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February 16, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

VIA HAND DELIVERY

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

Dear Secretary Chiavetta:

Enclosed please find for filing with the Pennsylvania Public Utility Commission ("PUC" or "Commission") an original and nine (9) copies of the Exceptions of the PP&L Industrial Customer Alliance ("PPLICA") in the above-referenced proceeding.

As shown by the attached Certificate of Service, all parties to this proceeding are being duly served with a copy of this document. Please date stamp the extra copy of this transmittal letter and Exceptions, and kindly return them for our filing purposes. Thank you.

Very truly yours,

McNEES WALLACE & NURICK LLC

By 

Adeolu A. Bakare

Counsel to PP&L Industrial Customer Alliance

Enclosures

c: Administrative Law Judge Susan D. Colwell (via E-mail and Hand Delivery);
Certificate of Service

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**EXCEPTIONS OF THE
PP&L INDUSTRIAL CUSTOMER ALLIANCE**

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Dated: February 16, 2012

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. EXCEPTIONS.....	3
A. <u>Exception No. 1: Remand RD Misdefines the Scope of the Proceeding on Remand</u> (Remand RD, pp. 19-21)	3
B. <u>Exception No. 2: The Remand RD Commits an Error of Law By Treating the Request as a Rate Discrimination Claim, Which Renders Section 2806(h) Superfluous</u> (Remand RD, pp. 24, 41)	8
C. <u>Exception No. 3: The Remand RD Erred in Failing to find that Donsco has Demonstrated "Special Circumstances" for Relief</u> (Remand RD, p. 25)	10
D. <u>Exception No. 4: The Remand RD Erred in Failing to Adopt Witness Baudino's Calculation of the Appropriate Rate for Donsco</u> (Remand RD, pp. 30-32)	15
E. <u>Exception No. 5: The Remand RD Erred in Finding PPLICA's Eligibility Criteria for the Proposed Rate Schedule LP-4 SI to be Overly Broad</u> (Remand RD, pp. 33-36)	18
F. <u>Exception No. 6: The Remand RD Failed to Consider PPLICA's Alternative Proposal to Reflect Section 2806(h) in PPL's Tariff</u> (Remand RD, p. 33)	20
G. <u>Exception No. 7: The Remand RD Failed to Consider the Merits of PPL's Alternative Rate Design</u> (Remand RD, pp. 38-41)	22
III. CONCLUSION.....	25

I. INTRODUCTION

On August 26, 2010, PPL Electric Utilities Corporation ("PPL" or "Company"), Bureau of Investigation and Enforcement ("I&E")¹, Office of Consumer Advocate ("OCA"), and Richards Energy Group ("Richards"), submitted a Joint Petition of Partial Settlement of Rate Investigation ("Joint Petition"). The Joint Petition settled issues related to PPL's proposed rate increase filed on March 31, 2010.² On October 15, 2012, Administrative Law Judge Susan D. Colwell issued a Recommended Decision approving the Joint Petition and disposing of litigated issues.

The PP&L Industrial Customer Alliance ("PPLICA") was not a party to the Joint Petition and filed Exceptions to the Recommended Decision. PPLICA is an *ad hoc* association of energy-intensive commercial and industrial customers receiving electric service in PPL's service territory. PPLICA members purchase service from PPL primarily under Rate Schedules LP-4, LP-5, LP-6, IS-P and IS-T, as well as available riders.³ Those rates make up the Large Commercial and Industrial ("Large C&I") Class for purposes of PPL's rate filing.

On December 21, 2010, the Pennsylvania Public Utility Commission ("PUC" or "Commission") entered an Opinion and Order approving the Recommended Decision with modifications and disposing of the litigated issues. In particular, the Commission denied PPLICA's request to establish an LP-4 Special Industrial tariff ("LP-4 SI") for Donsco, Inc. ("Donsco"), a member of PPLICA.

On January 5, 2011, PPLICA filed a Petition for Reconsideration of the December 21 Order addressing solely the Commission's denial of its request to establish an LP-4 SI for

¹ Formerly known as the Office of Trial Staff, the Commission's prosecutory bureau has been renamed the Bureau of Investigation and Enforcement.

² On March 31, 2010, PPL filed Supplement No. 83 to Tariff-Electric-Pa P.U.C. No. 201 ("Supplement No. 83"), to become effective on June 1, 2010, with the Pennsylvania Public Utility Commission.

³ Some PPLICA members also have accounts on Rate Schedules GS-1 and GS-3.

Donsco. In the December Order, the Commission concluded that Section 2806 of the Public Utility Code did not provide authority for adjusting distribution rates and that Donsco would be eligible for a negotiated rate only if PPL charged unjust and unreasonable rates or provided inadequate service.

In the Petition for Reconsideration, PPLICA argued that Section 2806(h) explicitly authorizes the Commission to adjust distribution rates and that Donsco's special circumstances merit such relief. PPL filed an Answer opposing the Petition for Reconsideration on January 18, 2011.

The Commission entered an *Opinion and Order on April 27, 2011 ("Remand Order")* granting PPLICA's Petition for Reconsideration. The Commission found that Section 2806(h) of the Public Utility Code provides direct authority for flexible pricing of distribution rates and that Donsco presents a special situation. The Commission urged parties to the proceeding to find a solution to Donsco's problems that would not unduly burden other customers, and remanded the case to the ALJ for further proceedings and the issuance of a Recommended Decision on Remand.

PPL, PPLICA, I&E, OCA, OSBA, and Eric Epstein ("Parties"), attended the remand prehearing conference on May 16, 2011. Following the prehearing conference, the parties engaged in discovery, submitted several rounds of remand testimony, and attended evidentiary hearings on September 16, 2011. Pursuant to the schedule established at the prehearing conference, PPLICA filed Remand Main Brief on October 6, 2011 and a Remand Reply Brief on October 18, 2011.

