

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

Public Meeting held February 25, 2010

Commissioners Present:

James H. Cawley, Chairman, Statement
Tyrone J. Christy, Vice Chairman, Statement
Kim Pizzingrilli
Wayne Gardner
Robert F. Powelson, Statement

Joint Default Service Plan for Citizens'
Electric Company of Lewisburg, PA and
Wellsboro Electric Company for the Period
of June 1, 2010 through May 31, 2013

P-2009-2110798
P-2009-2110780

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Joint Default Service Plan (proposed DSP) for Citizens' Electric Company of Lewisburg, PA (Citizens) and Wellsboro Electric Company (Wellsboro) (collectively, Companies) for the period of June 1, 2010, through May 31, 2013. Also before the Commission are the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) David A. Salapa which recommends approval, in part, of the proposed DSP; the Exceptions of the Companies; the Exceptions of the Office of Small Business Advocate (OSBA); and the Reply Exceptions of the Companies, the Office of Consumer Advocate and the OSBA.

History of the Proceeding

On May 29, 2009, the Companies filed with the Pennsylvania Public Utility Commission their proposed DSP for the period of June 1, 2010, through May 31, 2013. The proposed DSP includes an Implementation and Procurement Plan, an Alternative Energy Portfolio Standard Act¹ (AEPS) Plan, a Congestion Management Plan and a unified Rate Design reflected in the Generation Supply Service Rate (GSSR). On June 18, 2009, the OSBA filed a notice of intervention, a public statement, an answer with new matter, and a notice of appearance. The OCA also filed a notice of intervention, a public statement, and an answer on June 18, 2009. On June 25, 2009, the Office of Trial Staff (OTS) entered a notice of appearance.

On July 13, 2009, the Companies filed their prepared direct testimony. On July 15, 2009, a Prehearing Conference was held before ALJ Ember Jandebour. Present were counsel for the OTS, the OCA, the OSBA, and the Companies. At the Prehearing Conference, a procedural schedule was established for the submission of testimony, evidentiary hearings, and the submission of briefs to the Commission. On July 16, 2009, ALJ Jandebour issued a Scheduling and Briefing Order setting forth the litigation and briefing schedule established at the prehearing conference.

On August 24, 2009, pursuant to the Scheduling and Briefing Order, the OSBA submitted its direct testimony. On the same date, the OCA submitted its direct testimony. The OTS did not submit direct testimony. The OSBA submitted supplemental direct testimony on September 14, 2009. On September 28, 2009, the OSBA, the OCA, and the Companies submitted rebuttal testimony. The OTS did not submit rebuttal testimony. On October 14, 2009, the OSBA and the OCA submitted surrebuttal testimony. The Companies and the OTS did not submit surrebuttal testimony.

¹ Alternative Energy Portfolio Standards Act, P.L. 1672, No. 213 (November 30, 2004), 73 P.S. §§ 1648.1 -1648.8, amended by Act No. 35 of 2007 (July 17, 2007).

ALJ Jandebaur held an evidentiary hearing on October 20, 2009. The hearing resulted in a transcript of eighty (80) pages. During this hearing, the Companies and the other Parties entered their prepared testimony and exhibits into the record. In addition, the Companies also presented brief oral rejoinder testimony.

On October 30, 2009, ALJ Jandebaur issued a Protective Order granting the request of the Companies for special treatment and designation of confidential and proprietary information.

Pursuant to the procedural schedule set forth at the July 15, 2009 prehearing conference and the Commission's regulations, 52 Pa. Code §§ 5.501 and 5.502, the Companies, the OCA and the OSBA filed their Main Briefs (M.B.) on November 10, 2009. The same Parties filed Reply Briefs (R.B.) on November 23, 2009. The record closed on November 23, 2009, upon the filing of Reply Briefs.

On January 20, 2010, pursuant to 66 Pa. C.S. § 334(a), the proceeding was reassigned to ALJ Salapa. On January 22, 2010, the Recommended Decision of ALJ Salapa was issued which recommended approval, in part, of the Companies' proposed DSP, including the AEPS Plan and the Congestion Management Plan. Timely Exceptions were filed by the Companies and OSBA. Timely Replies to Exceptions were filed by the Companies, OSBA and OCA.

Discussion

The ALJ issued forty-seven (47) Findings of Fact (R.D. at 4-10) and twelve (12) Conclusions of Law (*Id.* at 35 - 37). The ALJ's Findings of Fact and Conclusions of Law are incorporated herein by reference unless, expressly or by necessary implication, they are modified or reversed by this Opinion and Order.

We also note that any issue or Exception, which we do not specifically address herein, has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider expressly or at length each contention or argument raised by the parties. *Wheeling & Lake Erie Railway Co. v. Pa. PUC*, 778 A.2d 785, 794 (Pa. Cmwlth. 2001), also *see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

In addition to the foregoing, Section 332(a) of the Public Utility Code (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 axiomatic 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. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990). The term “preponderance of the evidence” means that one party has presented evidence that is more convincing, by even the smallest amount, than the evidence presented by the other party. *Se-ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Here, the Companies have the burden of proof as to the proposed DSP. As will be seen below, OSBA has proposed a directed study of the potential for the Companies to combine their loads with other EDCs. On that issue, the OSBA bears the burden of proof.

The Companies

Before reviewing the proposed DSP, a description of the Companies will be helpful. In particular, the size of the Companies will be important as we discuss various aspects of the procurement plan as well as some of the requested regulatory waivers, particularly those involving rate design and rate classes. The following is taken from the proposed DSP.

Citizens and Wellsboro are two of the smallest jurisdictional Electric Distribution Companies (EDCs) in Pennsylvania. Citizens provides service to approximately 6,800 customers in Lewisburg, Pennsylvania and the surrounding area. The majority of Citizens' customers are residential (5,660 accounts), while Citizens also serves 1,140 commercial, industrial and lighting accounts. Citizens has a peak load of approximately 46 MW. Wellsboro serves a total of approximately 6,000 customers, 4,850 of which are residential, and 1,050 of which are commercial, industrial, resale or lighting. Wellsboro's peak load is approximately 25 MW. Proposed DSP at 2.

The Current Default Service Plan

The Companies and the ALJ have framed the discussion of the proposed DSP by explaining the manner in which it modifies the current DSP approved by this Commission in *Petition for Joint Default Service Plan for Citizens' Electric Company of Lewisburg, Pennsylvania and Wellsboro Electric Company for the Period of January 1, 2008 through May 31, 2010*, Docket Nos. P-00072306 and P-00072307 (Order entered October 3, 2007) (*2007 DSP Order*). We find that to be a reasonable approach. Accordingly, we will use the ALJ's description of the current DSP as provided in the Recommended Decision at pages ten (10) through twelve (12):

Under the existing Stratified Procurement Plan approach, the Companies procure a portion of their required default energy supply for a given month of service over the four quarters preceding that given month. The existing approach utilizes the purchasing of an annual 7x24 (or round-the-clock) product or products totaling at least 20 MWs, with the anticipation that 20-25 MW are in place from this product for each consumption period. The balance of the combined monthly load requirement for the Companies is procured through 5x16 (or on-peak) products, also purchased during the preceding four quarters. The existing procurement schedule for meeting the portfolio provides percentage targets for procurement of the products of supply for each delivery period at different times throughout the year. The Companies and their portfolio manager operate within defined windows, thus limiting the discretion afforded to the Companies regarding the timing and duration of purchases under the approved plan. In addition, any generation requirements beyond the set procurements, annual 7x24 and monthly 5x16, are purchased at prevailing market rates on the PJM Interconnection, LLC² spot market. (PJM) When the Companies' loads are less than the purchased products, any excess energy is sold back to PJM at prevailing market prices.

