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November 18, 2011

Rosemary Chiavetta
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
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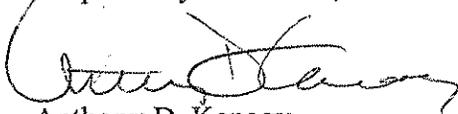
**RE: William R. Lloyd, Jr., Small Business Advocate v. PPL Electric Utilities Corporation
Docket No. C-2011-2245906**

**PPL Electric Utilities Corporation Proposed Generation Supply Charge-1 for the period June 1, 2011 through August 31, 2011
Docket No. M-2011-2243137**

Dear Secretary Chiavetta:

Enclosed please find the Motion of PPL Electric Utilities Corporation to Strike Certain Portions of the Reply Brief of the Office of Small Business Advocate or, in the Alternative, Petition to Reopen the Record in the above-referenced proceeding. Copies will be provided as indicated on the certificate of service.

Respectfully Submitted,



Anthony D. Kanagy

ADK/skr
Enclosure

cc: Honorable Susan D. Colwell
Certificate of Service

CERTIFICATE OF SERVICE

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

VIA E-MAIL & FIRST CLASS MAIL

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Date: November 18, 2011



Anthony D. Kanagy

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William R. Lloyd, Jr.,
Small Business Advocate,

v.

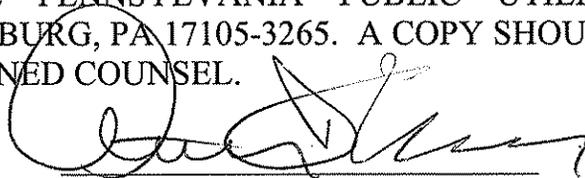
PPL Electric Utilities Corporation

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Docket Nos. C-2011-2245906
M-2011-2243137

NOTICE TO PLEAD

YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.103(c), ANSWERS TO MOTIONS ARE DUE WITHIN TWENTY (20) DAYS AFTER THE DATE OF SERVICE. YOU ARE HEREBY ADVISED THAT, PURSUANT TO 52 PA. CODE § 5.571(c), ANSWERS PETITIONS TO REOPEN ARE DUE WITHIN TEN (10) DAYS AFTER THE DATE OF SERVICE. YOUR ANSWERS SHOULD BE FILED WITH THE SECRETARY OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION, P.O. BOX 3265, HARRISBURG, PA 17105-3265. A COPY SHOULD ALSO BE SERVED ON THE UNDERSIGNED COUNSEL.



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Of Counsel:

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Dated: November 18, 2011

Attorneys for PPL Electric Utilities Corporation

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William R. Lloyd, Jr.,	:	
Small Business Advocate,	:	
	:	Docket Nos. C-2011-2245906
v.	:	M-2011-2243137
	:	
PPL Electric Utilities Corporation	:	

**MOTION OF PPL ELECTRIC UTILITIES CORPORATION
TO STRIKE CERTAIN PORTIONS OF THE REPLY BRIEF OF
THE OFFICE OF SMALL BUSINESS ADVOCATE OR,
IN THE ALTERNATIVE, PETITION TO REOPEN THE RECORD**

TO ADMINISTRATIVE LAW JUDGE SUSAN D. COLWELL:

PPL Electric Utilities Corporation (“PPL Electric”) files this motion to strike certain portions of the Reply Brief of the Office of Small Business Advocate (“OSBA”) or, in the alternative, petitions to reopen the record in the above-referenced matter pursuant to the Pennsylvania Public Utility Commission’s (“Commission”) regulations at 52 Pa. Code §§ 5.103 and 5.571. In support thereof, PPL Electric states as follows:

I. BACKGROUND

1. On May 20, 2011, PPL Electric filed its Generation Supply Charge-1 (“GSC-1”) for the period June 1, 2011 through August 31, 2011 (“Application Period”). The default service rates were set based upon a projection of the Company’s default service costs for the Application Period and also were designed to refund or recover prior period under or over collections from each customer class.

2. On May 31, 2011, the OSBA filed a Formal Complaint against the May 20 GSC-1 filing and, in particular, the rate increase for small commercial and industrial (“C&I”) customers. The principal gravamen of the Complaint involves the amount of the under collection from 2010. See OSBA Complaint, ¶ 8; OSBA St. 1, p. 2. PPL Electric timely filed an Answer to OSBA’s Complaint.¹

3. At a Prehearing Conference, the parties agreed to a litigation schedule and modified discovery terms, which were set forth in the Scheduling Order issued by Administrative Law Judge Susan D. Colwell (the “ALJ”) on July 13, 2011.

