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

IN REPLY PLEASE
REFER TO OUR FILE

January 9, 2012

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

Re: Petition of PPL for Approval to Implement
Reconciliation Rider for Default Supply Service

Docket No. P-2011-2256365

Dear Secretary Chiavetta:

Enclosed please find an original and nine (9) copies of the Bureau of Investigation and Enforcement's (I&E) **Main Brief** in the above-captioned proceeding.

Copies are being served on all active parties of record. If you have any questions, please contact me at (717) 783-6184.

Sincerely,

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

Enclosure
RAK/edc

cc: Parties of Record
Hon. Susan D. Colwell

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PPL Electric Utilities	:	
Corporation for Approval to	:	**Docket No. P-2011-2256365**
Implement a Reconciliation Rider	:	
for Default Supply Service	:	

MAIN BRIEF OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT

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Dated: January 9, 2012

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I. INTRODUCTION

A. Procedural History

On August 3, 2011, PPL Electric Utilities Corporation ("PPL" or "Company") filed a petition with the Pennsylvania Public Utility Commission ("Commission") seeking approval to implement a cost recovery mechanism related to transmission service and generation supply service. Entitled *Petition for Approval to Implement a Reconciliation Rider and Competitive Transition Rider for Default Supply Service*, this petition sought to establish a Reconciliation Rider as its mechanism to refund over-collections or recover under-collections from customers who were default service customers at the time of the over or under-collection. On August 25, 2011, PPL filed its *Amended Petition for Approval to Implement a Reconciliation Rider and Competitive Transition Rider for Default Supply Service* ("Amended Petition"). The Amended Petition added a Competitive Transition Rider ("CTR") as a temporary non-bypassable surcharge that would serve as the mechanism to refund, or recover, over-collections or under-collections in existence on the effective date of the proposed Reconciliation Rider ("RR").

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") filed its Notice of Appearance indicating its participation in this proceeding on August 25, 2011. The Office of Small Business Advocate ("OSBA") filed a Notice of Intervention, Public Statement and Answer on August 18, 2011. On August 23, 2011, the Office of Consumer Advocate ("OCA")

submitted its Notice of Intervention and Public Statement. In addition, Dominion Retail ("Dominion"), the Retail Energy Suppliers Association ("RESA"), the PPL Industrial Customer Alliance ("PPLICA") filed Answers to the original or Amended Petition while Richards Energy Group ("Richards") and Wal-Mart Stores East, L.P. and Sam's East, Inc. (collectively "Wal-Mart") filed Petitions to Intervene.

The filing was assigned to the Office of Administrative Law Judge ("OALJ") for the purpose of conducting Evidentiary Hearings and the preparation and issuance of a Recommended Decision. On August 29, 2011, a Notice of Prehearing Conference was issued establishing the Prehearing Conference date. The OALJ subsequently assigned Administrative Law Judge ("ALJ") Susan D. Colwell as the presiding officer. ALJ Colwell issued a Prehearing Order to the parties on the current service list on August 29, 2011.

On October 3, 2011, PPL submitted the Direct Testimony of its expert witness. A Prehearing Conference was held on October 5, 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 dates for an Evidentiary Hearing. The Prehearing Conference also resulted in the modification of the Commission's Discovery Rules.

The Evidentiary Hearing in this proceeding was conducted on December 5, 2011 and included the presentation of evidence and cross-examination of witnesses. In anticipation of litigation, I&E had preliminarily identified and served the testimony of its expert witness. The I&E testimony submitted in this proceeding

includes Direct Testimony and Surrebuttal Testimony identified as I&E Statement No. 1 and I&E Statement No. 1-SR respectively. In addition, OCA, OSBA, Dominion, Richards, RESA, Wal-mart and the Company all offered testimony into the record. This proceeding also includes Cross-Examination exhibits that were offered and entered into the record at the December 6, 2011 Hearing.

