**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PPL Electric Utilities :

Corporation for Approval of a Default :

Service Program and Procurement : P-2014-2417907

Plan for the Period June 1, 2015 :

Through May 31, 2017 :

**RECOMMENDED DECISION**

Before

Susan D. Colwell

Administrative Law Judge

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 This Recommended Decision recommends the adoption of a partial settlement and the disposition of the remaining issues. The statutory deadline for the Commission's disposition of this matter is January 18, 2015.

I. HISTORY OF THE PROCEEDING

 On April 18, 2014, PPL Electric Utilities Corporation (PPL Electric or Company) filed its Petition for approval of a default service program and procurement plan (DSPP III) for the period of June 1, 2015 through May 31, 2017. The Company served the Petition on the public advocates and the electric generation suppliers doing business in its territory. On May 5, 2014, a prehearing order containing directions on becoming a party and informing the entities of the date of the prehearing conference was served on the same entities listed in the Company's certificate of service for the DSPP III itself.

 On May 10, 2014, notice of the Petition was published in the *Pennsylvania Bulletin*, 44 Pa.B. 2832, along with notice of the prehearing conference scheduled for June 5, 2014. The deadline for filing interventions and protests was set for May 30, 2014.

 Notice of appearance was filed by the Commission's Bureau of Investigation and Enforcement (I&E) on May 14, 2014. Notice of Intervention and Answer was filed by the Office of Consumer Advocate (OCA) on May 21, 2014, and by the Office of Small Business Advocate (OSBA) on May 28, 2014.

 By prehearing order dated May 5, 2014, served on the same list used by the Company to serve the Petition, those entities intending to participate in the litigation were directed to file and serve a prehearing memo on or before June 3, 2014. Each of the parties and intervenors filed a prehearing memo.

 Timely petitions to intervene were filed by: (1) Citizens for Pennsylvania's Future (PennFuture), (2) the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA), (3) Direct Energy Services, LLC (Direct Energy), (4) Exelon Generation Company, LLC (ExGen), (5) FirstEnergy Solutions Corporation (FES), (6) NextEra Energy Power Marketing, LLC (NextEra), (7) Noble Americas Energy Solutions, LLC (Noble Americas), (8) PP&L Industrial Customer Alliance (PPLICA), (9) Retail Energy Supply Association (RESA), and (10) the Sustainable Energy Fund (SEF). The prehearing conference was held as scheduled on June 5, 2014. No party objected to any of the interventions, and all were granted in the Scheduling Order issued on June 6, 2014, which also adopted the litigation schedule agreed upon at the prehearing conference and incorporated proposed modifications to the Commission's rules of discovery.

 On June 10, 2014, the Company filed a motion for protective order, which was issued without objection on July 16, 2014. A Revised Protective Order was issued on July 23, 2014, to correct a typographical error.

 The parties submitted prepared testimony according to the schedule set forth in the Scheduling Order. Shortly before the scheduled hearing, the parties informed me that they had achieved a full settlement on almost all issues. All parties waived cross-examination of all witnesses, and the hearing was held to accept the prepared testimony, exhibits, cross-exhibits and verifications or affidavits into the record as scheduled. The parties agreed to submit the partial settlement at the same time as the initial briefs on the issues not settled, on September 12, 2014, and reply briefs would be filed on September 26, 2014.

 A transcript from page 14 through 43 was generated.

 Main briefs and the Joint Petition for Approval of Partial Settlement (JPPS or Settlement) were filed on September 12, 2014. The Joint Petition indicates that I&E, FES, Noble Americas, and Direct Energy Services are not parties to the Settlement but do not oppose it. Statements in support of the Joint Petition were filed by PPL Electric, SEF, OCA, OSBA, PPLICA, NextEra, PennFUTURE, RESA, CAUSE-PA, and ExGen.

 Main briefs on outstanding issues were filed by the Company, OSBA, PPLICA, RESA, and Noble Americas. Letters indicating that no main brief would be filed were filed by CAUSE-PA and FES.

 The record closed upon receipt of the reply briefs on September 26, 2014. Reply briefs were filed by the Company, OSBA, RESA, PPLICA, and ExGen. Letters indicating that no reply brief would be filed were filed by CAUSE-PA, Noble Americas and FES.

 The matter is ripe for disposition.

II. FINDINGS OF FACT

**1. Parties**

 1. PPL Electric Utilities Corporation is an electric distribution company providing service to approximately 1.4 million customers in its certificated service territory over about 10,000 square miles in 29 counties of the Commonwealth.

 2. OCA is a statutorily created public advocate empowered to represent the interests of consumers before the Public Utility Commission, pursuant to Act 161 of the General Assembly, as amended, 71 P.S. §§ 309-1 *et seq.*

 3. OSBA is authorized to represent the interests of small business customers of utility services before the Commission, pursuant to the provisions of the Small Business Advocate Act, Act 181 of 1988, 73 P.S. §§ 399.41-399.50.

 4. SEF is a Pennsylvania corporation established at the conclusion of PPL Electric’s restructuring proceeding pursuant to the terms of the joint settlement filed in that proceeding. Its mission is to promote and invest in energy efficiency, renewable energy and energy conservation in order to provide opportunities and benefits for PPL Electric’s ratepayers. Petition to Intervene of SEF.

 5. RESA is a trade association of power marketers, independent power producers, and a broad range of companies within the Mid-Atlantic marketplace, whose members at the time of filing included AAEP Energy, Inc.; Champion Energy Services, LLC; ConEdison Solutions; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; GDF SUEZ Energy Resources NA, Inc.; Homefield Energy Company; IDT Energy, Inc.; Integrys Energy Services, Inc.; Interstate Gas Supply, Inc. dba IGS Energy; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; NextEra Energy Services, Noble Americas Energy Solutions LLC; NRG Energy, Inc.; PPL Energy Plus, LLC; Stream Energy; TransCanada Power Marketing Ltd. And TriEagle Energy, L.P. The comments expressed by RESA may not reflect those of the individual members. RESA Prehearing Memo at 1.

 6. PPLICA is a an organization of industrial and commercial users which included the following at the time of filing: Air Products and Chemicals, Inc.; Armstrong World Industries, Inc.; General Dynamics-OTS Scranton; Hercules Cement Company; Linde LLC; SAPA Extrusions, Inc.; The Hershey Company; TIMET North America; and Wegmans Food Markets, Inc. PPLICA Petition to Intervene.

 7. Direct Energy Services, LLC, is an EGS licensed in Pennsylvania, with approximately 5.1 million customers in 20 states, the District of Columbia, and Canada. Direct Energy Petition to Intervene.

 8. Exelon Generation Company, LLC, is an indirect, wholly-owned subsidiary of Exelon Corporation, a North American energy company with several merchant subsidiaries in addition to ExGen, as well as regulated utility subsidiaries in Pennsylvania (PECO), Illinois, and Maryland. ExGen has been granted market-based rate authority by the Federal Energy Regulatory Commission and is a buyer and seller of wholesale electricity and capacity. ExGen Petition to intervene.

 9. FirstEnergy Solutions Corporation (FES) is a subsidiary of FirstEnergy Corporation, and is a licensed EGS in Pennsylvania. FES provides wholesale and retail energy and related products to customers located primarily in the Mid-Atlantic and Midwest regions. Petition to Intervene of FES.

 10. NextEra Energy Power Marketing, LLC, is a unit of NextEra Energy Resources, LLC, which owns and operates over 16,000 megawatts of electric generating capacity in 23 states, of which more than 90 percent comes from clean and/or renewable resources. It owns and operates nearly 130 MW of wind generation and approximately 800 MW of natural gas generation in the Commonwealth of Pennsylvania. Petition to Intervene of NextEra.

 11. Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) is an unincorporated association of low-income individuals that advocates on behalf of its members to enable consumers of limited economic means to connect to and maintain affordable water, electric, heating and telecommunication services. Petition to Intervene of CAUSE-PA.

 12. Noble Americas Energy Solutions is a California LLC authorized to provide EGS services in Pennsylvania to large commercial, industrial and governmental customers, and to residential small commercial customers throughout the Commonwealth of Pennsylvania. Petition to Intervene of Noble Americas.

 13. PennFuture is a Pennsylvania nonprofit corporation with offices in Philadelphia, West Chester, Wilkes-Barre, Harrisburg and Pittsburgh, and has members living in the PPL Electric service territory. PennFuture's goals include promoting clean energy and energy efficiency. PennFuture Petition to Intervene.

 14. The Commission's Bureau of Investigation and Enforcement (I&E) is statutorily charged with representing the public interest in cases before the Commission concerning rates.

 *The following is taken directly from the Joint Petition for Settlement. The numbering is unchanged from the Settlement to facilitate ease of reference for the reader, which results in there being no Findings of Fact Nos. 15-17:*

**2. Terms of Settlement**

18. The following terms of this Settlement reflect a carefully balanced compromise of the interests of all of the Signatory Parties in this proceeding. The Signatory Parties unanimously agree that the Settlement is in the public interest. The Signatory parties respectfully request that the proposals set forth in PPL Electric's above-captioned petition be granted subject to the terms and conditions of the Settlement and a decision on the issues reserved for litigation.

 19. The Signatory Parties agree to the following:

 **A. GENERAL**

20. Subject to the terms and conditions of the Settlement, and a decision on the issues reserved for litigation, the Parties agree that the proposals set forth in PPL Electric's Petition requesting approval of its DSP III Program, including the Default Service SMA, RFP, Program Product Procurement Schedule, and Tariff provisions for the Generation Supply Charge-1 ("GSC-1"), the Generation Supply Charge-2 ("GSC-2") and the Transmission Service Charge ("TSC"), are acceptable as modified below and should be adopted by the Commission.

 21. The parties agree that PPL Electric's DSP III Program, as modified by the terms and conditions of the Settlement, and subject to the resolution of the issues reserved for litigation, includes and/or addresses all of the elements prescribed by Section 2807 of the Public Utility Code, the Commission's regulations, and the Commission's policies for a Default Service plan.

 **B. PRODUCT PORTFOLIO AND PROCUREMENT SCHEDULE**

 22. The Parties agree that the final October 2016 procurements under the DSP III Program will continue to obtain both 12- and 6-month fixed-price products for the Residential and Small C&I rate class categories.

