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September 14, 2012

**Via Electronic Filing**
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission v. Petition of PPL Electric Utilities Corporation, Docket No. R-2012-2290597

Dear Secretary Chiavetta:

On behalf of Direct Energy Services LLC("Direct Energy") enclosed please find the original of its Reply Brief which has been filed electronically with regard to the above referenced matter. Copies have been served in accordance with the attached Certificate of Service.

Sincerely,

Deanne M. O'Dell

Deanne M. O'Dell

DMO/lww
Enclosure

cc: Hon. Susan D. Colwell, w/enc.
Cert. of Service w/enc.

## CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Direct Energy's Reply Brief upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

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Dated: September 24, 2012

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**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|---|---|---|
| Pennsylvania Public Utility Commission | : | |
| | : | Docket No. R-2012-2290597 |
| v. | : | |
| | : | |
| PPL Electric Utilities Corporation | : | |

# REPLY BRIEF OF DIRECT ENERGY SERVICES, LLC


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Date: September 14, 2012

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## I. INTRODUCTION

PPL Electric Utilities Corporation ("PPL") proposes to increase by 17.04% for all residential customers and 34.78% for all small commercial customers the generation-related uncollectible accounts expense they must pay either through the Merchant Function Charge ("MFC") (if they are a default service customer) or the Purchase of Receivables ("POR") discount rate (as shopping customers). PPL has not met its burden of proving that this requested rate increase is just and reasonable, non-discriminatory and constitutes adequate and reasonable service. Therefore, Direct Energy Services, LLC ("Direct Energy") recommends that PPL's request be rejected and replaced with one of Direct Energy's two alternative recommendations: either, a) a revised MFC that is charged to all customers on a non-bypassable basis; or b) adjust the POR discount so that it properly allocates late payment charges to shopping customers and returns approximately $1 million in fees that PPL collected from EGSs that it has not shown it has incurred or has not otherwise recovered. While Direct Energy anticipated and responded to the arguments raised by the parties in opposition to its recommendations in its main brief (the arguments which are incorporated herein by reference), additional response to a few of the issues raised by PPL and the Office of Consumer ("OCA") will be addressed herein.

As a threshold matter, PPL and the Office of Consumer Advocate ("OCA") attempt to completely dismiss Direct Energy's advocacy before any careful analysis is undertaken by claiming that Direct Energy has not met its burden of proof or is otherwise precluded from making recommendations to alter the current method through which PPL collects the uncollectible accounts expense from generation customers. As explained further below, PPL retains the ultimate burden of proof in this case and has not carried it on this issue. Nothing in

the Commission's past orders addressing PPL's POR program precludes adoption of either one of Direct Energy's alternative approaches here.[1] On the contrary, the Commission specifically indicated its intent to continue to review the PPL POR program and presumably to make changes – just like the ones proposed here by Direct Energy – as may be appropriate.

In lieu of adopting PPL's proposal, Direct Energy proposes two alternative approaches – both of which are fully supported by the record. Direct Energy's primary alternative is that PPL's current MFC/POR discount mechanism be converted to a non-bypassable charge applied to all customers. Contrary to the viewpoints of PPL and OCA, this preferred approach is consistent with Commission precedent and a superior approach for socializing the cost of uncollectible accounts expense.

Direct Energy's second choice alternative approach – if PPL's current MFC/POR discount rate mechanism is continued – is to direct PPL to make two adjustments to the discount rate. First, PPL should be directed to reduce the discount rate to reflect the amount of late payment charges that the Company collects and which offset its net uncollectibles account expense (but which are now credited 100% to distribution customers). Second, PPL should be directed to reduce the discount factor by an administrative cost *credit* to return to the EGSs the amounts that have been collected through the administrative cost adder but which PPL admits it has not tracked or identified.

The arguments made by PPL against the late payment fees adjustment were fully addressed in Direct Energy's main brief and will not be repeated here.[2] Regarding the credit

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1 Direct Energy Main Brief ("MB") at 5-8; 16-17.