On January 27, 2012, ALJ Colwell issued a Recommended Decision on Remand ("Remand RD") finding that Donsco failed to sustain its burden of proving entitlement to relief

under Section 2806(h). As detailed in the below Exceptions, the Remand RD fails to apply the appropriate legal standards to Donsco's requested relief. PPLICA has sustained its burden of proof and provided a framework for resolving Donsco's special situation without unduly burdening other customers, in compliance with the Remand Order. Accordingly, PPLICA requests that the Commission reject the Remand Recommended Decision, adopt the suggested tariff provision, Rate Schedule LP-4 SI, or otherwise revise PPL's tariff to implement a monthly charge of \$11,000. Following the Commission's decision regarding the rate proposals for Donsco, PPLICA requests that the Commission Order PPL to issue Donsco a credit retroactive to January 1, 2011, for the difference between the rate approved in this proceeding and the distribution charges paid by Donsco.

II. EXCEPTIONS

A. Exception No. 1: Remand RD Misdefines the Scope of the Proceeding on Remand (Remand RD, pp. 19-21)

The Remand RD fails to accurately represent the scope of the Proceeding on Remand articulated in the Commission's Remand Order. According to the Remand RD, the Commission remanded the proceeding to evaluate whether PPLICA had sustained its burden of proving both that Donsco is entitled to relief and the nature of such relief. However, as emphasized in PPLICA's Main Brief, the totality of the Commission's directives set forth in the Remand Order relate solely to the nature of relief available to Donsco.

The Remand RD appears to emphasize an individual passage of the Remand Order rather than address the aggregate of the Commission's observations. As stated in the Remand RD, the Commission found that "granting reconsideration is necessary because the record is devoid of information that the Commission requires to render a meaningful decision on the Donsco special rate issue." Remand RD, p. 7. The Remand RD interprets this language to mean that the

Commission had made no findings regarding Donsco's entitlement to relief and finds that the Commission remanded the proceeding to afford PPLICA "another bite of the litigation apple" primarily as a result of PPLICA's averments that new evidence had been presented for the Commission's consideration. Remand RD, p. 21. This position conflicts with the specific directives and general statements outlined in the Remand Order.

As referenced in PPLICA's Main Brief, the Remand Order set forth four principal directives, none of which bore any relation to Donsco's eligibility for relief. The Commission directed the parties to develop a record addressing 1) information regarding the annual operations and maintenance ("O&M") costs of the dedicated facilities and the rate impact upon other LP-4 customers, 2) rate impacts on other customers in the event that Donsco curtails or terminates service, 3) the viability of Donsco's plan to obtain PennDOT permits and purchase PPL's 12 kV lines, and 4) whether receipt of the PennDOT permits and Donsco's purchase of the 12 kV lines would render the requested relief moot. Remand Order, pp. 12-13.

PPLICA addressed each of the Commission's items as follows:

- 1) Through discovery responses received from PPL, PPLICA identified O&M costs of \$18,000 and net depreciated original cost of \$828,000, for the facilities used to supply Donsco. PPLICA Remand Stmt. No. 2, p. 5-6, PPLICA Remand Exh. No. RAB-2.
- 2) PPLICA identified both direct and indirect rate impacts to be absorbed by other customers if Donsco curtails or terminates service. PPL would allocate the \$344,000 in annual revenues currently received from Donsco. PPLICA Remand Stmt. No. 2, p. 13. Additionally, ratepayers would likely experience negative effects on the local economy. See PPLICA Remand Stmt. No. 2, p. 13.

- 3) Donsco pursued the possibility of obtaining PennDOT approval to purchase the 12 kV lines and accompanying equipment from PPL. PPLICA Remand Stmt. No. 1, pp. 2-5. Through discovery, PPLICA obtained a full explanation of the steps that would be necessary to pursue this option. PPLICA Remand Exh. CAB-3. Donsco also pursued an independent quote from a third party to operate and maintain the lines. PPLICA Remand Stmt. No. 1, p. 3. As confirmed by PPLICA Witness Christopher Buck, Donsco was prepared to assume financial and operational responsibility for the 12 kV lines. Id. at 4. However, PPLICA abandoned this option as the discovery responses and PPL Witness David T. Bobb's subsequent testimony raised reliability concerns and burdensome code requirements for non-utility operators. PPL Statement No. 16-RM, p. 7. PPLICA notes that PPL Witness Bobb also dismissed the PennDOT proposal as "not a practical option." Id.
- 4) The final inquiry from the Commission, whether obtaining PennDOT permits and purchasing the two lines would render the requested relief moot, has itself been rendered moot by the impracticability of obtaining purchasing the lines. PPL Statement No. 16-RM, p. 7.

In addition to investigating the Commission's specific directives, PPLICA calculated a proposed rate level for Donsco based on the data and relevant circumstances, which results in a proposed monthly charge of \$11,000. PPLICA proposed two methods to implement the negotiated rate under Section 2806(h), and calculated the impact on other customers for each. PPLICA also responded to an alternative rate design proposed by PPL, indicating modifications that would make the proposal acceptable as an option to address this situation (including the impact on other customers of those options). In compliance with the Remand Order, PPLICA

worked to develop a record from which the Commission to consider different pricing options for Donsco.

Importantly, while the Commission requested information regarding the potential PennDOT plan, it did not base its *granting of PPLICA's Petition for Reconsideration* upon the evidence concerning PennDOT, as incorrectly stated in the Remand RD. As referenced above, the Remand RD claimed that the Commission granted PPLICA's Petition for Reconsideration because of new evidence regarding the potential PennDOT right of way. Remand RD, p. 21. However, the Commission clarified that its decision to remand the proceeding bore no relation to the PennDOT issue, declaring "[b]ecause we find that the record is deficient with regard to other necessary evidence, *we need not address PPLICA's request for rehearing with regard to the alleged new evidence of the potential willingness of the Pennsylvania Department of Transportation (PennDOT) to work with Donsco with regard to authorized utilization of highway and/or bridge rights-of-way to accomplish alternate distribution service from PPL*" Remand Order, p. 5 [Emphasis added].

