17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
717-731-1970 Main
717-731-1985 Fax
www.postschell.com

John H. Isom

jisom@postschell.com
717-612-6032 Direct
717-731-1985 Fax
File #: 2507/140070

May 22, 2009

James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
PO Box 3265
Harrisburg, PA 17105-3265

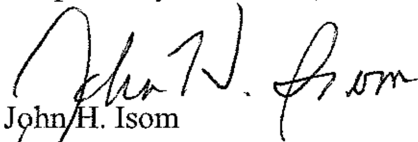
RE: Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period January 1, 2011 through May 31, 2013 - Docket No. P-2008-2060309

Dear Secretary McNulty:

Enclosed, for filing, please find the original Replies of PPL Electric Utilities Corporation to the Exceptions of Other Parties in the above-referenced proceeding.

As indicated on the certificate of service, copies have been provided to the parties in the manner indicated.

Respectfully Submitted,



John H. Isom

JHI/jl
Enclosures
cc: Honorable Susan D. Colwell
Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

VIA E-MAIL AND FIRST CLASS MAIL

Erin L. Gannon
James A. Mullins
Aron J. Beatty
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101-1923
egannon@paoca.org
jmullins@paoca.org
abeatty@paoca.org

Allison Kaster
Office of Trial Staff
400 North Street, 2nd Floor West
P.O. Box 3265
Harrisburg, PA 17105-3265
akaster@state.pa.us

Steven C. Gray, Esquire
Office of Small Business Advocate
300 North Second Street, Suite 1102
Harrisburg, PA 17101
sgray@state.pa.us

Brian Knipe
Buchanan Ingersol & Rooney, PC
One South Market Square
213 Market Street, 3rd Floor
Harrisburg, PA 17101-2121
Brian.Knipe@bipc.com

Pamela C. Polacek
Shelby A. Linton-Keddie
McNees, Wallace & Nurick
P.O. Box 1166
100 Pine Street
Harrisburg, PA 17108-1166
ppolacek@mwn.com
skeddie@mwn.com

Craig R. Burgraff
Todd Stewart
Hawke, McKeon, Sniscak & Kennard, LLP
100 N. 10th Street
Harrisburg, PA 17101
crburgraff@hmslegal.com
tsstewart@hmslegal.com

Thomas T. Niesen
Charles E. Thomas, III
Thomas, Long, Niesen & Kennard
P.O. Box 9500
212 Locust Street, Suite 500
Harrisburg, PA 17108-9500
tniesen@thomaslonglaw.com
cet3@thomaslonglaw.com

Charles E. Thomas, Jr.
Jennifer M. Sultzaberger
Thomas, Long, Niesen & Kennard
P.O. Box 9500
212 Locust Street, Suite 500
Harrisburg, PA 17108-9500
cthomasjr@thomaslonglaw.com
jms@thomaslonglaw.com

Daniel Clearfield
Carl R. Shultz
Deanne O'Dell
Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17108-1248
dclearfield@eckertseamans.com
cshultz@eckertseamans.com
dodell@eckertseamans.com

Eric J. Epstein
4100 Hillsdale Road
Harrisburg, PA 17112
ericepstein@comcast.net

Christopher A. Lewis
Christopher R. Sharp
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
Lewis@blankrome.com
Sharp@blankrome.com

Divesh Gupta
Constellation NewEnergy Inc.
Candler Bldg., 7th Floor
111 Market Place
Baltimore, MD 21202
divesh.gupta@Constellation.com

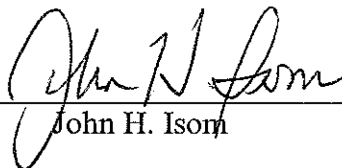
Craig A. Doll
P.O. Box 403
25 West Second Street
Hummelstown, PA 17036
CDoll76342@aol.com

Frank Richards
Richards Energy Group
3901 Nolt Road, Bldg. #1
Landisville, PA 17538
frichards@richardsenergy.com

Jesse A. Dillon
PPL EnergyPlus LLC
Two North Ninth Street
Allentown, PA 18101-1179
jadillon@pplweb.com

Michelle M. Skjoldal
Pepper Hamilton LLP
100 Market Street, Suite 200
P.O. Box 1181
Harrisburg, PA 17108-1181
skjoldalm@pepperlaw.com

Date: May 22, 2009



John H. Isom

6127241v1

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the Period January 1, 2011 Through May 31, 2013.	:	Docket No. P-2008-2060309

REPLIES OF PPL ELECTRIC UTILITIES CORPORATION TO THE EXCEPTIONS OF OTHER PARTIES

Paul E. Russell (ID #21643)
Associate General Counsel
PPL Services Corporation
Office of General Counsel
Two North Ninth Street
Allentown, PA 18106
Phone: 610-774-4254
Fax: 610-774-6726
E-mail: perussell@pplweb.com

Matthew J. Agen
Post & Schell, P.C.
607 14th St. N.W.
Washington, DC 20005-2006
Phone: 202-347-1000
Fax: 202-661-6970
E-mail: matthewagen@postschell.com

David B. MacGregor (ID # 28804)
Post & Schell, P.C.
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2808
Phone: 215-587-1197
Fax: 215-320-4879
E-mail: dmacgregor@postschell.com

Michael W. Hassell (ID # 34851)
John H. Isom (ID # 16569)
Post & Schell, P.C.
17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
Phone: 717-612-6032
Fax: 717-731-1985
E-mail: mhassell@postschell.com
E-mail: jisom@postschell.com

Of Counsel:

Post & Schell, P.C.

Date: May 22, 2009

Attorneys for PPL Electric Utilities Corporation

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. AMTRAK'S EXCEPTIONS ARE WITHOUT MERIT. 1

1. Factual Background. 1
2. PPL EU's Position Concerning 25 Hz Service To Amtrak. 4
3. PPL EU Has No 25 Hz POLR Obligation. 5
4. PPL EU Has No Obligation Or Authority To Provide POLR Service Beyond Its Certificated Service Territory. 10
5. A Cessation Of Deliveries Of 25 Hz Power To PPL EU By Safe Harbor Would Not Be An Abandonment Of Service By PPL EU 11
6. PPL EU Should Not Be Ordered To Use Its "Best Efforts" To Obtain A Contract With Safe Harbor For 25 Hz Power. 13
7. Amtrak's Proposals For Price Protection Are Unlawful, Impractical And/Or Contrary To The Public Interest. 14
8. Amtrak Does Not Require PPL EU's 25 Hz Service. 16

B. THE EXCEPTIONS OF CONSTELLATION SHOULD BE REJECTED 17

1. The SMAs Proposed By PPL EU Are Consistent With Contract Law 17
2. The SMAs Proposed By PPL EU Satisfy The Requirements Of Act 129. 20
3. The Full Two-Way Payment Clause Would Require Revisions To The SMAs To Include Detail On The Rights Of The Non-Defaulting Party. 23
4. The Preference Of Credit Rating Agencies Is Not Relevant. 24
5. Constellation's Claims Regarding The Financial Netting Improvements Act Should Be Rejected. 24

III. CONCLUSION 25

TABLE OF AUTHORITIES

Page

APPELLATE COURT CASES

Byerly v. Pennsylvania Public Utility Commission, 440 Pa. 521, 270 A.2d 186 (1970)...............12

Cf. Lawson v. Simonsen, 490 Pa. 509, 417 A.2d 155 (1980)...............12

Emerald Coal and Coke Co. v. Equitable Gas Co., 378 Pa. 591, 107 A.2d 374 (1954)...............12

Feather v. Pennsylvania Public Utility Commission, 41 Pa. Commonwealth Ct. 544, 399 A.2d 829 (1979)...............12