2 Direct Energy M.B. at 24-27. In its Initial Brief, PPL's continues to claim that Direct Energy's proposal regarding the late payment fees would "increase rates for all distribution customers." PPL Initial Brief at

Direct Energy seeks for the administrative charges that PPL collected from electric generation suppliers ("EGSs") and as explained further below, PPL's claim that Direct Energy's proposal would result in impermissible retroactive ratemaking has no merit. There is no record dispute that PPL never tracked the actual POR incremental implementation and on-going administrative costs despite agreeing to do so and clear Commission pronouncements that "the discount rate [should] reflect only actual incremental costs incurred by PPL."[3] While PPL does not propose to continue to collect an administrative charge from EGSs in the future, the fact remains that PPL did collect it for nearly three years now without any proof of the actual incremental costs and; therefore, a refund as proposed by Direct Energy is necessary.

Thus, for all the reasons set forth in Direct Energy's main brief and those further explained herein, Direct Energy urges Your Honor to recommend that the Commission reject PPL's proposal to increase the MFC/POR discount rate paid by generation customers and adopt one of Direct Energy's alternative proposals regarding the POR program as a more equitable approach that is more consistent with the goals of the Electricity Generation Customer Choice and Competition Act ("Competition Act").[4]

## II. ARGUMENT

### A. Nothing Precludes The Commission From Adopting Direct Energy's Proposed Alternative Approach Regarding The Recovery Of Generation Related Uncollectible Accounts Expense As A Result Of PPL's Failure To Carry Its Burden Of Proof

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189. This lament, however, appears to intentionally ignore Direct Energy Witness Cernigila's repeated statements that if Direct Energy's modification were adopted, then PPL would need to reduce the amount of late payment charge revenue it credits in *pro forma* distribution revenues for the purposes of determining revenue requirement. Direct Energy St. No. 1 at 16, n.14; Direct Energy St. No. 1-SR at 15.

3 *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-210427, Final Order entered on August 11, 2009 at 29. ("*PPL Retail Markets Order*").

4 66 Pa. C.S. § 2801, et. seq.

As explained by the Commission, the burden of proof in rate cases remains with the utility:

> The Commission has continued to affirm that the utilities have the burden of proof in base rate proceedings. In *Pennsylvania Public Utility Commission v. Breezewood Telephone Company*, 74 Pa. PUC 431, 442 (1991), the Commission made the following ruling:
>
> > [t]hus, where a party has raised a question concerning an element at issue, the affirmative burden of proving justness and reasonableness of its claim is upon [the utility].
>
> The Commission and the Courts have clearly held that the burden of proof does not shift to the party challenging a requested rate increase. While the burden of going forward may shift, the burden of establishing the justness and reasonableness of every component of a requested rate increase remains on the utility. The opposing parties have no such burden. OTS M.B. at 6, OCA M.B. at 8. As stated by the Pennsylvania Supreme Court in *Berner v. Pennsylvania Public Utility Commission*, 382 Pa. 622, 631, 116 A.2d 738, 744 (1955) :
>
> > [t]he appellants did not have the burden of proving that the plant additions were improper, unnecessary or too costly; on the contrary, that burden is, by statute, on the utility to demonstrate the reasonable necessity and cost of the installations . . . .
>
> On this subject, the Commission has ruled as follows:
>
> > [t]here is no presumption of reasonableness, which attached to a utility's claim, at least none which survives the raising of credible issues regarding a utility's claims. A utility's burden is to affirmatively establish the reasonableness of its claim. It is not the burden of another party to disprove the reasonableness of a utility's claims. *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, 57 Pa. PUC 423, 444 (fn. 37) (1983).[5]

Here, PPL is seeking to increase the amount it recovers from residential and small commercial customers for the cost of the generation-related uncollectible accounts through the MFC and POR discount rate. Therefore, PPL has the burden of proving that this requested rate

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[5] *Pennsylvania Public Utility Commission v. Philadelphia Gas Works*, Docket Nos. R-00061931; R-00061931C0001 et al, 2007 Pa. PUC LEXIS 46, *17-*18. (Order entered July 24, 2007)

increase is just and reasonable and there is no presumption of reasonableness which attaches to PPL's claim that such increase is necessary.[6] For the reasons explained in Direct Energy's main brief, PPL has not met this burden and, therefore, its requested increases should be rejected.[7]

In their opposition to Direct Energy's alternative proposals, PPL and OCA argue that Direct Energy's alternatives cannot be adopted (or even considered) by the Commission. All of these arguments are without merit and must be rejected.