Also contrary to the representations in the Remand Order, the Commission did not request further development of information regarding the applicability of Section 2806(h) to Donsco's situation. Remand Order, p. 11. Section 2806(h) authorizes consideration of flexible pricing by the Commission. *Id.* The Commission noted that Section 2806(h) was not considered in disposing of PPLICA's arguments in the original rate proceeding, but far from identifying the statute's applicability as an issue to be addressed, the Commission definitively stated that Section 2806(h)⁴ "is an essential tool for exactly the type of situation presented by Donsco." Remand Order, p. 11. Notably, the Commission recognized the applicability of Section 2806(h) to Donsco's situation after reviewing the very same rate discrimination argument restated in the

⁴ 66 Pa. C.S. § 2806(h).

Remand RD, but originally presented in the Recommended Decision issued in the original rate proceeding. RD, p. 102. What the Commission sought from the remand proceeding was constructive information to identify an appropriate rate design and pricing options for Donsco. The Remand RD erred in concluding that the Commission made no affirmative findings regarding Donsco's entitlement to relief under Section 2806(h). In the plainest of words, the Commission articulated its purpose for remand as follows:

We exercise our discretion to grant reconsideration and remand this matter to the Office of Administrative Law Judge (OALJ) for the development of a more complete record to allow consideration of *additional pricing options* permitted by Section 2806(h) of the Code.

Remand Order, p. 6. PPLICA submits that the language provided in the Remand Order overwhelmingly encourages the parties to concentrate efforts and resources towards developing an appropriate rate for Donsco under 2806(h) rather than relitigate issues relating to Donsco's eligibility for flexible pricing. As further discussed below, PPLICA has diligently developed a negotiated rate design and two recovery methods to assist the Commission with its stated desire to explore pricing options for Donsco.

B. Exception No. 2: The Remand RD Commits an Error of Law By Treating the Request as a Rate Discrimination Claim, Which Renders Section 2806(h) Superfluous
(Remand RD, pp. 24, 41)

The Remand RD erred in interpreting Section 2806(h) of the Public Utility Code solely under the non-discriminatory standard of Section 1304. As interpreted by the Remand RD, Section 2806(h) is rendered superfluous, essentially subsumed by Section 1304. The reasoning creates a result inconsistent with the rules of statutory construction. Section 2806(h) must be

applied as an independent cause of action, separate and apart from the generalized provisions of Section 1304.

The Remand RD fails to reconcile the operation of Sections 2806(h) and 1304. Appropriately, the Remand RD observes that Section 2806(h) authorizes the Commission to "approve flexible pricing and flexible rates to meet the specific needs of a utility customer and to address competitive alternatives." Remand RD, p. 22. However, the Remand RD next finds that flexible pricing must be non-discriminatory pursuant to Section 1304, and applies the legal standard for establishing rate discrimination as the test to determine whether "special circumstances" warranting a negotiated rate exist pursuant to Section 2806(h). Remand RD, p. 24. This finding translates into a recharacterization of PPLICA's request for relief under Section 2806(h) as a rate discrimination claim under Section 1304. Rather than evaluate the merits of PPLICA's claim under the authority explicitly granted in Section 2806(h), the Remand RD concludes that PPLICA's request "is essentially a rate discrimination claim, and to prevail, the claimant must prove that its rates are unreasonably high and that the rates of other customers are unreasonably low." Remand RD, p. 41.

Negotiated or flexible pricing under Section 2806(h) is distinct from a rate discrimination claim. Section 2806(h) authorizes the Commission to approve flexible pricing based on a customer's special needs. As observed in the Remand RD, rate discrimination claims under Section 1304 concern solely the relative condition of the complainant versus other customers. Id. Contrarily, flexible pricing can incorporate broader considerations. The Remand RD references examples of flexible pricing where a utility faces a competitive threat from bypass opportunities or alternative supply sources. Remand RD, p. 24. The Remand RD correctly notes that natural gas customers with bypass or alternative supply opportunities may receive a

negotiated rate, i.e. a lower rate than other customers in the same class. See Id. This rate is awarded not because the customer has demonstrated rate discrimination, but because of the potential for lost fixed revenues should such customer terminate its utility service. Despite *implicitly acknowledging that flex prices can address situations other than rate discrimination claims*, i.e. competitive bypass or alternative supply, the Remand RD nevertheless reduces PPLICA's claim to a rate discrimination action under Section 1304.

Moreover, as Mr. Baudino explained, the criterion that is often used in the natural gas industry to justify negotiated rates (*i.e.*, bypass or alternative fuel options) is not appropriate for the electric industry under Section 2806(h). As noted by Mr. Baudino, natural gas customers may take advantage of viable alternatives, such as fuel oil. PPLICA Remand Stmt. No. 2-R, p. 9. Conversely, there is no substitute for electricity for Donsco. Id. Therefore, application of the competing fuel criteria is inappropriate in the context of Donsco's request for negotiated electric service rates. Id.

PPLICA strenuously objects to the Remand RD's narrow interpretation of Section 2806(h). It is axiomatic that a statute must be read to give effect to each provision.⁵ The General Assembly's specific grant of authority to approve flex-pricing must be interpreted as an additional grant of authority beyond the Commission's existing authority to approve rate discrimination claims. Moreover, "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). In light of the foregoing principles of statutory construction, Section 2806(h) cannot reasonably be interpreted through the rate discrimination paradigm. If Section 1304 were

⁵ 1 Pa. C.S. § 1921(a). "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions."

a sufficient remedy in all situations, then the General Assembly would have had no reason to create and approve Section 2806(h) as part of the Competition Act.