The Companies have been satisfying the requirements of the Alternative Energy Portfolio Standards Acts (AEPS) using a model similar to the Stratified Procurement Plan in the existing plan. As with the purchase of electricity, the portfolio manager regularly monitors the Alternative Energy Credit (AEC) market and enters the market through multiple entry points throughout each Reporting Period (RP). The approach utilized is as follows: AECs for Tier 1 and Tier 2 are purchased in blocks of approximately 5,000 MWh per transaction to meet the RP requirements in accordance with the procurement matrix as approved by the Commission. Pennsylvania AECs are

² PJM Interconnection, LLC (PJM) is the Federal Energy Regulatory Commission approved Regional Transmission Organization which oversees the region that includes Pennsylvania. The Companies' congestion management proposal includes participation in various transmission markets overseen by PJM as more fully described in the proposed DSP.

bankable for the current and two subsequent RPs, thus, any excess AECs purchased are used in subsequent RPs.

The current contract with the current portfolio manager provides for receiving ongoing advice on matters such as congestion management. Although congestion has been generally stable and predictable in the Companies' territories, an episode of congestion occurred in early 2008 in Wellsboro territory. Consequently, in addition to filing a congestion management plan for Commission approval on the advice of their portfolio manager, the Companies commenced participation in the PJM Auction Revenue Rights, its Annual Financial Transmission Rights process and its monthly Annual Financial Transmission Rights auction as a way to protect ratepayers from potential spikes in congestion. The Companies try to include reasonable bids for the monthly Annual Financial Transmission Rights auctions that reflect seasonal variation in the value of the Financial Transmission Rights that are based on such values as historical congestion, model congestion, and any prior financial transmission rights.

As part of the existing Stratified Procurement Plan, the Companies provide quarterly transaction reports detailing the executed transactions and the comparison bids that the portfolio manager obtained to confirm the reasonableness of the executed transactions. In addition, The Companies filed three annual benchmark analyses in compliance with *Petition for a Joint Default Service Plan for Citizens' Electric Company of Lewisburg, Pennsylvania and Wellsboro Electric Company for the Period of January 1, 2008 through May 31, 2010-Benchmarks*, Docket Nos. P-00072306 and P-00072307 (Order entered March 28, 2008) (*Benchmark Order*). The benchmark analyses included: (1) a spot price comparison; (2) a scheduled procurement plan comparison; and (3) a comparison of the rates of the Companies with various electric distribution companies (EDCs) in Pennsylvania and New Jersey.

The Proposed Default Service Plan

As noted, the Companies propose to continue the previously approved DSP, but with four specific modifications. As stated by the ALJ, those modifications are:

1. Adding financially-settled products;
2. Including an abbreviated approval process to confirm the Companies' authorization to enter multiple-year transactions when favorable market conditions exist;
3. Modifying the existing base load, 7x24, 20-25 MW by splitting the product into multiple procurements during the year; and,
4. Requesting a waiver of the Commission's Policy Statement at 52 Pa. Code § 69.1809 relating to interim adjustments.

R.D. at 12.

In addition to the foregoing adjustments to the current DSP, the Companies seek approval of a specific congestion management plan which had not been included in the prior DSP. A general description of the congestion management plan is set forth in the Companies' Main Brief at pages thirty-four (34) through thirty-seven (37). The Companies, with the advice of their portfolio manager, participate in the PJM Auction Revenue Rights, PJM's Annual Financial Transmission Rights process and PJM's monthly Annual Financial Transmission Rights auction. Based upon the Companies' transmission needs and the potential for congestion, the Companies will act in the various PJM auctions in order to either acquire or hedge against the need for firm transmission commitments. Companies' M.B. at 34 – 37.

The Companies also seek approval of an AEPS Plan which uses a model similar to the Stratified Procurement Plan. The Companies' portfolio manager regularly monitors the Alternative Energy Credit (AEC) market and will acquire the necessary AECs in blocks of approximately 5,000 MWh per transaction in order to meet specific reporting period requirements as set forth by the Commission. Any excess AECs acquired may be banked and used in the two subsequent reporting periods. R.D. at 11.

Recommended Decision

The ALJ approved the Companies' proposed DSP with the exception of the Companies' proposal to adopt an abbreviated process for Commission review and approval of possible requests by the Companies to enter into multiple-year product transactions in the event that favorable market conditions exist. R.D. at 35.

Stratified vs. Scheduled Procurement Plan

Initially, the ALJ discussed the Parties' disagreement regarding the basic nature of the proposed DSP. The Companies proposed to continue with the Stratified Procurement Plan with the modifications noted above. The OSBA disagreed and argued that the Stratified Procurement Plan gives the Companies too much discretion. The OSBA argued, as it did in the Company's 2007 DSP case, that limits must be placed on the Companies' discretion by using a Scheduled Procurement Plan. R.D. at 16.

Before the ALJ here, the OSBA asserted that a Scheduled Procurement Plan would require the Companies to follow a specific procurement schedule and make purchases within designated parameters. According to the OSBA, since the Companies would have less discretion in the timing of purchases, there is less risk that default service customers would experience higher costs in the event of a poor decision by the Companies.

That approach is said to produce a better dollar cost averaging outcome for ratepayers. R.D. at 18.

The OSBA also argued that the current Stratified Procurement Plan did not perform well when measured by the benchmark results. The OSBA argued that the benchmark report filed in response to the Commission's *Benchmark Order* in May of 2009 was misleading because it did not include an analysis of the contract prices for supply which the Companies would have paid under contracts entered into with Lehman Brothers (Lehman) for 2008 and 2009. As a result of the collapse of Lehman, Lehman failed to deliver energy to the Companies under the contract. At that point, the Companies were able to secure replacement power in the market at prices which were less than the Lehman contract price. However, the Companies' benchmark report failed to include prices which would have been paid had the Lehman contract remained in force. The OSBA argued that had the Lehman contract prices been included in the benchmark report, the Stratified Procurement Plan would have produced a higher per MWh cost than the Scheduled Procurement Plan. R.D. at 16-17.

The Companies responded that their proposed modification which splits the 7x24 product procurement into multiple procurements during the year addresses the OSBA's concerns regarding discretion. The Companies also argued that while the Lehman contract may have produced higher prices, that was one transaction for one period of time. The Stratified Procurement Plan should be observed for both price and rate stability over time. The Companies noted that the OSBA did not suggest that it was imprudent to enter into the Lehman contract at the time it was executed. R.D. at 18.

The OCA argued that the Companies' analysis compared actual results of the Stratified Procurement Plan and the Scheduled Procurement Plan while the OSBA relied on a hypothetical calculation of the Lehman contract prices compared to market prices without recognizing the impact of the Lehman failure on wholesale energy markets. According to

the OCA, the energy markets experienced an almost immediate decline after the Lehman failure which placed spot market purchasers at an advantage. The OCA asserted that had the Companies been operating under a Scheduled Procurement Plan, they would not have been able to react to the market decline because they would have purchased pursuant to a pre-set schedule. R.D. at 19.