Lancellotti v. Thomas, 491 A.2d 117 (Pa. Super. 1985)...............19, 20

Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission, 6 Pa. Commonwealth Ct. 229, 293 A.2d 895 (1972)...............12

Sevast v. Kakouras, 591 Pa. 44, 915 A.2d 1147 (2007)...............19, 20

W.D. Rubright Co. v. Pennsylvania Public Utility Commission, 197 Pa. Superior Ct. 242, 177 A.2d 119 (1962)...............12

Yellow Cab Co. v. Pa. PUC, 60 Pa. Commonwealth 343, 346-47, 431 A.2d 1106 (1981)...............12

STATUTES

12 U.S.C. § 1821(e)...............24

12 U.S.C. § 1821(e)(8)...............24

12 U.S.C. § 1821(e)(8)(G)(iii)...............24

54 Pa. Code §§ 54.181 - 54.189...............6

66 Pa.C.S. Ch. 28...............5, 16

66 Pa.C.S. § 1102(a)(1)...............11

66 Pa.C.S. § 1102(a)(2)...............11

66 Pa.C.S. § 2804(1)...............9

66 Pa.C.S. § 2804(5)...............10

66 Pa.C.S. § 2804(7)...............10

TABLE OF AUTHORITIES

Page

66 Pa.C.S. § 2807(b) ... 8, 9, 10, 13

66 Pa.C.S. § 2807(e)(1) ... 5

66 Pa.C.S. § 2807(e)(5)(ii) ... 6

66 Pa.C.S. § 2807(e)(2) ... 6

66 Pa.C.S. § 2807(e)(3) ... 6, 9

66 Pa.C.S. § 2807(e)(3.1) through (3.9) ... 6

66 Pa.C.S. § 2807(e)(3.4) ... 10, 21

66 Pa.C.S. § 2807(e)(3.9) ... 20

I. INTRODUCTION

PPL Electric Utilities Corporation ("PPL EU" or the "Company"), pursuant to 52 Pa. Code §5.535, submits these replies to the Exceptions filed by the National Railroad Passenger Corporation ("Amtrak") and Constellation New Energy, Inc. and Constellation Energy Commodities Group, Inc. (collectively, "Constellation") to the Recommend Decision ("RD") of Administrative Law Judge Susan D. Colwell ("ALJ") in the above-captioned proceeding.[1] As explained below, Amtrak's contention, that PPL EU has a provider of last resort ("POLR") obligation to provide nonstandard 25 Hertz ("Hz") electric service to Amtrak, is erroneous. Furthermore, Constellation's arguments to include a Full Two-Way Payment Clause in PPL EU's proposed Supply Master Agreements ("SMAs") are without merit and have previously been rejected by the Pennsylvania Public Utility Commission ("PUC").

II. ARGUMENT

A. AMTRAK'S EXCEPTIONS ARE WITHOUT MERIT.

Amtrak contends erroneously that PPL EU has a POLR obligation to provide nonstandard 25 Hz electric service to Amtrak after PPL EU's transition period ends on December 31, 2009. Amtrak's contentions are erroneous for the reasons explained below.

1. Factual Background.

The basic facts regarding PPL EU's service to Amtrak are not in dispute in this proceeding. PPL EU currently serves Amtrak under Rate Schedule LPEP, Power Service to Electric Propulsion, for the purpose of operating railroads. Rate Schedule LPEP does not specify the frequency of the power to be delivered to customers. PPL EU Ex. DRS-1. Amtrak is the only

---

[1] Pennsylvania State University ("Penn State") also filed an exception in this proceeding excepting to the statement on page 4 of the Recommend Decision that Penn State filed a letter of non-opposition to the Joint Petition for Settlement ("Settlement"). Penn State explains that it takes no position with respect to the terms and conditions of the Settlement. The Company takes no position on the exceptions filed by Penn State.

customer served under Rate Schedule LPEP. Amtrak is the only customer of PPL EU that receives 25 Hz service. All other customers of PPL EU receive 60 Hz service.

All 25 Hz electric power supplied to Amtrak by PPL EU is delivered at the Conestoga Substation in Lancaster County, Pennsylvania. All of this power is produced by Safe Harbor Water Power Corporation ("Safe Harbor"). To produce 25 Hz power, Safe Harbor can utilize its two 25 Hz hydroelectric units. Each unit has a capacity of 28 Megawatts ("MW").[2] In addition, Safe Harbor can use a rotary converter to convert 25 Hz power to 60 Hz power or 60 Hz power to 25 Hz power. The capacity of the rotary converter is 24 MW. The converter was recently returned to service (Tr. 397-98) after a two-year outage (Tr. 345). Safe Harbor's capacity to produce 25 Hz power, when all facilities are operating, is 80 MW (28 MW + 28 MW + 24 MW = 80 MW). Safe Harbor's facilities are located at the Safe Harbor Dam in Conestoga, Lancaster County, Pennsylvania. PPL EU St. 1-R, p. 5.

Safe Harbor is jointly owned by PPL Holtwood, LLC ("PPL Holtwood"), which is entitled to one-third of Safe Harbor's output, and Constellation Power Source Generation, Inc., which is entitled to the remaining two-thirds of Safe Harbor's output. PPL EU St. 1-R, p. 6; Tr. 343-44. PPL Holtwood's total share of the 25 Hz power produced by Safe Harbor is approximately 27 MW (80 MW ÷ 3). PPL EU St. 1-R, p. 11.

Since the 1950s, when PPL EU's predecessor commenced 25 Hz service to Amtrak or its predecessors, Safe Harbor has been the sole source of 25 Hz power for PPL EU. Amtrak MB, pp. 5-6. PPL EU has never had the physical ability to provide 25 Hz service to Amtrak when, for any reason, 25 Hz power from Safe Harbor was not available.

---

[2] There are also ten 60 Hz hydroelectric generating units at Safe Harbor.

PPL Holtwood sells its portion of Safe Harbor's output to PPL EnergyPlus, LLC ("PPL EnergyPlus") under a wholesale contract that is subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC"). PPL EnergyPlus, in turn, sells its portion of the 25 Hz output from Safe Harbor to PPL EU, which in turn resells the power to Amtrak. PPL EU St. 1-R, p. 6. The sale by PPL EnergyPlus is made pursuant to a PUC-approved generation supply agreement ("GSA") under which PPL EU purchases its POLR supply requirements from PPL EnergyPlus at a price equal to the rate caps agreed to in PPL EU's Restructuring Settlement.[3] Under the Settlement, PPL EU's generation rate caps and the GSA terminate at the end of 2009.

Of all Amtrak's operations, only the Southern End of its Northeast Corridor is operated at 25 Hz. The Southern End runs between New York City and Washington and between Philadelphia and Harrisburg. The remaining portions of Amtrak's facilities are either operated at 60 Hz or are not electrified. Amtrak St. 2R, pp. 13-14.

Safe Harbor produces only a small portion of the 25 Hz electric power that Amtrak uses. At five other locations, Amtrak either receives 60 Hz power which it then converts to 25 Hz power, using rotary or static frequency converters, or receives 25 Hz power which has been converted from 60 Hz power by others. The total capacity of these converters is 310 MW. Amtrak Ex. SCF-1. When Safe Harbor's 80 MW of 25 Hz capacity are included, Amtrak's total amount of 25 Hz capacity is 390 MW.[4]

In 2000, PPL EU, with the PUC's and FERC's approval, transferred all of its generation assets to affiliates. PPL EU St. 1-R, p. 6. PPL EU has no generation assets and has no access to

[3] Affiliated Interest Agreement Between PPL EU and PPL EnergyPlus for the Supply by PPL EnergyPlus of Wholesale Capacity and Energy Sufficient to Meet 100% of PPL EU's Obligation as a Provider of Last Resort, Docket No. G-00010886.