As Section 2806(h) clearly empowers the Commission to award flexible rates, its plain meaning must be given effect under Section 1921(a). Additionally, to the extent that a perceived conflict between Section 2806(h) and Section 1304 remains unresolved, then Section 2806(h) prevails as the "latest in a date of enactment."⁶ Regardless, Section 2806(h) should be applied to find that Donsco has demonstrated special circumstances meriting flexible rate pricing.

C. **Exception No. 3: The Remand RD Erred in Failing to find that Donsco has Demonstrated "Special Circumstances" for Relief**
(Remand RD, p. 25)

PPLICA's Main and Reply Briefs provided clear evidence establishing that Donsco faces special circumstances. However, the Remand RD adopts an unreasonable standard which would require any customer seeking relief under Section 2806(h) to first provide information about every other customer in the service territory. Similarly, PPL and OSBA speculate that a significant number of other customers could furnish evidence demonstrating circumstances similar to Donsco, but neither party has identified a specific customer in the same situation. Further, no party has otherwise rebutted the evidence of Donsco's special circumstances. While Donsco bears the burden of proof in this proceeding, the parties opposing Donsco's request must carry the burden of persuasion following Donsco's presentation of evidence. Despite the Remand RD's findings to the contrary, Donsco provided evidence establishing its prima facie case and shifting the burden of persuasion to the opposing parties. As the opposing parties failed to carry the burden of persuasion, the Commission should find that Donsco met its burden of proving special circumstances.

⁶ 1 Pa. C.S. § 1936.

PPLICA provided evidence establishing Donsco's special circumstances. The Remand RD found that PPLICA has not offered evidence to support a finding that its situation is substantially different from other LP-4 customers. Remand RD, p. 25. This observation ignores evidence presented in PPLICA's Remand Main and Reply Briefs, much of which remains un rebutted. For example, the record shows that:

- 1) In 2000, at the urging of the Pennsylvania Department of Environmental Protection ("DEP"), Donsco converted its Wrightsville facility from cupola melting process to electric melting operations, greatly increasing the facility's electric consumption. See PPLICA Remand Stmt. No. 1-R, p. 4, PPLICA Remand M.B., p. 10.
- 2) To accommodate the increased electric load resulting from its conversion, Donsco requested service on Rate LP-5. See PPLICA Remand Stmt. No. 1-R, p. 4, PPLICA Remand M.B., p. 10.
- 3) PPL concluded, at that time, that extending transmission voltage facilities from its North Columbia Substation across the Susquehanna River to Donsco's Wrightsville plant was "not a practical option." PPL Statement No. 16-RM, p. 7.
- 4) Donsco instead agreed to pay PPL \$914,000 over 5 years for service through two dedicated 12.5kV lines, with both parties agreeing to remove the final two year obligation in exchange for Donsco granting PPL access to the lines for reliability purposes. PPLICA Remand M.B., p. 11.
- 5) Although unable to receive LP-5 service, Donsco reduced electric expenses through diligent participation in PPL's Time-of-Day program and paid approximately \$42,744 in annual distribution charges in 2009. PPLICA Remand M.B., p. 11, Remand Order, p.7.
- 6) Elimination of the Time-of-Day program contributed to a 1,300% increase to Donsco's base rates in January 2010, resulting in a \$35,000 monthly payment and an approximately \$410,496 annual payment for electric distribution service. Remand Order, p. 7.

- 7) Donsco again requested conversion to LP-5; PPL confirmed available conversion options to be: 1) building a new 69 kV line over the Susquehanna River; 2) boring under the Susquehanna River to install the 69 kV line underground; 3) running 69 kV submersible cables across the Susquehanna River; or 4) constructing a new 13-mile 69 kV line from the Otter Creek 230/69kV substation. PPLICA Stmt. No. 1, p. 10, RR Tab 3.
- 8) Each option has fundamental impediments making it unworkable and/or cost prohibitive. Building a new line over the Susquehanna River was projected to face substantial resistance from residents and environmental groups, tunneling under the river would take 5-6 years, and both PPL and Donsco agreed that laying submersible cables or constructing a new line from Otter Creek was not practical from either an engineering or economic perspective. PPLICA Stmt. No. 1, p. 11, RR tab 3.
- 9) Although served by dedicated lines⁷, Donsco's Wrightsville facility pays 1.5% of the revenue requirement for integrated distribution equipment serving the LP-4 class, despite being only one of over 1,100 accounts in the class. PPLICA Remand Stmt. No. 2, p. 6, Remand Order, p. 7, PPL Statement No. 8-R, p. 3.
- 10) Donsco's two direct competitors in PPL's service territory, Benton Foundry and Anvil International, each pay \$709 per month for distribution service under Rate Schedule LP-5. PPLICA Remand M.B., p. 12.
- 11) Donsco's Wrightsville facility operates with a monthly billing demand of 16 MW, with the LP-4 class average demand at 1 MW and the next highest user peaking at 12 MW. PPLICA Remand M.B., p. 12.