### (1) The Commission Has Expressly Reserved The Discretion To Direct Changes To PPL's POR Program Structure

PPL repeatedly refers to its POR program as "voluntary" and states that the "Commission cannot make PPL Electric offer a POR Program and EGSs are not required to participate in the Program."[8] PPL even boldly states that if Direct Energy's preferred alternative approach is approved, then PPL would "terminate" its current POR program and reinstate the procedures that were in place from 1999 through 2009.[9] The insinuation here appears to be that the Commission cannot direct changes to PPL's existing program and that any concerns expressed by Direct Energy, as an EGS, about the program should be ignored because there is no requirement that Direct Energy participate in the program. This flawed viewpoint lacks any merit and must be rejected.

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6 66 Pa. C.S. § 332(a); *See also Pennsylvania Public Utility Commission v. Equitable Gas Co.,* Docket No. R-822133, 1983 Pa. PUC LEXIS 33, *54.

7 Direct Energy MB at 9-15.

8 PPL Initial Brief at 186-187.

9 PPL Initial Brief at 192-193. As Direct Energy Witness Cerniglia explained, "PPL's pre-2009 program had little value because PPL was only obligated to purchase supplier receivables for 90 days. If an EGS enrolled a customer that developed arrearages after 90 days, PPL would revert that customer to dual billing and would no longer purchase the receivables for that customer. Once this happened, the EGS was required to either absorb the full uncollectible expense for the customer's non-payment of charges from that point forward or return the customer to default supply service provided by PPL. PPL's pre-2009 program had fewer customer benefits because suppliers had an incentive to only market products to customers with good credit." Direct Energy St. No. 1-SR at 7.

First, the fact that the POR program is a "voluntary" filing by PPL is not dispositive. PPL has filed the program in a proposed tariff and the Commission has approved the program for implementation. The POR program is no different than any other rate, term or condition; once proposed by PPL the rate must be just, reasonable and non-discriminatory. Indeed, the Commission has consistently viewed the POR discount rate as well as the associated terms and conditions in this manner. In PPL's previous distribution rate case, the Commission directed PPL to make changes to the structure of its POR program consistent with the advocacy of the Retail Energy Supply Association ("RESA").[10] Similarly, Direct Energy's alternative approach here recommends a change to the way PPL recovers the uncollectible accounts expense and such change is well within the discretion of the Commission and consistent with the majority of the other major EDCs in Pennsylvania.[11] Therefore, PPL has no support for the claim that the Commission cannot continue to evaluate PPL's POR program and direct changes as may be appropriated and supported by the record (such as Direct Energy's proposals are here). It has done so in the past and presumably it will continue to do so.[12]

In fact, while addressing PPL's POR program in PPL's previous distribution case, the Commission made clear that the program was still new and the Commission clearly contemplated the possibility of directing additional changes in the future if warranted. As stated by the Commission, "it is fair to allow additional time for full implementation of the current

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10 *Pennsylvania Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2010-2161694, Opinion and Order entered December 21, 2012 at 96. ("*PPL 2010 Rate Case Order*").

11 Direct Energy MB at 22-24.

12 Even if PPL were to follow through with its threat to "withdraw" the POR program, it would have to file a tariff revision to do so, and the elimination of the program would have to be considered by the Commission from the standpoint of its obligation to advance competition and the public interest.

POR program and subsequent evaluation of its effectiveness before directing major changes."[13] As well explained on the record in this proceeding, PPL has not met its burden of justifying its requested increase. As such, implementation of either of the alternative changes to the POR program recommended by Direct Energy are warranted and the Commission has clearly expressed a willingness to consider such changes.