[4] Even this capacity is understated because it does not recognize that the rotary converters can increase their output by 20 to 30 percent for up to 10 hours. Tr. 380.

generation supplies except through the marketplace. Since January 1, 1999, when the transition period under the Competition Act began, through 2009, PPL EU has relied on electric generation supplies purchased from PPL EnergyPlus to meet its POLR obligations. After 2009, PPL EnergyPlus has no obligation to provide generation supply of any kind to PPL EU.[5] Beginning January 1, 2010, PPL EU must rely on the competitive marketplace to obtain the supply needed to meet its POLR obligations. The price for that supply will be set by the market and the costs will be recovered from retail customers through PPL EU's generation supply charge beginning in 2010. *Petition of PPL Electric Utilities Corp. for Approval of a Default Service Plan*, ¶¶ 9-10.

2. PPL EU's Position Concerning 25 Hz Service To Amtrak.

PPL EU has not threatened to cease delivering 25 Hz service to Amtrak at the Conestoga Substation. To the contrary, PPL EU has stated that it will continue to provide this service so long as PPL EnergyPlus continues to sell 25 Hz power to PPL EU and so long as Amtrak wishes to receive the service PPL EU MB, p. 45.

PPL EU has informed Amtrak that, if PPL EnergyPlus no longer sells 25 Hz power to PPL EU at the Conestoga Substation, PPL EU has no physical ability to continue to provide 25 Hz service to Amtrak, although it could provide standard 60 Hz service to Amtrak. Further, PPL EU has advised Amtrak that PPL EU has no contractual assurance that PPL EnegyPlus will continue to sell 25 Hz power to PPL EU for redelivery to Amtrak after December 31, 2009. Nevertheless, in order to provide such service, PPL EU is willing to issue a request for proposal ("RFP") for such power. It would make far more sense, however, for Amtrak to negotiate directly with PPL EnergyPlus to purchase the 25 Hz power produced by Safe Harbor because Amtrak best understands what contract terms and conditions are most consistent with its interests and

[5] GSA, Article 2.1. PPL EnergyPlus, however, is willing to sell 25 Hz power to Amtrak at market-based prices. PPL EnergyPlus St. 1, pp. 2-3.

operations. The ALJ found that PPL EU has a POLR obligation to Amtrak only to provide 60 Hz service and that, upon Amtrak's request, PPL EU should issue an RFP for 25 Hz service. RD, p. 45.

3. PPL EU Has No 25 Hz POLR Obligation.

Amtrak asserts that "the fundamental purpose of default service is to ensure that all users of electric power have a fallback generation option" and that PPL EU must provide "usable" default service to all customers. Amtrak St. 2-SR, p. 2; Amtrak Exc., p. 15. Amtrak, however, has not provided, and cannot provide, any basis for its characterization of POLR service. In fact, PPL EU has no duty after 2009 to provide nonstandard 25 Hz POLR service if 25 Hz power is not available in the market place.

Pursuant to Section 2807 of the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. Ch. 28 ("Competition Act"), electric distribution companies' ("EDCs") POLR obligation after the expiration of the applicable rate caps is limited to **acquiring** electric generation supplies; EDCs have no obligation to produce or generate electric power to meet POLR obligations. EDCs' only obligation is to enter into the electric generation market and purchase generation supplies. If 25 Hz power is not available in the market, then PPL EU will not be able to acquire it. Both the original Competition Act and Act 129 of 2008 ("Act 129") eliminated any POLR obligation for "production" of electricity after rate caps expire. After 2009, PPL EU's only POLR obligation to Amtrak is to receive 25 Hz power, provided by others. It has no obligation to produce 25 Hz power.

An EDC's obligation to provide POLR service <u>prior</u> to the expiration of its rate caps is set forth in Section 2807(e)(1) of the Competition Act:

> "(1) While an electric distribution company collects either a competitive transition charge or an intangible transition charge … the electric distribution company shall continue to have the full

obligation to serve, including the connection of customers, the delivery of electric energy and the **production or acquisition** of electric energy for customers."

(Emphasis added). Pursuant to the PUC-approved settlement of its restructuring proceeding, PPL EU is recovering CTCs and ITCs through 2009.

Under the Competition Act, as originally enacted, after the rate caps expire, the nature of an EDC's POLR obligation was governed by Section 2807(e)(2) and (3), which state:

"(2) At the end of the transition period, the Commission shall promulgate regulations to define the electric distribution company's obligation to connect and deliver and **acquire** electricity under paragraph (3) that will exist at the end of the phase-in period."[6]

"(3) If a customer contracts for electric energy and it is not delivered or if a customer does not choose an alternative electric generation supplier, the electric distribution company or commission-approved alternative supplier shall **acquire** electric energy at prevailing market prices to serve that customer and shall recover fully all reasonable costs." (Emphasis added.)

POLR service after the expiration of the transition period is limited to the **acquisition** of power and does not include the **production** of electricity. Thus, the General Assembly changed EDCs' POLR obligations after the transition period from an obligation for "production or acquisition" of electric generation supplies to a more limited obligation to "acquire" electric generation supplies.

This change was carried forward in Act 129, which *inter alia*, replaced Sections 2807(e)(2) and (3) with Sections 2807(e)(3.1) through (3.9). Act 129 also limits EDCs' post-rate cap POLR obligations to the acquisition of power. Section 2807(e)(3.1). Act 129 authorizes EDCs to build or acquire generation facilities only under limited circumstances that are not applicable to PPL EU.[7] EDCs' obligations are limited to standard service unless the customer or its EGS pays for any nonstandard facilities necessary to provide the service.[8]

---

[6] The regulations under Section 2807(e)(2) have been codified at 54 Pa. Code, Subchapter G, §§ 54.181 - 54.189.

[7] Section 2807(e)(5)(ii) states, in pertinent part:

(Continued)

Further, PPL EU's POLR obligation cannot be extended beyond the obligations that existed prior to the Competition Act. Under PPL EU's PUC-approved tariff, it has no obligation to continue to provide nonstandard 25 Hz service. The PPL EU's Tariff provides that its standard service is 60 Hz service and that PPL EU has no duty to provide nonstandard service. Tr. 80. PPL EU's present Tariff Rule 4.A(1) states:

> "The Company's standard service is single or three-phase, sixty Hz alternating current at standard voltages as specified in the Company's 'Rules for Electric Meter and Service Installations.' **All nonstandard service is in the process of elimination** and no new or additional nonstandard service will be supplied." (Emphasis added.)[9]

The phase out of nonstandard service is consistent with PPL EU's Service Agreement with Amtrak, which is terminable upon one month's prior written notice:

> "TERM. This Agreement is effective April 6, 1995 and shall continue in effect for an initial term of one (1) year and thereafter month to month until terminated by either party by one month's written notice." PPL EU Ex. DRS-2, p. 1, ¶ 1

> "For purposes of providing service under this paragraph to customers with a peak demand of 20 megawatts or greater at one meter at a location within that distribution company's service territory, **an electric distribution company that has completed its restructuring transition period as of the effective date of this paragraph** may, in its sole discretion, acquire an interest in a generation facility or construct a generation facility specifically to meet the energy requirements of the customers, including the electric requirements of the customers' other billing locations within its service territory." (Emphasis added.)