 23. The parties agree that the product portfolio and procurement schedule for the final October 2016 procurements under the DSP III Program will be modified so that 55% of the Residential portfolio will expire on May 31, 2017, and 45% of the Residential portfolio will extend beyond May 31, 2017. The Parties acknowledge that this modification is consistent with the product portfolio and procurement schedule approved by the Commission in PPL Electric's DSP II Plan. Attached as Appendix A[[1]](#footnote-1) is a product portfolio and procurement schedule that has been modified to reflect this settlement term.

 24. Should the Commission determine, any time prior to the last solicitation under the DSP III program in October 2016, that PPL Electric will not continue in its role as Default Service provider beyond May 31, 2017, PPL Electric agrees to file an appropriate petition with the Commission requesting to amend the DSP III Program to ensure that no fixed-priced contracts extend beyond May 31, 2017, or the date set by the Commission for the termination of PPL Electric's role as Default Service provider.

 **C. CONTINGENCY PLAN**

25. PPL Electric agrees to modify the RFP to provide that, if the Commission rejects all bids for a given product, in any solicitation, or if some tranches of a given product in a particular solicitation do not receive bids, the Independent Auction Manager will [sic] responsible to contact suppliers, including all suppliers that submitted bids and suppliers that registered as potential bidders in response to the RFP, in an attempt to gain an understanding of the underlying cause of any shortfall or supplier failure, and to include such understanding in a report to the Commission. Nothing in this provision shall be construed to require any supplier contacted by the Independent Auction Manager to provide confidential or proprietary business information, whether the supplier registered as a potential bidder or not, or submitted bids or not.

 26. If the Commission rejects all bids for a given product, in any solicitation, or if some tranches of a given product in a particular solicitation do not receive bids, PPL Electric agrees to issue a new RFP as soon as practicable and, if needed, to obtain Default Supply through the spot market in the interim. PPL Electric will make all reasonable efforts to minimize the Residential load that is unhedged, including but not limited to consideration of combined block and spot products, when it seeks Commission guidance following a failed solicitation.[[2]](#footnote-2)

 27. The Parties agree that the settlement makes no changes to the Contingency Plan described in the SMA in the event of a supplier default.

 **D. AECs**

 28. PPL Electric agrees to modify Paragraph 5 of Appendix D to the Default Service SMA to require Default Service Suppliers to transfer Alternative Energy Credits ("AECs") into PPL Electric's Generator Attribute Tracking System ("GATS") account on a quarterly basis.

 29. PPL Electric will procure Tier I (non-solar) and Tier II AECs through new individual long-term contracts in an amount necessary to cover the AEPS requirements associated with the pre-existing Long-Term Product contract for 50 MW committed through May 31, 2021. PPL Electric agrees that these new long-term contracts will be solicited in the first auction under the DSP III Program.

 **E. PTC AND TIMING OF PROCUREMENTS**

30. The Parties agree that PPL Electric will issue its Price to Compare ("PTC") 30 days in advance of the effective date of the PTC.

 31. The Parties agree that, in order to accommodate filing the PTC on 30 days advance notice, PPL Electric's procurements will be advanced by two weeks from the dates proposed by PPL Electric in the Petition.

 32. The Parties agree that PPL Electric will discontinue its practice of issuing a preliminary PTC approximately 45 days before the effective date.

 **F. RECONCILIATION OF GSC-1, GSC-2, AND TSC**

33. The Parties agree that the GSC-1 will be adjusted every 6 months to reflect the cost of the Default Service supply contracts in place for the upcoming 6-month period.

 34. The Parties agree that, in order to accommodate filing the PTC on 30 days advance notice, the GSC-1 will be reconciled every 6 months, using the over/under collection balance for the 6-month period ending 2 months prior to the new PTC effective date.

 35. The Parties agree that the GSC-2 will be reconciled every 12 months using the over/under collection balance for the 12-month period ending 2 months prior to the June 1 PTC effective date.

 36. The Parties agree that the TSC will be reconciled every 12 months using the over/under collection balance for the 12-month period ending 2 months prior to the June 1 PTC effective date.

 **G. CREDIT RATINGS**

37. PPL Electric agrees to modify Section 6.7(b) of the SMA to reduce the credit rating of a bank or other financial institution from which a Default Supplier has obtained a letter of credit to a minimum "A-" senior unsecured debt rating (or, if unavailable, corporate issuer rating discounted one notch) from Standard & Poor's Financial Services LLC and "A3" from Moody's Investors Service, Inc. The Parties acknowledge that the modification of Section 6.7(b) of the SMA is consistent with the credit rating set forth in the SMA approved by the Commission in PPL Electric's DSP II plan.

 **H. SMA**

38. The Parties agree that PPL Electric will delete Section 16.3(b) of the SMA regarding the termination of the SMA, and revise any cross-references thereto.

 39. PPL Electric agrees to remove the reference to "pursuant to FERC Order No. 745" from Section 2.4(c) of the SMA.

 40. PPL Electric agrees to modify Section 3.4 of the SMA to replace Financial Accounting Standards Board Statement No. 133 ("FAS 133") with Accounting Standards Codification 815 ("ASC 815"). PPL Electric also agrees to add Section 3.4 to the SMA Table of Contents.

 41. PPL Electric agrees to modify the SMA to replace "sole discretion" with "reasonable discretion."

 42. PPL Electric agrees to revise Section 9.2 of the SMA to add the phrase "Except as set forth in Section 2.5 and 2.6," to the beginning of the first sentence in Section 9.2.

 43. PPL Electric agrees to reconcile the language in Sections 11.2 and 16.17 of the SMA regarding the Mobile-Sierra Doctrine so that both Sections provide, in pertinent part, as follows:

To the extent permitted by law and absent agreement to the contrary, each party, for itself and its successors and assigns, hereby expressly and irrevocably waives its rights to argue before any governmental authority that any review, modification, or rescission of this Agreement should be considered under any standard of review other than the "public interest" standard set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956), affirmed by Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, Washington, et al., 554 U.S. 527 (2008) (the "Mobile-Sierra Doctrine").

 **I. STANDARD OFFER PROGRAM**

 44. PPL Electric agrees to revise its Standard Offer Program ("SOP") scripts within 90 days of the Commission approval of the settlement to provide more explicit disclosures explaining that:

(a) The initial discount of 7% is based on the current PTC;

(b) The PTC will change semiannually with the next change in [month];

(c) The percentage savings a customer will experience will vary as the PTC changes; and

(d) The SOP rate may be higher or lower than the next PTC.

 45. With respect to PPL Electric's proposal to implement a SOP Web Self Service application, the Parties agree as follows:

 (a) On or before September 30, 2014, PPL Electric will provide interested parties with details regarding the design, costs, and implementation of the SOP Web Self Service application;

 (b) On or before October 31, 2014, PPL Electric will hold a collaborative open to all interested parties to seek input on the design, costs, and implementation of the SOP Web Self Service application;

 (c) If all parties to the collaborative reach a consensus as to the design, costs, and implementation of the SOP Web Self Service application, the SOP Web Self Service application will become effective on June 1, 2015, consistent with the consensus; and

 (d) If no consensus is reached at the collaborative, PPL Electric will file a petition with the Commission, on or before November 28, 2014, seeking a resolution of the unresolved SOP Web Self Service application. The Parties agree that all responses to the petition will be filed within thirty days from the date of filing. The intent of this process is to obtain resolution of the SOP Web Self Service application proposal in time to implement any SOP Web Self Service application effective June 1, 2015.

 46. PPL Electric agrees that electric generation suppliers ("EGSs") may participate in the SOP for a 3-month term, and that EGSs have the ability to change their participation status with each 3-month period.

 47. PPL Electric agrees to notify all EGSs via e-mail of the SOP price the same day the PTC issued, and to post the SOP price to the web and supplier portal one day after the PTC becomes effective.

 48. PPL Electric agrees to address SOP at a separate stakeholder meeting that will be open to all interested parties. The SOP stakeholder meeting will be held before January 31, 2015.

 49. The SOP stakeholder meeting will address, at a minimum the following issues:

(a) EGS recommendations regarding administration of the SOP;

(b) EGS recommendation that the SOP program be open to EGSs using bill ready billing; and

(c) Recommended changes to the SOP scripts and administrative process.

 50. PPL Electric agrees to provide the statutory advocates and any interested party with the following information in advance of the SOP meeting:

(a) SOP scripts;

(b) Customer enrollment figures and SOP process for the first 12-month period of the SOP;

(c) Statistics regarding EGS participation in the SOP from inception through the enrollment period beginning December 1, 2014;

(d) A report of all informal and formal complaints related to the SOP received by the Company during the first 12-month period of the SOP; and

(e) A report on statistics, lessons learned, and best practices for the SOP program, including enrollment data, EGS participation data, and rate of successful enrollments.

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

 **J. NET METERING**

 52. The parties acknowledge that the issue of a net metering option for Time-of-Use ("TOU") customers was litigated before and is currently pending before the Commission for disposition at Docket No. P-2013-2389572. The Parties agree that for the DSP III Program period PPL Electric shall implement the TOU Program as approved by the Commission at Docket No. P-2013-2389572, including a net metering option if adopted.

 53. PPL Electric and the Sustainable Energy Fund ("SEF") agree to recommend and support in their respective statements in support that the Commission decide the TOU Program, which currently is pending before the Commission for disposition at Docket No. P-2013-2389572, in sufficient time to allow the TOU Program to be fully implemented at the beginning of DSP III Program period, *i.e.,* June 1, 2015.

 54. The parties acknowledge that currently pending before the Commission is a Proposed Rulemaking Order at Docket No. L-2014-2404361 that proposes to modify the Commission's regulations to, among other things, provide guidance and clarity regarding net metering and compensation under net metering. *See Implementation of the Alternative Energy Portfolio Standards Act of 2004,* Docket No. Docket No. [sic] L-2014-2404361 (Order entered Feb. 20, 2014). The Parties agree that PPL Electric will file a new net metering Tariff consistent with the outcome of the Commission's Proposed Rulemaking Order at Docket No. L-2014-240361 [sic]. The Parties retain the right to review and file testimony concerning such tariff filing as permitted by the normal Commission process for the review of a new tariff filing.

