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

IN REPLY PLEASE
REFER TO OUR FILE

March 21, 2012

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

Re: PPL Electric Utilities Corporation Supplement No. 110 to Tariff Electric – Pa. P.U.C. No. 201 – Time of Use Rates

Docket No. R-2011-2264771

Dear Secretary Chiavetta:

Enclosed please find an original and one (1) copy 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

Pennsylvania Public Utility Commission	:	
	:	
v.	:	**Docket No. R-2011-2264771**
	:	
PPL Electric Utilities Corporation	:	

MAIN BRIEF OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT

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Dated: March 21, 2012

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Regulations

I. INTRODUCTION

A. Procedural History

On September 26, 2011, PPL Electric Utilities Corporation ("PPL" or "Company") filed Supplement No. 110 to Tariff Electric – Pa. P.U.C. No. 201 with the Pennsylvania Public Utility Commission ("Commission"). Supplement No. 110 contained the Company's proposal to implement a new Time of Use ("TOU") program for its residential class and its small commercial and industrial class. The proposed TOU program was designed to become effective with the customer's first billing cycle commencing after March 1, 2012.

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 October 12, 2011. Complaints against Supplement No. 110 were submitted by the Office of Small Business Advocate ("OSBA") and the Office of Consumer Advocate ("OCA"). Answers to these Complaints were filed by the Company. In addition to these Complaints, Petitions to Intervene were submitted by Dominion Retail Inc. d/b/a Dominion Energy Solutions ("Dominion"), the Sustainable Energy Fund of Central Eastern Pennsylvania ("SEF") and Eric Joseph Epstein ("Mr. Epstein").

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 November 28, 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.

A Prehearing Conference was held on December 9, 2011 at which time a procedural schedule was developed. The procedural schedule included filing dates for Testimony, Main Briefs and Reply Briefs as well as the date for an Evidentiary Hearing. The Prehearing Conference also resulted in the modification of the Commission's Discovery Rules. The procedural schedule and Discovery modifications were memorialized in the ALJ Scheduling Order that was issued on December 12, 2011. Also on December 12, 2011, PPL submitted the Direct Testimony of its expert witnesses.

The Evidentiary Hearing in this proceeding was conducted on February 22, 2012 and included the presentation of evidence and cross-examination of all 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, SEF and Eric Epstein offered testimony into the record. This proceeding also includes Cross-Examination exhibits that were offered and entered into the record at the February 22, 2012 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 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 are established for the customers of PPL based on the components of the proposed Time of Use ("TOU") program. 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]

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

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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.A. § 315(a).

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]

In the instant proceeding, it is incumbent upon the Company to affirmatively prove the reasonableness of every element of its proposed TOU program. A review of the record will demonstrate that PPL has failed to demonstrate that its proposed TOU program possesses the necessary characteristics to be considered as default service. In addition, the reasonableness

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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. P.U.C. 423, 444 (fn. 37) (1983).

of its claim for the recovery of the prior period shortfall that resulted from the improper design of its previous TOU program has not been supported with the type of substantial evidence needed in Commission proceedings.

Failing to sustain its burden of proof, the proposed program should not be classified as default service. Furthermore, the proposed recovery of the shortfall generated by the prior period TOU program should be denied as it would result in rates that are neither just, nor reasonable. The denial of recovery of the prior period shortfall vacates the need to address the collection of revenue from non-participating customers.

II. SUMMARY OF ARGUMENT

The Bureau of Investigation and Enforcement's involvement in this proceeding is centered on its disagreement with the Company's characterization of the Time of Use program as default service, the recovery of a prior period under-collection and whether costs associated with TOU programs should be recovered from customers other than those participating in the program.[8]

As presented in the testimony of its expert witness, I&E maintains that PPL Electric Utilities Corporation's proposed Time of Use program is not a Default Service program and should not be recognized as such. PPL's TOU program is an offering available to its customers with smart meters. Participation in PPL's TOU program requires an affirmative election on the part of the customers while default

8 Transcript, pp. 39-40.

service remains the incumbent plan for customers not choosing an alternative supplier or service.

Furthermore, even if the Company's TOU program was considered to be default service, the prior period under-collection sought by the Company is not based on reasonable regulatory principles. The Company maintains the burden of proving that the costs associated with its prior period TOU under-collection are reasonable and that its rates were properly designed to recover these costs.

Finally, the Company's proposed recovery of under-collections from rate schedules that did not participate in the TOU program is improper. As the record in this, and other related proceedings demonstrates, only TOU program ratepayers enjoyed the benefits of participation. It is not in the public interest to subsequently require non-participating ratepayers to subsidize the program.