Despite the above facts adduced by PPLICA, the Remand RD claims that any customer could present circumstances similar to Donsco's. The Remand RD inappropriately relies on individual

⁷ As noted in PPLICA's Main Brief, PPL has modified its position regarding the "dedicated" nature of the lines serving the Wrightsville facility. PPL Statement No. 16-MR., p. 5. PPL originally stated that "Donsco's two dedicated express feeders from the North Columbia Substation 06-01 and 06-06 offer *little benefit to PPL Electric's entire distribution system.*" PPL Stmt. No. 8-R, p. 3 [Emphasis added]. PPL now claims that the lines are used to serve other customers based on Donsco's agreeing to make the lines available in case of outages and the ability to switch Donsco's load between the two transformers in the North Columbia substation. PPL Statement No. 16-RM, pp. 5-6. As explained in Witness Baudino's testimony, emergency operations do not disturb the primary operation of the lines as dedicated to Donsco. PPLICA Remand Statement No. 2, pp. 6-7

components of Donsco's overall situation to portray the company's experience as common among PPL customers.⁸ However, neither the Remand RD, nor any other document on the record, identifies a single additional customer facing the Donsco's circumstances, including, but not limited to, the following factors: 1) a geographical impediment to LP-5 service, 2) monthly billing demand higher than any other customer in its class,⁹ and 3) paying for use of PPL's distribution network while taking service only from dedicated lines, for which the customer paid significant upfront guarantees.¹⁰ Remand M.B., p. 16. As PPL concluded in 2000, when Donsco converted to more environmentally-friendly electric melting and originally requested service on Rate LP-5, extending transmission voltage facilities to Donsco's Wrightsville plant is just not a viable option due to the configuration of PPL's transmission network in the area. While each individual element of Donsco's situation would not necessarily qualify for negotiated rate pricing, Donsco's experience, taken as a whole, creates a special circumstance which the Commission has the authority to address through flexible pricing under Section 2806(h).

The emphasis of the Remand RD, on the circumstances of every other individual customer, creates an insurmountable burden for relief under Section 2806(h). The Remand RD states that "if a Company is to qualify for special treatment because of its unique circumstances, there must be some comparisons offered which would establish that its circumstances are, in fact, unique." The Remand RD also cites to similar statements and averments offered by other

⁸ PPLICA addressed arguments diminishing the impact of Donsco's special circumstances in its Remand Reply Brief, stating that "these arguments take a microscopic view of a situation requiring much more perspective. Donsco's unique situation is anchored by two basic facts and amplified by a historic chain of events and interrelated circumstances." Remand R.B., p. 3.

⁹ Donsco's billing demand is also higher than the class average demand for Rate Schedule LP-5. PPLICA Cross-Examination Exh. No. 8, PPLICA Main Brief, p. 12 (noting PPL Witness Oliver Kasper incorrectly testified that the average demand for Rate LP-5 customers 37.9 MW prior to PPL's confirming the correct 4.9 MW figure in response to an On-the-Record Data Request from PPLICA).

¹⁰ As referenced above, Donsco had agreed to pay PPL \$914,000 over five years for construction of two dedicated lines to supply Donsco. Per an agreement between both parties, Donsco was not required to pay the final \$366,000 provided that it granted PPL emergency access to Donsco's lines. PPLICA M.B., p. 18-19, PPLICA Stmt. No. 1, p. 8, RR Tab 3.

parties.¹¹ PPLICA has provided evidence distinguishing Donsco's from other PPL customers. The Remand RD seems to require a customer seeking relief under Section 2806(h) to furnish specific information on the operations and circumstances of all other customers in the service territory. PPLICA contends that the information provided regarding Donsco's usage relative to other customers and the circumstances underlying its historic increase in usage meet its burden of proving special circumstances.

Having met its burden and furnished evidence establishing a prima facie case, PPLICA argues that speculative representations that other customers could show similar circumstances are insufficient to shift the burden of persuasion back to PPLICA. The burden of proving Donsco's special circumstances rests with PPLICA, but the burden of persuasion shifts to the opposing parties upon PPLICA's establishment of a prima facie case.¹² While the opposing parties have identified customers sharing individual components of Donsco's experience, no party has identified another customer facing similar circumstances to Donsco, including 1) facing a geographical impediment to LP-5 service, 2) registering a higher monthly billing demand than any other customer in its rate class, and 3) paying for the distribution grid despite taking service on dedicated lines for which it paid a substantial revenue guarantee. Therefore, the Commission should find that PPL and OSBA failed to sustain the burden of persuasion and conclude that PPLICA met its burden of proving Donsco's special circumstances.

¹¹ Remand RD, pp. 25, 36. (citing averments from OSBA and I&E).

¹² Pennsylvania Public Utility Comm. v. PECO Energy Company, 2010 WL 5651175, *13 (Dec. 16, 2010 Pa. P.U.C); Milkie v. Pa. PUC, 768 A.2d 1217 (Pa. Cmwlth. 2001).

D. Exception No. 4: The Remand RD Erred in Failing to Adopt Witness Baudino's Calculation of the Appropriate Rate for Donsco
(Remand RD, pp. 30-32)

The Remand RD fails to consider cost and the public policy justifications underlying PPLICA Witness Richard Baudino's proposed rate design. The RD concludes that Witness Baudino's rate design proposal is not grounded in sound ratemaking principles. In an attempt to support this finding, the Remand RD appears to criticize the general practice of flexible rates and restate the case against granting any relief for Donsco.¹³ Additionally, the Remand RD indirectly addresses PPLICA's alternative proposal for recovering revenue shortfall, but rejects the proposal as a "slippery slope" portending retroactive ratemaking. Remand RD, p. 32. The Remand RD fails to analyze PPLICA's proposed rate design within the appropriate context as a tailored solution to Donsco's special circumstances pursuant to Section 2806(h) of the Public Utility Code.

PPLICA Witness Richard Baudino developed a rate design based on cost of service principles, but appropriately modified to reflect the special circumstances at issue in this proceeding. PPLICA notes that the Commission requested information regarding the O&M and capital costs associated with Donsco's 12 kV lines in order to determine the potential rate impact of granting flex rates to Donsco and presumably shifting some costs onto other LP-4 customers. Remand Order p. 12, PPLICA Remand M.B., p. 18. As reported by PPL, the facilities used to service Donsco require \$18,000 in annual O&M expense and carry a net depreciated original cost of \$828,000. Id. at 18. Based on this cost information and other relevant factors, Witness Baudino calculated an alternative rate proposal incorporating the 9.0% cost of equity recommended in the original rate proceeding by OCA Witness Steven Hill. Id. at 19. This

¹³ The Remand RD appears to reject PPLICA's proposed rate design based not on the actual ratemaking aspects of the proposal, but due a disagreement that Donsco's geographical status entitles the company to relief. Remand RD, pp. 32-33.

process resulted in an annual revenue requirement of \$156,741 and a monthly revenue requirement of \$13,062. Id. at 20.