The above-quoted paragraph became effective 30 days after Act 129 was enacted on October 15, 2008, or on November 14, 2008. Act 129, § 6. At that time, PPL EU had not completed its transition period and will not complete its transition period until December 31, 2009. Therefore, the one provision of the Competition Act that authorizes certain EDCs to acquire generation facilities for the purpose of providing POLR service does not apply to PPL EU. Consequently, PPL EU clearly has no duty to generate or produce electricity. Its obligation is limited to acquiring electric generation supplies in the marketplace.

[8] Amtrak contends that the explanation regarding the absence of POLR obligation to produce power is immaterial because a converter does not "produce" electricity. (Amtrak Exc., p. 32, fn. 12). Amtrak is incorrect, however, because the Uniform System of Accounts provides that converters used in conjunction with generation are production equipment. *See* Instructions for Production Plant Account 315 (Accessory electric equipment). A converter at a generating station used to produce the product (25 Hz power or 60 Hz power) to be delivered to market is surely production equipment. The conversion is not done for transmission or distribution purposes.

[9] Similar rules have been in effect since at least 1982, long before restructuring. Amtrak MB, App. C.

The Service Agreement is consistent with PPL EU's tariff and clearly defeats Amtrak's unsupported contention that PPL EU has an obligation to provide nonstandard 25 Hz service to Amtrak indefinitely into the future.[10]

The Service Agreement between Amtrak and PPL EU also provides that PPL EU's service obligation is limited to selling to Amtrak the amount of 25 Hz power that Safe Harbor makes available to PPL EU at the Conestoga Substation. PPL EU Ex. DRS-2, ¶ 6. It states:

> "Company is not obligated to supply energy in excess of that available from the supply facilities as they existed on the effective date hereof. Also, Company is not obligated to supply energy in excess of that which is available to Company at Conestoga Substation at any given time. Electrical supply restrictions can result from outages of supply facilities or from low river flow conditions."

Further, over the more than 50 years that PPL EU has served Amtrak or its predecessors, the contracts for the sale of 25 Hz power from Safe Harbor to PPL EU have periodically been subject to renewal. At each renewal, Safe Harbor has had an opportunity to decline to renew the contract and cease selling 25 Hz power to PPL EU for resale to Amtrak or its predecessors. Despite Amtrak's protestations, PPL EU and Amtrak, after passage of the Competition Act and Act 129, are in precisely the same situation that they have been regarding 25 Hz service for decades.

Also, Section 2807(b) of the Competition Act provides that:

> "The electric distribution company shall not have an obligation to install nonstandard facilities, either as to type or location, for the purpose of receiving energy from the energy supplier unless the energy supplier or its customer pays the full cost of these facilities. . . ."

---

[10] Amtrak contends that the Service Agreement covers only certain operational issues and establishes charges for PPL EU's maintenance of certain transmission lines. Amtrak St. SRF-2, p. 13. To the contrary, Section 3 of the Service Agreement, page 2 of Exhibit DRS-2, sets forth PPL EU's service obligation to Amtrak and Amtrak's obligation to purchase 25 Hz service from PPL EU. Clearly, PPL EU Exhibit DRS-2 is the basic agreement governing 25 Hz service provided to Amtrak by PPL EU. The Company's service obligation to Amtrak is subject to the above-quoted mutual right of termination upon one month's written notice.

If 25 Hz power from PPL EnergyPlus is no longer available to PPL EU, the only power that would be available to PPL EU to serve Amtrak would be 60 Hz power. Such power, however, cannot be used by Amtrak's rail facilities that are designed for 25 Hz operation. Consequently, it would be necessary for PPL EU to obtain facilities to convert 60 Hz power to 25 Hz power prior to selling it to Amtrak at the Conestoga Substation. Such facilities are clearly nonstandard, as Amtrak is the only one of PPL EU's 1.4 million customers receiving 25 Hz power. Consequently, under Section 2807(b) of the Competition Act, any obligation to receive 60 Hz power for resale to Amtrak at the Conestoga Substation is conditioned upon PPL EU's ability to obtain the necessary converter and Amtrak's obligation to pay for the converter. Amtrak, however, has stated that obtaining a 25-60 Hz converter can require 5 to 9 years. Amtrak St. 2-SR, p. 20. This approach therefore is not an option for PPL EU's POLR supply plan, which begins on January 1, 2011.[11]

To support its view, Amtrak cobbles together a series of irrelevant provisions of the Competition Act. The foundations of Amtrak's argument are: (1) steadfastly refusing to acknowledge Section 2807(b) of the Competition Act, quoted in pertinent part above, which provides that an EDC has no POLR obligation to provide nonstandard service; (2) citing provisions which clearly do not apply to 25 Hz nonstandard service and (3) arguing by implication that the General Assembly's decision not to repeat the word "standard" every time it refers to a POLR service obligation means that there is an absolute POLR obligation to provide all forms of nonstandard service forever.

Amtrak initially cites Sections 2804(1) and 2807(e)(3) of the Competition Act for the proposition that safe and reliable service will continue to all customers. Amtrak Exc., p. 16.

[11] Amtrak states that it is willing to pay for a converter "if necessary." Amtrak Exc., p. 27. The actual statement in testimony is that Amtrak will pay if PPL EU can "demonstrate to Amtrak that a new converter is necessary." Amtrak St. 2SR, p. 16. Contrary to Amtrak's testimony, no demonstration by PPL EU is necessary. If Amtrak wants a 25 Hz converter on PPL EU's system, Amtrak must pay for it.

Amtrak also cites Section 2807(e)(3.4) of the Competition Act for the proposition that a default service provider must ensure that it is able to provide adequate and reliable default service at the least cost to customers over time. Amtrak Exc., p. 17. In these cites, Amtrak relies on general provisions of the Competition Act that do not address the distinction between standard and nonstandard services and ignores the pertinent portions of Section 2807(b).

Amtrak contends also that PPL EU's position, that it has no POLR obligation to provide nonstandard services, such as 25 Hz service, is discriminatory, citing Section 2804(7). Amtrak Exc., p. 16. Contrary to Amtrak's contention, PPL EU is simply following the classifications of service in the Competition Act. PPL EU's proposed Default Service Program and Procurement Plan ("DSP Plan") fully meets its obligation to provide standard 60 Hz service to all customers. PPL EU has no POLR obligation, however, to provide nonstandard 25 Hz service to anyone. The distinction between standard and nonstandard service was established by the legislature as a reasonable basis for determining the scope of POLR service obligations, and PPL EU has proposed nothing inconsistent with that distinction.

Amtrak also relies on Section 2803 of the Competition Act which defines reliability to include "sufficient generation, transmission and distribution capacity so as to supply . . . the requirements of customers." This provision does not support Amtrak's position because EDCs are not required to maintain generation capacity at all. *See, e.g.*, 66 Pa.C.S. § 2804(5). For the reasons noted above, PPL EU has no POLR obligation to provide nonstandard 25 Hz service to Amtrak after 2009.

4. PPL EU Has No Obligation Or Authority To Provide POLR Service Beyond Its Certificated Service Territory.

The Southern End of Amtrak's Northeast Corridor is an integrated, dynamic electric transmission and distribution system that moves electricity delivered to Amtrak by PPL EU at the

Conestoga Substation throughout the Southern End of the Northeast Corridor, including the District of Columbia, Maryland, New Jersey and New York. Further, approximately 49 percent of the power sold to Amtrak by PPL EU is resold by Amtrak to commuter rail lines operating in and along the Southern End of the Northeast Corridor, including New Jersey Transit, Southeastern Pennsylvania Transportation Authority ("SEPTA"), Delaware Department of Transportation and the Maryland Transit Administration. Amtrak St. 2R, p. 13. Amtrak believes erroneously that PPL EU's POLR service obligation to Amtrak includes the obligation to provide power to these rail lines located in other states and in portions of Pennsylvania that are not within PPL EU's certificated service territory. Tr. 375.