B. Evidentiary Standard and Burden of Proof

The Company has the burden of proving the reasonableness of each and every element of its claim. Section 1301 of the Public Utility Code, states that "[e]very rate made, demanded, or received by any public utility...shall be just and reasonable, and in conformity with regulations or orders of the commission...."[1] The Public Utility Code ("Code") also provides that the burden of establishing the justness and reasonableness of rates is clearly on the public utility.[2] The purpose of this proceeding is to assure that just and reasonable rates remain for the customers of PPL based on the components of the proposed Reconciliation Rider. The standard to be met by the Company is set forth at Section 315(a) of the Public Utility Code, and is summarized as follows:

> [R]easonableness of rates. In any proceeding upon the motion of the Commission, involving any proposed or existing rate of any public utility, or in any proceeding upon complaint involving any proposed increase in rates, the burden of proof to show that the rate involved is just and reasonable shall be upon the public utility.[3]

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1 66 Pa. C.S.A. § 1301.
2 See, 66 Pa. C.S.A. § 315(a).
3 66 Pa. C.S. § 315(a).

The legislative intent regarding the extent of a utility's burden of proof is supported by the pronouncements of the Pennsylvania Supreme Court in *Burleson v. Pennsylvania Public Utility Commission*, which clearly defined the dimensions of the Company's obligation with respect to the burden of proof. As noted by the Supreme Court in *Burleson* "there is clear distinction between the weight of evidence required to support a prima facie case and the weight necessary to meet a complainant's burden of proof."[4] 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.[5]

Substantial evidence has been defined as "...that quantum of evidence which a reasonable mind might accept as adequate to support a conclusion."[6]

The Commission and the Courts have clearly held that the burden of proof does not shift to the party challenging a proposed action. On this subject, the Commission has ruled as follows:

> [t]here is no presumption of reasonableness which attached to a utility's claim, at least none which survives the raising of credible issues regarding a utility's claims. A utility's burden is to affirmatively establish the reasonableness of its claim. It is not the burden of another party to disprove the reasonableness of a utility's claims.[7]

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4 *Burleson v. Pennsylvania Public Utility Commission*, 501 Pa. 433, 461 A.2d 1234 (1983).

5 Id. at 437.

6 *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).

7 *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, 57 PA PUC 423, 444 (fn. 37) (1983).

In the instant proceeding, it is incumbent upon the Company to affirmatively prove the reasonableness of every element of its proposed RR and CTR proposals. A review of the record will demonstrate that PPL has failed to prove the reasonableness of its claim for the recovery of the shortfall resulting from its ill designed Time of Use ("TOU") program. Failing to sustain its burden of proof, this feature of the proposed recovery mechanism requesting recovery of the shortfall generated by the TOU program should be denied as it would result in rates that are neither just, nor reasonable. The I&E position presented in this proceeding should be recommended for approval by ALJ Susan D. Colwell and adopted by the Commission as it will cure the deficiency in the Company's proposal and allow for the rate being established in this Reconciliation Rider to satisfy the legal standard of being just and reasonable.

II. SUMMARY OF ARGUMENT

The Bureau of Investigation and Enforcement does not oppose the implementation of a Reconciliation Rider as a means of recovering proper transmission service and generation supply service charges. However, I&E maintains that the RR, as proposed, is flawed in that it proposes to recover improper costs. I&E does not consider the costs associated with the Company's Time of Use program to be Default Service costs in the classic sense and, therefore, should not be recovered in the RR. Furthermore, the proposed recovery of TOU costs in the CTR is improper as the proposed mechanism's design and function is solely for the recovery the historical under-collection of the flawed

execution of the TOU program. As the Company currently maintains recovery mechanisms for its transmission service and generation supply service "[i]t can be legitimately questioned whether the filing of this Petition is intended to recover costs associated with PPL's default service program or whether PPL's true intention is to recover losses related to its less than successful Time-of-Use program."[8] In the alternative, if the TOU program was considered to be a default service program, the under-collection forming the basis for the formation of the CTR is not based on reasonable costs. As only reasonable costs associated with Default Service programs are recoverable, this proposal must be denied.

In the event the Commission allows for the implementation of the proposed Reconciliation Rider, I&E offers no further opinion as to the recognition of over or under-collections in the Company's published Price to Compare. As the Company's proposed mechanism substantially shares the characteristics of "migration riders" that have been approved and implemented in other industries, I&E vacates its arguments as to the necessity of the inclusion of these costs in the Price to Compare in this proceeding. The Commission's Policy Statement on the cost elements to be included in the Price to Compare speaks for itself.[9]

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8 I&E Statement No. 1, p. 9.

9 *See*, 52 Pa. Code § 69.1808.

