



March 21, 2012

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**Re: Pennsylvania Public Utility Commission
V.
PPL Electric Utilities Corporation
Time-of-Use Rates
Docket No. R-2011-2264771**

Dear Secretary Chiavetta:

Enclosed please find an original and nine (9) copies of the Main Brief of the Sustainable Energy Fund for filing in the above-cited proceeding. Copies have also been provided as indicated on the Certificate of Service.

Respectfully submitted,
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KLM/bls

cc: Honorable Susan Colwell, Administrative Law Judge
Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**MAIN BRIEF
OF THE
SUSTAINABLE ENERGY FUND**

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Dated: March 21, 2012

TABLE OF CONTENTS

- I. BACKGROUND AND HISTORY OF THE PROCEEDING 1
- II. SUMMARY OF ARGUMENT 3
- III. ARGUMENT..... 5
 - A. Burden of Proof..... 5
 - 1. PPL Electric has the Burden of Proving the Reasonableness of the Proposed TOU Rates. 5
 - B. Reasonableness of PPL Electric’s Proposed TOU Rates. 6
 - 1. PPL Electric’s Proposed Time-of-Use Rates Do Not Satisfy The Requirements of Act 129..... 6
 - 2. PPL Electric Should Be Ordered To Assign The TOU Program To A Third Party. 12
- IV. CONCLUSION 15

TABLE OF AUHTORITIES

Cases

<i>Application of Pennsylvania Power & Light Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al</i>	2
<i>Berner v. Pennsylvania Public Utility Commission</i>	5
<i>Burleson v. Pennsylvania Public Utility Commission</i>	5
<i>Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission</i>	5
<i>Feinstein v. Philadelphia Suburban Water Company</i>	6
<i>Joint Petition for Full Settlement of PP&L, Inc.’s Restructuring Plan and Related Court Proceedings</i>	2
<i>Lower Frederic Township v. Pennsylvania Public Utility Commission</i>	5
<i>Norfolk & Western Railway Company v. Pennsylvania Public Utility Commission</i>	5
<i>Patterson v. Bell Telephone Company of Pennsylvania</i>	6
<i>Pennsylvania Public Utility Commission v. Equitable Gas Company</i>	6
<i>Pennsylvania Public Utility Commission v. PPL Electric Utilities Corporation, Docket No. R-2009-2122718</i>	10
<i>Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission</i>	6
<i>Se-Ling Hosiery v. Margulies</i>	6

Statutes

66 Pa. C.S. § 315(a)	3
66 Pa. C.S. § 332(a)	3
66 Pa. C.S. §§2801-2812	1
66 Pa. C.S. §2806(1)	7
66 Pa. C.S. §2806(2).....	7
66 Pa. C.S. §2807(f)(5).....	1, 7, 9

I. BACKGROUND AND HISTORY OF THE PROCEEDING

On September 26, 2011, PPL Electric Utilities Corporation (“PPL Electric” or “the Company”)¹ filed with the Pennsylvania Public Utility Commission (“Commission”) Supplement No. 110 to Tariff Electric – Pa. P.U.C. No. 201 – Time-of-Use Rates. In this filing, PPL Electric proposes to implement a new Time-of-Use (“TOU”) program for its residential and small commercial and industrial customer classes to become effective for service beginning with the participating customer’s first bill cycle commencing after March 1, 2012. A Time-of-Use rate program must be offered by certain default service providers under Act 129 of 2008.²

In its Statement of Reasons for the filing, PPL Electric states that “[g]iven the high TOU rates and price differential between the fixed price default service rates and the TOU rates, the Company requested that the [Commission] suspend the [current] TOU rates for investigation, and also proposed the submission of a revised TOU program within 30 days to address the TOU pricing issues. By

¹ PPL Electric engages in the transmission and distribution of electricity to retail customers in eastern and central Pennsylvania. The Company also supplies electricity to retail customers. As of December 31, 2008, the Company provided electric service to approximately 1.4 million customers in 29 counties in eastern and central Pennsylvania.

² 66 Pa. C.S. §§2801-2812. Act 129 amended the Public Utility Code and changed the landscape for electricity default service by imposing a new legal standard – least cost procurement over time – which utilities must meet in the procurement of generation supply for default customers. Moreover, under Act 129, the electric default service provider must offer TOU rates and real time pricing to all residential or commercial customers that have been provided with smart meter technology. In addition, the default service provider “shall submit an annual report to the price programs and the efficacy of the programs in affecting energy demand and consumption and the effect on wholesale market prices.” 66 Pa. C.S. §2807(f) (5).