PPL EU has no duty to provide public utility services to customers outside its certificated service territory. Indeed, it would be unlawful for PPL EU to provide such service without first obtaining certificates of public convenience, which it does not have. 66 Pa.C.S. § 1102(a)(1). Amtrak contends that causing PPL EU to serve beyond its service territory is not improper because PPL EU has not demonstrated that it has been harmed by Amtrak's conduct. Amtrak Exc., p. 17. There is no basis in the law for Amtrak's contention.[12]

5. A Cessation Of Deliveries Of 25 Hz Power To PPL EU By Safe Harbor Would Not Be An Abandonment Of Service By PPL EU.

Amtrak contends that, if PPL EU is unable to continue to deliver 25 Hz power to it at the Conestoga Substation as a result of a cessation by PPL EnergyPlus of sales of 25 Hz power to PPL EU, the cessation of 25 Hz service by PPL EU would constitute an unlawful abandonment of service under Section 1102(a)(2) of the Public Utility Code. Amtrak Exc., pp. 18-19.

---

[12] Based on information revealed by Amtrak, some of its sales of 25 Hz power to local commuter lines may be in interstate commerce. If so, some or all of the sales of 25 Hz power by PPL EU to Amtrak may be sales for resale in interstate commerce. Although it is not necessary for the PUC to reach this issue because PPL EU clearly has no duty to provide POLR service beyond its certificated service territory, it appears that some or all of PPL EU's sales of 25 Hz power to Amtrak may be beyond the PUC's jurisdiction.

Contrary to Amtrak's assertions, Pennsylvania appellate courts have held that a cessation of service is not an abandonment when the cessation is compelled by events and circumstances beyond the public utility's control. The Commonwealth Court explained:

> "The appellant argues that it was error on the part of the Commission to find in the face of the evidence of declining service and revenues and the filing of an application to discontinue service that the transferor had not abandoned his right to render public service. 'To constitute an abandonment there must be an intention to abandon together with external acts by which the intention is carried into effect.' *Byerly v. Pennsylvania Public Utility Commission,* 440 Pa. 521, 525-26, 270 A.2d 186, 198 (1970). *See Morgan Drive Away, Inc. v. Pennsylvania Public Utility Commission,* 6 Pa. Commonwealth Ct. 229, 293 A.2d 895 (1972)....
>
> "While it is conceded that the transferor markedly curtailed its service, such curtailment or even nonuse, especially when compelled by events and circumstances beyond the carrier's control, does not constitute abandonment. *See W.D. Rubright Co. v. Pennsylvania Public Utility Commission,* 197 Pa. Superior Ct. 242, 177 A.2d 119 (1962) (authorities collected); *Feather v. Pennsylvania Public Utility Commission,* 41 Pa. Commonwealth Ct. 544, 399 A.2d 829 (1979) *Cf. Lawson v. Simonsen,* 490 Pa. 509, 417 A.2d 155 (1980)."

Yellow Cab Co. v. Pa. PUC, 60 Pa. Commonwealth 343, 346-47, 431 A.2d 1106, 1107-08 (1981)(footnote omitted). Similarly, the Pennsylvania Supreme Court held in *Emerald Coal and Coke Co. v. Equitable Gas Co.*, 378 Pa. 591, 596-97, 107 A.2d 374, 377-78 (1954) as follows:

> "Defendant contends that if the court is granted such power its decree can lead to a forced abandonment of its facilities, a result in the teeth of the provisions of the Natural Gas Act and of the Public Utility Law which provide that abandonment may be had only with the approval of the Commission. The answer to this is that there is no abandonment directed by the court at this stage of the proceedings. Abandonment necessarily implies the voluntary or intentional act of the party having the facility, right or power to relinquish it. Here, if the court should grant full injunctive relief, the cessation would be *forced* upon defendant."

A termination of 25 Hz service by PPL EU, caused by a cessation by PPL EnergyPlus of sales of 25 Hz power to PPL EU, clearly would not constitute an abandonment of service to Amtrak by PPL EU because the cessation of service would be caused by PPL EnergyPlus' conduct which is beyond PPL EU's control.

6. PPL EU Should Not Be Ordered To Use Its "Best Efforts" To Obtain A Contract With Safe Harbor For 25 Hz Power.

Amtrak contends that the PUC should order PPL EU to use its "best efforts" to enter into a contract with Safe Harbor and/or PPL EnergyPlus to purchase 25 Hz power for Amtrak's benefit. Amtrak Exc., pp. 30-33. As a corollary to this contention, Amtrak contends that, if PPL EU is unable to reach an agreement for 25 Hz power with either Safe Harbor or PPL EnergyPlus, PPL EU should be directed to "collaborate" with Amtrak for the design and construction of a 25 Hz converter. Amtrak Exc., pp. 32-33. Amtrak's Exceptions are without merit and should be rejected for several reasons. It would be far more appropriate for Amtrak to negotiate and enter into a contract with PPL EnergyPlus for 25 Hz power. Amtrak is in a better position than PPL EU to negotiate a 25 Hz power purchase agreement for Amtrak's benefit because Amtrak best knows its needs and future plans. Amtrak knows far better than PPL EU whether a 25 Hz power purchase agreement should be for one year, three years, 10 years or some other term. Further, if PPL EU were to enter into a contract with PPL EnergyPlus for 25 Hz power, the cost of that nonstandard service would be flowed through directly to Amtrak. It is appropriate for Amtrak to negotiate the price for 25 Hz power that Amtrak will pay.

In this regard, it should be noted that, as Amtrak recognizes, PPL EU is not in any special position to influence the actions of PPL EnergyPlus. Amtrak acknowledges that PPL EU cannot force PPL EnergyPlus to enter into a contract to sell 25 Hz power to PPL EU. Amtrak Exc., pp. 30-31. PPL EnergyPlus is in the non-regulated portion of the PPL corporate system. PPL EU has no ownership interest or other control over PPL EnergyPlus.

Nor should the PUC direct PPL EU to "collaborate" with Amtrak to design and build a new frequency converter. Under Section 2807(b) of the Public Utility Code, 66 Pa.C.S. § 2807(b), equipment that would convert 60 Hz power to 25 Hz power would be used only to

serve Amtrak at the Conestoga Substation and would be nonstandard equipment for which Amtrak would bear the cost. PPL EU is willing to acquire and install a converter on Amtrak's behalf, but only after Amtrak has paid the estimated full cost of the converter. In this regard, PPL EU notes that Amtrak's promises to pay for a new converter are always hedged with phrases like "if necessary." *See, e.g.*, Amtrak Exc., p. 32. Amtrak St. No. SCF-2, p. 16.[13]

Further, it makes sense for Amtrak to purchase and install a converter, not PPL EU. Amtrak presently owns and operates other converters along the Southern End of its Northeast Corridor. Amtrak Exc., p. 9; Amtrak Ex. SCF-1. Amtrak has experience in acquiring, operating and maintaining converters; PPL EU does not. For the foregoing reasons, although PPL EU is willing to acquire and install a converter which would be used exclusively to provide nonstandard service to Amtrak upon payment for such facilities by Amtrak, it is more logical and appropriate for such equipment to be purchased and installed by Amtrak.

7. Amtrak's Proposals For Price Protection Are Unlawful, Impractical And/Or Contrary To The Public Interest.

Amtrak argues that the ALJ erred in declining to adopt Amtrak's proposal for limitations on the price that can be charged for 25 Hz power purchased for Amtrak's benefit. Amtrak Exc., pp. 33-37. Each of the protections suggested by Amtrak should be rejected.