III. ARGUMENT

The Company has failed to satisfy its burden of proving that its proposed RR will only recover the reasonable costs associated with Default Service plan. PPL has not provided substantial evidence to describe how its TOU program satisfies the characteristics of default service. A cursory review of the credible record evidence will demonstrate that the TOU program requires active election by the participants whereas a default service program offered by PPL to customers that take no action is its fixed rate plan as represented in its Price to Compare. As presented by I&E witness Granger, "PPL's TOU program is not a default service option. TOU rates are specific rates in PPL's tariff that its default service customers have the option to choose if they believe TOU rates will benefit them."[10] Furthermore, the record indicates that "[t]he TOU program provides PPL customers an alternative choice within the Company's tariff that may be more appealing than obtaining default service or service from an EGS."[11] Further differentiation from the characteristics of a default service plan can be found in witness Granger's comments that "PPL's default service customers have the option of looking at the default service Price-to-Compare in order to decide whether or not PPL's TOU rates is a viable option for them."[12] The Company's TOU program is not a default service program as it requires positive action on behalf of the customer to participate. Absent this choice, customers revert to the

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10 I&E Statement No. 1-SR, p. 6.
11 Id.
12 Id.

Company's default service and are served under its fixed price as presented in the Price to Compare. This differentiation is supported in the record by the following excerpt from the transcript during the I&E cross-examination of PPL witness Joseph M. Kleha wherein the following responses were provided:

> Q. If a customer reverts to default service, you just mentioned that they must choose time of use if they care to be served under that program; is that correct?
>
> A. Well, it's an optional activity. You can either be a fixed price default service customer as residential or you could be a time of use default service customer as residential.
>
> Q. But I believe we've established that customers reverting to PPL for default service are served under the fixed rate option; is that correct?
>
> A. Most customers are, those who did not choose to be time of use customers.
>
> Q. So phrased another way, if I do nothing and I come back to PPL, I'm on the fixed rate?
>
> A. You will be asked whether you want to be on the fixed rate or the time of use rate.
>
> Q. Okay. Again, if I do nothing, what am I served under?
>
> A. Well, you would be served at default service if you didn't answer the question.
>
> Q. And that default service would be - -
>
> A. That would be fixed price.[13]

13 Transcript, p. 42.

The substantial evidence in the record supports the premise that the TOU program should not be recognized as a default service program and, therefore, any under or over-collections should not be included in the Company's proposed recovery mechanism. PPL's witness has clarified the difference between the default customers and customers that have chosen the TOU service. The Company merely offers that the TOU was included in its default service filing and therefore it should recover any, and all, costs falls short of the necessary evidentiary standard guiding its recognition. The evidence shows that default service customers made an active choice to be served under an alternative program. This choice differentiates the program from default service. As the full roll out of the TOU program was instituted, the flaws surfaced. The first significant customer choice of the TOU program resulted in a significant under-recovery that is the subject of recovery in the proposed CTR. Contrary to the Company's claim that because it offered a TOU program, it is entitled to recover its under collection of approximately $2 million on a full and current basis, I&E maintains that there must be substantial evidence to support this request. Only the reasonable costs associated with default service are eligible for recovery. As the Company has failed to meet the evidentiary standard in support of the characterization of the TOU program as default service, any revenue discrepancies are at the risk of the Company and/or customer. Choosing TOU rates is no different than choosing an alternative supplier. The customer makes the representation as to how they wish to receive service.

I&E maintains that the Company's TOU option is not default service. As a result, the costs associated with this program should not be included in any proposed Riders. As the CTR is solely for an historical under-collection, its implementation should be denied.

As the Reconciliation Rider is proposed as an alternative recovery mechanism for transmission service and default service generation supply costs, caution is urged to ensure that only the appropriate costs are included. In the instant proceeding, I&E opines that the mechanism requested for implementation allows for the recovery of costs that are not statutorily supported. The Public Utility Code allows for the recovery of all reasonable costs associated with default service.[14] The Company's proposed Riders attempt to recover under-collections without a showing of substantial evidence that these costs are reasonable. The repeated claims that the default service plan was previously approved do not demonstrate that all costs therein are reasonable, or that it is designed to recover all appropriate costs. In fact, the opposite is true. As recent experience has demonstrated, the Company's designed TOU plan failed to adequately recover the necessary costs from the program beneficiaries in a timely manner. I&E maintains that the resulting revenue shortfall is based on the flaws from PPL's design of the TOU program for the period January 1, 2011 to May 31, 2011 and should not be considered reasonable costs.