*End Terms of Direct Quotation from the Joint Petition for Partial Settlement. Note that there are additional numbered paragraphs in the JPPS discussing public interest and terms of settlement that are not listed here. The following are the ALJ's Findings of Fact on the litigated issues:*

**3. Litigated Issues**

 55. PPL Electric's small business customers are generally aggregated into the Small Commercial & Industrial rate class group which is served by full requirements load-following contracts. OSBA Stmt. 1 at 2.

 56. PPL Electric currently has a maximum demand limit of 500 kW for customers to be included in the Small C&I generation default service rate class group which is currently served under Rate Schedule GSC-1. OSBA Stmt. 1 at 2.

 57. PPL Electric default customers whose maximum demand exceeds 500 kW currently are served by hourly spot market purchases in Rate Schedule GSC-2. PPL Stmt. No. 1 at 30.

 58. In its DSP II Petition, PPL Electric stated that it would propose to reduce the size limit from 500 kW to 100 kW for inclusion in Rate Schedule GSC-1. OSBA Stmt. 4 at 1; PPL DSP II Petition ¶¶58-59.

 59. Implementation of the size reduction would cause 430 small business customers to be removed from the current method of default service and placed into the hourly default service. OSBA Stmt. 4 at 1; PPL Electric MB at 14.

 60. The 430 small business customers who would be affected by the proposal represent 13.7% of total Small Commercial & Industrial generation default service load. OSBA Stmt. 4 at 4.

 61. The current full requirements load-following contracts constitute a prudent mix, designed to provide adequate and reliable service at the least cost to customers over time. DSP II Opinion and Order.

 62. PPL Electric has not identified or offered any evidence to support its proposal that hourly procurements meet the prudent mix standard for customers with maximum loads between 100 kW and 500 kW.

 63. PPL Electric's proposal regarding the cost responsibilities for non-market-based (NMB) Charges is identical to the proposal litigated and approved in the PPL Electric DSP II Petition.

 64. Under PJM rules, a load serving entity is responsible for both market-based and NMB Charges. PPL Electric Stmt. 3-R at 13.

 65. Each EGS is a load-serving entity and is responsible for NMB Charges. PPL Electric Stmt. 3-R at 13.

III. DISCUSSION

**1. LEGAL STANDARDS**

**A. Burden of Proof**

 Section 332(a) of the Code, 66 Pa.C.S. §332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

 The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. The burden of production tells the adjudicator which party must come forward with evidence to support a particular proposition. See *In re Loudenslager’s Estate*, 430 Pa. 33, 240 A.2d 477, 482 (1968). The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established, and it never leaves the party on whom it is originally cast. *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa.Cmwlth.1993).

 A party that offers a proposal not included in the original filing bears the burden of proof for that proposal. *See Brockway Glass Co. v. Pa. Pub. Util. Comm’n,*437 A.2d 1067 (Pa.Cmwlth. 1981); *Pa. Pub. Util. Comm’n v. Duquesne Light Company,* Docket Nos. R-2013-2372129, et al. (Opinion and Order entered April 23, 2014).

 Therefore, the Company has the burden of proving that its proposed default service provider program is just and reasonable, and any party contesting it has the burden of persuading the Commission that the filing is not just and reasonable.

**B. Standards for Default Service**

 The requirements of a default service plan appear in Section 2807(e) of the Public Utility Code,[[3]](#footnote-3) 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. §§ 2707(e), 2708.

 The Competition Act also mandates that customers have direct access to a competitive retail generation market. 66 Pa.C.S. § 2801(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. § 2801(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.

*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, P-2011-2273668, P-2011-2273669, and P-2011-2273670, at 7-8 (Opinion and Order entered August 16, 2012)(*FirstEnergy Order)*.

 Also applicable are the Commission's default service regulations, 52 Pa.Code

§§ 54.181-54-189, and policy statement, 52 Pa.Code §§ 69.1802-69-1816. 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*).

 Finally, a default service provider shall file its service program with the Commission no later than 12 months prior to the conclusion of the currently effective program. 52 Pa.Code § 54.185(a). The Company's current plan expires on May 31, 2015, and the filing date for the DSP III was April 18, 2014, more than 12 months prior to the expiration. This requirement has been met.

**2. Party Positions on Settled Issues**

**A. General**

 The designation matches the designation appearing with each topic in the Settlement document. The Joint Petition for Partial Settlement paragraph designations are given for ease of reference.

B**. Product Portfolio and Procurement Schedule (Settlement ¶¶22-24)**

PPL Electric will acquire the Residential and Small Commercial and Industrial Class default service supply, other than Time-of-Use supply, through a series of fixed-price, load-following, full requirements supply contracts. For the large Commercial and Industrial (Large C&I) Customer Class, the Company will enter into annual contracts with suppliers for the provision of the default service spot market, load-following, full-requirements supply. PPL Electric will hold solicitations pursuant to a series of RFPs to obtain default service products from competitive wholesale generation suppliers, and each customer class will be bid separately. Settlement ¶22-24.

 To satisfy the "prudent mix" requirement, the DSP III provides for the Company to acquire a fixed percentage of the Residential and Small C&I default service load on a semiannual basis through short and medium-term 6 and 12 month contracts. The Company states:

The DSP III Program procurement schedule includes procuring a large percentage of supply through short-term, 6-month, contracts which enable more market-reflective rates while continuing to moderate price volatility through the procurement of 12-month contracts. The Large C&I Customer Class will continue to be served by 12-month, full-requirements, load-following, spot market contracts procured once a year. Additionally, the Company has 100 MW of fixed-price, long-term block supply committed through December 31, 2015 and 50 MW of energy and capacity associated with a long-term product for the period June 1, 2015 through May 31, 2021. (PPL Electric Statement No. 1, pp. 11-12) Based upon a review of these products and giving consideration to the relatively high level of shopping on PPL Electric's system, PPL Electric's independent, outside expert concluded that PPL Electric's DSP III Program procurements are consistent with the "prudent mix" requirement. (PPL Electric Statement No. 2, pp. 22-28)

PPL Electric Statement in Support at 7.

 The Company is confident that the DSP III will provide continuous, adequate and reliable service to customers for the duration of the program. Wholesale suppliers are responsible for the acquisition of energy, capacity, transmission, ancillary services, AECs, and any other related products to meet Default Service customers' hourly load. This is designed to provide the least cost service over time.

 OCA expressed concern that the original proposal resulted in only 25% of the residential portfolio extended beyond the last day of the DSP III, having recommended that 70% extend beyond that point, but is satisfied that the Settlement results in a modification so that 55% of the Residential portfolio will expire on May 31, 2017, and 45% will extend beyond that date. See Settlement ¶ 23; OCA Stmt. in Support at 5.

 In contrast, RESA recommended that the DSP III procurements end on May 31, 2017 and do not extend beyond that date. The final agreement represents a compromise among the parties and overall, serves the public interest. RESA St. 1 at 12-13.

 OSBA, long a proponent of fixed-price full requirements contracts, agreed that the Company’s original proposal for procurement for Small C&I customers was within the range of reasonable for both the duration and timing of the procurements. OSBA Witness Knecht stated:

With a 50/50 mix of 6-month and 12-month supplies, the Small C&I C-Factor should be reasonably stable and predictable. It also reflects a reasonable balance between being reflective of market conditions, while remaining simple, understandable, and providing some rate stability. By laddering the 12-month contracts, the Company’s proposal will reduce the magnitude of potential price shifts at the end of the 12-month contracts. In addition, the Company proposed to conduct its procurements within a month of the start of service, thereby reducing the temporal risks faced by suppliers.

OSBA Stmt. No. 1, at 9-10; OSBA Stmt. In Support at 2.

 OSBA states that the Settlement generally adopts the procurement schedule but actually improves it with the modification that the laddering will take procurements beyond May 2017. The Settlement’s procurement for Small C&I customers is acceptable to the OSBA as just and reasonable. OSBA Stmt. In Support at 3.

 RESA expressed support for the Settlement even though it does not transition to more 3-month contracts but agrees that the overall procurement plan is an improvement over the DSP II and, therefore, is acceptable for this proceeding. Specifically, the Settlement reduces the number of contracts that will extend beyond the term of the program and represents a reasonable solution to the disagreement. RESA Stmt. In Support at 2.

 RESA supports the change from the current 10-day lead time for filing the PTC prior to the effective date of the rate to 30 days. In addition, the DSP’s procurement schedule will advance by two weeks, which will enable customers additional time to make shopping decisions. RESA Stmt. In Support at 3.

 PPLICA “has concerns” about the Settlement’s proposal to procure Large C&I default service through competitive bids rather than directly from the PJM market but agrees that it is “generally consistent” with the Commission’s default service regulations. While stating that it will continue to monitor the situation, PPLICA states that the Company has satisfactorily addressed its concerns for purposes of this proceeding. PPLICA Stmt. In Support at 4.

 ExGen supports the Settlement as reasonably meeting the necessary characteristics required by Act 129 in promoting the least cost to customers over time, as well as meeting the requirements of the *End State Order*. By relying largely on full requirements default service supply products, the DSP III reduces market risks to consumers through fixed-price products to provide adequate and reliable service. The procurements are competitively bid, again furthering the goals of the Commission in encouraging further retail market development. ExGen Stmt. In Support at 3-4.

**C. Contingency Plan (Settlement ¶¶25-27)**

 The proposed Plan provided that the Company would seek Commission guidance and approval to address any shortfall resulting from failure to receive acceptable bids for a given product, and to obtain Default Service through the PJM spot market. OCA expressed its concern that the proposal did not require the Company to make any effort to locate other suppliers but was limited to procuring spot market purchases. The Settlement requires the Independent Auction Manager to contact suppliers to attempt to determine the underlying cause of any shortfall and to relay that information to the Commission. In the Settlement, PPL Electric agrees to make reasonable efforts to minimize the Residential load that is unhedged and agrees to consider the use of combined block and spot products. ¶25.

 The OCA points out that the modifications are in the public interest as the contingency plan now better avoids the potential of residential load being obtained from the spot market for an extended period of time. OCA Stmt. in Support at 6.

**D. AECs**

 PennFUTURE focused its testimony on the EDC’s compliance with the Alternative Energy Portfolio Standards Act [[4]](#footnote-4)and states that the Settlement resolves its issues. PennFUTURE is satisfied that the Company will procure Tier I (non-solar) and Tier II AECs through new individual long-term contracts in an amount necessary to cover the AEPS requirements associated with the pre-existing Long-Term Product contract for 50 MW committed through May 31, 2021. These are set to be solicited in the first auction under the DSP III Program. PennFUTURE Stmt. In Support at 2-3.

