



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF SMALL BUSINESS ADVOCATE

December 23, 2011

Hand Delivery

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: William R. Lloyd, Jr., Small Business Advocate v. PPL Electric Utilities Corporation
Docket No. C-2011-2245906

PPL Electric Utilities Corporation Calculation of Generation Supply Charge-1
Docket No. M-2011-2243137

Dear Secretary Chiavetta:

Enclosed for filing are the original and ten (10) copies of the Amended Reply Brief, on behalf of the Office of Small Business Advocate, in the above-docketed proceedings. This Amended Reply Brief is being filed pursuant to Administrative Law Judge Susan D. Colwell's Order Granting Motion to Strike, dated December 15, 2011. As evidenced by the enclosed certificate of service, two copies have been served on all active parties in this case.

If you have any questions, please contact me.

Sincerely,

Elizabeth Rose Triscari
Assistant Small Business Advocate
Attorney ID #306921

Enclosures

cc: Parties of Record

Robert D. Knecht

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**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	:	

**AMENDED REPLY BRIEF
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

**Elizabeth Rose Triscari
Assistant Small Business Advocate
Attorney ID # 306921**

**Office of Small Business Advocate
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Dated: December 23, 2011

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	REPLY ARGUMENT.....	3
	A. Burden Of Proof.....	3
	1. No Change to PPL’s Tariff Is Necessary.....	3
	2. 2010 GSC Undercollection Amount Not Approved By Commission.....	5
	3. OSBA Complaint Is Against A Proposed Rate.....	6
	B. Accounting Method.....	7
	1. Same Mismatch Exists Over Two-Year Period.....	7
	2. Compliance With Section 1307(e).....	8
	3. Commission Practice and Precedent.....	9
	4. Other Utilities.....	11
	5. Cash Working Capital.....	12
	6. Price Distortion.....	12
	7. Auditors.....	13
	8. Forecasting Test Year Revenues In Base Rate Proceedings.....	14
	C. Substantial Portion of Reported GSC Undercollection Was Not Caused By PPL’s Accounting Method.....	15
	D. Rate Stability.....	18
III.	CONCLUSION.....	20
APPENDIX A:	Proposed Findings of Fact Proposed Conclusions of Law Proposed Ordering Paragraphs	

TABLE OF AUTHORITIES

Cases

Petition of PPL Electric Utilities Corporation for Approval of a Competitive Bridge Plan,
Docket No. P-00062227 (Recommended Decision dated February 7, 2001)4

*PPL Electric Utilities Corporation Generation Supply Charge Reconciliation for the
Twelve Months ending November 30, 2010,*
Docket No. M-2010-2213731 (Recommended Decision dated February 8, 2011)5

*PPL Electric Utilities Corporation Generation Supply Charge Reconciliation for the
Twelve Months ending November 30, 2010,*
Docket No. M-2010-2213731 (Order entered April 14, 2011).....6

Statutes and Regulations

66 Pa. C.S. §1307(e)8, 9

52 Pa. Code §5.5012

I. INTRODUCTION

On May 20, 2011, PPL Electric Utilities Corporation (“PPL”) filed its calculation of the proposed GSC-1 rates for the period of June 1, 2011, through August 31, 2011, at Docket No. M-2011-2243137.¹ The rate proposed for small commercial and industrial (“SC&I”) customers in the May 20, 2011, filing (“June GSC-1”) is the rate at issue in this proceeding.

On May 31, 2011, the OSBA filed a Complaint against the proposed June GSC-1. The Company filed its Answer to the OSBA’s Complaint on June 29, 2011. The Office of Administrative Law Judge assigned this proceeding to Administrative Law Judge (“ALJ”) Susan D. Colwell.

The Office of Trial Staff, now part of the Bureau of Investigation and Enforcement (“BI&E”), filed a notice of appearance on June 22, 2011. The Office of Consumer Advocate (“OCA”) filed a Notice of Intervention on July 12, 2011.

A prehearing conference was held on July 13, 2011 at which the parties agreed to a procedural schedule and modified discovery terms. ALJ Colwell issued a Scheduling Order on July 13, 2011.

The OSBA submitted OSBA Statement No. 1 (the Direct Testimony and Exhibits of Robert D. Knecht) and OSBA Statement No. 2 (the Surrebuttal Testimony of Robert D. Knecht) on July 29, 2011, and August 25, 2011, respectively. PPL submitted Direct Testimony, Rebuttal Testimony, and Rejoinder Testimony. Neither the OCA nor the BI&E filed testimony.

¹ OSBA Statement No. 1 at 7.

The hearing originally scheduled for August 29, 2011, was continued. It was subsequently held on October 5, 2011, at which time OSBA Statement No. 1 and OSBA Statement No. 2 were entered into the record, along with OSBA Exhibits A, B, C, D, and E.

It was agreed to by the parties (and approved by ALJ Colwell at the hearing) that due to the continuance, the procedural schedule would be altered to have Main Briefs due on October 26, 2011, and Reply Briefs on November 9, 2011.

PPL and the OSBA submitted Main Briefs on October 26, 2011. Neither the OCA nor the BI&E filed Main Briefs.

The OSBA submits this Reply Brief in accordance with the altered procedural schedule. The OSBA also submits Proposed Findings of Fact, Conclusions of Law and Ordering Paragraphs in the attached Appendix A in response to those provided by PPL. These were not provided in the OSBA's Main Brief because they had not been requested by the presiding officer pursuant to 52 Pa. Code §5.501.

II. REPLY ARGUMENT

A. Burden of Proof

PPL purports that the OSBA has raised two primary issues in this proceeding and has the burden of proof with respect to both issues.² PPL has misconstrued the OSBA's argument on the first issue, PPL's reconciliation accounting method. On the second issue, PPL incorrectly asserts that the Commission has approved the amount of PPL's reported 2010 GSC undercollection. PPL has the burden of proof in this proceeding on all issues and has not met that burden.

1. No Change to PPL's Tariff Is Necessary

PPL describes OSBA's first argument as being that "PPL Electric's Section 1307(e) reconciliation methodology under its Commission-approved tariff is unreasonable."³ PPL argues that tariffs that have been approved by the Commission have the force of law and are binding, and therefore the burden of proving that an existing tariff provision is unreasonable is on the complainant. The OSBA does not disagree with PPL's recitation of the law, and if the OSBA were in fact seeking a change to the reconciliation provisions of PPL's Commission-approved tariff, it would indeed have a heavy burden of proof.

However, the OSBA is not seeking any change to PPL's tariff. The OSBA has not argued that the reconciliation provisions in PPL's tariff or the formula used to calculate the GSC or GSC-1 are unreasonable. Rather, the OSBA disagrees with the reconciliation accounting method used by PPL to determine the "E factor" to be plugged

² PPL Main Brief at 1.