Amtrak criticizes the ALJ for concluding that RFPs for the large commercial and industrial class should not include a requirement that a bidder provide 25 Hz power for Amtrak. Amtrak Exc., pp. 33-34. In rejecting Amtrak's argument, the ALJ correctly noted that such a requirement would permit PPL EnergyPlus to control the price for all power to the large commercial and industrial class because PPL EnergyPlus would be the sole source for 25 Hz

[13] Amtrak is under no obligation to buy 25 Hz power from PPL EU. If PPL EU builds a converter, it needs guaranteed recovery of its investment. Otherwise, other customers would end up paying for it.

power. RD, p. 44. Amtrak's proposal might protect it, but it would have the effect of disrupting the competitive process for the large commercial and industrial class and would also have the effect of shifting the cost of 25 Hz power to all large commercial and industrial customers, when such power is required exclusively by Amtrak.

Amtrak next urges that prices for 25 Hz power be set at "cost-based" rates. Amtrak Exc., pp. 34-35. Significantly, Amtrak has never provided any details as to how this suggestion could be implemented. Apparently, Amtrak would have the PUC conduct base-rate cases for Safe Harbor to establish the cost of producing 25 Hz power. In making this proposal, Amtrak ignores the fact that rate regulation for electric generation supplies has been repealed, that Safe Harbor is an exempt wholesale generator ("EWG") whose rates and contracts are subject to the exclusive jurisdiction of the FERC and that the PUC has no power, jurisdiction or authority to require that Safe Harbor submit to a base-rate proceeding.

Amtrak next contends that the price for 25 Hz power should be capped at the price of 60 Hz, three-phase power. Amtrak Exc., p. 36. Although it is easy to understand why Amtrak would want this protection, it is difficult to understand why Amtrak believes that it is entitled to such protection. In making this proposal, Amtrak seeks a better deal for its 25 Hz power supplies from PPL EU than Amtrak has been able to achieve at any other location where it receives electric power for railroad operations for the Southern End of the Northeast Corridor. At these locations, Amtrak bears the costs of 60 Hz power and of converting 60 Hz power to 25 Hz power.[14]

[14] Amtrak contends also that PPL EU "seemed willing to accept this approach." Amtrak Exc., p. 36. PPL EU definitely has not accepted having the price of 60 Hz power serve as a proxy for the price of 25 Hz power. Instead, PPL EU explained in its Main Brief that Amtrak did not need the protection of this type of price restriction. Because 25 Hz power can be converted to 60 Hz power and vice versa, it is likely that the market price for 60 Hz power would not exceed the sum of the 60 Hz power plus the value or cost of converting such power to 25 Hz. PPL EU MB, p. 44.

In making these contentions, Amtrak states erroneously that Amtrak's current situation results from PPL EU's actions. Amtrak Exc., p. 35. Specifically, Amtrak contends that the situation arose as a result of the sale by PPL EU of its partial ownership interest in Safe Harbor to an unregulated EWG, PPL Holtwood. In making these contentions, PPL EU, however, has never owned a majority or controlling interest in Safe Harbor, nor does PPL Holtwood own such an interest presently. Therefore, PPL EU could not have required Safe Harbor to sell 25 Hz power to PPL EU for resale to Amtrak even if it had retained partial ownership of Safe Harbor. Further, Amtrak ignores the fact that PPL EU sought and obtained the approval for the sale of its partial ownership in Safe Harbor from both the PUC and the FERC prior to the sale. PPL EU St. 1-R, pp. 5-6. Amtrak next contends that PPL EU should have obtained a commitment from PPL EnergyPlus that it would continue to sell 25 Hz power to PPL EU for Amtrak's benefit. Amtrak Exc., p. 35. In making this contention, Amtrak ignores the fact that PPL EU did obtain such commitment from PPL EnergyPlus for eleven years from the initial deregulation of rates for retail electric generation supplies under the Competition Act, 66 Pa.C.S. Ch. 28, through December 31, 2009. Despite the protections that PPL EU obtained for Amtrak during that period, Amtrak did nothing to assure continuation of the production of 25 Hz power for Amtrak at the Conestoga Substation.

8. Amtrak Does Not Require PPL EU's 25 Hz Service.

Amtrak devotes much of its Exceptions to its contention that it needs 25 Hz power from PPL EU at the Conestoga Substation "to ensure the safe and reliable operation of the south end of the Northeast Corridor." Amtrak Exc., pp. 11-14. Amtrak, however, admits that it can operate without 25 Hz power delivered by PPL EU and that it needs power from PPL EU to carry a reserve margin to respond to contingencies. Amtrak Exc., p. 12. Amtrak substantially overstates its need for 25 Hz power from PPL EU.

As shown by Amtrak in Exhibits SCF-1 and SCF-2, Amtrak obtains 310 MW of 25 Hz power from converters at locations other than Safe Harbor. Amtrak is able to use 25 Hz power delivered to it elsewhere by using its 1,200 miles of transmission and distribution lines that form a fully integrated grid that is completely isolated from the grid operated by PJM. Amtrak Exc., p. 10.

In addition, with the return to service of the Safe Harbor converter, Safe Harbor's total capacity, assuming water flows are adequate and the converter is operating, is 80 MW. Therefore, Amtrak's maximum peak capacity is 390 MW. In contrast, PPL EU delivers only about one-third of the 80 MW of capacity produced by Safe Harbor, or approximately 27 MW. Therefore, PPL EU provides Amtrak less than 7% of Amtrak's total capacity (27 MW ÷ 390 MW). Even this comparison overstates Amtrak's need for 25 Hz power delivered to it by PPL EU because the rotary converters can operate at capacities 20 to 30 percent above their normal capacity for up to ten hours. Amtrak St. 2-SR, p. 24; Tr. 380. Amtrak has substantially overstated the significance of the 25 Hz power delivered to it by PPL EU.

B. THE EXCEPTIONS OF CONSTELLATION SHOULD BE REJECTED

Constellation requests that the SMAs proposed by PPL EU be revised to include a Full Two-Way Payment Clause. The PUC should reject this request because it is not the responsibility of the POLR customers to guarantee the forward income of a defaulting supplier.

1. The SMAs Proposed By PPL EU Are Consistent With Contract Law.

The ALJ correctly determined that the default provisions of the SMAs proposed by PPL EU are consistent with the public interest and contract law. RD, p. 48. The last sentence of Section 12.3(a) of the SMA, pertaining to settlement calculations in the event of an early termination of the contract, provides that: "In no event will a termination payment result in payment from the Non-Defaulting Party with the exception for any amount due, after set off, for

services provided by the Defaulting Party prior to the Early Termination Date." PPL EU Ex. No. 1, Attachments A and B; PPL EU MB, p. 8; PPL EU RB, p. 13. This ensures that a defaulting party will receive payment for services it provided prior to the default and not for expected forward income after the termination (or default) date.[15] Constellation proposes that the termination payments be "*...due to or due from* the Non-Defaulting Party as appropriate," as compared to "...due to the Non-Defaulting Party..." Const. St. 1, p. 20, (emphasis added); *see* Constellation MB, p. 10. Under Constellation's approach, the non-defaulting buyer would have to pay the defaulting supplier's expected "forward income" contracted for under a breached SMA even where the supplier is in default and fails to perform (*i.e.,* fails to provide electricity). *See* Const. St. 1, p. 20. The following illustrates the effect of Constellation's Full Two-way Payment Clause:

> "assume that Constellation is a successful bidder in [PPL EU's] RFP and agrees to sell [PPL EU] a specified amount of power in 2011 at a price of 10 cents per kwh. Assume further that Constellation supplies one half of the contracted for power and then breaches the contract and refuses to perform any further. Assume further that in the meantime the price of power in the market has fallen to 8 cents per kwh. After Constellation's breach, [PPL EU] "covers" its position by buying replacement power at 8 cents per kwh. Under [PPL EU's] proposed SMAs, Constellation would be paid 10 cents per kwh for all power actually supplied and nothing for power not supplied. Under Constellation's proposed SMA, however, [PPL EU] (and more specifically its customers) would have to pay Constellation 10 cents per kwh for all power actually supplied plus 2 cents per kwh (Constellation's anticipated future profit) for all remaining supply contemplated by the original contract even though Constellation never performed on this portion of the agreement." PPL MB, pp. 12-13.