 ExGen avers that the Settlement promotes more competitive results for customers’ benefits by revising AEC transfers to occur at least less frequently than monthly.

**E. PTC and Timing of Procurements (Settlement ¶¶30-32)**

 Under current practice, PPL Electric issues its Price to Compare (PTC) 10 days prior to its effective date. In the DSP III proposal, the Company sought to maintain the 10 days. OCA recommended against this, and the Settlement accepts that the Company will issue the PTC 30 days before its effective date. This represents an acceptable compromise of the parties and serves the best interests of the public because it improves the notice period from its present 10 days to 30 days. OCA Stmt. it Support at 7.

 RESA states that this result is a good resolution of the issue because it will enable customers additional time to make shopping decisions should they wish to change their generation service provider and will also assist EGSs in assessing their participation in the standard offer program. RESA Stmt. in Support at 3.

**F. Reconciliation of GSC-1, GSC-2, and TSC (Settlement ¶¶33-36)**

 The reconciliation periods as proposed by the Company, April 30th and September 30th, resulted in an overlap in April and a gap in the month of October. OCA recommended that the Company use March 30th to make the time periods consistent, and the Settlement adopts that recommendation. OCA avers that this will improve the accuracy of PPL's reconciliation calculations to the benefit of ratepayers. OCA Stmt. in Support at 7-8.

 OSBA states that the Settlement’s provision that the GSC-1 rate be adjusted every six months to reflect the cost of supply contracts for the upcoming six month period, and be reconciled every six months using the over/under collection balance for the six-month period ending two months prior to the new Price to Compare effective date is an improvement over the current three-month reconciliation. Witness Knecht testified that the three-month reconciliation exacerbated the fluctuations in the reconciliation charges/credits, worsening market distortions. OSBA supported a 12-month reconciliation but recognizes that the Settlement’s six-month reconciliation is an improvement and supports it for the purposes of this proceeding. OSBA Stmt. 1 at 10; OSBA Stmt. In Support at 3-4.

**G. Credit Ratings (Settlement ¶ 37)**

 The Company had proposed a change to its SMA to reduce the unsecured credit limit in conjunction with allowing sub-investment grade companies to participate in the procurement process, and OCA had opposed this change. The Settlement maintains the credit rating as it was in DSP II, protecting the Company and its customers from increased financial risk due to supplier default, which is in the public interest. OCA Stmt. in Support at 8.

**H. SMA (Settlement ¶¶38-43)**

 In its original proposal, PPL Electric sought to increase the required credit rating of wholesale suppliers from the current DSP II’s A-/A3 (A- for S&P and A3 for Moody’s) to A/A2. NextEra Witness Sean Cheslock testified that increasing the credit standards would reduce the number of LOC issuers and would potentially provide for increased costs to customers and decreased participation in the program by suppliers. As a result of negotiations, the Company agreed to maintain the present level of credit required and NextEra submits that the result is in the public interest. There is no opposition to this term. NextEra Stmt. In Support at 1-3.

 ExGen is satisfied that the revisions promote more competitive pricing by wholesale suppliers in its CBPs. ExGen Stmt. In Support at 4.

**I. Standard Offer Program (Settlement ¶¶ 44-51)**

 The Company explains that it began offering the SOP in August 2013, after the Commission’s approval in the DSP II proceeding. Between August 2013 and the first week of April 2014, the Company states that approximately 66,100 customers were offered the program and 56,600, or 86%, enrolled. The DSP III proposal was to continue the program.

 The SOP provides customers with a standard 7% discount off the PTC in effect at the time of enrollment for a 12-month term. The customers not designating a particular EGS are assigned one randomly, and the customers may exit the program at any time without penalty. EGSs participating in the program are charged a fee of $28 per referred customer.

The offer is extended to customers who contact the Company Contact Center and are eligible as new/moving customers, high bill complaints, or those asking questions regarding the SOP. The customers interested in the SOP are transferred to PPL Solutions, LLP, the third-party administrator, for more information or enrollment. The costs of the program are paid by participating EGSs. PPL Electric MB at 22-23.

The program was opposed by the OCA, which sought more information regarding the ultimate success of the program. RESA sought modifications.

The Settlement provides that the SOP scripts will be revised to provide more detail to prospective participants, and the development of a self-service web-based application following a collaborative to seek consensus regarding the details.

OCA is satisfied that the modifications provided by the Settlement are an improvement to the SOP and are in the public interest. OCA Stmt. in Support at 8-10.

 CAUSE-PA states that the terms of the Settlement reflect a carefully balanced compromise of the interests of all the Joint Petitioners. CAUSE-PA in particular approves of the Company’s agreement to amend its SOP scripts within 90 days to explicitly disclose key features of the SOP, including: (1) the 7% discount is based on the current PTC; (2) the PTC changes semiannually; (3) the percentage of savings will vary as the PTC changes; and (4) the SOP rate may be higher or lower than the next PTC. CAUSE-PA believes that the increased disclosure of the terms and limitations of the discount is a “significant improvement” over the current program structure, which does not provide such disclosures. CAUSE-PA Stmt. In Support at 2.

 CAUSE-PA states that it has a specific interest in ensuring that economically vulnerable customers receive clear and detailed information prior to enrollment in the program, and the terms of the Settlement move in the right direction. CAUSE-PA Stmt. In Support at 3.

 Paragraph 49 includes a commitment by the Company to convene a Stakeholder meeting to resolve other outstanding issues associated with the SOP, such as program administration, bill ready billing, and additional changes to the script, all of which may have significant impact on the low-income customers. CAUSE-PA supports this stakeholder meeting, as it permits a free exchange of viewpoints directed toward constructive ends, avoids litigation and the appellate proceedings regarding the settled issues at what would have been a substantial cost to the Joint Petitioners and PPL customers. CAUSE-PA Stmt. In Support at 4-5.

 RESA expressed concerns relating to the SOP and believes that the Settlement addresses these concerns reasonably. RESA states:

The Partial Settlement represents significant progress on the issues identified by RESA regarding the SOP and, importantly, establishes a going forward collaborative process for administrative and other issues related to the program to be addressed. For all these reasons, the Partial Settlement is a reasonable resolution of SOP issues that permits SOP to continue to operate while providing a future opportunity to assess how the program is functioning and how it can be improved.

RESA Stmt. In Support at 4.

 ExGen states that the revisions to the DSP III further support retail market development. ExGen Stmt. In Support at 5.

**J. Net Metering (Settlement ¶¶52-54)**

 The original proposal was to implement the plan that the Commission approved in Docket No. P-2013-2389572, which was pending before the Commission when the Settlement was submitted. This TOU Plan was the subject of a separate settlement, as well as a recommended decision recommending approval. Anticipating Commission approval, the Company has proposed the same program as had been agreed upon in the prior proceeding. On September 11, 2014, the Commission approved the TOU Settlement. Specifically, PPL Electric and the SEF agreed to recommend and support in their respective statements in support that the Commission decide the TOU Program, which at the time of the execution of the Settlement was pending before the Commission for disposition at Docket No. P-2013-2389572, in sufficient time to allow the TOU Program to be fully implemented at the beginning of DSP III Program period, *i.e*., June 1, 2015.[[5]](#footnote-5) SEF strongly urged the Commission to resolve the TOU Program pending at the time of the Statement in Support’s filing at P-2012-2389572 to permit the full implementation of the program resulting from that case at the beginning of the DSP III Program period (June 1, 2015).

  OSBA states that a major contributing factor to the instability in PP" Electric’s Small C&I default service charges has been the “cash out” costs related to net metered customers with large amounts of excess generation. OSBA fully support the Settlement provision which specifies that the resolution of TOU rates for net metered customers in the proceeding referenced in Paragraph 53 should continue to apply to PPL’s DSP III. OSBA Stmt. In Support at 4.

 SEF also acknowledges that the Commission has pending a proposed rulemaking regarding net metering at L-2014-2404361,[[6]](#footnote-6) and submits that the Company’s agreement to file a new tariff in this case is consistent with the rulemaking and the opportunity for interested parties to respond to the tariff.

 As the Time of Use program is identical to that approved by the Commission in the litigation stemming from the DSP II, its approval here is consistent with Commission precedent.

**K. PUBLIC INTEREST**

 PPLICA avers that the Settlement is in the public interest because its terms reflect a just and reasonable compromise of issues raise by PPLICA and other parties to the proceeding. It states that all parties will benefit from a comprehensive resolution as it avoids the expense of further litigation and advances the policy of the Commission to encourage amicable resolutions. PPLICA Stmt. In Support at 4-5.

  SEF submits that the Settlement is in the public interest because it discontinues litigation, establishes a procedure for a full discussion of relevant issues in the proposed Stakeholder meeting for the SOP program and adjusts all substantial issues that are the subject of dispute. SEF Stmt. In Support at 4-5.

  NextEra states that the Settlement is in the public interest because maintaining the status quo in credit requirements for wholesale suppliers instead of increasing them has no negative impacts and avoids an increase in costs to customers and potential decrease in the number of participating issuers of letters of credit.

 ExGen states that the Settlement is in the public interest because it further supports retail market development and because it complies with the applicable laws. ExGen Stmt. In Support.

 The Company states that the Settlement reflects a carefully balanced compromise of the competing interests of all of the Signatory Parties to the proceeding. It is unopposed by the remaining parties. It was achieved after a comprehensive investigation of PPL Electric’s proposals in the original Petition. The Settlement meets all applicable legal requirements. PPL Electric Stmt. In Support.

**L. RECOMMENDED DISPOSITION OF THE SETTLEMENT**

 The terms of the Settlement[[7]](#footnote-7) meet the legal requirements of a default service plan. In particular, it proposes to acquire its default load pursuant to a competitive procurement plan that includes auctions, RFPs, and bilateral agreements. Residential and Small C&I customer classes will be served through a series of laddered fixed-price, load-following, full-requirements supply contracts, and the Large C&I class will be served by spot market, load-following, full-requirements supply through competitive solicitations. This constitutes a prudent mix of supply methods. The result is anticipated to be both the provision of adequate, reasonable, and reliable service to customers, and the provision of service that is least cost over time. The TOU option available to Residential and Small C&I customers is consistent with the program approved by the Commission in the proceeding stemming from the DSP II,[[8]](#footnote-8) *Petition of PPL Electric Utilities Corporation for Approval of a New Pilot Time-of-Use Program*, Docket No. P-2013-2389572 (Opinion and Order entered September 11, 2014).