³ *Id.*

into the tariff formula. The accounting method PPL uses to determine the E factor is not required by, or even mentioned in, PPL's tariff or the Orders approving the tariff's reconciliation provisions. Moreover, as the OSBA explained in its Main Brief, there is no Commission Order stating that PPL must use this accounting method for reconciliation of the GSC or GSC-1.⁴ Therefore, PPL has the burden of proving the reconciliation accounting method it uses to determine the E factor is reasonable.

PPL further asserts that it has presented unrebutted evidence in this proceeding that its reconciliation methodology has not changed for over 30 years and is fully consistent with Commission practice and precedent.⁵ The OSBA has distinguished the reconciliation of PPL's GSC and GSC-1 from other reconciliation mechanisms and has justified the use of an alternative reconciliation accounting method, namely including earned, but unbilled revenues in the reconciliation.⁶ This alternative is entirely consistent with the plain language of PPL's tariff and the Commission Orders approving the tariff, and does not require any change to PPL's tariff or any determination that the tariff's reconciliation provisions are unreasonable. Moreover, this alternative produces a more stable E factor that is consistent with the Company's own intent and expectations for reconciliation of its default service plans.⁷

⁴ OSBA Main Brief at 20-22.

⁵ PPL Main Brief at 17.

⁶ OSBA Main Brief at 19-20.

⁷ See *Petition of PPL Electric Utilities Corporation for Approval of a Competitive Bridge Plan*, Docket No. P-00062227, Recommended Decision dated February 7, 2001, at 50 quoting PPL Statement No. 3 (J. M. Kleha) ("It is important to note that, because of the proposed structure of the Company's POLR supply procurement, PPL Electric expects that the annual reconciliation will be relatively small.").

2. 2010 Undercollection Amount Not Approved By Commission

PPL Electric claims that the OSBA also has the burden of proving that PPL's reported GSC 2010 undercollection is incorrect, because the reported undercollection was approved by Recommended Decision and by Order of the Commission at Docket No. M-2010-2213731.⁸ However, neither the Recommended Decision nor the Commission Order cited by PPL actually approved the 2010 GSC undercollection amount.

In the Recommended Decision, ALJ Colwell simply deems the 2010 GSC reconciliation statement to be an "adequate filing...subject to further review and revision as may be found necessary by the Commission."⁹ The Recommended Decision states that "[a]cceptance of the Statement deemed to be adequate is based on the unaudited data reported by the utility and *does not constitute final approval of the accuracy of those figures or of the reasonableness of the underlying transaction.*"¹⁰ ALJ Colwell further finds that acceptance of the reconciliation "is expressly subject to such further review and revision as may be found necessary as a result of a subsequent Commission audit, or some other proceeding."¹¹

Similarly, the Commission's Order adopting the Recommended Decision does not approve the amount of the 2010 GSC undercollection. Specifically, the Order merely accepts the 2010 GSC reconciliation and finds that such acceptance is "expressly subject to such further review and revision as may be found necessary as a result of a subsequent

⁸ PPL Main Brief at 11.

⁹ *PPL Electric Utilities Corporation Generation Supply Charge Reconciliation for the Twelve Months ending November 30, 2010*, Docket No. M-2010-2213731, Recommended Decision dated February 8, 2011, at 2.

¹⁰ *Id.* at 3 (emphasis added).

¹¹ *Id.*

Commission audit, or some other proceeding.”¹² The Order further finds that acceptance of the reconciliation statement “*shall not constitute approval of either the accuracy of the reported figures or the reasonableness of the underlying transaction.*”¹³

Because PPL’s reported 2010 GSC undercollection has not been granted final approval by the Commission, PPL retains the burden of proof.

3. OSBA Complaint Is Against A Proposed Rate

PPL also argues that the OSBA’s complaint should not be characterized as one against an existing rate because rather than challenging PPL’s projection of default service costs for the applicable quarter, the OSBA is challenging the already approved 2010 GSC undercollection.¹⁴ As explained above, the reported 2010 GSC undercollection has not been approved by the Commission. Moreover, PPL wrongly assumes that the only appropriate challenge to a reconciliation calculation is projected default service costs. In this proceeding, the OSBA is challenging the accuracy of the value of one of the variables used in the calculation of the GSC-1, namely the E factor. How the E factor is set determines what the proposed GSC-1 rate will be. Therefore, the OSBA’s challenge to how PPL determined the E factor is a complaint against the resultant proposed rate.

¹² *PPL Electric Utilities Corporation Generation Supply Charge Reconciliation for the Twelve Months ending November 30, 2010*, Docket No. M-2010-2213731, Order entered April 14, 2011, at ¶2.

¹³ *Id.* at ¶3 (emphasis added).

¹⁴ PPL Main Brief at 11.

B. Accounting Method

1. Same Mismatch Exists Over Two-Year Time Period

In response to the OSBA's argument that PPL's reconciliation accounting method improperly matches 12 months of incurred costs with 11½ months of billed revenue, PPL states that over a two-year period, there is a "matching" of 24 months of actual incurred costs and 24 months of actual billed revenue.¹⁵ However, because of the billing lag between when PPL incurs costs and when it bills revenues, it is impossible to ever "match" incurred costs with billed revenues no matter how long of a time period is considered.

For example, at the end of 2010, OSBA and PPL agree that PPL has incurred costs for 12 months, but reports billed revenues for only about 11½ months. In January 2011, PPL Electric incurs costs for all January deliveries, and it reports one month of billed revenues, i.e., for half of December 2010 and half of January 2011. At the end of January, the Company has reported 13 months of incurred costs, and 12½ months of revenues. This situation continues through all of 2011, such that at the end of 2011, PPL Electric has incurred costs for 24 months, and reported billed revenues for 23½ months. The 12 months of costs were incurred from January through December 2011. But, the billed revenues are for costs incurred from the middle of December 2010 through the middle of December 2011. Therefore, there is no matching of costs and revenues for the same time period.

It is this half-month of unreported revenue that PPL Electric wishes to include in its E factor, even though PPL has earned that revenue under generally accepted

¹⁵ PPL Main Brief at 16-17.

accounting principles (“GAAP”). As Mr. Knecht indicates in unrebutted testimony, PPL Electric’s own audited financial statements require that PPL accrue unbilled revenue.¹⁶ Only in its reconciliation calculation does PPL Electric pretend that this revenue does not exist.

2. Compliance With Section 1307(e)

PPL states in its Main Brief that it is undisputed that its reconciliation methodology is consistent with the requirements Section 1307(e) of the Public Utility Code, 66 Pa C.S. §1307(e).¹⁷ It argues that the plain language of Section 1307(e) requires reconciliation based on “revenues received” which “obviously” does not include unbilled revenues.¹⁸ PPL also asserts that the accounting alternatives described by the OSBA are inconsistent with Section 1307(e).¹⁹

However, Section 1307(e) does not require PPL to only billed revenue in its reconciliation of the GSC and GSC-1. PPL relies on the language “revenues received” as support for its accounting method of including only billed revenues. But, billed revenue does not equate to revenue received. Revenue received is revenue which has actually been collected. The OSBA’s proposed use of earned revenue in reconciliation of the GSC and GSC-1 is certainly no more inconsistent with Section 1307(e)’s requirement of

¹⁶ OSBA Statement No. 1 at 9.