To arrive at a final recommend fixed monthly charge for Donsco, Mr. Baudino considered the magnitude of Donsco's experienced monthly rate increase from its 2009 monthly distribution charges of approximately \$5000 to a new monthly revenue requirement of \$13,000. Id. To avoid an unjust rate impact, Mr. Baudino recommended a monthly charge for Donsco of \$11,000, which still results in a 120% increase for Donsco and, based on the \$344,000 in annual revenues currently recovered from Donsco, imposes only a 0.64% increase to the \$32,889,900 in annual revenues currently collected from other LP-4 customers. Id. Mr. Baudino recommends that the flexible rates remain in effect for five-year terms, but reviewable upon conclusion of every such term to determine whether the circumstances warranting the rate relief continue to exist (i.e., the geographic impediment to converting the account to Rate Schedule LP-5). Id. at 21. Finally, Mr. Baudino suggests that revenue impact of the rate be recovered from other LP-4 customers at present, but that future cases should evaluate the value accorded to other customers by such flex rate contracts and allocate costs in accordance with any findings. Id. at 21.

The Remand RD fails to evaluate the proposed rate design within the appropriate context of negotiated rates. The Remand RD rejects PPLICA's proposed rate design because it would create a revenue deficiency or a deferred regulatory asset. Remand RD, p. 31-32. This finding undermines the very purpose of Section 2806(h) which authorizes the Commission to address special needs and approve special rates. Any negotiated rate structure will create revenue deficiency to be absorbed by the utility, recovered through a change in rates, or recorded as a deferral. Under the analysis applied in the Remand RD, any negotiated rate proposed under Section 2806(h) would be denied as a violation of traditional ratemaking principles. As

discussed above, this approach violates the principles of statutory construction and must be rejected.¹⁴

Additionally, the Remand RD inappropriately rejects PPLICA's proposal to revisit the flexible rate upon expiration of each five-year term. The Remand RD concludes that the circumstances identified as preventing 69 kV service have been identified as the Susquehanna River and will not change. Remand RD, p. 33. Due to these circumstances, the Remand RD concludes that the flexible rate will become perpetual. PPLICA encourages the Commission to consider the various methods in which external circumstances, such as further development in the region and additional transmission construction by PPL, could change the circumstances faced by Donsco. The Susquehanna River is certainly a geographical impediment today, but PPLICA believes it prudent to provide for periodic evaluations as the river may not pose the same limitations following future technological and economic developments.

PPLICA's proposed rate design reflects a well-reasoned approach to Donsco's special circumstances, seeking to determine an appropriate monthly payment without imposing unreasonable burdens upon other customers.¹⁵ The Remand RD addresses only the consistency of Mr. Baudino's proposed rate design with traditional ratemaking principles, but fails to address whether its methods and calculations are consistent with construction of a flexible rate under Section 2806(h).¹⁶ The Commission should reject the Remand RD's conclusion and adopt Mr. Baudino's proposed rate design.

¹⁴ See Exception No. 2, *supra*.

¹⁵ Witness Baudino describes the necessity to apply different ratemaking methods to flexible rate pricing structures, stating "I am very well aware that my proposal does not follow a traditional allocated cost of service approach. But for the reasons that are set forth in my testimony and the testimony of Mr. Christopher Buck, PPLICA is asking the Commission to follow a different, non-traditional alternative for Donsco. The application of traditional cost of service ratemaking simply does not fit Donsco and results in Donsco paying excessive rates that are harming the company economically." PPLICA Remand R.B., p. 20.

¹⁶ PPLICA acknowledges that Section 2806(h) does not sanction unfettered redistribution of rates and submits that recovering the minimal revenue shortfall (equal to 0.64% of the current LP-4 revenue requirement) within the LP-4

E. Exception No. 5: The Remand RD Erred in Finding PPLICA's Eligibility Criteria for the Proposed Rate Schedule LP-4 SI to be Overly Broad
(Remand RD, pp. 33-36)

The Remand RD takes the position that the eligibility criteria proposed by PPLICA in the original rate proceeding provides no meaningful restrictions on eligibility for the requested relief. As noted above, PPLICA proposed that the Commission establish a Rate LP-4 SI with appropriate criteria to limit applicability to customers similarly situated to Donsco. PPLICA Remand M.B., p. 23. As discussed in Exception No. 6, PPLICA supports implementation of flexible rates through a tariff rule tailored to Section 2806(h) as the preferable solution for this situation. However, the criteria developed for Rate LP-4 SI remains a reasonable alternative for implementing negotiated rates.

The Remand RD's conclusion that PPLICA's eligibility criteria fails to meaningfully exclude customers from eligibility is unsupported by record evidence. PPLICA Witness Richard Baudino developed specific criteria for Rate LP-4 SI. As an initial threshold, only customers registering a 4 MW monthly billing demand would be eligible for the negotiated rate. Additionally, any customer attempting to qualify for the negotiated rate would have to meet at least one of the following four criteria 1) economic development, load retention and employment, 2) economic and/or environmental feasibility of converting the account to transmission voltage in Rate Schedule LP-5, 3) the proximity to 69 kV (or higher) facilities and/or the ability to specifically identify the lines and equipment used to serve the facility, and 4) payment of a contribution in aid of construction or a line extension guarantee. PPLICA Remand M.B., p. 23, PPLICA Remand Stmt. No. 2, pp. 7-8. The Remand RD claims that the

class is just and reasonable, and not unduly discriminatory pursuant to Sections 1301 and 1304 of the Public Utility Code. 66 Pa. C.S. §§ 1301, 1304.

four criteria other than the 4 MW threshold fail to exclude any customers from the negotiated rate.