 The AECs are provided for in a competitive fashion, and contingency plans are set forth in case of the default of a wholesale provider. Changes to the reconciliation of costs are reasonable and agreed upon by the signatory parties and unopposed by the remaining parties. For these reasons, the Settlement is in the public interest and should be approved without modification.

**3. Issues reserved for litigation**

 The Joint Petition for Settlement specifies as follows:

 55. The Parties agree that PPL Electric's proposal to change the customer size demarcation between Small C&I and Large C&I customers from 500 kW to 100 kW is reserved for litigation.

 56. The Parties agree that the issue of the cost responsibility for NMB Charges is reserved for litigation.

**M. Size of Small C&I and Large C&I customer usage designation**

 The Company proposed to reduce the peak demand limitation for the Small C&I customer class from 500 kW to 100 kW in its original Petition, which places the burden of proving that the proposal is reasonable squarely on the Company. The Company accepts this burden. PPL Electric MB at 7.

 The DSP II Plan currently in effect provides that the Small C&I Customer class is comprised of customers with a peak demand of less than 500 kW. Customers on Rate Schedules GS-3 and LP-4 with a demand level of 500 kW and above are classified as Large C&I customers and receive spot market-based default service. Those with a demand below 500 kW are classified as Small C&I and receive fixed price default service.

 PPL Electric states that it is proposing to reduce the demand level for the Small C&I Customer Class for three primary reasons: (1) the stated expectation of the Commission in its *End State Order;* (2) the commitment made in the *DSP II* case; and (3) the number of Default Service customer impacted is, at 430 customers, only 0.4% of all Default Service commercial and industrial customers. RESA supports this proposal, and the OSBA opposes it.

 The final order in *Investigation of Pennsylvania's Retail Electricity Market: End State of Default Service,* Docket No. I-2011-2237952 (Final Order entered February 15, 2013), 2013 Pa. PUC LEXIS 306, 303 P.U.R.4th 28 (*End State Order)*, states that:

Therefore, at this time, the Commission continues to support the threshold of 100 kW for purposes of determining medium and large C&I customers, but expects the EDCs to offer hourly LMP products only to the customers above that demand level who have interval meters. We expect the EDCs to continue adding medium C&I customers to the hourly LMP product as interval meters are deployed. Further, the Commission directs all LMP default service customers to be grouped into one single auction class for each EDC in order to avoid creating extremely small procurement classes.

*End State Order* at 50-51.

 PPL Electric notes that it committed in the DSP II case to reduce the peak demand for the Small C&I Customer Class from 500 kW to 100 kW in its next Default Service filing, which is, of course, the present case. In its Order approving the DSP II, the Commission stated:

### 2. Hourly Priced Default Service for Small C&I Customers with Load Over 100 kW

#### a. Positions of the Parties

 PPL notes that it currently provides real time hourly default service pricing for its Large C&I customer class, which includes customers with demands greater than 500 kW. PPL MB at 51. PPL points out that in the *December 16 Upcoming DSP Order*, the Commission directed the Company to file testimony in this default service case setting forth the cost to convert its billing system to allow hourly price service to all default service customers larger than 100 kW. *Id*.; *See, December 16 Upcoming DSP Order* at 60, Footnote 11. In compliance with this directive, PPL estimates that it would cost over $360,000 to implement real-time default service pricing for all default service customers larger than 100 kW. PPL St. 1-R, p. 31; PPL MB at 51.

 Additionally, PPL notes that in an Order issued by the Commission addressing a petition filed by the Company to modify its Smart Meter Technology Procurement and Installation Plan, PPL was encouraged to propose a mechanism for implementing real-time pricing for Small C&I customers with load over 100 kW in a future default service filing. PPL MB at 52; *See*, *Petition of PPL Electric Utilities Corporation for Approval to Modify Its Smart Meter Technology Procurement and Installation Plan and to Extend Its Grace Period*, Docket No. P-2012-2303075, (Order entered August 2, 2012) (*PPL* *Smart Meter Order*) at 9-10. Accordingly, PPL states that it will address the implementation of a 100 kW split for Small C&I customers in a future default service filing. PPL MB at 52. PPL states that is aware of no opposition to this proposal. *Id*.

 RESA generally supports PPL’s proposal to lower the hourly-priced threshold for Small C&I customers to 100 kW, and urges the Company to transition such customers to hourly-priced service on an ongoing basis as it continues to develop the capability to do so. RESA MB at 40. RESA states that “PPL should reassess its capability to provide hourly-priced service each quarter in order to forgo a quarterly procurement for each new segment of customers capable of receiving hourly-priced service.”  *Id*.

*DSP II* at pp. 62-63.

 The Commission adopted the RD's recommendation, which was based on the Company's Brief and the lack of any opposition to the Company's position that it postpone action on this matter until the DSP III:

 The Company currently provides real time hourly default service pricing to its large C&I customer class.[[9]](#footnote-9) This class includes customers with demands greater than 500 kW.

In the *December 16 RMI Order*, the Commission noted that PPL Electric has interval metering capability and directed the Company to file testimony in this default service case setting forth the cost to convert its billing system to allow hourly price service to all default service customers larger than 100 kW. In compliance with this directive, PPL Electric estimated that it would cost over $360,000 to implement real-time default service pricing for all default service customers larger than 100 kW. (PPL Electric St. 1-R, p. 31).

 The Company also provided additional information relevant to implementing real time pricing for default service customers larger than 100 kW. As of August 2012, there were 4,007 Small C&I customers larger than 100 kW who are eligible for fixed-price default service. Of this number, 3,709, or 93%, of the customers are currently shopping. (PPL Electric St. 1-R, p. 32). The Company further explained that the procurement contracts currently in effect and scheduled under the DSP I Program for Small C&I customers specifically established that supplies for the Small C&I class were being acquired for customers smaller than 500 kW. The last of these DSP I contracts will not expire until March 2015. (PPL Electric St. 4, p. 33).

 Based upon the terms of existing contracts with wholesale suppliers under DSP I for service to Small C&I customers, the small number of customers over 100 kW actually taking default service and the cost of making necessary billing system modifications, the Company proposed in a *Petition for Approval to Modify Its Smart Meter Technology Procurement and Installation Plan and to Extend Its Grace Period*, at Docket No. P-2012-2303075, 2012 Pa. PUC LEXIS 1232 (August 2, 2012) (“*Smart Meter Order*”), to undertake the modifications necessary to provide hourly priced service for all default service customers larger than 100 kW on a schedule intended to permit the introduction of this capability by June of 2015, which would be the start of the next procurement plan period for PPL Electric default service customers.[[10]](#footnote-10) The Commission denied PPL Electric’s request to implement real-time default service pricing for Small C&I customers over 100 kW as part of its Smart Meter Technology Procurement and Installation Plan. The Commission’s Order encouraged PPL Electric to propose a mechanism for implementing such real-time pricing in a future default service filing. (*Smart Meter Order* at pp. 9-10). Consistent with this directive, PPL Electric will address the implementation of a 100 kW split for Small C&I customers in a future default service filing. PPL Electric is aware of no opposition to this proposal.

####  PPL Electric MB at 51-52.

Accordingly, the Company's proposal to address this further in a future DSP case is recommended for approval.

*DSP II RD* at 58-59.

 As is evident, the prior case contained no substantive discussion or disposition of this issue, simply the stated intent to address it in the DSP III.

 In the present case, PPL reports that it has the interval meters installed for all 3,200 customers with demand between 100 kW and 500 kW. PPL Electric MB at 14. The Company reports that 88% of customers with demand between 100 kW and 500 kW are shopping, and over 90% of customers with a demand greater than 500 kW are shopping. PPL Electric MB at 14, quoting PPL Electric Stmt. 1 at 31. This, the Company argues, makes it clear that commercial and industrial customers with demand over 100 kW are well-equipped and educated to manage their commodity costs in an hourly spot market default service environment.

 The Company argues that there are 430 Default Service customers with a demand between 100 kW and 500 kW who would be impacted by the change, and each of these can obtain fixed-price electric generation supply from the competitive market. PPL Electric MB at 14.

 For these reasons, PPL Electric proposes to change the customer classes to include those commercial customers with demand over 100 kW and less than 500 kW to be included in the Large C&I class for purposes of default service.

RESA supports PPL Electric's proposal and characterizes it as consistent with the Commission's *End State Order* and moves affected customers into a "more appropriate" default service structure. RESA MB at 5. First, a competitive market offers a variety of different products and services which will, overall, better meet the needs of the customers. It is the implementation of the PPL proposal which will lead to a default service structure that promotes the development of a robust competitive retail market, which in turn enables competitors to fulfill all appropriate policy objectives, including but not limited to offering stable priced products to consumers.

 Second, the PPL proposal is consistent with the Commission's *End State Order,* which states the Commission's expectation that this round of default service plans will see EDCs offering only hourly LMP to medium and large C&I customers with interval meters. *End State Order* at 29. In addition, RESA argues that hourly default service pricing is a more appropriate default service structure for the medium to larger commercial and industrial market because it avoids the "boom" or "bust" business cycle that can result in periods of time where retail competition is stifled because longer term fixed price, utility-provided default service fails to reflect current market conditions. RESA states that hourly pricing also benefits customers and achieves broader public policy goals by providing more accurate price signals that can better encourage energy conservation and demand response. RESA MB at 6.

 RESA argues that there is no need for legislative action to implement this change because nothing in the *End State Order* prohibits the movement of C&I customers to the hourly priced procurement group or requires legislative change, and it relies upon the Pike County Power & Light case for support. Finally, the fact that PPL already has interval meters in place sets it apart from the other EDCs which have not moved this size customer to LMP pricing.

 OSBA claims that the Company has done a poor job of maintaining a reasonably stable GSC-1 rate for Small C&I customers but the solution is to fix the underlying problems in the Company's administration of that class's tariff, not to move the customers off the class in order to minimize the effects of the incompetence. The effect of the Company proposal is to move 430 small business customers, representing 13.8% of the total Small C&I default service load, from their current default service to hourly pricing – a very different service from what they now have.