¹⁷ PPL Main Brief at 1.

¹⁸ PPL Main Brief at 7.

¹⁹ PPL Main Brief at 23-24. In his Direct Testimony, Mr. Knecht described two alternative accounting methods that would more properly match revenues and costs. One of the alternatives was to record costs related to unbilled revenues as a pre-paid asset, thereby excluding those costs from the reconciliation calculation. However, he noted that the preferred alternative would be to include unbilled revenue for the last month of the reconciliation period because that method is consistent with PPL’s own accounting practices. Mr. Knecht, who is not a lawyer, did not opine as to the consistency of these methods with Section 1307(e). OSBA Statement 1 at 9. The OSBA in its Main Brief made clear that the alternative accounting method it has proposed is to include unbilled revenue in the reconciliation of the GSC and GSC-1, rather than to exclude costs.

using “revenues received” than PPL’s use of billed revenue, and is arguably more consistent with that requirement. Neither billed nor earned revenue is literally “revenues received.” *Both are a relatively reliable estimation of that revenue which will ultimately be collected.* Earned revenue, consistent with GAAP, is the more reasonable interpretation of “revenues received” for use in a reconciliation calculation, because it properly matches costs and revenues and does not result in the phantom undercollection that results from PPL’s accounting method.

Moreover, Section 1307(e)(4) actually recognizes the Commission’s authority to direct PPL to change its reconciliation accounting method and include earned revenue in the reconciliation of the GSC and GSC-1. It states in pertinent part:

...nor shall anything in this section prevent the commission from amending at any time any method used by any utility in automatically adjusting its rates, so as to provide the commission more adequate supervision of the administration by a utility of such method and to decrease the likelihood of collection by a utility, in subsequent periods, of amounts greater or less than that to which it is entitled, or, in the event that such deficiency or surplus in collected amounts is found, more prompt readjustment thereof.²⁰

Thus, the OSBA’s alternative accounting method is both consistent with Section 1307(e) and such a change is provided for by the statute.

3. Commission Practice and Precedent

PPL asserts that it is undisputed that PPL’s reconciliation accounting method is consistent with over thirty years of Commission practice and procedure and therefore should be continued.²¹ The OSBA disagrees. With the passing of the Electric Choice Act and the expiration of PPL’s rate caps, the playing field has changed. The regulation

²⁰ 66 Pa. C.S. §1307(e)(4).

²¹ PPL Main Brief at 16-17.

of the electric industry in Pennsylvania is vastly different than it was in the 1970s when Mr. Kleha apparently was involved in the development of reconcilable energy clauses.

As OSBA witness Mr. Knecht explained, past Commission practice is not necessarily appropriately applied to PPL's GSC and GSC-1 because it results in significant rate instability.²² Earlier reconciliation mechanisms involved costs that did not represent such a large percentage of the overall bill (over 75% of the average Rate GS-1 customer bill and over 82% of the average Rate GS-3 customer bill). Instability in the GSC thus creates instability in total electric bills and should be avoided. Moreover, 30 years ago, reconciliation mechanisms were not part of the Price To Compare ("PTC") as they are now with retail competition. Reasonable price signals were less of an important consideration, because regulated utilities did not face competition for generation service. Furthermore, in 2010, PPL had just transitioned from capped to market-based rates. This was not the case with earlier reconciliation mechanisms. Customers were already facing a substantial rate increase making rate stability even more important to reasonable rate design.

For all of these reasons, even if PPL's reconciliation accounting method is consistent with past Commission practice with respect to earlier reconciliation mechanisms, it is not appropriately applied in reconciling the GSC and GSC-1.

²² OSBA Statement No. 2 at 4-5; OSBA Main Brief at 19-20.

4. Other Utilities

PPL also claims that other utilities employ the same accounting method in Section 1307(e) reconciliations and therefore any change should be accomplished through a generic statewide proceeding.²³

[The OSBA's reply is omitted pursuant to the attached Order entered December 15, 2011.]

²³ PPL Main Brief at 30.

5. Cash Working Capital

PPL argues that its accounting method of reconciling incurred costs against billed revenues is reasonable because it provides PPL with a cash working capital allowance.²⁴ As the OSBA argued in its Main Brief, this is an after-the-fact justification that was not anticipated, or at least not disclosed and evaluated, in PPL’s Competitive Bridge Plan (“CBP”) or Default Service Plan (“DSP”).²⁵ PPL has never made any affirmative claim for cash working capital until this reconciliation proceeding nor established what the costs actually are. The appropriate time to do so was in the CBP and DSP proceedings. If PPL has now determined that it requires cash working capital, it can raise that issue in its next default service case. It is inappropriate and denies ratepayers due process to retroactively impose a claim for cash working capital pre-funded by a flawed accounting method that creates a phantom undercollection.

6. Price Distortion

Ironically, PPL argues against a change to its accounting method because it “could cause significant customer confusion and disrupt the competitive market.”²⁶ PPL asserts that if it were required to include unbilled revenue in the GSC-1 calculation, a “phantom” overcollection would be created and then refunded to customers through a reduction in rates. PPL argues this would create a false price signal and cause customers to return to default service, contrary to the Commission’s efforts to promote retail competition.

²⁴ PPL Main Brief at 18.

²⁵ OSBA Main Brief at 23-24.

²⁶ PPL Main Brief at 31.

However, there has already been enormous price distortion and disruption to the competitive market. The June GSC-1 was incredibly distorted and likely caused many remaining default service customers to shop for electricity. Apparently PPL believes that a price distortion that would cause customers to leave default service is acceptable, but one that would cause them to return is not.

Moreover, there is no reason why refunding PPL's overcharges would necessarily cause market distortion. If PPL simply credited those customers who were unfairly overcharged as a result of its flawed reconciliation accounting, the PTC and the competitive playing field would be unaffected.

7. Auditors

PPL explains in its Main Brief that its accounting method of reconciling billed revenues with incurred costs is consistent with how Commission staff audits the Company's GSC and GSC-1.²⁷ Therefore, including unbilled revenue, as the OSBA has proposed, would make it more difficult for the auditors to "meaningfully" audit the GSC and GSC-1. However, a more meaningful audit would properly match earned revenue and costs.

Moreover, PPL's method already requires the Commission's auditors to be able to segregate billed revenues into the months to which those revenues apply. As PPL explained, its reconciliation mechanism segregated January 2010 billed revenues into those revenues related to December 2009 and those revenues related to January 2010. This "prorating" must necessarily be audited by the Commission. If the Commission can audit the January 2010 billed revenues for service in December 2009 that PPL Electric

²⁷ PPL Main Brief at 20.

moves out of the reconciliation calculation for 2010, it can also audit the January 2011 billed revenues that are related to service in December 2010.