Finally, PPL's dismissive attitude that EGSs have the choice to not participate in the POR program flippantly ignores the purpose and value of a POR program in the electricity market.[14] PPL's generalization of how purchase of receivables program function in the traditional commercial marketplace – where all entities presumably have equal bargaining power and are similarly situated with respect to their customers – ignores what the Commission has already recognized, i.e. that "a viable POR program is an essential element to the creation of a competitive market for generation in Pennsylvania, as envisioned by the Competition Act."[15] The Commission has also made clear that a properly structured POR program in the context of utility service is necessary to help level the playing field between the monopoly provider of service and the new entrant's provision of service by reducing barriers to entry.[16]

As Direct Energy Witness Cerniglia testified:

> There really is no viable alternative today to a properly structured POR program to enable EGSs to cost efficiently provide service to the mass market. Thus, a POR program that is not properly structured is likely to result in EGSs choosing not to enter or to exit the market. Maintaining their own accounts receivables (especially when they have no ability to

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13 *PPL 2010 Rate Case Order* at 94-95.

14 PPL Initial Brief at 187.

15 *PPL Retail Markets Order* at 27.

16 *See e.g. PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271, Tentative Order adopted May 14, 2009 at 15 ("The purpose of the POR program is to facilitate the growth of the competitive market.")

> terminate service to a non-paying customers) is not a realistic alternative to a poorly structured POR program as Mr. Kleha seems to believe. Thus, Mr. Kleha's approach must really be interpreted as "promote a fair and pro-competitive program or have an unfair program that slows or stymies competition." I am sure that the Commission would not be in favor of the latter option.[17]

Despite PPL's cavalier opinion to the contrary, an improperly designed POR program is likely to result in less EGSs willing to serve the customers in that service territory. Such a result of EGSs not providing service to the mass market because of the presence of an ill-designed POR program would be to lessen the availability of competitive alternatives to consumers in direct contradiction to the goals of the Competition Act. Thus the categorization of the POR program as merely a program that EGSs can take or leave, is not only not dispositive of the issue, but factually incorrect. It should not be the basis for rejecting Direct Energy's valid – and substantiated – concerns about this charge.

**(2) Direct Energy's Primary Alternative Recommendation Is Not A Rebundling Of Uncollectible Accounts Expense; Rather, It Would More Fully Satisfy The Requirements Of The Competition Act**

Both PPL and OCA continue their criticism of Direct Energy's preferred alternative approach regarding the MFC/POR discount factor as a "rebundling" of uncollectible accounts expense that has already been rejected by the Commission.[18] As explained in the preceding section, the Commission's decision in PPL's previous distribution rate case clearly indicates a willingness to consider changes in the future to the POR program structure. Therefore, there is no reason to outright dismiss Direct Energy's advocacy – and the record that supports it – based on the Commission's previous action.

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17 Direct Energy St. No. 1-SR at 4-5

18 PPL Initial Brief at 189; OCA MB at 111-112.

While PPL does properly acknowledge that Direct Energy's proposal is not to include the uncollectible accounts expense as part of the distribution rates but rather as a separate non-bypassable charge, PPL argues that the "result" of Direct Energy's proposal would be inconsistent with the goals of the Competition Act and Commission policy and cites to the unbundling requirements for generation, transmission and distribution.[19] Tellingly, PPL ignores an overarching goal of the Competition Act which is to foster the development of a fully competitive market and how PPL's POR program if PPL's requested increase is adopted (especially when compared to most of the other POR programs in the Commonwealth)[20] may stymie that progress. A properly structured POR program is and will remain an important part of developing a robust competitive market because it keeps "barriers to entry" down, reduces costs and places competitive supply on an equal footing with default service in terms of collection. Direct Energy's proposals will encourage more competitors to come into the market to fulfill the goals of the Competition Act. Direct Energy's recommendation is also a reasonable way to mitigate the overall cost of uncollectible accounts expense because it eliminates the need for duplicative collection responsibilities, treats all customers the same, and leverages the well-established and powerful system of the EDC to minimize the cost of uncollectible accounts expense for the benefit of all consumers. In this sense, Direct Energy's alternative proposals to

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19 PPL Initial Brief at 191.