 OSBA points out that the Company's stated intent in the DSP II to take an action is insufficient justification to approve that action here. In addition, the Company's attitude that this will affect a de minimus number of customers is wrong. Thirteen percent equals 430 customers, and OSBA posits that any change affecting more than 10% should be considered to be significant. OSBA MB at 3-4. OSBA adds:

 Furthermore, in light of the well-publicized difficulties in the winter of 2013-2014 with unexpected and volatile utility rates, it is absurd to throw 13.7 percent of the Small C&I load off of fixed rate generation default service and onto a completely unhedged hourly priced service.

OSBA MB at 4.

 Presently, Small C&I default service customers are served through full requirements load following (FRLF) contracts. Large C&I generation default customers are supplied through hourly spot market purchases.

 OSBA points out that the statutory requirements of the Electric Competition Act in the Public Utility Code require that the EDC procure a mix of spot market purchases, short-term and long-term contracts which are prudent, meaning that they are designed to provide adequate and reliable service at the least cost to customers over time. 66 Pa.C.S. §§ 2807(e)(3.2) and (3.4). The Commission has already determined that the "least cost" standard need not be market-reflective:

We disagree with RESA's overall recommendations as to the proper interpretation of the 'least cost' standard as mandating that default service rates approximate, on a prospective basis, the market price of energy. Such an interpretation would signal retention of the 'prevailing market price' standard that has been expressly replaced under Act 129. Moreover, this interpretation conflicts with the Act 129 objective of achieving price stability which dictates consideration of a range of energy products, not just those that necessarily reflect the market price of electricity at a given point in time. Price stability benefits are very important to some customer groups in that exposing them to significant price volatility through general reliance on short term pricing would be inconsistent with Act 129 objectives.

*Final Default Service Rulemaking Order*, at 39-40; OSBA MB at 6.

 The Commission Order continued, as follows:

Finally, we disagree with RESA's assertion that the 'least cost' standard mandates that a default service plan be reasonably likely to result in a 'market-reflective and market-responsive' service rate that recovers all costs related to providing default service. We interpret this standard, not contained in either the Competition Act or Act 129, to mean a preference for short term and spot price supplies which ignore both the Act 129 concerns of price stability and a 'prudent mix' of products. We do not believe that adoption of RESA's suggested standard is consistent with the 'least cost' standard contained in Act 129 and would not adequately protect retail customers from volatility and risks inherent in the energy market. Price stability benefits are very important to some customer groups, so an interpretation of 'least cost' that mandates subjecting all default service customers to significant price volatility through general reliance on short term pricing is inconsistent with Act 129's objectives. This is especially true given that the statute specifically enumerates short-term (up to 4 years) and long-term (over 4 to 20 years) contracts as part of the 'prudent mix' of contracts that should be included in a default service plan 66 Pa. C.S. § 2807(e)(3.2).

*Final Default Service Rulemaking Order*, at 41; OSBA MB at 6-7.

 OSBA states that default service procurement for large industrial customers is generally through hourly spot markets but agrees that it is justified due to the unsuccessful stable price procurements experience affected by shopping risk. There has been no such problem identified for medium commercial customers which are served by FRLF procurements. Accordingly, OSBA points out that the Company has not identified or offered any evidence to support its proposal that hourly procurements meet the prudent mix standard for customers with maximum loads between 100 kW and 500 kW. OSBA MB at 7-8.

 OSBA characterizes the Commission's *End State Order* as a statement by the Commission regarding how it envisions default service in the Commonwealth in the future and not a legal mandate. The Order itself expresses concern that the move to hourly pricing for medium commercial customers does not, on its face, comply with the prudent mix standard required by the statute. Without such legislative assurance, there is no need and no benefit to moving the customers to hourly pricing. OSBA MB at 9.

 PPL Electric responds to the OSBA's argument that it has failed to provide evidence that hourly pricing for medium commercial customers constitutes a prudent mix at the least cost over time within the meaning of the statute as one which should be rejected as it is an argument which has not been raised until briefing. As such, the Company states, it has not had a meaningful opportunity to explore this issue. PPL Electric RB at 6, 9. As it is the acknowledged burden of the Company to prove that its proposal fulfills the requirements of the statute, which on its face requires that the default procurement be comprised of a prudent mix of spot market purchases, and short-term and long-term contracts to provide the least cost over time, 66 Pa.C.S. § 2807(e)(3.2), this counterargument is both mystifying and without merit. There is plenty of room for argument to determine the meaning of the terms, but there is no question that they are statutory requirements which must be met. As such, it is the very essence of a default service plan petition that the plan must meet the statutory requirements. Briefing is the correct place to raise the legal argument that the proponent has failed to carry its burden of proof. There is simply no surprise here.

 The Company continues by citing the Commonwealth Court's decision in *Popowsky v. Pa. Pub. Util. Comm'n,* 71 A.2d 1112 (Pa. Cmwlth. 2013), appeal denied, 83 A.3d 416 (2013)(*Pike County*), which affirmed the Commission's decision to permit hourly default service to a very small utility, Pike County Light & Power, where the majority of customers were shopping under a Commission-ordered aggregation plan and the utility's ability to contract for stable priced supplies in the wholesale market was constrained. The Court permits the Commission's interpretation to allow for variations under the circumstances. PPL Electric argues here that the *Pike County* case was a rejection by the Commonwealth Court of the requirement that a default service plan contain an actual mix of products to meet the prudent mix standard. PPL Electric RB at 7.

 OSBA responds:

 Under certain specific, narrow conditions, procuring default service through hourly spot markets may best meet the "prudent mix" standard. Pike County Light & Power ("Pike") has procured default service supplies for residential and commercial customers in hourly markets for many years. RESA offered no evidence that the circumstances affecting Pike are even remotely relevant to PPL Electric's Small C&I customers with loads ranging from 100 to 150 kW.

 First, while Pike *procures* its default suppliers on an hourly basis, it does not set prices on an hourly basis. In contrast to PPL's proposed approach for the 100 to 500 kW customers, Pike sets it default service on a quarterly basis.

 Second, as the Commission is well aware, when hourly default service pricing was implemented, Pike was a tiny utility where the majority of its customers were shopping under a Commission-sponsored aggregation plan. Also, stable price products were readily available from competitive suppliers, and Pike's ability to contract for stable priced supplies in the wholesale market for its tiny default service load was constrained. *See, e.g., Petition of Pike County Light & Power Company,* Docket

No. P-2008-2044561 (Order entered March 23, 2009) at 14-15. RESA makes no pretense of explaining the relevance of the Pike situation to PPL, and it is apparent to any participant in this proceeding that none of these conditions apply to PPL's Small C&I default service customers.

OSBA RB at 11-12.

**Disposition**

 The Commission's *End State Order* is not consistent with its duly published policy statement, creating a dilemma for the recommendation here:

#### § 69.1805. Electric generation supply procurement.

A proposed procurement plan should balance the goals of allowing the development of a competitive retail supply market and also including a prudent mix of arrangements to minimize the risk of over-reliance on any energy products at a particular point in time. In developing a proposed procurement plan, a DSP should consider including a prudent mix of supply-side and demand-side resources such as long-term, short-term, staggered-term and spot market purchases to minimize the risk of contracting for supply at times of peak prices. Short-term contracts are contracts up to and including 4 years in length. Long-term contracts are contracts more than 4 years in length but not more than 20 years. Long-term contracts of more than 4 years in length but not more than 20 years should not constitute more than 25% of the DSP’s projected load unless the Commission determines that a greater portion of load is necessary to achieve least cost procurement. The plan should be tailored to the following customer groupings, but DSPs may propose alternative divisions of customers by registered peak load to preserve existing customer classes.

(1) *Residential customers and nonresidential customers with less than 25 kW in maximum registered peak load.* Initially, the DSP should acquire electric generation supply for these customers using a prudent mix of resources as described in the introductory paragraph to this section. Contracts should be laddered to minimize risk, in which a portion of the portfolio changes at least annually, with a minimum of two competitive bid solicitations a year to further reduce the risk of acquisition at a time of peak prices. In subsequent programs, the mix percentage of supply acquired through long-term and short-term contracts and spot market purchases should be adjusted, depending on developments in retail and wholesale energy markets to ensure least cost to customers.

(2) *Nonresidential customers with 25—500 kW in maximum registered peak load.* The DSP should acquire electric generation supply for these customers using a mix of resources as described in the introductory paragraph to this section. Fixed-term contracts may be laddered to minimize risk, with a minimum of two competitive bid solicitations a year to further reduce the risk of acquisition at a time of peak prices. In subsequent programs, the mix percentage of supply acquired through long-term and short-term contracts and spot market purchases should be adjusted, depending on developments in retail and wholesale energy markets to ensure least cost to customers.

(3) *Nonresidential customers with greater than 500 kW in maximum registered peak load.* Hourly priced or monthly-priced service should be available to these customers. The DSP may propose a fixed-price option for the Commission’s consideration.

52 Pa.Code § 69.1805.

 As is evident, the policy statement promotes the "prudent mix" standard taken from the statute for serving the customers in the Small C&I Class. The *End State Order*, however, prefers the LMP approach. Neither document is a regulation nor is either an adjudication.