[15] This "forward income" could occur if the market price is below the contract price at the time of a seller's default. *See* PPL EU MB, p. 9.

In contrast, the PPL EU SMAs do not allow for the payment of the defaulting party's anticipated future profit.[16]

Constellation maintains that the SMAs as proposed by PPL EU are inconsistent with *Lancellotti v. Thomas*, 491 A.2d 117, 120-22 (Pa. Super. 1985) ("*Lancellotti*") and Restatement (Second) of Contracts (1979) ("Restatement") § 374 - Restitution in Favor of Party in Breach. Const. Exc., pp. 3-8. As PPL EU has explained, the proposed SMAs are reasonable and consistent with the aforementioned authorities. PPL EU MB, pp. 13-14; PPL EU St. 1-R, p. 17.

In summary, Restatement § 374 and *Lancellotti* provide that, if a party justifiably refuses to pay the defaulting party that has breached the terms of a contract, the non-breaching party will compensate the defaulting party for the benefits received, after set off for any amounts owed, **prior to the default**. The comment to the Restatement further provides that in no case will the party in breach be allowed to recover more than a ratable portion of the total contract, where such a portion can be determined. Restatement § 374, Comment B.; *Lancellotti*, 491 A.2d at 119-120. Constellation maintains that the phrase "ratable portion" is PPL EU's characterization of these authorities and presumably is not part of Pennsylvania contract law. This is not the case. The concept of recovering no more than a "ratable portion of the total contract price" is specifically discussed in the comments to Restatement § 374 and in *Lancellotti*. PPL EU MB, p. 14.[17]

Moreover, in *Sevast v. Kakouras*, 591 Pa. 44, 50, 915 A.2d 1147, 1151 n.5 (2007) ("*Sevast*"), the Pennsylvania Supreme Court explained that *Lancellotti* permits restitution where, the measure of the benefit conferred is limited to the actual enrichment and cannot exceed a

---

[16] Notably the RD, p. 48, quotes the above example and Constellation has never contradicted the veracity of this example. In its exceptions, Constellation relies on this example to argue, incorrectly, that PPL EU will receive a windfall under the SMAs. This issue is fully addressed below. Const. Exc., p. 8.

[17] Restatement § 374, Comment B; *see Lancellotti*, 491 A.2d at 120-22. The concept of "ratable portion" is mentioned when the court cites the text of the First Restatement of Contracts (1932) and when citing J. Calamari and J. Perillo, The Law of Contracts in n.3.

ratable portion of the contract price.[18] Constellation's argument, that "[n]either *Lancellotti* nor Restatement § 374 raises the notion of a 'ratable portion of the total contract price,'" is erroneous and thus inapplicable to this proceeding and any related arguments are without merit. The notion of restitution based on a ratable portion of the total contract price was raised in the Restatement, *Lancellotti* and *Sevast*, and is part of Pennsylvania contract law. The SMAs proposed by PPL EU are consistent with this principle. Regarding the SMAs, the ratable portion of the total contract can be determined because, once a breach occurs, PPL EU will be able to determine the amount of electricity received for default service prior to the breach and, as noted above, the breaching party will receive payment, after offset for loss, for the services provided before the breach.

Constellation's assertion, that PPL EU could experience a windfall, is without merit. Const. Exc., p. 8. This assertion is incorrect because if, after an SMA breach, PPL EU purchases supply for less than the original contract price, the difference will be reflected in the Generation Supply Charges ("GSCs") which determine the rate customers will pay for default service. Therefore, the POLR customers will receive any benefit from acquiring replacement electricity at a lower price. The GSCs were agreed to as part of the Settlement in this proceeding as the proper mechanism to recover the costs of the DSP Plan.[19]

2. The SMAs Proposed By PPL EU Satisfy The Requirements Of Act 129.

Constellation asserts that adoption of its proposed Full Two-Way Payment Clause is consistent with the provisions of Act 129, and in particular the "least cost" provisions of Act 129. Const. Exc., pp. 8-14. Constellation's assertions are without merit and should be rejected. Significantly, Constellation's request to revise the SMAs is a request for the PUC to approve a

---

[18] The Court cites J. Calamari and J. Perillo, The Law of Contracts mentioned in n.3 of *Lancellotti*.

[19] *See* Act 129 of 2008 § 2807(e)(3.9)(the default service provider has a right to all costs incurred related to default service and a PUC approved competitive procurement plan).

provision that would have POLR customers pay a supplier's future profits if market prices drop and the supplier defaulted on its supply contract. It is not "least cost" to reward a default with payments that the supplier did not earn. *See* PPL EU RB, p. 4.

Constellation contends that the SMAs proposed by PPL EU would impair the ability of PPL EU to obtain least cost generation supplies under the DSP Plan. Const. Exc. pp., 9-11. Constellation avers that the SMAs, without the Full Two-Way Payment Clause, will reduce competition in the POLR supply procurement process and that this alleged reduction in competition will inhibit PPL EU's ability to obtain least cost contracts. *See* Const. Exc., p. 20. Constellation's arguments ignore the requirement of Act 129 that the procurement plan and contracts ensure adequate and reliable service. 66 Pa.C.S. § 2807(e)(3.4). A contract provision that does not discourage default will not provide the required assurance. PPL EU RB, pp. 5-6.

Constellation argues that the Full Two-Way Payment Clause will not hinder the reliability of electric service because PPL EU's customers will receive reliable service from the wholesale market, and PJM is responsible for ensuring the reliable operation of the electricity system. Const. Exc., pp. 17-18. Constellation also states that the Full Two-Way Payment Clause will enhance the reliability of electric supply because it will ensure that the POLR customers will never pay more than the contracted for price under the SMAs. Const. Exc., p. 18.

The Full Two-Way Payment Clause provides an inappropriate incentive to breach the SMAs due to the potential for a financial windfall for the defaulting party. PPL EU MB, pp. 12-13; PPL EU RB, pp. 5-6. Because the Full Two-Way Payment Clause provides this inappropriate incentive, the provision will not ensure reliable service. Because PPL EU must provide reliable electric service, it is critical that contracted for supplies actually be delivered. PPL EU MB, p. 16; PPL EU RB, pp. 5-6; PPL EU St. 1-R, p. 17.

Constellation's argument that PJM is responsible for ensuring the reliable operation of the electricity system is correct with regard to the transmission system. PJM, however, does not have a POLR obligation to serve retail customers in Pennsylvania. *See* 52 Pa. Code §§ 54.181-54.189. Any argument that PJM is responsible for providing reliable POLR service is without merit. Additionally, the argument that POLR customers are protected because they will never pay more than the contract price ignores the fact that under the Full Two-Way Payment Clause, the POLR customers would potentially be responsible for the "forward income" of a defaulting supplier, when said supplier has stopped providing electricity.