The ALJ recommended approval of the Stratified Procurement Plan over the Scheduled Procurement Plan. Noting that many of the OSBA's arguments had been answered in the *2007 DSP Order*, the ALJ observed that management discretion in purchasing was said to be a particular advantage. That discretion could be used to benefit ratepayers by avoiding purchasing during unexpected price spikes. R.D. at 21 (citation to *2007 DSP Order* omitted). The ALJ also found that the OSBA had failed to support its argument that the Stratified Procurement Plan provided too much discretion to the Companies. *Id.*

The ALJ concluded:

The Stratified Purchasing Plan, as measured by the benchmarks established by the Commission, has provided the Companies' customers with energy at the lowest cost over time when compared to the spot market and the Scheduled Purchasing Plan. The Companies have, based on their experience with the Stratified Purchasing Plan, now proposed modifications to the Stratified Purchasing Plan in order to attempt to improve it. OSBA has failed to set forth any substantial reason why the Commission should order the Companies to abandon the Stratified Purchasing Plan in favor of the Scheduled Purchasing Plan. I therefore conclude that the Commission should deny OSBA's request to substitute the Scheduled Purchasing Plan for the Stratified Purchasing Plan.

R.D. at 22-23.

Use of Financial Products

The ALJ next discussed the Companies' request to include financial products as well as physical energy products in their procurement plan. Those financial products could include futures, swaps, call-options, and capacity options. Because of the size of their product purchases, the Companies argued that it can be difficult to attract enough sellers to obtain more competitive pricing. According to the Companies, use of financial products would result in more potential parties and more liquidity. In addition, use of financial products would enable the Companies to procure much smaller products which, in turn, would result in fewer situations where they would have to sell back excess power. The Companies argued that use of financial products would provide them with an additional tool to help negotiate favorable supply contracts as required by 66 Pa. C.S. § 2807(e)(3.7)(i) and obtain least cost generation over time as required by 66 Pa. C.S. § 2807(3)(3.7)(ii). R.D. at 23.

The Companies also argued that the use of financial products will require less upfront credit and reduce the cost of credit which is passed on to ratepayers. The Companies stated they will deal only with parties that meet the Companies' credit standards whether the product is physical energy or a financial product. The Companies noted that Section 2803 of the Code, 66 Pa. C.S. § 2803, specifically contemplates the use of financial products by referencing the industry standard template for financial products. R.D. at 24.

The OCA supported the Companies' proposal to use financial products in the procurement plan. The OCA argued that use of financial products would provide risk management at reasonable prices. Such products would also result in a greater pool of parties willing to deal with the Companies. R.D. at 24.

The OSBA opposed the Companies' request. The OSBA argued that the financial products described by the Companies serve as financial hedges. However, the

Companies' proposal seeks unlimited discretion both as to products and markets without any restrictions. In view of the lack of any limitations, the OSBA pointed out that ratepayers would bear the risk and be responsible for the consequences of any transaction the Companies choose to enter. R.D. at 25.

The ALJ recommended approval of the Companies' proposal to use financial products as part of their procurement plan. The ALJ agreed with the Companies and the OCA that use of financial products would result in more potential parties and more liquidity. The ALJ disagreed with the OSBA that the Companies' proposal would place ratepayers at any greater risk than that involved in the purchase of physical energy. Also, the ALJ agreed that the use of financial products would require less upfront credit and would serve to reduce the cost of credit passed on to ratepayers. R.D. at 26.

Abbreviated Review Process for Multi-Year Products

One of the more significant modifications to the Companies' current DSP is their request to provide for an abbreviated review process which would enable the Companies to obtain expedited Commission approval to enter into multi-year product transactions in the event of favorable market conditions. The Companies proposed a thirty-day process which would run from the time the Companies file their initial request. The request would provide a full description of the proposed transaction and why market conditions favored it. Interested parties would have ten days after the filing to submit written comments. The Companies would have five days to file any replies. A Commission decision approving or denying the request would be handed down not later than thirty days after the initial filing by the Companies. R.D. at 27.

The Companies argued that their proposed process was necessary to permit the Companies to react to volatile markets. They asserted that the process provided for the necessary due process to other parties and had sufficient safeguards to limit the discretion of

the Companies regarding whether and when to add a new product. The OCA supported the Companies' proposal. The OCA argued that the Companies had attempted to seek approval to purchase energy under favorable conditions in March of 2009, but were unable to do so when the Commission ordered hearings. R.D. at 28.

The OSBA objected to the Companies' proposal. The OSBA argued that the proposal does not provide for due process, that the abbreviated review and response period does not provide for discovery, evidentiary hearings, cross-examination and other elements of a full Commission hearing. R.D. at 29. The OSBA addressed the Companies' argument that it had failed to secure prompt approval in March of 2009. In that filing, the OSBA argued that the Companies sought approval to obtain more than 50% of their power for the period 2010 through part of 2014. According to the OSBA, that was not merely an amendment of the Companies' DSP, but rather was a proposal for a new DSP and required the full panoply of hearing processes. R.D. at 29.

The Companies responded that not every Commission decision requires discovery, testimony and the like to satisfy due process concerns. The Companies assert that due process requires notice and an opportunity to be heard. Contrary to the OSBA's arguments, the Companies argued that their proposal provided for those due process protections. The Companies also refer to our decision in *Petition of West Penn Power Company t/d/b/a Allegheny Power for Acceleration of its Competitive Procurement Plan and Request for Expedited Consideration*, Docket No. P-00072342 (Order entered March 20, 2009) (*West Penn Order*). In the *West Penn Order*, we granted a Petition for expedited consideration and approval of Allegheny Power's request to move its procurement schedule forward to take advantage of lowering energy prices. The Companies agreed that the circumstances here are different in that Allegheny Power presented existing facts while the Companies' proposal necessarily looks to the future. However, the Companies argued that the *West Penn Order* is one example of the Commission acting swiftly to enable a Default

Service Provider to move quickly to take advantage of favorable market conditions. The OCA supported the Companies' proposal. R.D. at 27-28.

The ALJ recommended denial of the Companies' proposal. He agreed with the OSBA that the abbreviated process failed to provide the necessary due process to other parties, *citing Schneider v. Pennsylvania Public Utility Commission*, 479 A.2d 10 (Pa. Cmwlth. 1984). The ALJ determined that the Companies' proposal provided notice, but no meaningful opportunity to be heard. The ALJ noted that there may be circumstances in which there is no factual dispute. In those instances, a hearing may not be necessary. He opined that the *West Penn Order* appeared to be such a case as no party raised any due process issues. However, the ALJ stated that the Companies' proposal here was different than the situation presented in the *West Penn Order*. R.D. at 31-32.

Combining Default Service Load with other EDCs

The ALJ then discussed the OSBA's recommendation that the Companies be directed to engage in a study to determine the feasibility of including their default service load in the future procurements of PPL Electric Utilities (PPL) and Pennsylvania Electric Company (Penelec). The OSBA argued that under the Commission's Regulations at 52 Pa. Code § 54.186(b)(2), default service providers with loads of 50 MW or less are obligated to evaluate the costs and benefits of joining with other default service providers or affiliates in contracting for electric supply. The OSBA asserted that if Citizens' load is combined with PPL's and Wellsboro's with Penelec, the Companies may be able to obtain lower default rates for their customers in compliance with the Code's requirement that default service providers must seek to provide service at the least cost over time. R.D. at 32-33.