 The binding legal effect of a substantive regulation is well established:

. . .the distinctions between rules adopted under administrative agencies' legislative rulemaking power and their interpretative rulemaking power. The former, known as substantive rules or regulations, result from legislative power granted by the legislature and establish new law, rights or duties and "enjoy a general presumption of reasonableness." [Borough of Pottstown v. Pennsylvania Municipal Retirement Board, 551 Pa. 605, 610, 712 A.2d 741, 743 (1998)](https://www.lexis.com/research/buttonTFLink?_m=637fe528d0430af093ccf6e2f26f7bff&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b958%20A.2d%201050%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=103&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b551%20Pa.%20605%2c%20610%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=44&_startdoc=41&wchp=dGLzVzk-zSkAz&_md5=67a9d60acc41abbff7e7ce820c76f82e). Regulations adopted under legislative rulemaking power [\*1057] have the force of law and are binding on reviewing courts as part of a statute as long as they are within the granted power, issued under proper procedures and are reasonable. [Bailey v. Zoning Board of Adjustment of Philadelphia, 569 Pa. 147, 801 A.2d 492 (2002)](https://www.lexis.com/research/buttonTFLink?_m=637fe528d0430af093ccf6e2f26f7bff&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b958%20A.2d%201050%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=104&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b569%20Pa.%20147%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=44&_startdoc=41&wchp=dGLzVzk-zSkAz&_md5=fd3192bb7ae42355fca4cd1dd93db3b5). Interpretative rules or regulations construe a statute and do not expand upon its terms, and courts defer to agency interpretations so long as they are reasonable [\*\*17] and genuinely track the meaning of the underlying statute. Id. [6](https://www.lexis.com/research/retrieve?cc=&pushme=1&tmpFBSel=all&totaldocs=&taggedDocs=&toggleValue=&numDocsChked=0&prefFBSel=0&delformat=FULL&fpDocs=&fpNodeId=&fpCiteReq=&expNewLead=id%3D%22expandedNewLead%22&brand=&_m=b822426cc78e84a43b59611656a70435&searchType=&docnum=44&_fmtstr=FULL&_startdoc=41&wchp=dGLzVzk-zSkAz&_md5=ff94d2e9936b20f478bc37eed28bbca1&focBudTerms=&focBudSel=all#fnote6)

Bayada Nurses, Inc. v. Commonwealth of Pennsylvania, Department of Labor and Industry, 958 A.2d 1050 (Pa.Cmwlth. 2008), 2008 Pa. Commw. LEXIS 395.

 For the Commission to adopt a standard other than the "prudent mix" standard as a general rule (as opposed to the specific exception presented by the Pike County situation), thus expanding the standard provided in the statute, the Commission would be well advised to do so in a formal rulemaking proceeding. While the *End State Order* most likely does not reach the level of exceeding the Commission's administrative authority,[[11]](#footnote-11) neither is it, as an implementation order, standing alone, enforceable law.

 The result is that the Commission has one policy statement published in the Pennsylvania Code, where anyone unfamiliar with the law in Pennsylvania would, nonetheless, be likely to search for and find it, and one order which amounts to a policy statement that has not been published in a service such as the Pennsylvania Code. Reliance upon the latter is antithetical to the Commission's usual practice of transparency. The result is that neither is legally binding and each acts as advisory to both the parties to a default service case and to the Commission itself. As such, the legal analysis turns back to the statute for authority.

 The statutes states that:

 (3.1) …. The electric power acquired shall be procured through competitive procurement processes and shall include one or more of the following:

(i) Auctions.

(ii) Requests for proposal.

(iii) Bilateral agreements entered into at the sole discretion of the default service provider which shall be at prices which are:

 (A) no greater than the cost of obtaining generation under comparable terms in the wholesale market, as determined by the commission at the time of execution of the contract; or

 (B) consistent with a commission-approved competition procurement process. . . .

 (3.2) The electric power procured pursuant to paragraph (3.1) shall include a prudent mix of the following:

 (i) Spot market purchases.

 (ii) Short-term contracts.

 (iii) Long-term purchase contracts . . . .

66 Pa.C.S.A. § 2807(e)(3.1), (3.2) (in pertinent part)

 It is clear that the statute favors the published policy statement, and that any change to that policy statement and the statute itself needs to be supported by substantial evidence.

 The question is whether the Company has carried its burden of proving that its proposal to move commercial customers with maximum load of 100 kW to 500 kW to hourly pricing is consistent with the statute. The Company claims that it has the interval meters and that a significant number of customers in this category are already shopping, so very few will be affected. In addition, the move is consistent with the Commission's *End Use Order.* OSBA points out that 430 customers, or approximately 13% of the rate class, is not de minimus. Further, the *End Use Order* recognizes that the Commission position would be better grounded if there were legislative recognition that hourly pricing without the hedging of short and long term contracts is sufficient to meet the price stabilization requirement of Act 129.

 Further, the percentage of shopping Small C&I customers dropped from the 93% in the DSP II to the present 88%. Arguably, the product available from default service under the full-requirements load-following contracts approach is one which those customers see as desirable.

 While PPL Electric has set forth a plan to comply with the *End State Order*, it has provided no evidence to support a finding that its proposal to move these small commercial customers to hourly pricing is consistent with the goal of the statute to establish a default plan which provides the least cost over time by using a prudent mix of products. With the knowledge that this issue can be revisited in future DSP cases, I recommend that the proposal be rejected and the Company be directed to continue to serve the Small C&I customers consistent with the plan approved in the DSP II.

**N. Responsibility for NMB charges**

 The Company did not propose any changes to the handling of NMB charges in its Petition. Rather, RESA and ExGen propose that PPL Electric pay the NMB Charges incurred to serve all customers, both Default Service and shopping customers, and recover these costs from all retail customers through a non-bypassable surcharge. As such, RESA and ExGen are charged with the burden of proving that this change should be adopted. PPL Electric MB at 8; PPLICA MB at 10. I note that RESA's recitation of the burden of proof merely states that PPL has the ultimate burden of proof in the proceeding and that the initial burden of going forward with evidence showing that its proposals are lawful and reasonable. RESA MB at 4. While that is true of proposals of the Company, this issue was not raised by the Company, and therefore, the burden of proof lies with that party or those parties who raised it.

 RESA explains that under the present DSP II, PPL Electric assumes the cost responsibility for the following charges associated with default service:

(1) Network Integration Transmission Services (NITS); (2) Transmission Enhancement; (3) Expansion Cost Recovery; (4) Non-firm Point to Point Transmission Service Credits; (5) Generation Reactivation or RMR; and, (6) Regional Transmission Expansion (RTEP). RESA also states that PPL Electric proposes to seek Commission approval to assume the cost responsibility of any new PJM-related charges on behalf of wholesale default service suppliers only. Wholesale default service suppliers, on the other hand, are responsible for assuming the cost responsibility for Unaccounted for Energy. However, the EGSs are required to assume the cost responsibility for these charges on their own behalf.

 RESA recommends that the Company be directed to assume the cost responsibility for all of these charges on behalf of both the wholesale default suppliers and the EGSs through a non-bypassable charge assessed to all customers. RESA believes that this would reasonably and fairly spread the costs of NMB charges to all customers in a competitively fair manner without creating a competitive advantage for default service or denying EGSs equal access to the EDC's facilities. RESA MB at 8-9.

 RESA states:

 NITS, RMR, RTEP and Unaccounted for Energy are all non-hedgeable wholesale cost obligations for which all load serving entities in the wholesale market are required to pay. These cost items are not market based because they are either fully regulated or quasi-regulated costs imposed at the wholesale level on all load serving entities. These costs are unpredictable and cannot be hedged by competitive retail suppliers or wholesale default service suppliers.

RESA MB at 9, citing RESA St. No. 1 at 17-18.

 However, Noble Americas points out that NMB costs are manageable and to change them would unnecessarily shift risk, harming existing retail contracts and licensed retail customers and their contracts:

NITS costs, in particular, are predictable from year to year. PPL witness Johnson explained that "NITS charges are the largest portion of the transmission service charge and the NITS rate is set by PJM on an annual basis, thereby reducing the volatility to which any entity is exposed."

Noble Americas MB at 3, citing PPL St. No. 3-R at 15.

 RESA admits that the NITS rate is set annually. RESA MB at 10.

 PPL Electric avers that there has been no change to the nature of the NMB charges from the DSP II case, where the Commission approved the present approach. In fact, there is growing precedent to support the present approach, as the Commission rejected this same

argument in DSP II, citing its rejection of it in the *FirstEnergy DSP II* order.[[12]](#footnote-12) Recently, the Commission issued its decision in *FirstEnergy DSP III*, which affirms its prior rejection.

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.

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

 In short, the Commission has repeatedly and consistently decided that the NMB costs should be assigned to those served by the load which is accompanied by those costs. The RESA/Ex-Gen plan to aggregate those NMB costs and spread them evenly among all customers is not consistent with the Commission's decisions in this matter.

 RESA claims that presently, there exists inequitable treatment of the NMB charges between default and competitive retail supply which it explains as follows:

 The difference is that allowing PPL to assume the cost responsibility for only wholesale default service suppliers (versus for all load) unfairly shifts a competitive advantage to PPL's default service. This is because when PPL assumes responsibility on behalf of the wholesale default service suppliers, the wholesale default service suppliers no longer need to factor in the risk of future price increases in the NMB Charges into the bids they submit for default service supply. Therefore, the resultant bid price (which forms the final default service rate charged) does not account for the risk of cost increases for NMB Charges. Instead, PPL will simply pass on the actual costs to default service customers at the currently applicable level. Thus, PPL's default service rate includes the current transmission rate (reflected in the Transmission Service Charge rider) but no any additional amount to account for the risk of future price increases to the NMB Charges. PPL does not need to include this additional cost factor because it is permitted to pass through to customers the actual future rates.

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

RESA MB at 12 (footnotes omitted).

 PPL Electric points out that, under PJM rules, all load-serving entities (LSEs) are charged market-based and NMB costs based on each LSE's share of the load served. Further, the EGSs are the LSEs for shopping customers, and it is unclear whether PJM rules would permit a third party to assume the LSE's obligation to pay NMB Charges. In addition, there are no details regarding the proposed implementation of the proposal which makes an assessment regarding the extent to which the proposal may shift costs impossible to evaluate. PPL Electric MB at 17.

 The costs incurred to provide competitive electric generation supply to shopping customers belong to the EGS, and these costs include NMB Charges. PPL Electric MB at 17-18.

 Continuation of the present practice is supported by Noble Americas and PPLICA, both of which assert that RESA and Ex-Gen have failed to carry their burden of proving that the proposed non-bypassable riders are consistent with the Competition Act, Commission precedent and regulations. Noble Americas asserts that a customer's ability to manage its NITS costs enables the customer and supplier to effectively manage their load obligations and allows for further development of product and service offerings in the marketplace, and that implementation of the non-bypassable riders would require revising the contract with every EGS effective on the date of the change in order to prevent double collection of the costs. Noble Americas MB at 4.