III. ARGUMENT

A. Time of Use program is not Default Service.

PPL has not provided substantial evidence to describe how its TOU program satisfies the characteristics of default service. Although the broad definition of Default Service suggests that it is solely classified as service that is not provided by an alternative electric generation supplier ("EGS"), I&E maintains that this interpretation must be read in conjunction with the Commission's Regulations at 52 Pa. Code §§ 54.181 et al and Chapter 28 of the Public Utility

Code.[9] Clearly, the obligation of a Default Service Provider is to provide electric generation supply service to customers that do not choose an alternative supplier.[10] PPL has consistently fulfilled that obligation with its fixed rate default service offering. As the record in this proceeding demonstrates, "[r]etail electric customers are provided default service as a result of not electing an alternative electric generation supplier other than the incumbent electric distribution company (in other words, due to inaction)."[11] 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. The differentiation between the fixed rate Default Service plan and the TOU plan is summarized by the Company's own witness in his comments that customers must apply to PPL Electric to participate in the proposed TOU plan and that "[c]ustomers who do not make an affirmative election will be transferred to the Company's fixed price default service option."[12] Similarly, I&E commented that "PPL's TOU program is an optional program available to qualifying PPL customers with smart meters that affirmatively elect to join."[13] PPL's witness also added that the program is an optional program that customers are not required to participate in.[14] It is the characterization of an affirmative action that must be taken to participate in the Time of Use program

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9 66 Pa. C.S.A. §§ 2801, et al.
10 66 Pa. C.S.A. § 2807(e), 52 Pa. Code § 54.184.
11 I&E Statement No. 1, p. 4.
12 PPL Electric Utilities Corporation Statement No. 1, p. 12.
13 I&E Statement No. 1, pp. 4-5.
14 PPL Electric Utilities Corporation Statement No. 2, p. 11.

that exemplifies the difference between the Company's fixed rate Default Service and this optional Time of Use service. In fact, "[a] customer receiving competitive supply who returns to Basic Utility Supply Service will return to fixed price default service."[15] Furthermore, the Company's tariff separates the offerings by its listing of the programs on two distinct rate schedules. "The Company's default service or Price-to-Compare rates are described on PPL Electric Pa. P.U.C. No 201, revised page No 19Z.5. On the other hand, the rates paid by TOU customers are described on PPL Electric Pa. P.U.C. No 201, revised page No 19Z.5A."[16] "The 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."[17] As offered by the I&E witness in this proceeding, "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 are a viable option for them."[18] The public interest is best served by the clear identification of default service and any, and all, available options. The record in this proceeding indicates that absent a choice, customers default to PPL's fixed rate option. The Company has consistently demonstrated this concept through their acknowledgement that customers default to its fixed rate option, but must affirmatively choose any option or alternative.

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15 PPL Electric Utilities Corporation Statement No. 1, p. 13.
16 I&E Statement No. 1, p. 3.
17 Id.
18 Id.

Furthermore, a review of the Commission's Regulations demonstrates the inseparable connection of Default Service and the Price to Compare.[19] There has not been any presentation by the Company in the way of credible evidence addressing how this "competing" default service provision impacts the price to compare. In addition, default service is obtained under least cost requirements. Again, the record is void of any evidence demonstrating how this will be adhered to under this alternative service. As enunciated in the burden of proof argument above, it is incumbent upon the Company to supply substantial evidence in order to support the efficacy of the proposed changes to its tariff. I&E is not required to disprove the Company's case. As such, the substantial evidence requirement remains with the Company. I&E submits that this evidentiary requirement has not been met. The record does not contain substantial evidence demonstrating how an optional program that requires affirmative action can be considered default service when the Company's existing fixed rate option satisfies the statutory obligation to serve requirement.[20]

B. Recovery of a Prior Period Under-Collection is Not in the Public Interest.

As presented above, PPL has not demonstrated, with substantial evidence, that its Time of Use program contains all the regulatory characteristics in order to be considered default service. I&E maintains that the classic default service is represented by the Company's fixed rate option. As such, reasonable costs

19 *See, e.g.* 52 Pa. Code §§ 69.1808 – 1810.
20 66 Pa. C.S.A. § 2807(e).

associated with the fixed rate default service program as represented in the published Price-to-Compare are eligible for recovery on a full and current basis. As the prior period under-collection sought by the Company in this proceeding is the result of its ill designed Time of Use program, recovery should be denied.

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.

The Public Utility Code allows for the recovery of all reasonable costs associated with default service.[21] The Company's proposal attempts to recover under-collections without a showing of substantial evidence that this revenue deficiency was based on reasonable actions. The repeated claims that the prior period default service plan was previously approved do not demonstrate that all costs therein are reasonable, or that the program was properly designed allowing for the generation of sufficient revenue to recover all appropriate costs. The crux of this issue in this proceeding demonstrates that, in fact, the TOU program was not properly designed. 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

21 66 Pa. C.S.A. § 2807(e)(3).

for the period January 1, 2011 to May 31, 2011 and should not be misconstrued as being based on reasonable costs. I&E does not dispute that reasonable default service costs are recoverable. In this proceeding, I&E maintains that the TOU program is not default service and, in the alternative, the revenue deficiency was the result of a poorly designed program.

