



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

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October 6, 2011

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission v.
PPL Electric Utilities Corporation (Remand)

Docket No. R-2010-2161694

Dear Secretary Chiavetta:

Enclosed please find a copy of the **Main Brief** of the Bureau of Investigation and Enforcement (I&E). As evidenced by the enclosed Certificate of Service, copies have been served on all active parties.

If you have any questions, please contact me at (717) 783-6184.

Sincerely,

Richard A. Kanaskie
Senior Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #80409

Enclosure
RAK/edc

cc: Parties of Record
Hon. Susan D. Colwell

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission, <i>et al.</i>	:	
	:	
v.	:	Docket No. R-2010-2161694
	:	
PPL Electric Utilities Corporation	:	

**MAIN BRIEF ON REMAND
OF THE BUREAU OF
INVESTIGATION AND ENFORCEMENT**

Richard A. Kanaskie
Senior Prosecutor
PA Attorney ID #80409

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976

Dated: October 6, 2011

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I. INTRODUCTION

A. Statement of the Case and Procedural History

On March 31, 2010, PPL Electric Utilities, Inc. (“PPL” or “Company”) filed Supplement No. 83 to Tariff Electric - Pa. P.U.C. No. 201 (“Supplement No. 83”) with the Pennsylvania Public Utility Commission (“Commission”). Supplement No. 83 contained proposed changes in rates, rules and regulations designed to produce approximately an additional \$114.7 million in additional annual base rate revenue to become effective June 1, 2010. The requested revenue equated to an increase of 16.5% over existing base rates.

By Order Entered on May 20, 2010, the Commission suspended the base rate filing and instituted an investigation to determine the lawfulness, justness and reasonableness of the proposed rates, rules and regulations contained in the Company’s filing. The filing was assigned to the Office of Administrative Law Judge (“OALJ”) for the purpose of developing an Evidentiary Record and the preparation and issuance of a Recommended Decision (“RD”). The OALJ subsequently assigned Administrative Law Judge (“ALJ”) Susan D. Colwell as the presiding officer.

Consistent with its duty to represent the public interest in matters before the Commission that have an impact on rates, the Bureau of Investigation and Enforcement (“I&E”), during its identification as the Office of Trial Staff

(“OTS”),¹ filed its Notice of Appearance indicating its participation in this proceeding. In addition, the Office of Consumer Advocate (“OCA”), the Office of Small Business Advocate (“OSBA”), the PPL Industrial Customer Alliance (“PPLICA”), Eric Epstein, Richards Energy Group (“REG”), Sustainable Energy Fund (“SEF”), Commission on Economic Opportunity (“CEO”), Citizens for Pennsylvania’s Future (“PennFuture”), Dominion Retail, Inc. (“Dominion”) and the Retail Energy Supply Association (“RESA”) appeared in this proceeding and participated at varying levels.

On August 26, 2010, PPL, OTS, OCA and REG filed a Joint Petition for Partial Settlement (“Joint Petition” or “Partial Settlement”) including Statements in Support. The balance of the participants identified above did not oppose the Partial Settlement. The issues not addressed in the Joint Petition continued in accordance with the established litigation schedule and culminated in the issuance of a Recommended Decision by ALJ Colwell on October 15, 2010. Exceptions were filed by CEO, OCA, OSBA, PPLICA, RESA and SEF on November 4, 2010. Reply Exceptions were submitted on November 15, 2010 by OTS, OCA, OSBA, PPLICA and PPL. A Non-Binding Poll of the unresolved issues was conducted by the Commission on December 3, 2010 at the regularly scheduled Public Meeting.

1 Pursuant to its Final Procedural Order entered August 11, 2011, at Docket No. M-2008-2071852, the Commission created the Bureau of Investigation and Enforcement (“I&E”) consisting of all staff currently assigned to the Office of Trial Staff (“OTS”) and other staff as described therein. The Order establishes that any obligations of the parties to OTS in current proceedings shall extend to I&E, who retains the responsibilities of OTS in an ongoing manner. For ease of reference and identification purposes only, any OTS document served, filed or entered into the record in this, or any other, proceeding prior to August 11, 2011, will continue to be referred to by its existing OTS title by the now designated I&E counsel and technical staff.