14 66 Pa. C.S.A. § 2807(e)(3).

The record evidence in this proceeding shows that "[t]he maximum number of time of use customers for calendar year 2010 was 426, and that number occurred in December, 2010."[15] However, as noted by Company witness Kleha, "approximately 23,000 customers took service under the program during the period January 1, 2011 through May 31, 2011."[16] During this time, the design of the Company's TOU program included a peak component and an off-peak pricing component where the "peak service was less than the company's fixed rate service under its price to compare."[17] Further exacerbating the problem is "the fact that only 3,900 customers presently take service under the TOU program."[18] I&E opines that the components of the TOU program that are under the control of the Company created the scenario wherein there are dramatic fluctuations in customer numbers. As presented by the Company's own witness, the peak pricing of the TOU program was lower than the fixed price reflected in the price to compare charged to default service customers. While this pricing scenario existed, approximately 55 times the number of customers in the 2010 program opted to receive service from a program where the peak prices, generally regarded as the highest prices, were lower than the fixed rate currently in effect. I&E believes that a company with the business acumen of PPL would contemplate an influx of customers under this offering and have sufficient measures to handle the

15 Transcript, p. 168.
16 PPL Statement No. 1-R, pp. 29-30, See also, Transcript, p. 43.
17 Transcript, p. 45 (I&E cross-examination of PPL witness Kleha).
18 PPL Statement No. 1-R, p. 30 (during cross-examination, PPL witness Kleha indicated that there are approximately 3,700 customer taking service under the TOU program. See, Transcript, p. 43).

additional participants. The record is void of evidence to demonstrate how PPL anticipated this response to the advantageous pricing of its January 1, 2011 through May 31, 2011 TOU program. To the extent the wide variation in customer numbers has contributed to the large under-collection associated with the TOU program during this time period, I&E maintains that this was a known risk that is clearly the Company's responsibility. I&E offers that the resulting costs should not be considered reasonable as they are the result of the flawed design of the program. As has been presented by the Bureau of Investigation and Enforcement, "Commission approval of a rate methodology does not equate to a guaranteed recovery or guaranteed revenue. Commission approval simply means that the Company will have the opportunity to generate revenue and recover costs using the approved methodology."[19] In addition, "[i]t is ...the burden of the Company to propose and manage its price structure, commodity costs and other inherent risks to produce a successful program and the desired recovery of revenue...."[20] As the results have demonstrated "PPL did not do [this] to the level they desired."[21] Implementation of a mechanism to recover costs lacking evidentiary support in order to be considered reasonable is not in the public interest and should be denied.

19 I&E Statement No. 1-SR, p. 7.
20 Id.
21 Id.

IV. CONCLUSION

For the reasons set forth above, the Bureau of Investigation and Enforcement respectfully submits that the Company has not provided the types of substantial evidence anticipated by the court to support all aspects of its proposal. Failing to satisfy its burden of proof, PPL's Reconciliation Rider and Competitive Transition Rider cannot be accepted without modification. There is not sufficient record evidence to classify the Time of Use program as a default service program. In addition, the under-collection recovery contemplated in the Competitive Transition Rider is premised on costs that have not been demonstrated to be reasonable. I&E is of the opinion that the Reconciliation Rider, as presented, has merit but should not include costs associated with the Time of Use program. In addition, the Competitive Transition Rider is unnecessary as its sole purpose is to recover, or refund, unjust and unreasonable historical Time of Use costs.

Respectfully submitted,

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Dated January 9, 2012

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PPL for Approval to Implement Reconciliation Rider for Default Supply Service	: : :	Docket No. P-2011-2256365

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** dated January 9, 2012, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of § 1.54 (relating to service by a party):

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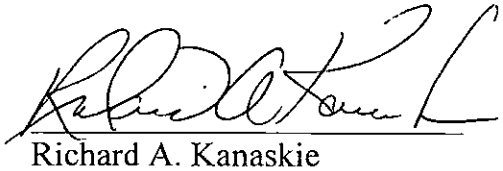

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