Order entered August 25, 2011, the Commission suspended the Company's TOU rates contained in the August 22, 2011 filing and ordered the Company to maintain its current TOU rates for up to a six-month period. The Commission also directed PPL Electric to submit a plan proposing a revision to the pricing issues in the future.”³

On October 27, 2011, the Sustainable Energy Fund of Central Eastern Pennsylvania (“SEF”) filed a Petition to Intervene in this proceeding. SEF is a Pennsylvania corporation established at the conclusion of PPL Electric's Restructuring proceeding⁴ and pursuant to the terms of the Joint Settlement⁵ filed in that proceeding. SEF's mission is to promote and invest in energy efficiency, renewable energy and energy education in order to provide opportunities and benefits for PPL Electric ratepayers. SEF has been certified as a Conservation Service Provider (“CSP”).

At Public Meeting on November 10, 2011, the Commission suspended PPL Electric's TOU filing until September 1, 2012 and ordered that an investigation be held to determine the reasonableness of the filing.⁶ The matter was assigned

³ PPL Electric Statement of Reasons, p. 2.

⁴ *Application of Pennsylvania Power & Light Company for Approval of its Restructuring Plan Under Section 2806 of the Public Utility Code, et al.*, Docket No. R-00973954, Final Order (entered August 13, 1998).

⁵ *Joint Petition for Full Settlement of PP&L, Inc.'s Restructuring Plan and Related Court Proceedings*, filed August 12, 1998 at Docket No. R-00973954.

⁶ PPL Electric 2011 TOU Suspension Order, p. 3.

to Administrative Law Judge Susan D. Colwell. A Prehearing Conference was held in Harrisburg on December 9, 2011 at which time SEF's Petition to Intervene was approved and a litigation schedule was set.

II. SUMMARY OF ARGUMENT

As the moving party, PPL Electric has the burden of proving the reasonableness of the TOU rates proposed in this proceeding.⁷ Since PPL Electric has proposed the TOU rates in this proceeding, it must demonstrate, by substantial evidence, that such rates are reasonable and will deliver the demand and consumption reductions required under Act 129.

The Company has failed to meet its burden of proof concerning the reasonableness of the proposed TOU rates largely because it has failed to analyze the demand and consumption TOU program data that it has been collecting since 2002. Most importantly, the Company has failed to gather or analyze the data the Commission specifically ordered it to provide in this TOU filing or properly demonstrate how its proposed TOU rates will deliver the demand and consumption reductions required by Act 129. This result leads to the inevitable conclusion that its burden of proof has not been met. Moreover, SEF has demonstrated that the

⁷ 66 Pa. C.S. § 315(a); 66 Pa. C.S. § 332(a).

current TOU proposal includes a critical error which render's PPL Electric's proposed on-peak and off-peak periods inappropriate.

The record in this proceeding indicates that PPL Electric has failed to properly analyze its historical TOU programs, failed to properly analyze the proposed TOU program and failed to provide critical data that the Commission specifically ordered it to provide in this 2011 filing.

Consequently, SEF asserts, for the reasons discussed herein, that the Commission should dispense with the repeated attempts to coerce the Company into complying with Act 129. The record in this proceeding indicates that despite repeated attempts, PPL Electric is either unable or unwillingly to propose a TOU program that complies with the requirements of Act 129. As a direct result of its ineptitude, PPL Electric has saddled its default service customers with a \$1.8 million under collection and proposed a flawed new TOU program which does not comply with the requirements of Act 129 and is unlikely to attract customers. Instead, the Commission should order the Company to assign the TOU program to a third party operator pursuant to an RFP approved by the Commission after input is gathered from stakeholders.

III. ARGUMENT

A. Burden of Proof

1. PPL Electric has the Burden of Proving the Reasonableness of the Proposed TOU Rates.

The Public Utility Code at 66 Pa. C.S. §315(a) and 66 Pa. C.S. §332(a) clearly indicate that PPL Electric has the burden of proof in this proceeding. When a party bears the burden of proof, in addition to establishing a prima facie case, the party must also establish 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.”⁸ Substantial evidence has been defined as “that quantum of evidence which a reasonable mind might accept as adequate to support a conclusion.”⁹

Moreover, the courts have held that the burden of proof does not shift to the party challenging a utility’s proposal.¹⁰ Thus, while the burden of going forward may shift, the burden of finally and convincingly establishing the reasonableness and legality of its TOU proposal always remains with PPL Electric. The intervening parties have no such burden. In this regard, the Commission has stated

⁸ *Burleson v. Pennsylvania Public Utility Commission*, 501 Pa. 433, 437, 461 A.2d 1234, 1236 (1983); *Lower Frederic Township v. Pennsylvania Public Utility Commission*, 409 A.2d 505, 507 (Pa. Cmwlth. 1980).