By Commission Order Adopted December 16, 2010 and Entered December 21, 2010, the Commission adopted the RD with modifications and disposed of the balance of the issues raised during the parties' Exceptions, including the subject matter of the instant proceeding. In the underlying proceeding, the Commission based its decision on the mandates of utility regulation.² In its determination, the Commission concluded that "[a]pplying these parameters to this issue, we find that PPLICA has not carried its burden to demonstrate that a special rate schedule governing its distribution charges and those of similarly-situated customers should be established in this case."³

On January 5, 2011, PPLICA filed a Petition for Reconsideration or, in the alternative, rehearing or reargument ("Petition") seeking to revisit the issue of establishing a special rate for Donsco, Inc. Donsco, Inc. is part of PPLICA and is a PPL Industrial Customer currently served under rate class LP-4. PPL filed an Answer to PPLICA's Petition on January 18, 2011. By Order Adopted March 31, 2011 and Entered April 27, 2011, the Commission granted the Petition for Reconsideration and remanded the case to the OALJ for further proceedings to culminate in the issuance of a Recommended Decision on Remand.⁴

2 The Commission commented that "[while we find the factual circumstances faced by Donsco very troubling, we are bound by our statutory authority and case law regarding burden of proof, our regulations governing the conduct of proceedings, and our mandate to base our decisions is substantial evidence of record." Docket No. R-2010-2161694, Order Adopted December 16, 2010 and Entered December 21, 2010, p. 113.

3 Id.

4 Docket No. R-2010-2161694, Order Adopted March 3, 2011 and Entered April 27, 2011, p. 16.

A Prehearing Conference on Remand was held on May 16, 2011 at which time a Procedural Schedule was developed. The procedural schedule included filing dates for testimony, Main Briefs and Reply Briefs as well as the date for an Evidentiary Hearing. The Prehearing Conference also resulted in the modification of the Commission's Discovery rules. In anticipation of litigation, I&E had preliminarily identified and served the testimony of its expert witness. The I&E evidence submitted in this remand proceeding and admitted into the record at the September 16, 2011 Hearing includes the Remand Testimony and Remand Surrebuttal Testimony of Michael J. Gruber (I&E Statement Nos. 3-RM and 3-RM-SR.).⁵

B. Burden of Proof

PPLICA bears the burden of proof in this remanded proceeding to show that Donsco, Inc. is unique and therefore, a special rate is appropriate. As such, the evidence offered in support of its proposal must be substantial. The court in *Burleson* opined that:

...the elements of that cause of action are proven with substantial evidence that enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary.⁶

5 As noted during the admission of testimony, I&E Statement No. 3-RM was served and preliminarily identified as OTS Statement No. 3-RM. Corrections were made prior to the admission of testimony.

6 *Burleson. v. Pennsylvania Public Utility Commission*, 501 Pa. 437 A.2d 1234 (1983).

Substantial evidence has been defined as “. . . that quantum of evidence which a reasonable mind might accept as adequate to support a conclusion.”⁷ Setting rates is within the expertise of the Commission and will not be overturned as long as the determination is based on the presentation of substantial evidence.⁸ A review of the record will demonstrate that in a number of instances identified herein PPLICA has failed to prove the reasonableness of its proposal with substantial evidence. As such, proper regulatory review requires that established safeguards be retained in order to offer the necessary protection against improper rates.

II. ARGUMENT

The subject matter of the instant remanded proceeding involves the establishment of a special, negotiated rate for Donsco, Inc. The outcome of this litigated matter may have a direct impact on the established rates of other similarly situated ratepayers. These rates were developed to allocate the Commission’s approved revenue requirement to the various rate classes contained in the PPL tariff. Inherent in this allocation is the premise that a properly designed rate will not unduly burden one group of ratepayers to the benefit of another. The Public Utility Code (“Code”) maintains that rates “shall be just and reasonable and in

7 *Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission*, 19 Pa. Cmwlth. 1, 337 A.2d 922 (1975), as quoted in *Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 128 (1980).