8. Forecasting Test Year Revenues In Base Rate Proceedings

Apparently as support for its exclusion of unbilled revenues in its GSC reconciliation calculation, PPL points to the fact that the Commission has held that unbilled revenues are not considered when forecasting test year revenues in a base rate proceeding.²⁸ However, this is not a base rate proceeding and PPL is not forecasting test year revenues.

In a base rate proceeding, it is highly unlikely that the Commission would allow PPL to make a test year claim based on 12 months of incurred costs and 11½ months of billed revenues at current rates, and then collect the “revenue shortfall” as part of the allowed rate increase. And yet that is exactly what PPL proposes for default service reconciliation.

²⁸ PPL Main Brief at 25.

C. Substantial Portion of Reported GSC Undercollection Was Not Caused By PPL's Accounting Method

Throughout this proceeding, PPL has consistently claimed that the 2010 reported GSC undercollection was primarily the result of pro-rating approximately half of January 2010 revenues to December 2009 for service rendered in December 2009. The OSBA acknowledges that PPL was required to pro-rate January 2010 revenues because it could not charge new rates for service rendered in 2009 prior to the expiration of rate caps. But, this fact does not explain the year-end 2010 reported undercollection.

As shopping increased through 2010, the shortfall due to the mismatch between billed revenue and incurred costs should have declined.²⁹ This is demonstrated in the example in Mr. Knecht's direct testimony, and it was unrebutted by any PPL witness.³⁰ Mr. Knecht's example shows how the "undercollection" in January is not because some January billed revenues were prorated to December 2009; it's because the billed revenues from February that were for January service were not pro-rated back to January. By the end of February, the January "undercollection" is gone and it becomes a February "undercollection." The February "undercollection" is because the billed revenues from March that were for February service are not pro-rated back to February, and so on and so on. Fast forward to the end of December 2010, when the December "undercollection" is because revenues billed in January 2011 that were for service in December 2010 are not pro-rated back to December 2010. Thus, the year-end 2010 undercollection related to PPL's accounting method should only be December unbilled revenues. This amount was

²⁹ OSBA Main Brief at 22.

³⁰ OSBA Statement No. 1 at 13 (Table 1A).

approximately \$14 million, not the \$29 million PPL reported in its 2010 GSC reconciliation.

The table on page 15 of PPL's Main Brief is therefore misleading. It does not prove that the entire 2010 reported undercollection was due to pro-rating January revenue to December 2009. Comparing the table in PPL's Main Brief to the table below, which contains the same information for Residential customers, illustrates that the accounting method is not the entire explanation.

PPL Electric Utilities Corporation			
2010 Residential GSC Over/(Under) Collection Summary			
	Billed Revenues Excluding GRT and MFC (line 5)	Total Expenses (line 7)	Net Over/(Under) Collection (line 8)
January	\$ 66,734,942	\$143,786,758	(\$77,051,816)
February	\$126,492,141	\$106,449,459	\$20,042,682
March	\$ 99,842,073	\$ 75,055,210	\$24,786,863
April	\$ 66,023,691	\$ 62,882,590	\$ 3,141,101
May	\$ 55,729,434	\$ 60,724,645	(\$ 4,995,211)
June	\$ 64,689,513	\$ 68,457,821	(\$ 3,768,308)
July	\$ 76,882,114	\$ 81,627,647	(\$ 4,745,533)
August	\$ 75,745,377	\$ 73,769,300	\$ 1,976,077
September	\$ 63,692,768	\$ 61,638,096	\$ 2,054,672
October	\$ 50,830,774	\$ 54,043,048	(\$ 3,212,274)
November	\$ 54,791,656	\$ 64,544,128	(\$ 9,752,472)
December (est.)	\$ 84,466,162	\$ 80,454,929	\$ 4,011,233
TOTAL	\$885,920,645	\$933,433,631	(\$47,512,986)
Source: Docket No. M-2011-2213731, "Final 2010 Generation Supply Charge Reconciliation Report," December 14, 2011, Schedule 2, page 1 of 5, as included in Exhibit JMK-1.			

The reported undercollection for Residential customers was \$77.1 million in January 2010 and fell to \$47.5 million in December 2010. If we were to apply PPL's argument that the year-end undercollection is primarily the result of the January pro-ration, then Residential customers should have had a much larger 2010 undercollection.

Moreover, since significantly more SC&I than Residential customers began shopping in 2010, the SC&I undercollection should logically have declined by more than the Residential decline. However, the decline in the SC&I reported undercollection was much less. PPL has not adequately explained why the Residential undercollection does not show the same pattern as the SC&I undercollection.

Mr. Knecht's explanation is that throughout 2010, the SC&I undercollection resulting from PPL's accounting mismatch got smaller, but the undercollection related to revenue under-reporting got larger. However, PPL barely addresses in its Main Brief the issues the OSBA has raised regarding apparent under-reporting of revenues. It instead claims these issues were addressed in PPL witness Mr. Woodruff's testimony. As explained in the OSBA's Main Brief, Mr. Woodruff's testimony regarding estimating costs and revenues is not an adequate explanation.³¹

PPL further relies on the audit being conducted by the Commission to uncover any under-reporting of revenues. Because PPL is apparently willing to allow the Commission's Bureau of Audits to uncover any under-reporting of revenues, the Company should have no reluctance for the auditors to be made aware of the issues the OSBA has raised in this proceeding and to be directed to investigate them.

³¹ OSBA Main Brief at 27.

D. Rate Stability

PPL argues that the OSBA has overstated the goal of rate stability and regardless, that its accounting method is not the cause of its undisputed rate instability. Rather, PPL claims the primary cause of its rate instability and the substantial increase in the June GSC-1 is quarterly reconciliation.³² PPL argues that if rate stability were a concern to the Commission, its regulations would not provide for quarterly adjustment of default service rates.³³

However, quarterly reconciliation is not the underlying problem, and thus annual reconciliation is not the best solution. While quarterly reconciliation may have required PPL to recover the 2010 reported GSC undercollection over a shorter period of time through larger increases to rates, PPL's accounting method and apparent under-reporting of revenues created the reported undercollection in the first place. Even if recovery of the 2010 reported GSC undercollection had been spread out over 2011, it still would have added over 2 cents to the total rate and would have accounted for approximately 20% of that rate.³⁴ This is a substantial variation from the actual cost of generation supply in 2011, particularly in light of the fact that PPL itself did not anticipate *any* material E factor charges or credits in its default service plans.

Quarterly reconciliation would not have caused such a sharp increase in the June GSC-1 if the 2010 reported GSC undercollection had not been so large. PPL has proposed annual reconciliation and a reconciliation rider to reduce the impact on

³² PPL Main Brief at 21.

³³ PPL Main Brief at 28.

³⁴ PPL Main Brief at 22.

customers of a problem it caused as a result of its accounting method and apparent under-reporting of revenues. If the magnitude of the 2010 reported undercollection had not been so large, there would be no need to soften the blow to ratepayers through alternative mechanisms like a reconciliation rider or annual reconciliation.