The Companies responded that the OSBA's proposal has no legal or factual support. The Companies noted that they are already filing a joint DSP in compliance with 52 Pa. Code § 54.186(b)(2). They argued that the OSBA's suggestion that they could

obtain lower cost power by joining with PPL and Penelec was pure conjecture with no support in the record. R.D. at 33. The OCA also argued against the OSBA's recommendation, arguing that the OSBA's proposal would require the Companies to undertake a costly study without any evidence about the magnitude of the cost and whether or not that cost would be recovered from ratepayers. *Id.* In response to the OCA, the OSBA modified its proposal and restricted it to the small commercial and industrial rate class only.

The ALJ initially determined that since the OSBA initiated the proposal and not the Companies, the OSBA had the burden of proof that such a study was a reasonable endeavor. The ALJ found that the OSBA's justification for the proposed study consisted of "conjecture and supposition." R.D. at 34. Further, the ALJ determined that the Companies' current procurement methodology compares favorably to the pre-scheduled procurement now predominantly used by PPL and Penelec. Accordingly, the OSBA failed to show that its proposed study was warranted. *Id.*

Exceptions

The Companies and the OSBA have filed Exceptions to the Recommended Decision. We will first examine the Companies' Exceptions and then those of the OSBA.

Companies' Exceptions

First Exception: The Administrative Law Judge erred in his recommended denial of the abbreviated process for approval of multi-year contracts.

The Companies' first Exception claims error in the ALJ's recommended denial of the Companies' proposal for an expedited process within which to secure approval for the addition of future multiple-year contracts during the existing DSP. The Companies

argue that the ALJ did not correctly apply the law of due process to their proposal. Further, the Companies assert that the ALJ's recommendation "precludes the Companies from satisfying the PUC's regulations requiring monitoring of the wholesale markets to take advantage of favorable market conditions." Companies' Exc. at 5.

The Companies argue that their proposal requires that any request provide specific details regarding the product involved, its size and a maximum price cap on any transaction which is the subject of the request. Also, the request would provide specific information regarding the market conditions which would make the transaction prudent and reasonable at the time of its execution. Companies' Exc. at 6. Given the detailed nature of the request, the Companies argue that all interested parties will have sufficient notice as well as a full and fair opportunity to be heard prior to a Commission determination. *Id.* at 7.

The Companies go on to assert that the issue of due process revolves around the narrower question of whether the opportunity to be heard in the context of the Companies' prospective requests necessarily requires a full evidentiary hearing. Companies' Exc. at 8. The Companies assert that the question of whether a particular energy product should be added to a DSP procurement plan "is a question of policy or discretion that can be decided without a hearing." *Id.* at 9. According to the Companies, the ALJ's determination is correct, but only in those instances where there is a factual dispute. The Companies then proceed to construct several hypotheticals which are claimed to show that there will be no factual disputes, or the primary issue involved will not be of a factual nature. *See*, Companies' Exc. at 10-13.

The Companies argue that without approval of the proposed abbreviated review process, they will be "incapable of taking full advantage of favorable market conditions to the long-term benefit of their customers." Companies' Exc. at 15. The proposed abbreviated process is said to provide a reasonable means for the Companies to meet the practical requirement that they obtain a prudent mix of supply products.

According to the Companies, the ALJ's recommendation refuses "to permit the Companies to enter into such contracts." *Id.*

The OSBA responds that the Companies' own arguments necessarily concede that if there are issues of fact involved in any request brought within the abbreviated procedure, the procedure fails to meet due process requirements. The OSBA argues further that: "There are too many unknowns for the Commission to conclude with assurance there will be no issues of material fact if the Commission approves the abbreviated process and the Companies make a future filing under that process." OSBA R.Exc. at 5. The OSBA then proceeds to list a series of unknown factors, any one of which could produce a question of fact. The OSBA observes that the proposed length of any contract, the type and size of products involved, the manner of product procurement and the basis for a determination that market conditions are favorable, cannot now be known. *Id.* at 5-7.

Disposition

We decline to adopt the ALJ's reasoning that the proposed abbreviated process violates due process requirements. In this context, the OSBA is correct that there are simply too many unknown factors that could support a determination either way. Similarly, we are not persuaded by the Companies' arguments that we must, at this time, graft a mandated thirty day procedure onto their proposed DSP.

All Parties, and the ALJ, have referenced the *West Penn Order* on this issue. There, Allegheny Power successfully initiated an expedited proceeding and was able to obtain Commission permission to advance their procurement schedule in time to take advantage of market circumstances. Here, the Companies assert that they were unsuccessful in their own effort to attempt such an expedited proceeding in March of 2009. However, one such failure (in which the Companies withdrew the initial request) does not mean that we must mandate a particular process at this time.

In our view, the *West Penn Order* reveals that our existing processes are capable of managing the kind of request the Companies describe here. As the Companies themselves observe, not all DSP proceedings require a full nine months of complex litigation. Should the Companies perceive a need to seek the kind of approval described here, they can avail themselves of a process similar to that used in the *West Penn* proceeding. It would behoove the Companies to aggressively pursue agreement with the other interested parties or, at a minimum, substantially limit the number and scope of issues to be determined. This Commission has shown time and again that it can move with alacrity in these types of circumstances while, at the same time, protecting the due process rights of all parties by providing not only notice, but a meaningful opportunity to be heard.

Based upon the foregoing, we reject the ALJ's recommendation that the proposed abbreviated process must be denied on due process grounds. However, we agree with the OSBA that the underlying reasons presented by the Companies to support the requested abbreviated process are so hypothetical as to prevent a reasoned consideration of the request. More to the point, we find that the Companies have failed to show that existing Commission processes are inadequate to address the perceived need for prompt resolutions in appropriate circumstances. We will deny the Companies' Exception on this issue.

Second Exception: The Administrative Law Judge overlooked the Companies' request for permission to enter into supply contracts extending beyond May 31, 2013.

In their second Exception, the Companies assert that the ALJ failed to address their request for permission to enter into procurement contracts which extend beyond the period covered by the proposed DSP. The Companies state that "although the current portfolio of procurements does not include any transactions for delivery after this date [May 31, 2013], the procurement schedule could be extended beyond the current DSP 'if the

Commission is sufficiently comfortable with the approach' contained in the Procurement Plan." Companies Exc. at 15-16, *citing* Citizens/Wellsboro St. No. 4 at 20 and Citizens/Wellsboro St. No. 4-R at 5-6.

The Companies argue that their portfolio approach would benefit from allowing procurements beyond May 31, 2013, to continue the smooth implementation of the portfolio. They assert that without the ability to extend beyond the proposed time period, they will need to file their next proposed DSP two years prior to its implementation and only thirteen months after implementation of the DSP proposed here. The Companies also argue that such an extension would "preserve the ability of the Companies to possibly include 'long term' procurements, as defined and contemplated by Act 129." Companies' Exc. at 16.