8 *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 106 Pa. Cmwlth 437, 526 A.2d 1243 (1987).

conformity with regulations or orders of the commission.”⁹ The Code further dictates that “[n]o public utility shall...make or grant any unreasonable preference to any person, corporation....No public utility shall establish or maintain any unreasonable difference as to rates, either as between localities or as between classes of service.”¹⁰ Although the interpretation of this statute does not require each class to be charged the same rate, we are mindful that

[p]ublic utility rates should enable the utility to recover its cost of providing service and should allocate this cost among the utility’s customers in a just, reasonable and nondiscriminatory manner.¹¹

I&E understands that if “a financial hardship is being experienced by Donsco...and that the financial hardship is caused by special circumstances, then those special circumstances may call for a special rate.”¹² However, any special rate “should at the very least cover the actual cost of service....”¹³ In order to avoid a discriminatory rate, the established cost to serve the customer should be the benchmark for rates. “A rate set because of special circumstances...should not be used to provide a competitive advantage.”¹⁴ “A special rate below the cost to serve would give a customer an economic and competitive advantage over other customers in similar businesses.”¹⁵ PPLICA has not provided substantial evidence to dispute the possibility of a competitive advantage being provided to Donsco,

9 66 Pa. C.S.A. § 1301.

10 66 Pa. C.S.A. § 1304.

11 *Pennsylvania Public Utility Commission v. West Penn Power*, 73 Pa. P.U.C. 454, 510, 199 P.U.R. 4th 110 (1990).

12 I&E Statement No. 3-RM, p. 4:

13 *Id.*

14 *Id.*

15 *Id.*

Inc. through the granting of a special rate. In fact, no analysis was done as evidenced by the following dialogue from the Evidentiary Hearing:

“Q. And you made no examination of the financial condition of any other LP-4 customers?

A. No.

Q. And you made no examination of the competitive concerns those customers may face in the operation of their business?

A. No. I was not retained to do that....

Q. And no examination as to what extent these customers suffer economic distress during the recession and had to lay off employees?

A. I have not looked at that.”¹⁶

To address the concerns over an advantage being given to Donsco, Inc. due to a rate based on special circumstances, “that rate should, at the very least, recover the EDC’s cost of service associated with Donsco.”¹⁷

It is the function of utility ratemaking regulation to determine how a utility is allowed to recover its prudently incurred expenses while being permitted the opportunity to earn a reasonable return on its investment. The very nature of PPLICA’s proposal will result in a revenue shortfall being received from Donsco, Inc. As a result, this lost revenue must be collected from other ratepayers. I&E Expert Witness Gruber opines that “[a]ny lost revenues from a discounted rate

16 Transcript, p. 570.

17 I&E Statement No. 3-RM, p. 4.

should stay in the appropriate rate class....”¹⁸ To do otherwise would result in an inappropriate inter-class subsidy. The Commission has steadfastly ruled against inter-class subsidies and there is insufficient evidence presented to stray from this principle. As I&E Witness Gruber observed “...allowing Donsco to pay a rate less than its cost of service would result in a subsidization of Donsco; any shifting of costs out of LP-4 class would have other rate classes subsidizing the LP-4 customers.”¹⁹ “This Commission is still bound by the principle of setting rates based on the average cost of service by rate class to avoid interclass subsidies from occurring.”²⁰ This principle has consistently been supported by both the Commonwealth Court and the Legislature. In the seminal case of *Lloyd v. Pa. Public Utility Commission*,²¹ class cost causation was affirmed when it was determined that revenue shortfalls are to be recovered from the appropriate rate class using the cost of service as a guide. Absent the determination of a public good wherein all customers benefit from the activity, revenue must be recovered in-class to prevent illegal subsidies. “The Commission has consistently ruled that the lost revenue for financially troubled residential customers should remain within the residential rate class.”²² Therefore, as Mr. Gruber has testified, “...any lost revenue due to any discount provided to LP-4 customers should be recovered within the LP-4 rate class. If the Commission were to allow all rate classes to pay

18 Id., p. 5.

19 Id.

20 I&E Statement No. 3-RM-SR, p. 2.

21 *Lloyd v. Pennsylvania Public Utility Commission*, 904 A2d 1010 (Pa. Commw. 2006), appeal denied, 591 Pa. 676, 916 A2d 1104 (2007).