III. CONCLUSION

For the reasons outlined above and for the reasons set forth in its Main Brief, the OSBA respectfully requests that the ALJ and the Commission:

- (1) find that PPL's accounting method resulted in June GSC-1 rates that were not just and reasonable;
- (2) direct the Bureau of Audits to conduct a detailed audit of the Company's default service revenues and costs for 2010, including the possible under-reporting of revenues; and
- (3) direct PPL to make refunds as appropriate to default service customers.

Respectfully submitted,


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APPENDIX A

I. PROPOSED FINDINGS OF FACT

PPL Electric Utilities Corporation (“PPL” or the “Company”) provided Proposed Findings of Fact in Appendix A to its Main Brief filed on October 26, 2011. The OSBA has no objection to Nos. 1-10, 15-17, 21, 32, 35-36, and 41-42, and would also propose those findings of fact. The OSBA objects to Nos. 11-14, 18-20, 22-31, 33-34, and 37-40, and therefore does not propose these findings. The OSBA proposes the following additional findings of fact:

1. Under the Competitive Bridge Plan (“CBP”), PPL procured generation supplies through a portfolio of full requirements contracts under which energy was supplied by wholesalers at fixed per-kWh prices.³⁵ Accordingly, generation supply charges as incurred by PPL do not fluctuate based upon changes in market prices.

2. Under the CBP, PPL recovers its costs through a flat per-kWh generation supply charge (“GSC”).³⁶

3. The Company anticipated that the effect of reconciliation would be minor because the cost of the electricity would be known in advance and the wholesale suppliers (rather than PPL) would bear the risk of changes in load caused by shopping, weather, the economy, and other similar factors.³⁷

4. On December 11, 2009, PPL submitted its “Final Calculation of 2010 Generation Supply Charge” to the Commission at Docket No. M-2009-2145482 to

³⁵ OSBA Statement No. 1 at 3.

³⁶ OSBA Statement No. 1 at 5.

³⁷ OSBA Statement No. 1 at 4, fn. 4, quoting PPL witness Joseph M. Kleha’s testimony.

establish first quarter 2010 GSC rates. The rate for Small Commercial and Industrial (“SC&I”) customers was 10.125 cents per kWh.³⁸

5. On March 1, 2010, PPL submitted its “Proposed Generation Supply Charge for the Application Period April 1, 2010 through June 30, 2010” to the Commission at Docket No. M-2009-2145482, which reported a GSC under-collection for the first quarter of 2010 of \$125.5 million. In this filing, PPL proposed a GSC for SC&I customers of 10.534 cents per kWh.

6. On March 8, 2010, PPL submitted a letter to the Commission regarding the proposed GSC for the second quarter of 2010.³⁹

7. In its March 8, 2010 letter, PPL concluded that the significant undercollection “is not representative of a true over/undercollection.”⁴⁰

8. The March 8, 2010 letter stated that the January 2010 undercollection was expected to be balanced out as a result of a similar proration adjustment in January 2011.⁴¹

9. A similar proration adjustment was not made in January 2011.⁴²

10. PPL further admitted in the March 8, 2010 letter that it was experiencing billing problems for a variety of reasons.⁴³

³⁸ OSBA Statement No. 1 at 4-5.

³⁹ Exhibit IEC-2, attached to OSBA Statement No. 1.

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 1-2.

⁴² OSBA Statement No. 1 at 10.

⁴³ *Id.* at 2.

11. Because of the proration undercollection and the other billing problems, PPL requested in the March 8, 2010 letter to withdraw the proposed changes to the GSC rates for the second quarter of 2010 and continue the first quarter GSC until July 1, 2010.⁴⁴

12. When PPL made its subsequent GSC filings for the third and fourth quarters of 2010, PPL again requested Commission approval to defer reconciliation and recovery of reported undercollections and to continue the first quarter GSC rates, including the SC&I GSC rate of 10.125 cents per kWh.⁴⁵

13. The Commission approved each of these requests, resulting in no reconciliation charges to ratepayers and no changes to the GSC rates in 2010.⁴⁶

14. On December 14, 2010, PPL submitted a calculation of the proposed GSC-1 for January through May of 2011 at Docket No. M-2010-2213310.⁴⁷

15. For the SC&I class, the GSC-1 was set at 9.276 cents per kWh (including GRT).⁴⁸ This rate was intended to recoup PPL's estimated electricity purchase costs (8.293 cents per kWh) as well as a reported year-end 2010 undercollection of \$22.35 million by the end of May 2011 (0.983 cents per kWh).⁴⁹

⁴⁴ *Id.*

⁴⁵ OSBA Statement No. 1 at 5-6.

⁴⁶ *Id.*

⁴⁷ *Id.* at 6.

⁴⁸ *Id.*

⁴⁹ *Id.*

16. The reported year-end undercollection included the effects of the difference between billed revenues and incurred costs, as estimated at December 31, 2010.⁵⁰

17. In a Recommended Decision issued on February 28, 2011, ALJ Colwell deemed the year-end 2010 GSC reconciliation statement to be an “adequate filing...subject to further review and revision as may be found necessary by the Commission.”⁵¹

18. The Recommended Decision stated that “[a]cceptance of the Statement deemed to be adequate is based on the unaudited data reported by the utility and *does not constitute final approval of the accuracy of those figures or of the reasonableness of the underlying transaction.*”⁵²

19. The Recommended Decision further found that acceptance of the reconciliation “is expressly subject to such further review and revision as may be found necessary as a result of a subsequent Commission audit, or some other proceeding.”⁵³

20. The Commission’s Order entered on April 14, 2011 adopting the Recommended Decision accepted the 2010 GSC reconciliation and found that such

⁵⁰ *Id.*

⁵¹ *PPL Electric Utilities Corporation Generation Supply Charge Reconciliation for the Twelve Months ending November 30, 2010*, Docket No. M-2010-2213731, Recommended Decision dated February 8, 2011, at 2.

⁵² *Id.* at 3 (emphasis added).

⁵³ *Id.*

acceptance is “expressly subject to such further review and revision as may be found necessary as a result of a subsequent Commission audit, or some other proceeding.”⁵⁴

21. The Order further found that acceptance of the reconciliation statement “*shall not constitute approval* of either the accuracy of the reported figures or the reasonableness of the underlying transaction.”⁵⁵

22. On May 20, 2011, PPL filed its calculation of the proposed GSC-1 rates for the period of June 1, 2011, through August 31, 2011, at Docket No. M-2011-2243137.⁵⁶

23. The rate proposed for SC&I customers in the May 20, 2011, filing (“June GSC-1”) is the rate at issue in the instant proceeding.

24. The June GSC-1 was designed to recoup an \$18.6 million reported undercollection from SC&I customers over three months by increasing the GSC-1 from 9.276 cents per kWh to 12.171 cents per kWh (including Gross Receipts Tax or “GRT”).