The OSBA objects to this Exception. First, the OSBA outlines several Commission Regulations which set forth the process and the duration of proposed default service plans to be filed. The OSBA argues that none of those provisions envisions a process by which a default service supplier can artificially extend an approved DSP further than its approved time period simply by securing additional supply contracts which extend past the set time period. The OSBA does point out that our Regulation at 52 Pa. Code § 54.186(b)(3) provides that a procurement plan may include solicitations and contracts whose duration extends beyond the default service program period. However, that provision is expressly intended for contract laddering. OSBA R.Exc. at 12.

The OSBA argues that the Companies are not seeking approval for contract laddering here. Rather, the OSBA argues that the Companies' position could encompass an indefinite extension of their proposed DSP, without the need to file a new plan and seek Commission approval as required. OSBA R.Exc. at 13. The OSBA asserts that the Companies are seeking to avoid any review process and benchmarking of the existing plan. *Id.* at 13-14. The OSBA also points out that without a more specific description of how

long the anticipated contracts would run post-plan period, it is impossible for anyone to determine whether such contracts would be consistent with the Code and the Commission's Regulations. OSBA R.Exc. at 15.

Disposition

We will deny the Companies' second Exception. Initially, we note that the Companies suggestion was not advanced as part of its proposed DSP. The suggestion appeared in direct testimony. However, our primary concerns revolve around the vagueness of the Companies' suggestion. As argued by the OSBA, there is simply no description of the nature of the contracts, the procurement method or duration parameters of these transactions which we are requested, now and on this record, to approve. The Companies merely assert that if we are comfortable with the managed portfolio approach, then we also ought to be "comfortable" approving contracts which extend beyond the stated DSP period.

The reason we are comfortable with the Companies' managed portfolio approach is that, based upon the evidence before us, including the benchmark studies advanced by the Companies, we have found that the Companies have carried their burden of proof to show that the procurement plan as modified by this Opinion and Order meets the requirements of the Code and our Regulations. Conversely, we are not comfortable with an advanced approval of the Companies' proposal to secure contracts extending beyond the DSP period because there is simply no evidence whatsoever upon which we can base a finding regarding such contracts. Again, we agree with the OSBA that our Regulations provide for some supply contracts to extend beyond a DSP period for the purpose of laddering contracts and, therefore, avoiding placing most or all of a default load into one particular transaction regardless of market circumstances. We also acknowledge that Act 129 expressly provides for the allowance of supply contracts longer than four years in DSPs, which is longer than the term of the typical DSP. However, because the

Companies have not proposed the inclusion of a specific long-term contract in this DSP, there is nothing specific for us to evaluate at this time. If and when the Companies propose securing a contract that extends beyond the DSP period, we will evaluate the proposal on its merits at that time. This Exception is denied.

OSBA Exceptions

Exception No. 1: The Administrative Law Judge erred when he recommended adoption of the Stratified Procurement Plan over the Scheduled Procurement Plan.

In this Exception, the OSBA argues that the ALJ paid too much deference to the Commission's *2007 DSP Order* in approving the proposed DSP here. The OSBA argues that this Commission expressly stated that the current DSP, which was premised on a Stratified Procurement Plan basis, was to be a trial run. Rather than paying deference to the *2007 DSP Order*, the OSBA argues that the ALJ was required to carefully examine the benchmark study to determine whether the Stratified Procurement Plan should continue, or whether a Scheduled Procurement Plan would better meet the statutory test of least cost over time. OSBA Exc. at 2-5.

The OSBA then reiterates its arguments made before the ALJ that the Companies' benchmark study was flawed because it failed to include prices the Companies would have paid under the Lehman contract and did not contain data from the first two quarters of 2009. The OSBA argued that it presented a benchmark study which ran for an eighteen-month period. Further, the OSBA sponsored study adjusted the prices in the Companies' Stratified Procurement Plan to take into account the prices which would have been paid under the Lehman contracts. OSBA Exc. at 5-7.

According to the OSBA, the Companies were fortunate that Lehman failed to deliver under the contracts, thereby freeing the Companies to move into the market and obtain more attractive prices. However, the OSBA argues that the true measure of the Stratified Procurement Plan is to use a benchmark study which reflects the results had Lehman performed under its contract. According to the OSBA, had Lehman performed, the Stratified Procurement Plan would have produced higher average procurement costs than the Scheduled Procurement Plan. OSBA Exc. at 6-8. In addition, the OSBA argues that the OSBA benchmark study clearly shows that a portfolio manager cannot be counted on to time the market. A more certain approach, according to the OSBA, is to use a Scheduled Procurement Plan which provides a dollar cost averaging approach. *Id.* at 9.

The OSBA also argues that the legal standard by which the Stratified Procurement Plan is to be judged has been changed. The new standard is found in Section 2807(e) of the Code, 66 Pa. C.S. § 2807(e). That section provides that default service supply must be competitively acquired and result in the least cost to consumers over time. Since the OSBA's benchmark study reveals that a Scheduled Procurement Plan would have resulted in lower costs to customers over time than the Companies' Stratified Procurement Approach, the OSBA argues that the Stratified Procurement Approach must be rejected as failing the statutory test. OSBA R.Exc. at 10-11.

The OSBA next asserts that regardless of whether the Companies and their portfolio manager were prudent in arranging the Lehman contracts, the sole issue is whether the efforts of the Companies to time the market actually resulted in the least cost to customers over time. Again, the OSBA argues that it is the Lehman contract prices which control. In addition, the OSBA points to the experiences of Allegheny Power Company in its efforts to time the market. According to the OSBA, even when Allegheny Power successfully entered into a low priced market, risk premiums which attached offset the benefit of the lower market prices. OSBA R.Exc. at 12-16.

The OSBA also addresses the Companies' contention that they have proposed a modification of their base-load product to provide for multiple procurements during the year prior to delivery. The OSBA asserts that while the Companies' proposal is attractive, the OSBA asserts that it is tied to the Companies' proposal to include financial products in its portfolio. OSBA R.Exc. at 16-17.

The Companies respond that the OSBA misstates the legal standard to be applied in this proceeding. According to the Companies, the correct standard is whether the Stratified Procurement Plan is designed to ensure adequate and reliable service at the least cost to customers over time through a prudent mix of short-term contracts, long-term contracts, and spot market purchases. Companies' R.Exc. at 4, *citing* 66 Pa. C. S. §§ 2807(e)(3.1)(3.2) and (3.4). In that context, the Companies state that the proposed DSP, including the retention of limited discretion to procure products within limited time windows, meets that statutory standard. *Id.* at 5. The Companies also argue that the OSBA has failed to show how the Scheduled Procurement Plan supports the statutory requirements under Section 2807(e)(3.7), 66 Pa. C.S. § 2807(e)(3.7) (relating to required findings for approval of default service plans). *Id.*

The OCA responds and argues that the benchmark test results show that the Companies' Stratified Procurement Plan resulted in the lowest cost when compared to the spot market prices or a Scheduled Procurement Plan in 2008. For Citizens, the OCA testified that the Stratified Procurement Plan resulted in prices approximately \$10/MWh cheaper than either the spot market or a Scheduled Procurement Plan. For Wellsboro, the difference was approximately \$2.50/MWh. OCA R.Exc. at 4.