The criteria proposed by PPLICA outlines the "special circumstances" that should be considered under Section 2806(h). Admittedly, the criteria may apply to accounts beyond Donsco's Wrightsville facility; however, the universe of potential customers to which this provision could apply is substantially limited by the 4 MW threshold. As Mr. Baudino explains in the testimony during the initial phase of this proceeding, the 4 MW threshold was proposed because it is the approximate class average demand for customers on Rate Schedule LP-5. PPLICA Stmt. No. 2, p. 7, RR Tab 7. In comparison, the class average demand for Rate Schedule LP-4 is approximately 1 MW. PPLICA need not address the specific criteria underlying the 4 MW threshold because the initial 4 MW demand threshold alone provides sufficiently limiting criteria. PPL Witness Oliver G. Kasper confirmed that no more than 20 additional PPL customers could satisfy the 4 MW threshold and qualify for the LP-4 SI rate. The Remand RD generally adopts Mr. Kasper's statement, but erroneously suggests that Mr. Kasper calculated a minimum eligibility level, stating that "PPL estimates that the criteria proposed by PPLICA would result in at least 20 customers qualifying for the new rate. Remand RD, p. 33. The 20 customers identified by Mr. Kasper represent only 2% of the 1,100 current LP-4 customers in PPLICA's service territory, representing a de minimus impact upon the rate class. PPLICA Remand M.B., p. 15, PPL Statement No. 8-RM, pp. 2-3. The scope is further limited by the need to establish the other criteria for eligibility. Additionally, if the Commission desires to further reduce the applicability of the adjusted tariff, then PPLICA would propose increasing

the billing demand criteria from 4 MW to 6 MW. PPLICA Remand R.B., p. 24, PPLICA Remand Stmt. No. 2-R, p. 4.¹⁷

Contrary to the findings in the Remand RD, PPLICA has provided an alternative rate design which targets the special circumstances experienced by Donsco with appropriate specificity. PPLICA continues to support its proposed tariff language revisions as the preferred method for implementing flexible rates. This preferred option is discussed within the context of Exception No. 6 *infra*. As a secondary alternative, the standards established for creation of a separate LP-4 SI rate class comply with the directives of the Remand Order and should be adopted if the Commission declines to approve the Suggested Tariff Provisions.

F. Exception No. 6: The Remand RD Failed to Consider PPLICA's Alternative Proposal to Reflect Section 2806(h) in PPL's Tariff
(Remand RD, p. 33)

As indicated above, PPLICA's preferred method for implementing reduced rates for any business would be inserting the additional tariff language reflecting the Section 2806(h) requirements rather than specifically adopting the above-referenced LP-4 SI standards. PPLICA proposed this alternative in its Remand Direct testimony based on the Commission's discussion of Section 2806(h) in the Remand Order. However, the Remand RD gave no consideration to PPLICA's alternative proposal.

As proposed in Mr. Baudino's Remand Direct Testimony, an alternative method would modify PPL's tariff to explicitly recognize Section 2806(h) of the Public Utility Code. The following language would be inserted into PPL's tariff ("Suggested Tariff Provision"):

¹⁷ As indicated on a chart provided in PPLICA Witness Richard Baudino's Remand Direct Testimony, increasing the MW threshold significantly reduces the number of eligible customers. PPLICA Stmt. No. 2-R, p. 6 The chart provided in Mr. Baudino's testimony shows the effect on customer eligibility for PPL's alternate proposal, which measured peak billing demand rather than average billing demand. *See Id.*, Tr. 583. Accordingly, the MW thresholds identified in Mr. Baudino's testimony are more inclusive than the threshold applicable to PPLICA's proposal, showing 59 eligible customers at 4 MW peak demand threshold versus 20 eligible customers using PPLICA's 4 MW average demand threshold. *See* PPLICA Remand Stmt. 2-R, pp. 4, 6. However, under either metric, increasing the MW threshold will reduce eligibility.

The Company at its discretion or upon approval by the Commission of a customer request pursuant to Section 2806(h) of the Public Utility Code may enter into contracts containing flexible pricing for electric service to address the specific needs of a customer and to address competitive alternatives. If requested by the Company, the customer shall provide to the Company, on a confidential basis, all information, records and financial analyses necessary to evaluate the customer's request for flexible pricing. Terms and conditions of service will be included in the signed contract, which will be filed with the Public Utility Commission. The Company at its sole discretion may request Public Utility Commission approval. The terms of the agreement will be confidential upon filing with the Commission.

PPLICA Remand M.B., p. 22, Appendix A *attaching* PPLICA Remand Stmt No. 1, Remand Exh. No. RAB-3. This language restates the Commission's authority under Section 2806(h) and provides a clear procedural process for customers seeking flexible rates. Importantly, the Suggested Tariff Provision accounts for situations where utility and customer disagree as to the existence of special circumstances or the appropriate rate level, opening the opportunity for addressing flexible rates directly through the Commission. PPLICA Remand M.B., p. 22. As an added procedural and administrative benefit, this method of implementing Donsco's proposed flex rates reserves full authority over additional flex rate proposals with the Commission. Whereas the criteria developed for Rate LP-4 SI would create legal standards enabling some LP-4 customers to demand flex rates, the adoption of the Suggested Tariff Provision confers no entitlement to relief upon any party. *Id.* The Commission can review each request to ensure that the "special circumstances" justifying the flexible pricing exist and, as suggested in the Remand Order, can review the impact on other customers for each request. This appears to be fully consistent with the language of Section 2806(h).

PPLICA's preferred implementation method would allow the Commission to grant relief for Donsco without unduly burdening other customer classes. PPLICA's solution satisfies the

Commission's directives from the Remand Order should be adopted by the Commission. The RD erred in failing to consider and adopt this alternative.