25. The reconciliation portion of the GSC-1 calculation included recovery of a \$4.28 million reported undercollection from the January to May 2011 period and \$14.27 million remaining from the reported year-end 2010 undercollection, which PPL had not recovered in the first five months of 2011 as anticipated.⁵⁷

⁵⁴ PPL Electric Utilities Corporation Generation Supply Charge Reconciliation for the Twelve Months ending November 30, 2010, Docket No. M-2010-2213731, Order entered April 14, 2011, at ¶2.

⁵⁵ *Id.* at ¶3 (emphasis added).

⁵⁶ OSBA Statement No. 1 at 7.

⁵⁷ *Id.*

26. Of the 12.171 cents per kWh SC&I GSC-1, 4.15 cents per kWh was related to PPL's reported undercollection of costs in previous periods.⁵⁸

27. PPL imposed this more than 31 percent rate increase on SC&I default service customers with little warning and just in time to apply to the 2011 peak air conditioning demand season.⁵⁹

28. On May 26, 2011, PPL filed Supplement No. 106 to its tariff, which reflected the proposed June GSC-1, as well as changes to the Act 129 Compliance Rider ("ACR") and to the Transmission Service Charge ("TSC").

29. Supplement 106 is purported to have been "filed in compliance with the Commission's Secretarial Letters, entered on May 19, 2011, at Docket Nos. M-2011-2240233 and M-2011-2239841, its Order, entered on May 25, 2011, at Docket No. M-2011-2239805, as well as Docket No. M-2011-2243137."⁶⁰

30. None of the Secretarial Letters or the Order cited by PPL mentions or approves implementation of the proposed June GSC-1.

31. It is a fundamental principle of accounting to match revenues and costs.⁶¹

32. PPL's reconciliation accounting method by which it compares incurred costs and billed revenues is inconsistent with PPL's own audited financial statements, which require that PPL accrue unbilled revenue.⁶²

⁵⁸ *Id.*

⁵⁹ *Id.* at 2.

⁶⁰ Supplement No. 106 to Tariff – Electric Pa. P.U.C. No. 201 at Notice Page 1, filed May 26, 2011, at Docket Nos. M-2011-2240233 (GSC-2 docket), M-2011-223984 (ACR docket), and M-2011-2239805 (TSC docket). Supplement No. 106 is not filed at Docket No. M-2011-2243137 (June GSC-1 docket).

⁶¹ *Id.* at 8.

⁶² OSBA Statement No. 1 at 9.

33. PPL's reconciliation accounting method created a reported 2010 undercollection that was not a true undercollection, because it recognized all costs incurred in 2010 but failed to recognize revenues earned in 2010 but not billed until January 2011.⁶³

34. But for reconciliation charges, the SC&I GSC-1 would have decreased on January 1, 2011, and again on June 1, 2011, because procurement costs were declining.⁶⁴

35. Matching 12 months of incurred costs with the same 12 months of earned revenue would have resulted in a significantly lower reported undercollection to be recouped from SC&I ratepayers through the June GSC-1.

36. PPL did not make a claim for cash working capital in either the CBP proceeding or the proceeding to approve its current default service plan.⁶⁵

37. Using PPL's accounting method to provide a working capital allowance improperly requires default service ratepayers to pre-fund the working capital rate base rather than providing a return on the rate base.⁶⁶

38. PPL's reconciliation accounting method already requires the Commission's auditors to be able to segregate billed revenues into the months to which those revenues apply, *e.g.*, segregate January 2010 billed revenues into those revenues related to December 2009 and those revenues related to January 2010.

39. Only \$14.8 million of PPL's total \$29.2 million reported year-end 2010 reported SC&I undercollection is the result of the Company's accounting method.

⁶³ OSBA Statement No. 1 at 10-11.

⁶⁴ OSBA Statement No. 1 at 6-7.

⁶⁵ OSBA Statement No. 2 at 8-9.

⁶⁶ OSBA Statement No. 2 at 9, fn 7.

40. The remaining \$14.4 million of the SC&I 2010 undercollection resulted from causes other than the accounting method.⁶⁷

41. PPL's reconciliation accounting method does not explain the total year-end 2010 reported undercollection because as shopping increased through 2010, the shortfall due to the mismatch between billed revenue and incurred costs should have declined.⁶⁸

42. The GSC rate was the same each month in 2010, but PPL's reported per-kWh billed revenues varied materially from month to month.⁶⁹

43. The 2010 GSC rate each month was 10.125 cents per kWh, but the average revenue reported by PPL for 2010 was only 9.707 cents per kWh.⁷⁰

44. There is a 0.418 cent per kWh variance between the tariff rate charged and the average revenue reported.⁷¹

45. PPL has presented no evidence that the Bureau of Audits is aware of or investigating the issues raised by the OSBA in this proceeding.⁷²

⁶⁷ OSBA Statement No. 1 at 17.

⁶⁸ OSBA Statement No. 1 at 13 (Table 1A).

⁶⁹ OSBA Statement No. 1 at 21, Table IEc-2.

⁷⁰ OSBA Statement No. 1 at 21.

⁷¹ *Id.* at 22.

⁷² OSBA Exhibit A; Hearing Transcript at 49-50.

II. PROPOSED CONCLUSIONS OF LAW

PPL provided Proposed Conclusions of Law in Appendix A to its Main Brief filed on October 26, 2011. The OSBA has no objection to Nos. 1-2, 4, and 7-9, and would also propose those conclusions of law. The OSBA disagrees with Nos. 3, 5-6, and 10-11, and therefore does not propose these conclusions of law. The OSBA proposes the following additional conclusions of law:

1. Every rate made, demanded, or received by any public utility shall be just and reasonable.⁷³ As the public utility proposing the June GSC-1, PPL bears the burden of proving that such rate is just and reasonable.⁷⁴

2. A utility company has the burden of proof to show the reasonableness of a *proposed* rate, whereas a complainant bears the burden if the rate is an *existing* one.⁷⁵

3. The June GSC-1 is not an existing rate that would shift the burden of proof to the OSBA, because it was not in effect at the time the OSBA filed its Complaint.⁷⁶

4. The June GSC-1 is a proposed rate because it has not been adjudicated and approved by the Commission.

⁷³ 66 Pa. C.S. § 1301.

⁷⁴ 66 Pa. C.S. § 315(a).

⁷⁵ *Brockway Glass Co. v. Pennsylvania Public Utility Commission*, 437 A.2d 1067, 1070 (Pa. Cmwlth. 1981); *see also Cup v. Pennsylvania Public Utility Commission*, 556 A.2d 470, 472 (Pa. Cmwlth. 1989); *Zucker v. Pennsylvania Public Utility Commission*, 401 A.2d 1377, 1379-1380 (Pa. Cmwlth. 1979).