The OCA further argues that the basis for this Commission's approval of the Stratified Procurement Plan in our *2007 DSP Order* remains just as valid today as it was then. That is, the Stratified Procurement Plan provides the Companies with the ability to react to various market conditions such as the price spikes experienced just after Hurricane

Katrina. Conversely, a Scheduled Procurement Plan such as that advocated by the OSBA would handcuff the Companies and force them into the market regardless of current market circumstances. OCA R.Exc. at 5-7.

The OCA also argues that the Companies' benchmark study provides a real-world comparison of the operation of the Stratified Procurement Plan approach to both a spot market plan and a Scheduled Procurement Plan. Under that study, the Stratified Procurement Plan produced better results. The OCA criticizes OSBA's hypothetical benchmark study which theorizes the continued existence of the Lehman contracts, but ignores the collapse of the market and Lehman's role in that collapse. The OCA asserts that the OSBA's adjusted benchmark study has no basis in fact and cannot support any finding with regard to the relative merits of the plans. OCA Exc. at 8.

The OSA asserts that the ability of the Companies to act on the collapse of Lehman actually supports approval of the Stratified Procurement Plan. According to the OCA, a Scheduled Procurement Plan would not have provided the Companies with the discretion necessary to move into a falling market as the Companies did under the Stratified Procurement Plan. OCA Exc. at 10-11.

Disposition

We will deny this Exception. In our view, the record evidence in this proceeding strongly supports the arguments of the OCA. Simply put, the *actual* results of the Companies benchmark study support a finding that the Stratified Procurement Plan produced results which meet the standards of the Code as amended by Act 129. Further, we agree with the OCA's observations that the limited discretion provided by the Stratified Procurement Plan enabled the Companies to move into a falling market and take advantage of those market conditions to the benefit of their customers.

The OSBA forcefully argues that any analysis must account for the Lehman contracts regardless of the fact that Lehman failed to perform. However, the OCA effectively argues that one cannot benchmark the Stratified Procurement Plan based upon the Lehman contracts while ignoring the market collapse. The OCA is correct when it states that the OSBA essentially argues “that the *actual* results of the Stratified Procurement methodology should be abandoned for a *hypothetical* recalculation of rates.” OCA Exc. at 9.

We find that the OSBA’s arguments regarding the benchmark study and results of the Stratified Procurement Plan are speculative at best. The Companies’ and the OCA’s arguments are grounded in actual data which amount to substantial evidence of record. For these reasons, we will deny this Exception.

Exception No. 2: The Administrative Law Judge erred when he recommended approval of the Companies’ proposal to use financial products in their procurement plan.

The Companies propose to add financial products to the procurement plan in order to augment the physical energy products currently authorized. We have provided a description of the nature of the products involved in our review of the Recommended Decision, above. The OSBA argues that the proposal should not be approved. In the OSBA’s view, the Companies’ proposal seeks approval for unrestricted activity in both regulated and unregulated financial markets.³ OSBA Exc. at 18. Given the Companies’

³ An explanation of the difference between unregulated markets and regulated markets can be found in the cross-examination of the Companies’ Witness Walker at Tr. 32-37. Examples of regulated markets include the New York Mercantile Exchange and the Intercontinental Exchange where certain account and creditworthiness conditions must be met before an entity can begin trading on the exchange. In addition, firm credit requirements are required for each transaction. This is contrasted against the

statements that they propose to retain the option to engage in transactions in unregulated markets, the OSBA asserts that the risks are too great and those risks will be borne by the ratepayers. *Id.* at 19.

The OSBA recommends that if the Companies' request to include financial products is approved, that approval should be limited to participation in the regulated financial markets. According to the OSBA, the risks involved in financial products are less in regulated markets than they are in unregulated markets. The ALJ determined that in any transaction, the risk of default stems as much from the party as from the product. The OSBA agrees with that and argues that is why the Companies' proposal should be limited to the regulated financial markets if approval is granted at all. OSBA Exc. at 19.

The Companies oppose OSBA's proposed limitation to regulated financial markets. The Companies argue that such a restriction would produce results that are contrary to the goals of adding financial products to the procurement portfolio. The Companies point out that a restriction to regulated markets is actually a requirement that the Companies restrict their procurement to cleared financial products only. Those products are available on the Intercontinental Exchange (ICE) and the New York Mercantile Exchange (NYMEX) markets. Companies' R.Exc. at 11. The Companies point out that while the ICE and NYMEX do provide "a clearing service that facilitates market liquidity of the transactions and are designed to reduce credit risk for the settlement of these transactions," there are substantial costs and credit requirements involved in participation. *Id.* at 12.

The Companies argue that there is no greater risk associated with bilateral physical transactions than are associated with bilateral financial transactions. The Companies intend to maintain the same level of credit standards for financial transactions as they do for their current physical transactions, "and will deal only with reputable,

less stringent account and credit requirements in the unregulated markets which usually involve bilateral agreements subject only to negotiated terms between the parties.

creditworthy counterparties.” Companies’ R.Exc. at 12-13. However, if the OSBA restriction is adopted, the Companies argue that they would be required to post cash collateral rather than a letter of credit or parental guarantee. The Companies assert that requirement will significantly reduce the cash-flow available to the Companies, which in turn increases the ultimate financial risk for the Companies and their ratepayers. That outcome is said to be directly contrary to the goal of introducing financial products in order to have a positive impact on credit requirements for default service. *Id.* at 14.

The OCA supports the Companies’ proposal and opposes the OSBA’s suggested restriction. The OCA refers to its testimony, which stated that financial products are useful tools in a portfolio approach, not as a method to outsmart the market, but as hedges against price risk. The OCA argues that the financial products described by the Companies provide another means for the Companies to maintain reasonable prices. OCA R.Exc. at 11-14.

Disposition

We find this to be a very close question. The Companies and the OCA forcefully argue that the Companies should be permitted to move into the markets to obtain financial products such as futures, swaps, call-options and capacity options. This Commission is quite familiar with these types of transactions and concludes that, when used wisely, they can benefit a portfolio approach to default supply procurement. At the same time, the OCA does not at all address the risks associated with some types of financial transactions. While the Companies acknowledge that issue, they assert that they intend to maintain current creditworthiness standards. However, the Companies explain that any creditworthiness standards arranged in a bilateral market (not cleared by ICE or NYMEX) will be the result of negotiations between the parties.

On the other hand, the OSBA admits that financial products may serve a positive role in supply acquisition, however, it is concerned that the Companies' proposal is without restriction. The Companies have provided us with no parameters surrounding their intention to move into financial products other than rather broad pronouncements about the Companies' financial position at a given time, market conditions, liquidity and availability. Based upon the testimony of the Companies' Witness Walker, we agree with the OSBA's impression that the Companies appear to be more, not less, likely to move into the unregulated (non-clearing) markets rather than the regulated markets. *See*, Companies' St. No. 4 at 10-20; Tr. at 32-37.

Based upon the record before us, we will grant the OSBA's Exception to the extent that it seeks to restrict the Companies' transactions to cleared products obtained in ICE and NYMEX. We are sensitive to the Companies' reservations about lack of activity in the NYMEX market. *See*, Tr. at 37. However, we are persuaded by the OSBA that without a more detailed explanation regarding the use of financial products, restrictions and credit requirements for counter-parties, it would not be in the public interest to approve such wide authority to participate in any market for the products described by the Companies.