⁹ *Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission*, 19 Pa. Commonwealth Ct. 1, 337 A.2d 922 (1975), as quoted in *Norfolk & Western Railway Company v. Pennsylvania Public Utility Commission*, 489 Pa. 109, 128 (1980).

¹⁰ *Berner v. Pennsylvania Public Utility Commission*, 382 Pa. 622, 631, 116 A.2d 738, 744 (1955).

“[t]here is no presumption of reasonableness which attaches 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.”¹¹

Consequently, since PPL Electric has proposed the TOU rates at issue in this proceeding, it must demonstrate, by substantial evidence, that such rates are reasonable and will deliver the demand and consumption reductions required under Act 129.¹²

B. Reasonableness of PPL Electric’s Proposed TOU Rates.

1. PPL Electric’s Proposed Time-of-Use Rates Do Not Satisfy The Requirements of Act 129.

(a) PPL Electric’s TOU Program Must Be Designed To Reduce Consumption and Peak Energy Demand And Impact Wholesale Market Prices.

The Pennsylvania legislature has indicated that Act 129 is “designed to ensure that electricity obtained reduces the possibility of electric price instability,

¹¹ *Pennsylvania Public Utility Commission v. Equitable Gas Company*, 57 Pa. P.U.C. 423, 444 (fn. 37) (1983).

¹² SEF acknowledges that the burden of proving that the Company should implement something other than its own proposal is on the party proposing something else. The Complainant has the burden of showing that the utility is responsible or accountable for the problem described in the Complaint in order to prevail. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). This may be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. den.*, 529 A.2d 654, 602 A2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

promotes economic growth and ensures affordable and available electric service to all residents.”¹³

The Pennsylvania legislature also states that “[t]he health, safety and prosperity of all citizens of this commonwealth are inherently dependent upon the availability of adequate, reliable, affordable, efficient and environmentally sustainable electric service at *the least cost*, taking into account any benefits of price stability, *over time* and the impact on the environment.”¹⁴ In order to effectuate this design, Act 129 specifically provides that default service providers must offer TOU rates and real time pricing to customers who have been provided with smart meters. Most importantly, Act 129 further provides that the “default service provider shall submit an annual report to the price programs and the efficacy of the programs in affecting *energy demand and consumption and the effect on wholesale market prices.*”¹⁵

However, despite this clear statement by the Pennsylvania legislature, PPL Electric witnesses have explicitly indicated in testimony that the Company’s TOU proposal does not support these goals. For example, when PPL Electric witness Joseph M. Kleha was asked about the average annual savings of all participating TOU customers for each rate class, he responds that “PPL Electric has not

¹³ 66 Pa. C.S. §2806(2).

¹⁴ 66 Pa. C.S. §2806(1) (Emphasis added).

¹⁵ 66 Pa. C.S. §2807(f)(5) (Emphasis added).

calculated any participant financial savings.”¹⁶ Moreover, although Mr. Kleha argues that the proposed TOU rates will provide participants with an opportunity to save, he acknowledges that the Company has not quantified those savings or even established that there would be savings on an annual basis.¹⁷

Consequently, SEF witness John Costlow¹⁸ has testified that PPL Electric has failed to make a “good faith” effort to design and administer the TOU programs to effectuate the intent of Act 129, which is to provide the *least cost* of electricity *over time* for an EDC’s captive customers. Specifically, PPL Electric has “(1) failed to analyze the cost effectiveness of the Time of Use program; (2) failed to analyze energy demand reductions, if any; (3) failed to analyze energy consumption reductions, if any; and, (4) committed a critical error in the design of “on-peak” periods.”¹⁹

¹⁶ SEF Ex. 1, Sched. 7.

¹⁷ PPL Electric St. 1, p. 15.

¹⁸ Since October 27, 2008, Mr. Costlow has been the Director of Technical Services for SEF. In this capacity, he is responsible for managing the ongoing operations of the corporation, including the design, development and implementation of programs that invest in and promote energy conservation, energy efficiency and renewable energy. Mr. Costlow possesses a Bachelor of Science Degree in Organizational Management from Palm Beach Atlantic University and is a graduate of the Naval Nuclear Power School, where his focus was upon electronic monitoring and controls and nuclear reactor operations. Mr. Costlow is also certified by the Association of Energy Engineers in Carbon Reduction Management and is a Journeyman Certified Electronics Technician. Mr. Costlow has sponsored SEF Statements 1, 1-R and 1-SR in this proceeding.