 PPLICA points out that reliance on the *Fixed Price Order[[13]](#footnote-13)* is misplaced as that Order is intended to provide guidance regarding the use of nomenclature in customer contracts:

In the Fixed Price Order, the Commission finds that customers, specifically residential and small commercial customers, may be deceived by a fixed price contract that includes variable price components or regulatory-out clauses. Fixed Price Order, pp 21-23 ("It is simply unrealistic to expect the average residential consumer to understand electric markets to this level of granularity, with many of them still struggling with the basic distinctions of generation, transmission, and distribution.") Importantly, as observed by PPL Witness James Rouland, the Fixed Price Order specifically contemplated that EGSs would remain responsible for recovery of transmission-related charges. See PPL St. No. 1-R, p. 43. Specifically, Mr. Rouland notes that the *Fixed Price Order* explains that the "price an EGS presents to residential or small business customers is expected to be "all inclusive" – including all of the pricing components found in the PTC for default customers (generation, *transmission where applicable*, gross receipts tax, etc.)." *Id.* (Emphasis added)

PPLICA MB at 14-15.

 PPLICA argues that an EGS concerned with the level of risk premiums it would need to include within a fixed price contract, that EGS can negotiate a pass through clause with its customers, as has been done by many Large C&I customers. By contrast, Large C&I customers are often willing to pay a risk premium to EGSs for reasons including avoidance of market volatility, and the implementation of a non-bypassable rider would remove this option. PPLICA MB at 15.

 PPLICA points out that the Competition Act requires the unbundling of distribution costs from transmission and generation costs. The imposition of a non-bypassable rider would re-bundle these. See PPLICA MB at 16. This concern is consistent with the Commission's stated position on the issue. *Petition of Duquesne Light Company for Approval of Default Service Plan for the Period of June 1, 2013 Through May 31, 2013,* Docket No. P-2012-2301661 (Opinion and Order entered January 25, 2013) at 222 (collection of transmission costs by EGSs is consistent with the continued migration towards a more competitive retail market, and RESA's proposal would be a step backward because it would result in the re-bundling of transmission costs with distribution rates).

 From the point of view of a large industrial or commercial energy user, there is a concern that the imposition of the non-bypassable rider would create significant contractual and double collection concerns which would have to be addressed before the implementation could occur.

 In short, the record in this case contains no persuasive evidence to support a modification to the present method used by PPL Electric for the collection of transmission and transmission-related costs. I recommend that the RESA/Ex-Gen proposal to have the EDC collect NMB Charges through a non-bypassable rider be denied.

IV. CONCLUSIONS OF LAW

 1. The Commission has jurisdiction over this matter. 66 Pa.C.S. §§ 701; 2806-2808.

 2. Section 332(a) of the Code, 66 Pa.C.S. §332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. It is well-established that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

 3. The burden of proof is comprised of two distinct burdens: the burden of production and the burden of persuasion. The burden of production tells the adjudicator which party must come forward with evidence to support a particular proposition. See *In re Loudenslager’s Estate*, 430 Pa. 33, 240 A.2d 477, 482 (1968). The burden of persuasion determines which party must produce sufficient evidence to convince a judge that a fact has been established, and it never leaves the party on whom it is originally cast. *Reidel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa. Cmwlth. Ct. 1993).

 4. The Company has the burden of proving that its proposed default service provider program is just and reasonable, and any party contesting it has the burden of persuading the Commission that the filing is not just and reasonable.

5.The requirements of a default service plan appear in Section 2807(e) of the Public Utility Code,[[14]](#footnote-14) 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. §§ 2707(e), 2708.

 6. The Competition Act mandates that customers have direct access to a competitive retail generation market. 66 Pa.C.S. § 2801(3).

 7. Also applicable are the Commission's default service regulations, 52 Pa.Code §§ 54.181-54-189, and policy statement, 52 Pa.Code §§ 69.1802-69-1816.

 8. 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*).

 9. The Petition was filed in compliance with the requirement that a default service provider shall file its service program with the Commission no later than 12 months prior to the conclusion of the currently effective program. 52 Pa.Code § 54.185(a).

 10. The Settlement provides a default service plan which includes a prudent mix of auctions, RFPs, and/or bilateral agreements. 66 Pa.C.S. § 2807(e)(3.1), (3.2).

 11. The Settlement provides a default service plan which is designed to provide adequate and reliable service to customers at the least cost over time. 66 Pa.C.S. § 2807(e)(3.4).

 12. The Settlement provides a Time of Use default service option to customers with smart meters. 66 Pa.C.S. § 3807(f)(5).

 13. The Settlement provides a competitive bid solicitation process monitored by an independent evaluator. 52 Pa.Code § 69.1807(8).

 14. The Settlement provides a contingency plan to ensure the reliable provision of default service if a wholesale generation supplier fails to meet its contractual obligations. 52 Pa.Code § 54.185(e)(5).

 15. The Settlement is consistent with the legal and technical requirements pertaining to the generation, sale and transmission of electricity of PJM. 52 Pa.Code

§ 54.185(e)(4).

 16. The Settlement's Standard Offer Program is consistent with the requirements of the Commission.

 17. The proposal that PPL Electric assume cost responsibility for NMB Charges on behalf of all load on its system and recover these costs from all distribution customers through a non-bypassable surcharge is inconsistent with the rules of PJM Interconnection, LLC.

 18. The Commission has consistently rejected the proposal that an EDC assume cost responsibility for all NMB Charges. *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, P-2011-2273668, P-2011-2273669, and P-2011-2273670, at 7-8 (Opinion and Order entered August 16, 2012).

 19. The Joint Petition for Partial Settlement is in the public interest.

V. ORDER

 THEREFORE,

 IT IS RECOMMENDED:

 1. That the Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period June 1, 2015 through May 31, 2017, filed at P-2014-2417907, is approved as modified by the Joint Petition for Partial Settlement.

 2. That the proposal to reduce the size limit of Small Commercial & Industrial customers to be served under Rate Schedule GSC-1 from 500 kW to 100 kW is denied.

 3. That the proposal to require PPL Electric Utilities Corporation to assume cost responsibility for non-market-based charges on behalf of all load on its system and recover these costs from all distribution customers through a non-bypassable surcharge is denied.

Dated: October 17, 2014 \_\_\_/s/\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Susan D. Colwell

 Administrative Law Judge

1. Appendix A is attached to the Joint Petition, not to this Recommended Decision. [↑](#footnote-ref-1)
2. Settlement FN 2: The Parties reserve their respective rights to present their arguments on the effectiveness of using block and spot purchases at such time. [↑](#footnote-ref-2)
3. *Electricity Generation Customer Choice and Competition Act,* Act 138 of 1996, as amended by Act 129 of 2008, codified at 66 Pa.C.S. § 2801 *et seq.* [↑](#footnote-ref-3)
4. 66 Pa. C.S. §§2806.1-2806.2. [↑](#footnote-ref-4)
5. The Commission approved the TOU program in that proceeding at the public meeting held September 11, 2014, *Petition of PPL Electric Utilities Corporation for Approval of a New Pilot Time-of-Use Program*, Docket No. P-2013-2389572 (Opinion and Order entered September 11, 2014). [↑](#footnote-ref-5)
6. *Implementation of the Alternative Energy Portfolio Standards Act of 2004,* L-2014-2404361 (Order entered February 20, 2014). [↑](#footnote-ref-6)
7. The Settlement is conditioned upon the usual restrictions that Commission approval be without modification or the parties reserve the right to withdraw from the agreement, and is made without admission against or prejudice to any position that any signatory party may adopt in the event of subsequent litigation. JPPS p 61-65. [↑](#footnote-ref-7)
8. *Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program for the Period June 1, 2013 through May 31, 2015, Docket No. P-2012-2302074 (Opinion and Order entered January 24, 2013).* [↑](#footnote-ref-8)
9. FN from the DSP II RD quotes PPL Electric MB fn 52: The customers who are subject to real time hourly pricing under the Company’s generation supply charge‑2 (“GSC-2”) are those customers served under Rate Schedules LP-4, IS-P(R), LP-5, LP-6, LPET, IS-P(R) and standby service for those Rate Schedules. Schedule LP-4 customers who have a peak demand of less than 500 kW are served under the GSC-1 rate and Rate Schedule GS-3 customers who have a peak demand of 500 kW or greater are subject to the GSC-2 hourly default service rate. PPL Electric Ex. JMK-2. [↑](#footnote-ref-9)
10. It is noted that PPL Electric’s proposed default service procurement plan has no procurements for Small C&I customers continuing beyond May 31, 2015, and therefore there would be no issue regarding the definition of Small C&I customers for default service contracts beginning June 1, 2015. [↑](#footnote-ref-10)
11. For an agency to exceed its administrative authority, what has been ordered must appear to be so entirely at odds with fundamental principles as to be the expression of a whim rather than an exercise of judgment. *Tire Jockey Serv., Inc*. 591 Pa. at 108, 915 A.2d at 1186 (2007)( (quoting [*Housing Authority of Chester v. Pennsylvania State Civil Service Commission*, 556 Pa. 621, 635, 730 A.2d 935, 942 (1999))](https://www.lexis.com/research/buttonTFLink?_m=637fe528d0430af093ccf6e2f26f7bff&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b958%20A.2d%201050%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=106&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b556%20Pa.%20621%2c%20635%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=44&_startdoc=41&wchp=dGLzVzk-zSkAz&_md5=bd3400134d215e0b15b90105423d14fa); *Bayada Nurses, Inc. v. Commonwealth of Pennsylvania, Department of Labor and Industry*, 958 A.2d 1050 (Pa.Cmwlth. 2008), 2008 Pa. Commw. LEXIS 395 [↑](#footnote-ref-11)
12. . . . we will reaffirm our finding that the imposition of a non-bypassable charge for the recovery of transmission-based costs is inappropriate for the reasons given in the *FE DSP II* Order. Moreover, we agree with PPLICA that Electric Competition Law as well as Commission regulations require that transmission costs be treated as unbundled supply-related costs, and are more properly recovered from customers by the particular entity that provides generation service to those customers. *PPL DSP II, citing 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-2011-2273651, et al (Opinion and Order entered August 16, 2012). [↑](#footnote-ref-12)
13. *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*). [↑](#footnote-ref-13)
14. *Electricity Generation Customer Choice and Competition Act,* Act 138 of 1996, as amended by Act 129 of 2008, codified at 66 Pa.C.S. § 2801 *et seq.* [↑](#footnote-ref-14)