Constellation contends the inclusion of the Full Two-Way Payment Clause will encourage greater competition and produce a least cost generation supply. Const. Exc., pp. 13-14. To support its assertion, Constellation asserts that the clause is the "industry standard." Const. Exc., p. 1. However, Constellation has offered no citation to any state commission proceeding in which the propriety of the Full Two-Way Payment Clause was litigated and approved, and PPL EU has proven that it is not used in every jurisdiction. PPL EU MB, pp.15-16; PPL EU RB, p. 6, PPL EU St. 1-R, p. 21; PPL EU Ex. DRS-3, p. 4. It is not the "industry standard."

Constellation also avers that the use of the SMAs proposed by PPL EU and the resulting reduction in competition will raise prices. Const. Exc., p. 17. However, Constellation has provided no evidence that the inclusion of the Full Two-Way Payment Clause would lead to increased competition. In addition, Constellation has provided no evidence of a quantitative difference between the prices achieved by POLR supply solicitations that use the Full Two-Way Payment Clause and those that do not. PPL EU Ex. DRS-3 (PPL-I 27).

The ALJ determined that PPL EU has shown that competition flourishes without the Full Two-Way Payment Clause. RD, p. 50. However, Constellation argues that the inclusion of the

Full Two-Way Payment Clause in the SMA would increase competition. Const. Exc., p. 14. As noted by the ALJ, however, PPL EU has provided evidence that the default service procurements have been competitive.[20]

3. The Full Two-Way Payment Clause Would Require Revisions To The SMAs To Include Detail On The Rights Of The Non-Defaulting Party.

Constellation challenges the determination that the inclusion of the Full Two-Way Payment Clause would require revisions to the SMAs to include greater detail surrounding the rights of the non-defaulting party. RD, p. 49 *citing* PPL EU St. I-R, p. 22; PPL EU MB, pp. 16-17. PPL EU presented ample evidence that the inclusion of the Full Two-Way Payment Clause is not a change that can be made in isolation.[21] PPL EU has maintained throughout this proceeding that if the Full Two-Way Payment Clause were to be added to the SMAs, further revisions would be needed to ensure adequate customer protection and Constellation has responded that further protections were not necessary. PPL EU RB, p. 13; PPL EU MB, p. 16; PPL EU St. 1-R, p. 22; Const. MB, p. 23; Const. Exc., pp. 17-18.

If the "due to or due from" language requested by Constellation were added, further changes would be needed to protect customers such as revising how gains and losses are calculated. PPL EU RB, p. 14. Constellation's argument, that there is no evidence that additional protections are needed, is incorrect. The New Jersey Supply Master Agreements and the Pennsylvania Power Company supply agreements contain additional default provisions and protections. PPL EU St. 1-R, p. 22; PPL EU MB, p. 17.

---

[20] RD, p. 50; PPL EU MB, p. 19-20. For example, PPL EU's Competitive Bridge Plan ("CBP") procurements, which use agreements without the Full Two-Way Payment Clause, have produced more bidders in each successive procurement. PPL EU St. 1, p. 9. The ever increasing level of competition for PPL EU's CBP supply demonstrates that the resulting prices are fully competitive and have not been adversely affected by the absence of a two-way default provision.

[21] PPL EU MB, p. 16; PPL EU St. 1-R, p. 22. This conclusion was effectively confirmed by Constellation in its main brief where it requested further changes to the SMAs in the event the Full Two-Way Payment Clause were added. *See* PPL EU RB, p. 12; Constellation MB, pp. 17, 24.

4. The Preference Of Credit Rating Agencies Is Not Relevant.

The Recommended Decision held that the preference of credit rating agencies is not relevant to this proceeding. RD, p. 50. Constellation argues that the Full Two-Way Payment Clause would be preferred by credit agencies and its inclusion would increase competition. A supplier contract, which guarantees that the supplier will receive the benefit of its bargain even if it breaches the contract, will have less credit risk than one in which the breaching party does not receive a financial windfall. PPL EU MB, p. 18. However, the PUC should protect customers and assure reliable electric service at a reasonable price, not satisfy preferences of the credit agencies. RD, p. 50; PPL EU MB, p. 18.

5. Constellation's Claims Regarding The Financial Netting Improvements Act Should Be Rejected.

Constellation's argument, that the Financial Netting Improvements Act of 2006 ("FNI Act") renders the default provisions in the SMAs proposed by PPL EU unenforceable, is erroneous. That the ALJ did not dwell on such an argument is not error. *See* RD, p. 50; Const. Exc., pp. 18-21. The section of the Federal Deposit Insurance Act ("FDIC Act") cited by Constellation deals with the rights and remedies available to a Conservator or Receiver after they have been appointed to oversee the financial affairs of an insured depository institution. *See* 12 U.S.C. § 1821(e). Accordingly, the section of the FDIC Act relied on by Constellation is as inapplicable to the issue as is the Bankruptcy Code. Although Conservators, Receivers, and Bankruptcy Trustee's have special powers under their various acts, that has nothing to do with the ramifications of an on-going electric wholesaler deliberately breaching a contract for economic reasons. Moreover, 12 U.S.C. § 1821(e)(8) disproves Constellation's assertion that the SMA is subject to the statute. Specifically, 12 U.S.C. § 1821(e)(8)(G)(iii) defines "walkaway clauses" as:

> "any provision of a qualified financial contract that suspends, conditions or extinguishes a payment obligation of a party ... solely because of such party's

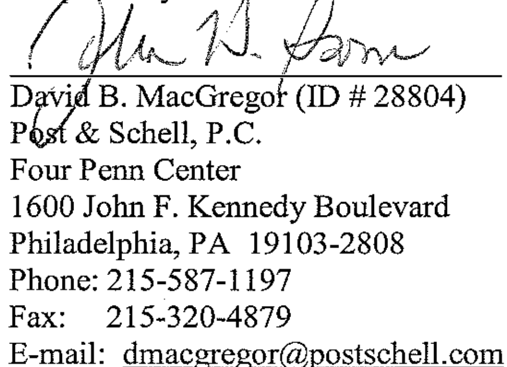
> status as a *nondefaulting* party in connection with the insolvency of an insured depository that is a party to the contract . . . " (Emphasis added).

Here the PPL EU SMA becomes relevant only if a party defaults which means that it is not a "walkaway clause" under the FNI Act.

III. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that the Pennsylvania Public Utility Commission deny the Exceptions of Amtrak and Constellation and affirm the Recommended Decision of Administrative Law Judge Susan D. Colwell.

Respectfully submitted,



David B. MacGregor (ID # 28804)
Post & Schell, P.C.
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103-2808
Phone: 215-587-1197
Fax: 215-320-4879
E-mail: dmacgregor@postschell.com

Michael W. Hassell (ID # 34851)
John H. Isom (ID # 16569)
Post & Schell, P.C.
17 North Second Street
12th Floor
Harrisburg, PA 17101-1601
Phone: 717-612-6032
Fax: 717-731-1985
E-mail: mhassell@postschell.com
E-mail: jisom@postschell.com

Paul E. Russell (ID #21643)
Associate General Counsel
PPL Services Corporation
Office of General Counsel
Two North Ninth Street
Allentown, PA 18106
Phone: 610-774-4254
Fax: 610-774-6726
E-mail: perussell@pplweb.com

Matthew J. Agen
Post & Schell, P.C.
607 14th St. N.W.
Washington, DC 20005-2006
Phone: 202-347-1000
Fax: 202-661-6970
E-mail: matthewagen@postschell.com

Of Counsel:

Post & Schell, P.C.

Date: May 22, 2009

Attorneys for PPL Electric Utilities Corporation