⁷⁶ *See, e.g., Suburban Water Co. v. Oakmont Borough*, 110 A. 778, 779 (Pa. 1920) (“On such hearing, where the proceedings have been instituted before the rate has become effective, the public service company must show the rates are reasonable”); *St. Clair Coal Co. v. Public Service Commission*, 79 Pa. Super. 528, 532 (Pa. Super. 1922) (“The complaint having been filed before the rates had become effective, the burden of proof was on the Power Company to sustain them.”); *Scranton-Spring Brook Water Service Co. v. Public Service Commission*, 160 A. 230, 232 (Pa. Super. 1932) (“As complaints were filed before the effective date of the tariff, the burden of proof of the reasonableness of the rates was on the water company.”).

5. The accuracy of the amount of the 2010 GSC undercollection has not been approved by the Commission nor has the reasonableness of the underlying transaction.

6. PPL has not presented sufficient justification for its reconciliation accounting practice of excluding earned but unbilled revenues in its reconciliation calculation.

7. Section 1307(e) provides for reconciliation of total revenues received with total expenses incurred.⁷⁷ Total revenues received do not equate to billed revenues. Earned revenue, consistent with GAAP, is the more reasonable interpretation of “revenues received” for use in a reconciliation calculation, because it properly matches costs and revenues.

8. PPL’s reconciliation accounting method is not required by its tariff or the Orders approving the tariff reconciliation provisions.

9. The GSC and GSC-1 are distinguishable from past Section 1307(e) recovery mechanisms such that historic Commission practice is not appropriately applied to them.

10. PPL reconciliation accounting method is not the appropriate mechanism to recover working capital costs.

11. To recover working capital costs, a public utility must make an affirmative claim in its default service plan and establish what those costs actually are.

12. PPL has not presented an adequate explanation for the reported 2010 SC&I GSC undercollection that cannot be explained by its accounting method.

⁷⁷ 66 Pa. C.S. §1307(e)(1).

III. PROPOSED ORDERING PARAGRAPHS

The OSBA proposes the following ordering paragraphs:

1. The OSBA's request to include unbilled revenues in reconciliation of the GSC and GSC-1 is granted.
2. The OSBA's request to require PPL to refund E-factor collections, revenue under-reporting and any excess costs is granted.
3. The OSBA's request to direct the Bureau of Audits to investigate, during its current audit of PPL, the issues raised by the OSBA in this proceeding, including the possible under-reporting of revenues, is granted.

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William R. Lloyd, Jr.,
Small Business Advocate

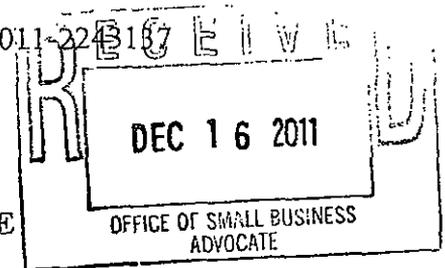
v.

PPL Electric Utilities Corporation

PPL Electric Utilities Corporation
Proposed Generation Supply Charge-1
For the period June 1, 2011
Through August 31, 2011

C-2011-2245906

M-2011-2245906



ORDER GRANTING MOTION TO STRIKE

The purpose of this Order is to: (1) grant the PPL Electric Motion to Strike Certain Portions of the Reply Brief of the Office of Small Business Advocate, and (2) grant the OSBA Motion to Reopen the Record for admittance of unopposed exhibits.

HISTORY OF THE PROCEEDING

This subject of this case is a Complaint filed by the Office of Small Business Advocate (OSBA) against a Section 1307(e) reconciliation filed by PPL Electric Utilities Corporation (PPL Electric or Company) for its Generation Supply Charge – 1 for the period June 1, 2011 through August 31, 2011. The generation supply charge was instituted in accordance with the Company's Competitive Bridge Plan (CBP) which was the plan to provide default service for calendar year 2010. The GSC would be the mechanism for recovery and quarterly reconciliation of default service generation supply costs.

The Company's default service plan (DSP) provided for default service from January 1, 2011 through May 31, 2013, and also included the GSC-1 for residential and small commercial and industrial customers, and GSC-2 for large commercial and industrial customers.

On December 11, 2009, at Docket No. M-2009-2145482, the Company submitted a final calculation of the proposed GSC for the first quarter of 2010. On March 1, 2010, the Company submitted its proposed GSC for the second quarter of 2010, which included a reconciliation of actual and estimated costs for January 2010.

On March 8, 2010, PPL Electric submitted a letter to the Commission stating that the significant undercollection was not typical and asking the withdraw the proposed change to the GSC for the second quarter of 2010 and continue the first quarter's until July 1, 2010. The Company sought permission to defer reconciliation until January 2011.

The third and fourth quarter reconciliations were also subject to requests for deferral. Each request was approved by the Commission.

On December 14, 2010, the Company submitted a calculation of the proposed GSC-1 for January through May of 2011 at Docket No. M-2010-2213310. The reported year end undercollection included the effects of the difference between billed revenues and incurred costs, as estimated at December 31, 2010.

On May 20, 2011, PPL Electric Utilities Corporation (PPL Electric or Company) filed its Generation Supply Charge-1 (GSC-1) for the period June 1, 2011 through August 31, 2011 with the Commission.

On May 26, 2011, PPL Electric filed Supplement No. 106 to its tariff which reflects the proposed June GSC-1, as well as changes to the Act 129 Compliance Rider (ACR) and the Transmission Service Charge (TSC).

On May 31, 2011, the OSBA filed a Complaint against the May 20 GSC-1 filing, alleging that the rate for small commercial and industrial (C&I) customers may be unjust, unreasonable, unduly discriminatory or otherwise contrary to law, and that the Company had not adequately justified its undercollection from prior periods.

On June 29, 2011, PPL filed its Answer.

On June 29, 2011, a notice of prehearing conference was issued which set the prehearing conference for July 13, 2011, and assigned the case to me.

On July 11, 2011, the Commission's Office of Trial Staff filed its Notice of Appearance. The name of this Commission office was renamed pursuant to an internal reorganization and is known as the Bureau of Investigation & Enforcement (I&E). *Implementation of Act 129 of 2008 Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011). On July 12, 2011, the Office of Consumer Advocate (OCA) filed its Notice of Intervention and Public Statement.

Prehearing memos were filed by the Company, OSBA and I&E, and the prehearing conference was held as scheduled. The parties agreed upon a litigation schedule and modified discovery terms, which were adopted in a scheduling order issued on July 13, 2011.

Following the submission of direct testimony on July 29, 2011, rebuttal on August 15, 2011, and surrebuttal on August 25, 2011, the evidentiary hearing was continued from its original date of August 29, 2011. The evidentiary hearing was held on October 5, 2011. The following testimony was admitted into the record:

OSA Statements 1 and 2, direct and surrebuttal testimony of Robert D. Knecht
PPL Statements 1, 1-R and 1-RJ, direct, rebuttal and rejoinder testimony of Joseph M. Kleha
PPL Statement 2-RJ, rejoinder testimony of David R. Woodruff

A transcript from pages 14 to 68 was generated. OSBA and PPL Electric filed main and reply briefs. The record closed upon receipt of the reply briefs on November 9, 2011.