4. On July 29, 2011, PPL Electric and OSBA served written Direct Testimony. On August 15, 2011, PPL Electric served written Rebuttal Testimony. On August 25, 2011, OSBA served written Surrebuttal Testimony. On September 30, 2011, PPL Electric served written Rejoinder Testimony.

5. At an evidentiary hearing held on October 5, 2011, the Parties moved their pre-filed testimony and exhibits into the record. In addition, the Parties’ witnesses responded to questions posed by the ALJ, as well as follow-up questions by Counsel. No other testimony, statements, or exhibits were introduced into the evidentiary record.

6. Pursuant to a briefing schedule established at the evidentiary hearing, PPL Electric and OSBA submitted Main Briefs on October 26, 2011, and Reply Briefs on November 9, 2011.

7. In its Reply Brief, OSBA improperly relies upon and cites to statements, exhibits, and interrogatory responses from an unrelated proceeding that are entirely outside the record in

¹ On June 22, 2011, the Bureau of Investigation and Enforcement (“I&E”) filed a Notice of Appearance. On July 12, 2011, the Office of Consumer Advocate (“OCA”) filed a Notice of Intervention and Public Statement.

the above-captioned matter. OSBA's reliance upon extra-record evidence in support of its Reply Brief is procedurally inappropriate, raises serious due process concerns, and should not be used by the ALJ or the Commission to support a finding of fact or conclusion of law.

8. For these reasons, as more fully explained below, those portions of OSBA's Reply Brief that rely upon and cite to extra-record evidence should be stricken from OSBA's Reply Brief and disregarded by the ALJ and the Commission or, in the alternative, the record should be re-opened for the limited purpose of admitting PPL Electric's response to OSBA's extra-record evidence as set forth in the Affidavit attached hereto as "Appendix A."

II. ARGUMENT

9. On page 11 of its Reply Brief, OSBA relies upon and cites to the following extra-record evidence:

However, at least one other Pennsylvania Electric Distribution Company ("EDC") has already indicated its intent to use OSBA's proposed alternative reconciliation accounting method in its Commission-approved default service plan. In the proceeding to approve its plan to provide default service beginning January 2011, West Penn Power Company ("West Penn") proposed an Energy Cost Adjustment ("EGA") rate to reconcile the difference between default service costs and revenues, similar to PPL's GSC and GSC-1. [Footnote 24 citing OSBA Statement No. 1 from *Pa. P.U.C. v. West Penn Power Company d/b/a Allegheny Power*, Docket No. P-00072342.] The OSBA asked West Penn in an interrogatory whether, when calculating the first quarter ECA variance, it would include 2.5 months of billed revenue and 3 months of incurred costs. [Footnote 26 citing OSBA Interrogatory Set I, No. 19 from *Pa. P.U.C. v. West Penn Power Company d/b/a Allegheny Power*, Docket No. P-00072342.] West Penn responded that it "plans to include unbilled revenues in the [reconciliation] calculation so that the comparison between billed amounts and purchased amounts will both be on a three-month basis." [Footnote 26 citing OSBA Interrogatory Set I, No. 19 from *Pa. P.U.C. v. West Penn Power Company d/b/a Allegheny Power*, Docket No. P-00072342.] This interrogatory response is attached to OSBA Statement 1, Direct Testimony of Robert D. Knecht, which was made part of the record in the case approving West Penn's default service plan.

See OSBA Reply Brief, at p. 11.

10. The testimony and interrogatory response from the West Penn default service plan proceeding referenced by OSBA are entirely outside the evidentiary record of this case presently pending before the ALJ. Indeed, other than OSBA's reply brief, these materials do not appear in, nor were they referenced in, any portion of the evidentiary record.

11. Further, PPL Electric was not a party to, and did not participate in, the West Penn default service plan proceeding, *Pa. P.U.C. v. West Penn Power Company d/b/a Allegheny Power*, Docket No. P-00072342, relied upon by the OSBA.

12. It is well established that the purpose of a brief is not to introduce new additional evidence or to offer rejoinder testimony. Indeed, the Commission has held that use of a brief for such purposes in a contested proceeding is a violation of due process. *Enron Capital & Trade Resources Corporation v. The Peoples Natural Gas Company, et al.*, Docket No. R-00973928C0001, 1998 Pa. PUC LEXIS 199 (August 24, 1998); *see also Dee-Dee Cab, Inc. v. Pa. P.U.C.*, 817 A.2d 593, 598 (Pa. Cmwlth. 2003), *appeal denied*, 575 Pa. 698, 836 A.2d 123 (2003) ("For matters coming before an administrative agency, procedural due process, however, requires that a party be afforded reasonable notice of the issues raised and the agency's rulings on those issues, so that the party has an opportunity to present any response or objection.").