22 I&E Statement No. 3-RM-SR, p. 2.

for the lost revenue due to discounts based on economic inability to pay, it would create inter rate class subsidies.”²³

In addition, the Legislature has recently reinforced this ideology of recovery based on class cost causation in its Act 129 mandate wherein “... [it was] specifically required that any revenue short fall created by the discounts given under the provisions of the Act should remain within the rate class where the discount occurred.”²⁴ Although there have been cases where the Commission has allowed revenue lost due to competitive rates be collected from all rate classes, these instances are the exception, not the rule.”²⁵

The Commission has consistently determined that rates are set based on the average cost of service by class. Any deviation from this practice is solely at the discretion of the Commission.

23 Id., pp 2-3.

24 Id., p. 2.

25 Id.

III. CONCLUSION

For the reasons set forth above, the Bureau of Investigation and Enforcement respectfully submits that if the Commission were to determine that there is sufficient support to Order that Donsco, Inc. be provided service at a discounted rate, that rate should be based on the established cost of service associated with this customer. Furthermore, any revenue shortfall resulting from a discounted rate must be recovered from the same class to avoid any illegal inter-class subsidies.

Respectfully submitted,



Richard A. Kanaskie
Senior Prosecutor
PA Attorney ID #80409

Bureau of Investigation and Enforcement
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-1976

Dated October 6, 2011

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission :
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v. : Docket No. R-2010-2161694
:
PPL Electric Utilities Corporation :

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** dated October 6, 2011, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below:

David B. MacGregor, Esquire
Post & Schell PC
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, PA 19103

Paul E. Russell
PPL Electric Utilities Corporation
Two North Ninth Street
Allentown, PA 18101-1179

Eric Joseph Epstein, Esquire
4100 Hillsdale Road
Harrisburg, PA 17112

Kenneth L. Mickens, Esquire
316 Yorkshire Drive
Harrisburg, PA 17111

Steven C. Gray, Esquire
Office of Small Business Advocate
Suite 1102, Commerce Building
300 North Second Street
Harrisburg, PA 17101

Aron J. Beatty, Esquire
Tanya J. McCloskey, Esquire
Jennedy S. Johnson, Esquire
Darryl A. Lawrence, Esquire
Office of Consumer Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923

Scott J. Rubin, Esquire
333 Oak Lane
Bloomsburg, PA 17815

Joseph L. Vullo, Esquire
1460 Wyoming Avenue
Forty Fort, PA 18704

Gary A. Jeffries, Esquire
Dominion Retail, Inc.
501 Martindale Street
Suite 400
Pittsburgh, PA 15212-5817

Thomas T. Niesen, Esquire
Thomas, Long, Niesen & Kennard
212 Locust Street, Suite 500
P.O. Box 9500
Harrisburg, PA 17108-9500

Pamela C. Polacek, Esquire
Shelby Linton-Keddie, Esquire
Adeolu A. Bakare, Esquire
McNees Wallace & Nurick, LLC
100 Pine Street
P.O. Box 1166
Harrisburg, PA 17108-1166

John K. Baillie, Esquire
Citizens for Pennsylvania's Future
425 Sixth Avenue
Suite 2770
Pittsburgh, PA 15219

Daniel Clearfield, Esquire
Deanne O'Dell, Esquire
Eckert Seamans Cherin & Mellott LLC
213 Market Street
8th Floor
P.O. Box 1248
Harrisburg, PA 17108-1248

Craig A. Doll, Esquire
25 West Second Street
P.O. Box 403
Hummelstown, PA 17036

Frank Richards, Esquire
Richards Energy Group, Inc.
781 S. Chiques Road
Manheim, PA 17545

Elaine & Clayton Andrews, Jr.
2014 Evergreen Drive
Tamaqua, PA 18252

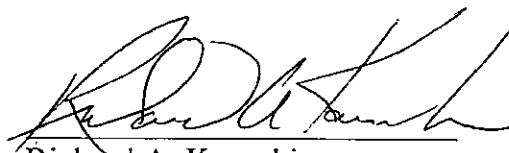
Elaine B. Santarelli
521 Second Avenue
Jessup, PA 18434

Ashley A. Buck
156 Johnson Drive
S. Williamsport, PA 17702

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Richard A. Kanaskie
Senior Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #80409