On November 18, 2011, the Company filed a Motion to Strike Certain Portions of the Reply Brief of the Office of Small Business Advocate or, in the Alternative, Petition to Reopen the Record. By e-mail, the parties were given until Wednesday, November 30, 2011, to file a response.

On November 23, 2011, OSBA filed a Motion to Reopen the Record and for Admission of Late-Filed Exhibits. On November 30, 2011, OSBA filed its Response to PPL Electric's Motion to Strike, which included a petition to open the record for the admission of its proposed Exhibit H. On December 1, 2011, PPL filed its Answer to the November 23rd Motion.

Following an email inquiry, both PPL Electric and OSBA indicated that they would not be filing additional pleadings. These matters are ripe for disposition.

DISCUSSION

PPL Electric objects to a discussion in the OSBA Reply Brief which references testimony that OSBA had presented in another Commission case. According to the OSBA Reply to the Motion, the impetus for the discussion that PPL Electric objects to was in the PPL Electric Main Brief (MB):

OSBA is requesting a significant policy change with regard to how costs and revenues are calculated in the reconciliation of a Section 1307(e) cost recovery mechanism. This obviously will affect a large number of utilities in the Commonwealth and also will likely affect how the Bureau of Audits reviews Section 1307(e) cost recovery mechanisms. Due to the potential broad impact, PPL Electric does not believe that any changes should be made on a single utility basis, but should only be made in a generic proceeding where all utilities have the opportunity to comment. PPL Electric MB at 30.

OSBA characterizes this statement as "an issue raised for the first time in its Main Brief after the record was closed, namely the potential effect of the outcome of this proceeding on other Pennsylvania utility companies." OSBA Answer at 2, ¶9.

This is not an "issue." This is one party's opinion that there exists a "potential broad impact" which, it opines, should be made in a generic proceeding. This is no different than if the Company had opined that it should be the subject of a rulemaking instead of done on a case-by-case basis. There are general rules which exist to support a rulemaking, which are legal

argument, not "new issues." The Company could have developed this further, and it would still be legal argument.

Purportedly in response, OSBA includes this in its Reply Brief:

4. Other Utilities

PPL also claims that other utilities employ the same accounting method is Section 1307(e) reconciliations and therefore any change should be accomplished through a generic statewide proceeding.

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 ("ECA") rate to reconcile the difference between default service costs and revenues, similar to PPL's GSC and GSC-1. 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. 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." 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. OSBA Reply Brief at 11 (footnotes omitted).

PPL Electric protests the inclusion of this for the following reasons:

(1) The testimony and interrogatory response are outside the evidentiary record; (2) PPL Electric was not a party to the West Penn DSP case; (3) using a brief for the introduction of evidence is a violation of due process.

Of course, the introduction of any evidence in a brief is absolutely forbidden and cannot be permitted. Its appearance in this case in a reply brief is surprising as the level of legal advocacy that the Commission is accustomed to seeing from the OSBA is substantially higher than this.

While a Commission *decision* is a matter of public record which may have persuasive or even precedential effect, the *evidence* taken in another case has no special qualities which would exempt it from the rules of evidence. The reasoning appearing in the PPL Electric Motion to Strike is sound and is adopted here.

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

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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.
PPL Electric Motion to Strike at 4-7.

I note that the PPL Electric hastily-added, last-paragraph alternative that an affidavit swearing to a conversation with a representative from the First Energy companies be permitted into the record as a response, is no more legally defensible than the OSBA reference to evidence in another proceeding. The affidavit is accurately characterized by OSBA as "hearsay within hearsay," OSBA Response at ¶10, and as such, is not permitted.

OSBA filed a legitimate Motion to Reopen the Record and for Admission of Late-Filed Exhibits which PPL Electric does not oppose, and OSBA Exhibits F and G will be admitted.

However, OSBA tacked a Petition to Reopen the Record onto its Response, seeking the admission of its Exhibit H, an excerpt of its testimony in the West Penn Default Service Case. OSBA characterizes this action as a solution to the controversy because it is "a narrowly-tailored response to an argument raised for the first time in PPL's Main Brief after the record was closed. Moreover, admission of the exhibit will render PPL's Motion moot." OSBA Response and Petition to Reopen at ¶21. As the exhibit is as inappropriate as the reference to it was in the Reply Brief, this Motion is denied.

The seminal statement at the root of this flurry of filings is a simple statement that this case will affect a large number of utilities and have a broad impact. This is a statement which falls squarely within the opinion and advocacy category that is expected in briefs. OSBA protests that, if portions of OSBA's Reply Brief are stricken, then due process requires that PPL's argument to which the OSBA was responding must also be stricken." OSBA Answer at 2, ¶9. This would only be true if the original statement were legally objectionable, which it is not.

THEREFORE,

IT IS ORDERED:

1. That the Motion of PPL Electric Utilities Corporation to Strike Certain Portions of the Reply Brief of the Office of Small Business Advocate is granted.
2. That the Office of Small Business Advocate shall file and serve an Amended Reply Brief which omits the stricken portion, consisting of the second full paragraph of page 11 of the Reply Brief, within ten days of the receipt of this Order, with a copy of this Order attached.
3. That the Petition to Reopen the Record, provided as an alternative to striking the offensive language of the Office of Small Business Advocate Reply Brief, filed by PPL Electric Utility Corporation for the purpose of admitting an affidavit, is denied.
4. That the Office of Small Business Advocate Motion to Reopen the Record and for Admission of Late-Filed Exhibits F & G is granted without opposition.
5. That the Office of Small Business Advocate Petition to Reopen the Record for the admission of its proposed Exhibit H is denied.

Dated: December 15, 2011


Susan D. Colwell
Administrative Law Judge

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C-2011-2245906 - WILLIAM R LLOYD JR, SMALL BUSINESS ADVOCATE v. PPL
ELECTRIC UTILITIES CORPORATION

M-2011-2243137 PPL ELECTRIC UTILITIES CORPORATION PROPOSED
GENERATION SUPPLY CHARGE – 1 FOR THE PERIOD JUNE 1, 2011 THROUGH
AUGUST 21, 2011

ELIZABETH ROSE TRISCARI
ESQUIRE
OFFICE OF SMALL BUSINESS
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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

William R. Lloyd, Jr., Small Business Advocate :
: **DOCKET NO. C-2011-2245906**
v. :
: **PPL Electric Utilities Corporation** :
:
PPL Electric Utilities Corporation :
Calculation of Generation Supply : **DOCKET NO. M-2011-2243137**
Charge-1 :

CERTIFICATE OF SERVICE

I certify that I am serving two copies of the Amended Reply Brief, on behalf of the Office of Small Business Advocate, by e-mail and first-class mail (unless otherwise noted) upon the persons addressed below:

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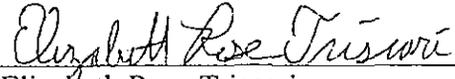
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