G. Exception No. 7: The Remand RD Failed to Consider the Merits of PPL's Alternative Rate Design
(Remand RD, pp. 38-41)

In addition to failing to address PPLICA's alternative method for implementing negotiated rates, the Remand RD also eschews any substantive discussion of PPL's Alternative Rate Design. During the remand proceeding, PPLICA submitted a proposal designed to set a rate reflecting costs of service principles and provide some relief for Donsco. In its Main Brief, PPLICA acknowledged PPL's proposal and proposed modifications to PPL's filed Demand Response threshold. However, the Remand RD declined to consider PPL's Alternative Rate Design based on PPL's withdrawal of support for its proposal.

PPL's alternative proposal followed the Company's acknowledgement of the substantial gap in billing demands for LP-4 customers.¹⁸ PPL Witness Oliver Kasper observed that "Donsco in 2009 had the largest monthly demand of any customer in the LP-4 Rate Class of 16,224 kW. The other customer with a demand above 10,000 kW had a demand of 11,901 kW. The next largest demand was substantially less (7,810 kW)." PPL Stmt. No. 8-RM, pp. 18-19. As a result, PPL proposed to divide LP-4 customers into two groups, those with billing demands higher than 10,000 kW and those with billing demands lower than 10,000 kW. PPLICA M.B., p. 23, PPL Stmt. 8-RM, p. 17. For all LP-4 customers, any portion of their billing demand that exceeds 10 MW would not be subject to the demand charge under the tariff. To reflect this proposal, the Company would increase monthly customer charges for LP-4 customers from \$160.19 to \$176.87, and demand charges would remain at \$2.136 per kW. *Id.*

¹⁸ PPLICA notes that PPL offered the proposal, but does not advocate its adoption. PPL Stmt. No. 8-RM. Regardless, PPL's alternative proposal remains a part of the evidentiary record to be considered by the Commission.

While PPLICA would prefer to implement its proposed negotiated rate and associated cost recovery methods, PPL's proposal could be used to address this situation with one modification. The monthly billing demand threshold for the Company's proposal must be reduced to 5 or 6 MW in order to lower Donsco's monthly payments to a level commensurate with Donsco's cost of service. Mr. Baudino provided the following chart to demonstrate the charges and impact on other customers at various threshold levels.

**DONSCO YEARLY REVENUE COMPARISON
PPLICA PROPOSAL VS. PPL PROPOSAL**

<u>MW Cutoff</u>	<u>PPLICA</u>	<u>PPL</u>
9	\$132,000	\$232,922
8	\$132,000	\$207,367
7	\$132,000	\$181,866
6	\$132,000	\$156,472
5	\$132,000	\$131,259
4	\$132,000	\$106,364

PPLICA Remand M.B., p. 24, PPLICA Remand Stmt. No. 2-R, p. 7. As evidenced by the above chart, reducing the demand threshold to 5 or 6 MW produces an annual revenue requirement of \$131,259 or \$156,472 for Donsco. The cost impact upon other LP-4 customers would be \$187,528 for a 6 MW threshold, and \$212,741 for a 5 MW threshold.

Although PPL's proposal was not stricken from the record, the Remand RD failed to consider the merits of its terms. Following criticism from OSBA¹⁹, PPL purported to "withdraw" its alternative rate design for LP-4 customers in its Reply Brief. Remand RD, p. 40. However, the proposal remains part of evidentiary record, and is available for consideration by the Commission as an option to address this situation. PPL Electric Stmt. 8-RM, p. 17. Further,

¹⁹ As described in PPLICA's Remand Main Brief, PPLICA is surprised by OSBA's participation on this issue as OSBA's testimony in the initial proceeding did not list Rate Schedule LP-4 as one of the small commercial rates that is under OSBA's constituency. PPLICA Remand M.B., p. 23. In fact, OSBA argued in favor of increasing rates for customers on Rate Schedules LP-4, LP-5, and LP-5. Id.

similar to the above discussion regarding the adoption of Mr. Baudino's proposed rate design, OSBA's opposition to PPL's alternative proposal arises primarily from OSBA's application of the class-wide costs of service approved in the rate proceeding. Remand RD, p. 40-41. As discussed on PPLICA's Remand Main Brief, there is simply no reason to apply a class-wide rate of return if such return would frustrate the attempt at lowering rates for the flexible price customers. PPLICA Remand M.B., p. 25.

PPLICA would not oppose implementation of PPL's alternative proposal, with a more appropriate demand threshold. As discussed above, PPL's proposal, as modified above, would result in an acceptable revenue requirement for Donsco, but might also create a variable shortfall dependent demand levels. PPLICA's proposal provides the most beneficial result, implementing a reasonable revenue requirement for Donsco and a minimal fixed revenue shortfall to be recovered from other LP-4 customers. PPLICA nevertheless asserts that PPL's alternative proposal fulfills the standards set forth in the Remand Order and should be considered by the Commission.


III. CONCLUSION

WHEREFORE, the PP&L Industrial Customer Alliance respectfully requests that the Pennsylvania Public Utility Commission:

- (a) Reject the Recommended Decision;
- (b) Adopt the Suggested Tariff Provision, Rate Schedule LP-4 SI, or otherwise revise PPL's tariff to implement a monthly charge of \$11,000;
- (c) Order PPL to issue Donsco, Inc. a credit retroactive to January 1, 2011, for the difference between the rate approved in this proceeding and the distribution charges paid by Donsco; and
- (d) Take any other actions as deemed necessary and appropriate.

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McNEES WALLACE & NURICK LLC

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Dated: February 16, 2012

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true copy of the foregoing document upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (relating to service by a participant).

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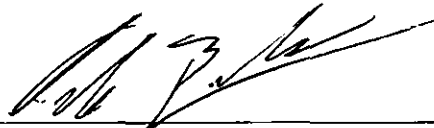
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