While we will grant the OSBA's Exception on this issue and adopt the recommended limitation, this does not preclude the Companies from seeking to modify the proposed plan and provide a clearer explanation of the parameters and restrictions they propose to apply to transactions for financial products. Clearly, Act 129 contemplates such transactions and, as argued by the OCA, appropriate use of such transactions can inure to the benefit of ratepayers. However, we are not prepared, on this record, to provide the broad and sweeping authority sought by the Companies. We will approve the request for accounting language subject to the limitations expressed herein.

Exception No. 3: The Administrative Law Judge erred by failing to direct an after-the-fact prudence review.

The OSBA recommended to the ALJ that if the Stratified Procurement Plan was adopted, there should also be a direction for an after-the-fact prudence review. The OSBA argues that Act 129 requires an after-the-fact prudence review of the Companies' procurement-related costs because of the degree of discretion in the Stratified Procurement Plan. The OSBA refers us to Sections 2807(e)(3) and 2807(e)(3)(9) of the Code, 66 Pa. C.S. §§ 2807(e)(3) and 2807(e)(3)(9).

According to the OSBA, the change in the default service plan standard from obtaining supply at prevailing market prices and acquiring energy through a prudent mix of contracts at the least cost over time mandates an after-the-fact prudence review. The OSBA asserts that adoption of the Stratified Procurement Plan necessarily means that the Commission cannot know, at the time of approval, whether the Companies and their portfolio manager will successfully meet the prudent mix of contracts at the least cost over time standard. The OSBA argues that the only way that determination can be made is with an after-the-fact prudency review. OSBA Exc. at 20-22.

The OSBA also argues that only "reasonable" default service costs are recoverable under Section 2807(e)(3.9), 66 Pa. C.S. § 2807(e)(3.9). Because of the latitude given the Companies and their portfolio manager, the OSBA submits that there must be an after-the-fact review in order to determine whether the costs incurred are actually reasonable. OSBA Exc. 22-23.

The OSBA points out that during the current DSP, Wellsboro experienced unexpectedly high congestion costs. At that point, the OSBA notes that this Commission instituted an investigation into the reasonableness of Wellsboro's GSSR. The OSBA also reiterates its concerns relating to the Lehman contracts. Finally, The OSBA argues that the

ALJ recommends that the appropriate standard for review of the Companies' actions regarding the Lehman contracts was whether the Companies acted reasonably in entering into those contracts. Similarly, the OSBA states that the ALJ adopted the same standard regarding contracts for financial products the Companies intend to enter into under the proposed DSP. However, the OSBA argues that the only way in which this Commission can determine whether the Companies' actions are reasonable under these circumstances is to direct an after-the-fact prudence review. OSBA Exc. at 24-28.

The Companies respond that the OSBA's position is based upon a strained interpretation of Act 129 standards and an overly-broad description of the Companies' authority under the Stratified Procurement Plan. With regard to Act 129, the Companies state:

Section 2807(e)(3.9), explicitly provides that EDCs "shall have the right to recovery on a full and current basis . . . all reasonable costs incurred under this section *and a commission-approved competitive procurement plan,*" and makes no reference to the possibility for the Commission to conduct after the fact prudence reviews. The statute is very clear that as long as the Companies adhere to their Commission-approved Procurement Plan, there is no need or opportunity for an after-the-fact prudence review.

Companies R.Exc. at 15.

The Companies argue further that while Act 129 does provide for a disallowance of costs, that provision is limited to instances in which the Commission finds, after hearing, that the provider is found to be at fault for not complying with a Commission-approved procurement plan or engaged in fraud, collusion or market manipulation with regard to the procurement contracts. Companies' R.Exc. at 16, *citing* 66 Pa. C.S. § 2807(e)(3.8). The Companies also point out that their procurement discretion is constrained by the "establishment of particular products, scheduled dates, and specified

energy blocks.” Companies R.Exc. at 20. Thus, there is simply not that breadth of discretion which the OSBA argues necessitates an after-the-fact prudence review. *Id.*

Disposition

We will deny this Exception. The Companies are correct that the OSBA’s argument is based upon a strained reading of Act 129 as well as an overly-broad description of the discretion afforded to the Companies under the Stratified Procurement Plan. We note that with our modification of the Companies’ proposal for financial products, the Companies’ discretion has been restricted on that facet as well.

The Companies are correct that while Act 129 does provide for an examination of a default service provider’s actions and the potential for denial of cost recovery, Section 2807(e)(3.8) specifically sets forth the circumstances when that may occur:

Notwithstanding Sections 508 (relating to power of Commission to vary, reform and revise contracts) and 2102 (relating to approval of contracts with affiliated interests), the Commission may modify contracts or disallow costs *only* when the party seeking recovery of the costs of a procurement plan is, after hearing, found to be at fault for the following:

- (i) Not complying with the Commission-approved procurement plan; or
- (ii) The commission of fraud, collusion or market manipulation with regard to these contracts.

66 Pa. C.S. § 2807(3)(3.8) (emphasis added).

Based on the foregoing, there is clearly no statutory mandate for an after-the-fact prudency review. We also agree with the Companies that the fact of the Wellsboro investigation, which the OSBA discusses at length, obviates the need for the establishment of an after-the-fact prudence review. Clearly, this Commission has the authority to examine

any facet of a default service program during its operation in the event that circumstances warrant it. In addition, the Companies are correct that the OSBA itself has the opportunity to file a complaint in the event it perceives the Companies are not following the approved procurement plan.

We will adopt both the OSBA recommendation and the Companies' suggestion to continue the annual benchmark reports. However, we will direct the Parties to consider a modification to the third benchmark to be used. In the *Benchmark Order*, we directed three points to be analyzed. They were: (1) a spot price comparison; (2) a scheduled procurement plan comparison; and (3) a comparison of the rates of the Companies with various EDCs in Pennsylvania and New Jersey. We recommend that the Parties meet and discuss the possibility of modifying the third comparative analysis. This Commission would prefer that the Companies eliminate the analysis of EDCs in New Jersey, but include PPL and Penelec in their third benchmark. The Parties will be directed to submit a status report of the benchmark discussions within thirty days of the entry of the Order.

Exception No. 4: The Administrative Law Judge erred by failing to direct an investigation into the feasibility of the combination of the Companies' default service load with the future procurements of PPL and Penelec.

The OSBA reiterates its request made before the ALJ that the Companies be directed to investigate the possibility of combining their default service loads with PPL and Penelec. The OSBA first argues that the ALJ incorrectly assigned the burden of proof to it, rather than the Companies. According to the OSBA, this Commission's Regulation at 52 Pa. Code § 54.186(b)(2) provides that default service providers with loads of 50 MW or less shall evaluate the costs and benefits of joining with other default service providers for supply procurement. The OSBA argues that the Companies' position is that they have satisfied that regulation by combining their default service loads. However, the OSBA asserts that the intent of the Regulation is to require smaller providers to evaluate the

benefits of combining with larger providers. In that case, the Companies have failed in their burden of proof by not carrying out the required investigation. OSBA Exc. at 28-29.