13. Because PPL Electric was not a party to the West Penn default service plan proceeding and because the materials relied upon and cited on page 11 of OSBA's Reply Brief were not introduced into the record in this proceeding, PPL Electric did not have notice of these materials or the opportunity to cross-examine and present evidence in response. In fact, because OSBA attempted to introduce this extra-record evidence through its Reply Brief, PPL Electric is without any opportunity to provide a meaningful response. To allow OSBA to introduce such

extra-record evidence through its Reply Brief clearly is a violation of PPL Electric's due process rights.

14. OSBA attempts to justify its use of the above-described extra-record evidence by stating that the referenced interrogatory response was attached to OSBA's direct testimony in the case approving the West Penn default service plan. *See* OSBA Reply Brief, at 11. OSBA's attempted justification is without merit for several reasons.

15. First, the Commission has distinguished between tariffs, Recommended, and Initial Decisions of this Commission and testimony or exhibits from a separate proceeding, holding that it is improper for a party to introduce extra-record testimony and exhibits from a separate proceeding through its reply brief. In *Pa. P.U.C. v. National Fuel Gas Distribution Corporation*, Docket No. R-00922499, 1993 Pa. PUC LEXIS 95 (July 30, 1993), the reply brief of the Office of Trial Staff ("OTS") included extra record material, namely, its filed testimony in another, unrelated case. The ALJ determined that no party had the opportunity to respond to or cross-examine the proffered evidence and, therefore, all references to the OTS testimony in its reply brief were stricken. The Commission agreed stating:

Consistent with our position that the infractions committed were anomalous to the prior conduct of counsel, we shall not publicly admonish the OTS. However, we do see a valid distinction between tariffs, Recommended and Initial Decisions of this Commission and the filed testimony of a party to the proceeding in a related case. We would, in principle, agree with the ALJ, that such material was outside the record and could be detrimental to rights of other parties to confront such evidence.... The appropriate response was, as the ALJ noted, to request a reopening of the record.

Id. at *10.

16. Second, it is entirely unknown from OSBA's reply brief whether the Commission in the West Penn default service plan proceeding adopted or found as fact the statements and

interrogatory responses relied upon by OSBA. Indeed, in its Reply Brief, OSBA cites to the testimony and interrogatory response rather than an order, opinion, conclusion, or finding of fact by the Commission. This is directly contrary to the Commission's holding in *National Fuel Gas Distribution Corporation, supra*.

17. Third, PPL Electric had no opportunity to investigate other aspects of West Penn's reconciliation mechanism to determine many important facts, including, but not limited to: whether West Penn's mechanism is different from PPL Electric's mechanism and, if so, to what extent; whether the Commission considered the statutory language of Section 1307(f), 66 Pa.C.S. § 1307(f); or whether West Penn recovers cash working capital costs through another method.

18. Here, PPL Electric was without notice that the ALJ or Commission may rely upon the testimony and interrogatory responses from the West Penn default service plan proceeding. Consequently, it is inappropriate and contrary to the requirements of due process for the ALJ or the Commission to rely upon the testimony and interrogatory responses from the West Penn default service plan proceeding as suggested by OSBA.

19. Finally, fact finding must be based exclusively on the evidence admitted to the record in the proceeding. *Kyu Son Yi v. State Board of Veterinary Medicine*, 960 A.2d 864, 870-871 (Pa. Cmwlth. 2008) (holding that extra-record evidence cannot sustain an adjudication). Here, the testimony and interrogatory response from the West Penn default service plan proceeding were not admitted to the record in this proceeding. Accordingly, these extra-record materials cannot support a finding of fact in this proceeding.

20. In summary, OSBA's attempt to introduce extra-record evidence on page 11 of its Reply Brief is procedurally inappropriate. To permit OSBA to introduce such extra-record

evidence through its Reply Brief without providing PPL Electric with notice and a meaningful opportunity to cross-examine or respond to such extra-record evidence clearly is a violation of PPL Electric's due process rights. Finally, PPL Electric was without notice that the ALJ or the Commission may rely upon OSBA's extra-record evidence and, therefore, such extra-record evidence cannot be used by the ALJ or the Commission to support a finding of fact or conclusion of law.

21. Based on the foregoing, the extra-record evidence on page 11 of OSBA's Reply Brief should be stricken and disregarded by the ALJ and the Commission.