The record evidence in this proceeding demonstrates that, for the time period of January 1, 2011 through May 31, 2011, both the TOU peak and off peak rates were lower than the Company's fixed price default service.[22] In addition, prior to the development of this TOU program rate, 426 customers were participating in the TOU program while the customer level swelled to almost 23,000 with the implementation of the advantageous rates.[23] The subsequent TOU rates established to go in effect June 1, 2011 caused the majority of existing TOU customers to stop taking service under the TOU program.[24] Moreover, the Company has acknowledged that its TOU program design for the time period under discussion allowed customers to choose the TOU program and save money without shifting usage.[25] In fact, every customer entering the TOU program during this time period could achieve savings without shifting usage.[26] Identified as "free riders,"[27] it was theoretically possible that customers that took service

22 PPL Electric Utilities Corporation Statement No. 2-R, p. 4. *See also*, Transcript, p. 41 (cross-examination of PPL Witness Kleha).
23 Transcript, p. 44.
24 PPL Electric Utilities Corporation Statement No. 2-R, pp. 4-5.
25 PPL Electric Utilities Corporation Statement No. 2, p. 11.
26 Transcript, p. 47.
27 Id.

under the TOU program during this time period could actually increase their usage and still save over the terms contained in the fixed price parameters of default service. [28]

I&E offers that all of the components of the TOU program identified above were under the control of the Company. I&E believes that a company with the business acumen of PPL would contemplate the impact that advantageous pricing and the resulting influx and subsequent departure of customers would have on its designed revenue recovery proposal. The record is void of evidence to demonstrate how PPL planned for this response to the advantageous pricing of its January 1, 2011 through May 31, 2011 TOU program. To the extent that the "free rider" design and the wide variation in customer numbers contributed to the prior period under-collection associated with the TOU program, I&E maintains that this was a known risk that is clearly the Company's responsibility. I&E offers that the resulting revenue shortfall should not be considered reasonable as it was the result of the flawed design of the program. The prior period under-collection is not a cost recovery issue; it is a revenue shortfall issue.[29] As has been presented by the Bureau of Investigation and Enforcement, "Commission approval of a Company created rate methodology does not equate to a guaranteed revenue or guaranteed recovery. Commission approval simply means that the Company will have the

28 Transcript, p. 46.
29 I&E Statement No. 1-R, p. 3.

opportunity to generate the desired revenue using the approved methodology."[30] 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."[31] To rule otherwise would overturn decades of utility regulation wherein the Commission has consistently allowed that properly designed cost recovery mechanisms provide an opportunity to collect revenue in a timely manner, not a guarantee.

The Company has failed to present substantial evidence in support of the recovery of the prior period revenue deficiency resulting from its TOU program. As such, this recovery must be denied.

C. Time of Use Program Costs Must Only Be Recovered From Time of Use Participants.

The Company's proposal to recover costs associated with its optional Time of Use program from default service customers served under the fixed rate option is improper and must be rejected. Widely accepted ratemaking principles call for the production of revenue from the ratepayers enjoying the benefits of the program offering.[32] In this particular proceeding, citing to the limited number of customers taking service under the current optional TOU program, the Company seeks recovery of the prior period, and future, revenue deficiencies from non-participants. Even though these default service customers did not enjoy the

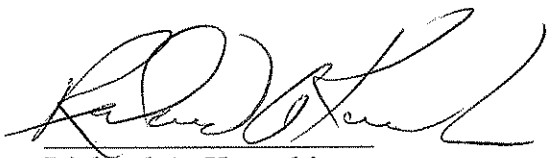
30 I&E Statement No. 1, pp. 7-8.
31 Id., p. 8.
32 I&E Statement No. 1, p. 5.

benefits of a rate design that endorsed "free riders" the Company maintains that they should contribute to its claimed revenue deficiency. This concept is clearly not in the public interest and must be rejected. Reconciliation is not the issue in this instance; it is recovery from the proper rate schedule. To penalize ratepayers that do not, or did not participate in the optional TOU program in question is irresponsible and does not merit consideration.

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 characterization of its optional Time of Use program as default service must be rejected. The Company's expanded definition of default service would allow for the imposition of rates that would not be just or reasonable. There is not sufficient record evidence to classify the Time of Use program as a default service program either historically, or prospectively. In addition, the under-collection recovery contemplated in the proposal is premised on a revenue deficiency that was within the control of the Company.

Respectfully submitted,



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PPL Electric Utilities Corporation Supplement No. 110 to Tariff Electric – Pa. P.U.C. No. 201 – Time of Use Rates	: : :	Docket No. R-2011-2264771

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Main Brief** dated March 21, 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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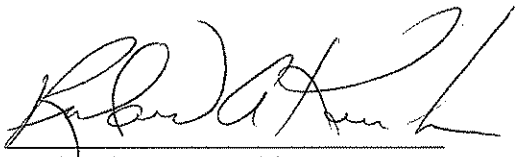

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