The OSBA argues further that Act 129's standard of acquiring supply at the least cost over time, together with our Regulation at Section 54.186(b)(2) requires that the Companies engage in a detailed investigation into the benefits of Wellsboro combining its default service load with Penelec and Citizens combining its default service load with PPL. The OSBA states that if the Companies do combine their loads as suggested, they "may be able to obtain lower default service rates for their customers." OSBA Exc. at 30. The OSBA recognizes that the actual question of feasibility cannot be answered at this time. However, that is the purpose of the investigation. OSBA R.Exc. at 31. In the event that a full investigation is not directed, the OSBA requests that at a minimum, the Commission direct an investigation into the potential for combination of the small commercial and industrial loads. *Id.*

The Companies respond that the OSBA attempts to improperly impose the burden of proof on the Companies. The Companies point out that they did not propose the investigation and have opposed it. Since the OSBA has initiated the proposal, they bear the burden of proof. Companies' R.Exc. at 21-22.

The Companies argue that the OSBA misinterprets our Regulation. The Regulation at 52 Pa. Code § 54.186(b)(2) simply provides that default service providers with loads of less than 50 MW shall evaluate the benefits of joining with other default service providers or affiliates for procurement of supply. The Companies observe that there is no discussion of the relative size of default service providers. Further, the Companies argue that Wellsboro has already investigated a combination with Penelec, but that proved unworkable. Companies R.Exc. at 23. The OCA also opposes the OSBA's Exception noting that the OSBA has not provided any analysis of the cost of such an investigation and

that any suggestion that combination of loads would lead to better pricing is purely speculative. OCA R.Exc. at 14-15.

Disposition

We will deny this Exception. We find that the ALJ correctly set forth the burden of proof in his Recommended Decision at Page 34. We also find the Companies' interpretation of 52 Pa. Code § 54.186(b)(2) is correct. There is no requirement that smaller companies investigate combination of load procurement with larger companies. While this Commission certainly has the authority to direct such an investigation, we do not find it appropriate to do so in the context of this proceeding. Nor do we find that the record before us supports such a directive. We particularly note the Companies' arguments regarding the prior examination of a combination of Wellsboro with Penelec as well as concerns relating to the different procurement methodologies currently in force. However, we have directed the Parties to consider inclusion of both PPL and Penelec in the benchmark study discussed above.

Required Findings

Based upon the record before us, the Recommended Decision and this Opinion and Order, we find that the provisions of the Companies' proposed Default Service Program, as modified by this Opinion and Order:

- 1) Include prudent steps necessary to negotiate favorable generation supply contracts;
- 2) Include competitive procurement plans that provide for a prudent mix of spot market purchases, short-term contracts and long term contracts;

3) Include a prudent mix of supply resources that is designed to obtain least cost generation supply contracts on a long-term, short-term and spot market basis;

4) Provide for competitive procurement plans designed to secure a prudent mix of contracts which will ensure adequate and reliable service, at the least cost to customers over time;

5) Provide for specific steps by which the Companies will pursue the described competitive procurement plans.

Further, we find that based upon the record before us, neither of the Companies, nor any affiliated interest of the Companies, has withheld from the market any generation supply in a manner that violates federal law.

In addition to the foregoing, we find that:

1) The Companies' selection of a single portfolio manager to administer the schedules for competitive bid solicitations, and the schedules contained within the Companies' Stratified Procurement Plan, satisfies the Commission's implementation requirements at 52 Pa. Code § 54.185(d)(2);

2) The Companies' GSSR is appropriately designed and properly provides for recovery of all reasonable costs associated with default service, to include costs associated with AEPS compliance as set forth in the Commission's Regulations and Statements of Policy at 52 Pa. Code §§ 54.185(d)(3), 69.1801 and 69.1806. On this basis it is appropriate to grant the Companies' request for waivers of regulatory requirements relating to separate rate classes;

3) The Companies' request to waive the 4% threshold requirement found in our Statement of Policy at 52 Pa. Code § 69.1809 for over/under collections is reasonable given the substantial timing issue and significant administrative burden it would impart to the Companies.

Conclusion

Based on the foregoing discussion, we will deny the Exceptions of the Companies; grant, in part, and deny, in part, the Exceptions of the OSBA; adopt the Recommended Decision of Administrative Law Judge Salapa as modified by this Opinion and Order; approve the proposed Default Service Plan as modified by this Opinion and Order; approve the retention of ACES Power Marketing, LLC as the Portfolio Manager; approve the accounting order to the extent necessary to implement the proposed Default Service Plan as modified by this Opinion and Order; and, grant the requested waivers of this Commission's Regulations and Statements of Policy to the extent necessary to implement the proposed Default Service Plan as modified by this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company are denied.
2. That the Exceptions of the Office of Small Business Advocate are granted, in part, and denied, in part, consistent with this Opinion and Order.
3. That the Recommended Decision of Administrative Law Judge David A. Salapa, issued on January 22, 2010, at this docket is adopted as modified by this Opinion and Order.

4. That the Joint Default Service Plan for Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company filed on May 29, 2009, at this docket is approved as modified by this Opinion and Order.

5. That Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company are granted waivers of this Commission's Regulations and Statements of Policy as requested and to the extent necessary to implement the proposed Default Service Plan as modified by this Opinion and Order.

6. That Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company's request to retain ACES Power Marketing, LLC, as the Portfolio Manager for implementation of the proposed Default Service Plan is approved.

7. That consistent with this Opinion and Order, Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company are approved to acquire financial products in the implementation of their Stratified Procurement Plan and they will record the fair value of various contracts according to FAS 133/138, as assets on Federal Energy Regulatory Commission Account 182, Other Regulatory Assets, or as liabilities in Federal Energy Regulatory Commission Account 253, Other Deferred Credits. These non-cash accounting entries will then be offset by regulatory assets or liabilities using Federal Energy Regulatory Commission Account 182.3, Miscellaneous Regulatory Assets, and Federal Energy Regulatory Commission Account 254, Other Regulatory Liabilities.

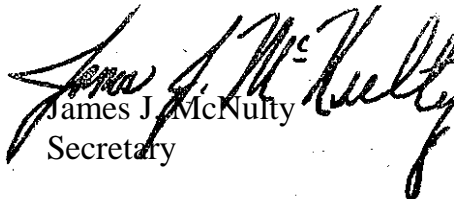
8. That Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company shall continue to file annual benchmark reports as described in this Commission's Opinion and Order in *Petition for a Joint Default Service Plan for Citizens' Electric Company of Lewisburg, Pennsylvania and Wellsboro Electric Company for the Period of January 1, 2008 through May 31, 2010-Benchmarks*, Docket Nos. P-00072306

and P-00072307 (Order entered March 28, 2008). We further direct that the Parties discuss the possibility of modifying the third benchmark to exclude electric distribution companies in New Jersey, but include an analysis of both PPL Electric Utilities, Inc. and the Pennsylvania Electric Company. The Parties are directed to submit a status report to this Commission within thirty (30) days of the entry of this Order regarding those discussions.

9. That Citizens' Electric Company of Lewisburg, PA and Wellsboro Electric Company shall file tariff supplements consistent with this Opinion and Order no later than April 2, 2010, to be effective on June 1, 2010.

10. That upon the filing of tariffs and tariff supplements in a format and with content acceptable to this Commission and which conform to the directives in this Opinion and Order, this proceeding shall be marked closed.

BY THE COMMISSION,


James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: February 25, 2010

ORDER ENTERED: **February 26, 2010**