summary judgment.

#### IV. Conclusion

Based on our review, evaluation and analysis of the record evidence, we shall grant the Exceptions filed by the Industrial Users Groups hereto, in part, and deny the Exceptions of FES, RESA, Exelon and the Companies, consistent with the discussion contained in the body of this Opinion and Order. We shall adopt the ALJ's Recommended Decision to approve the Partial Settlement, and adopt the ALJ's Recommended Decision with regard to the NITS Proposal, in part, consistent with our discussion, *supra*; **THEREFORE,**

#### **IT IS ORDERED:**

1. That the Exceptions filed by the Industrial Users Groups to the Recommended Decision of Administrative Law Judge Susan D. Colwell are granted, in part, and denied, in part, consistent with this Opinion and Order.
2. That the Exceptions filed by the FirstEnergy Solutions Corp., the Retail Energy Supply Association, Exelon Generation Company, LLC and the FirstEnergy Companies to the Recommended Decision of Administrative Law Judge Susan D. Colwell are denied, consistent with this Opinion and Order.
3. That the Recommended Decision of Administrative Law Judge Susan D. Colwell, issued on May 6, 2014, is adopted, in part, consistent with this Opinion and Order.
4. That the Joint Petition for Partial Settlement of the case captioned Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power for approval of their default service programs for the period of June 1, 2015 through May 31, 2017 at docket numbers

P-2013-2391368, P-2013-2301372, P-2013-2391375 and P-2013-2391378, is approved without modification.

5. That insofar as is necessary to permit Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power to procure generation for procurement classes as set forth in the Default Service Plans as revised by the Partial Settlement, the Commission's regulation at 52 Pa. Code § 54.187 is waived.

6. That CRA International, Inc. d/b/a Charles River Associates is approved as the independent third-party evaluator and auction manager for all DCAs.

7. That The Brattle Group is approved as the independent third-party evaluator and RFP manager for the separate SPAEC procurements.

8. That the form Supply Master Agreement attached to the Joint Petition as an affiliated interest agreement is approved pursuant to 66 Pa. C.S. § 2102.

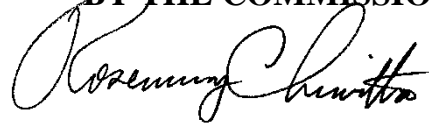
9. That insofar as is necessary to permit Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power to recover RTEP, ECRC, and the New NMB Charges through the non-bypassable DSSR as set forth in the Default Service Plans as revised by the Partial Settlement, the Commission's regulation at 52 Pa. Code § 54.187 is waived.

10. That the electric service tariff riders and new supplier tariff appendices attached to the Joint Petition shall become effective as of June 1, 2015.

11. That the proposal to include Network Integration Transmission Services in the Companies' Default Service Supply Rider as a non-bypassable charge is denied.

12. That the investigation at Docket Nos. P-2013-2391368, P-2013-2301372, P-2013-2391375 and P-2013-2391378 be terminated and the record be marked closed.

**BY THE COMMISSION,**

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta  
Secretary

(SEAL)

ORDER ADOPTED: July 24, 2014

ORDER ENTERED: July 24, 2014