20 As set forth in Direct Energy. St. No. 1 at 12-13, the only other the only other EDC that recovers some portion of the uncollectible accounts expense through the POR discount is Duquesne Light and, as seen in the chart below, the amount is recovers has historically been significantly lower than PPL.

| **Duquesne Light** | | | |
|---|---|---|---|
| **Supplier Tariff, Rule No. 12.1.7.1.2** | **Residential** | **Small C&I** | **Medium C&I** |
| Uncollectible | 0.42% | 0.42% | 0.18% |
| Administrative | 0.10% | 0.10% | 0.10% |
| **Uncollectible Rate** | **0.52%** | **0.52%** | **0.28%** |

PPL's approach are superior and more consistent with the Competition Act.[21] PPL's myopic focus on what proposal is the "true unbundling" proposal is merely a red herring that should be ignored.

### B. Direct Energy's Proposal To Credit EGSs For The Administrative Fees They Have Paid But PPL Has Not Tracked Is Not An Impermissible Retroactive Ratemaking

A part of Direct Energy's second alternative proposal – if the Commission permits PPL to continue the current MFC/POR discount mechanism – is that the POR discount factor be reduced by an administrative cost *credit* to return to the EGSs the amounts that have been collected through the administrative cost adder but which PPL admits it has not tracked or identified.[22] PPL's weak attempts to dodge this issue by claiming that Direct Energy's proposal would result in an impermissible retroactive ratemaking are meritless.[23]

The Commission has been absolutely clear that PPL can only recover the "actual incremental costs incurred" to administer the POR program.[24] According to the Commission, the POR program is not to be "a mechanism for the Company to make money."[25] And yet, that is arguably what PPL has done here. There is no dispute on the record that PPL never tracked its incremental administrative costs to implement and run the POR program.[26] This is despite the Commission's clear direction to PPL in August 2009 – before the POR program was implemented – and PPL's own express commitment to do so to address the concerns about this

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21 *See* Direct Energy MB at 14-23 (provides further supporting explanation).

22 *See* Direct Energy MB at 23-33 (provides further details regarding Direct Energy's proposed adjustments for the late payment fees and the collected administrative costs).

23 PPL Initial Brief at 194.

24 *PPL Retail Markets Order* at 29 (emphasis added).

25 *Id.*

26 PPL St. No. 8 at 29; PPL Initial Brief at 194.

issue raised in PPL's last distribution rate case.[27] Notwithstanding these clear directives, PPL claims that it incurred a cost and – yet again – makes another commitment to monitor the costs on a going forward basis even though it is not proposing to continue the administrative adder in the future. The administrative factor is a charge that was paid by EGSs in the discount rate for a specific purpose which PPL was required to quantify and track. Consequently, Section 1308 does not apply here. Rather, Direct Energy's proposal is supported by Section 1312 of the Public Utility Code which gives the Commission the authority to direct a utility to refund the excessive amounts paid by any "patron."[28] Here, the EGSs – through the discount rate – paid PPL for the incremental administrative costs of the POR program in which they participated. PPL, despite being ordered and agreeing to do so, never tracked the incremental costs incurred. Therefore, a refund – in the form of a credit to the on-going discount rate – is not only appropriate but legally required.

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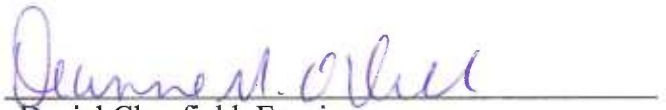
27 Tr. at 416-417.

28 66 Pa. C.S. § 1312(a).

## III. CONCLUSION

Direct Energy respectfully requests that the Administrative Law Judge issue a Recommended Decision consistent with Direct Energy's positions and recommendations in this proceeding.

Respectfully submitted,



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