22. Inclusion of extra-record evidence in OSBA's Reply Brief violates the principles of fundamental fairness and the due process rights of PPL Electric. To the extent that the ALJ declines to grant PPL Electric's motion to strike, justice requires that PPL Electric be provided with the opportunity to introduce into the record evidence in response to OSBA's extra-record evidence. Therefore, PPL Electric requests, in the alternative, that the record be re-opened for the limited purpose of admitting PPL Electric's response to OSBA's extra-record evidence as set forth in the Affidavit attached hereto as "Appendix A."

III. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that Administrative Law Judge Susan D. Colwell strike the extra-record evidence on page 11 of the Reply Brief of the Office of Small Business Advocate, and that Administrative Law Judge Susan D. Colwell and the Pennsylvania Public Utility Commission disregard said portions of page 11 in their disposition of the above-captioned matter or, in the alternative, re-open the evidentiary record for the limited purpose of admitting the Affidavit attached hereto as "Appendix A."

Respectfully submitted,



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Dated: November 18, 2011

Attorneys for PPL Electric Utilities Corporation

APPENDIX A
AFFIDAVIT OF
JOSEPH M. KLEHA

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William R. Lloyd, Jr.,	:	
Small Business Advocate,	:	
	:	Docket Nos. C-2011-2245906
v.	:	M-2011-2243137
	:	
PPL Electric Utilities Corporation	:	

**AFFIDAVIT OF
JOSEPH M. KLEHA**

State of Pennsylvania :
 :
County of Lehigh :

I, Joseph M. Kleha, hereby depose and say as follows:

1. I, Joseph M. Kleha, being duly sworn according to law, depose and say that I am authorized to make this affidavit on behalf of PPL Electric Utilities Corporation (“PPL Electric” or the “Company”).

2. I am employed by PPL Electric, a subsidiary of PPL Corporation, as the Manager-Regulatory Compliance and Rates, with a principal place of business at Two North Ninth Street, Allentown, Pennsylvania 18101.

3. PPL Electric is a public utility and electric distribution company subject to the regulatory jurisdiction of the Pennsylvania Public Utility Commission (“Commission”).

4. In my capacity for PPL Electric, I am responsible for PPL Electric's compliance with the regulatory requirements of the Pennsylvania Public Utility Commission ("PUC" or the "Commission"), the Federal Energy Regulatory Commission ("FERC") and other regulatory agencies, as necessary. As part of this function, I am responsible for the preparation and review, and technical oversight and guidance, of the development, content and structure of cost allocation and revenue requirement studies. In addition, I am responsible for all aspects of PPL Electric's rates and tariffs. I also prepare and present expert testimony regarding these and other cost-of-service and ratemaking-related issues.

5. I have prepared this Affidavit in response to certain extra-record evidence set forth on page eleven (11) of the Reply Brief submitted by the Office of Small Business Advocate ("OSBA") in the above-captioned proceeding.

6. To the best of my information, knowledge, and belief, other utilities employ the same or substantial similar accounting methods used by PPL Electric in Section 1307(e), 66 Pa.C.S. § 1307(e), reconciliation mechanisms.

7. I hereby swear and attest that, in a telephone discussion on November 15, 2011, I confirmed with my counterpart at Metropolitan Edison Company ("Met-Ed") that the Pennsylvania First Energy companies (Met Ed, Pennsylvania Electric Company, and Pennsylvania Power Company) prorate the first month of the implementation of a new Section 1307(e) cost recovery mechanism. In compliance with Section 1307(e), each of these electric distribution companies reconciles those mechanisms by comparing actual billed revenue to actual incurred costs each month of the application period. Further, each of these electric distribution companies all incurs significant under collections in the first application period due

to proration. Finally, each of these electric distribution companies does not include unbilled revenue in the reconciliation of its cost recovery mechanisms.

8. I hereby swear and attest that, in a telephone discussion on November 16, 2011, I confirmed with my counterpart at PECO Energy Company ("PECO") that PECO prorates the first month of the implementation of a new Section 1307(e) cost recovery mechanism. In compliance with Section 1307(e), PECO reconciles those mechanisms by comparing actual billed revenue to actual incurred costs each month of the application period. PECO incurs significant under collections in the first application period due to proration. Finally, PECO does not include unbilled revenue in the reconciliation of its cost recovery mechanisms.

9. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

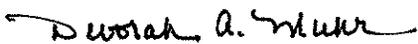


Joseph M. Kleha,
Manager-Regulatory Compliance and Rates

PPL Electric Utilities Corporation

Date: 11-17-11

Subscribed and sworn to
before me this 17th day
of November, 2011



Notary Public

COMMONWEALTH OF PENNSYLVANIA

Notarial Seal
Deborah A. Muhr, Notary Public
City of Allentown, Lehigh County
My Commission Expires July 16, 2012