¹⁹ SEF St. 1, pp. 8-9. In regard to the critical error, the Company has proposed a year-round 7 hour peak period starting at 12:00 pm and ending at 7:00 pm for residential customers and a year-round 12 hour peak period starting at 7:00 am and ending at 7:00 pm for Small C & I customers. PPL Electric St. 2, pp. 7-9. Despite the fact that the record in this proceeding clearly shows that residential and commercial customers experience the same economic peaks because both customer classes take their energy from the same wholesale market (SEF St. 1, p. 8), PPL Electric witness Mr. Woodruff has testified that he chose different peak periods for residential and small C & I customers because these customers have different load shapes. See, SEF Ex. 1, Sched. 9. While Mr. Woodruff is

Under cross examination PPL Electric witness Mr. Kleha has admitted that although the Company has captured hourly data which demonstrates that a PPL Electric customer who shifts usage from a high cost period to a low cost period can save money by doing so, he does not know whether the Company has analyzed that data.²⁰ Mr. Kleha has also testified that PPL Electric maintains two (2) years worth of historical consumption data on every customer, including TOU customers.²¹

However, despite the apparent existence of relevant TOU demand and consumption data, PPL Electric witness David R. Woodruff has testified under cross examination that the Company has *not* provided an analysis of the TOU program's impact on energy demand²² and has *not* analyzed the TOU program's impact on peak load contribution or total reduction in demand by rate schedule.²³

correct when he states that residential and business customers have different load shapes, his statement illuminates two critical design flaws in PPL Electric's proposed TOU program. The proposed program was: (1) designed for the load shape of an individual rate class; and, (2) designed for *load shape* and not *economic shape*. SEF witness Mr. Costlow has testified that TOU programs "are implemented to reduce the "economic peaks" by decreasing or shifting load to periods of lower cost in a quest to achieve economic efficiency, thereby in theory, delivering the least cost electrical service to energy users over time. PPL Electric's focus upon "load shape" is misplaced because the reduction in economic peaks" is more impactful in the pursuit of economic efficiency." SEF St. 1, p. 8. For example, Chart 1 in SEF St. 1 (SEF St. 1, p.10) shows that energy rates are *not* at their highest during the period 7:00 am to 7:00 pm as proposed by PPL Electric. In this regard, SEF witness Mr. Costlow has stated that "false knowledge will not assist customers in shopping; to the contrary, it will harm them by providing a false understanding of when the market is truly high as they negotiate with Energy Generation Suppliers." SEF St. 1, p. 11.

²⁰ Tr. pp. 48-49.

²¹ Tr. p. 49.

²² Tr. p. 88.

²³ Tr. p. 87. In fact, Mr. Woodruff argues that *peak load reductions* and *reductions to peak demand* are relevant only to the evaluation of PPL Electric's EE&C programs, not the Company's TOU programs. PPL Electric St. 2-R, pp. 18-19. However, as discussed above, Mr. Woodruff's position is not supported by the actual language of Act 129. See, 66 Pa. C.S. §2807(f)(5). Moreover, the Commission specifically ordered PPL Electric to provide certain of this data in the 2011 TOU filing. The Commission states "we shall direct PPL to provide, *within the context of its next TOU filing*, the following information as it pertains to currently enrolled (as of December 31, 2009) Rate RS and

Moreover, Mr. Woodruff has testified that the Company has *not* analyzed the TOU program's impact during the 100 highest demand hours by rate schedule.²⁴ Mr. Woodruff explains that the Company plans to file the annual reports required by Act 129 "by the end of June."²⁵

In response, SEF asserts that under Act 129 the annual reports are clearly intended to assist the Commission in its determination of the *validity* of the TOU program proposed by the default service provider. An annual report provided in June 2012 will not provide any evidence for the record in the current TOU proceeding. Such analysis is of critical importance here because the Company's previous TOU program has produced an under collection of \$1,889,460²⁶ for residential customers and PPL Electric has proposed to collect the under collection from *all* default service customers.²⁷ The Company's failure to provide the annual reports for this proceeding is magnified because the Commission admonished the Company in its 2010 TOU Order for failing to sufficiently analyze net usage and demand reductions as required under Act 129. The Commission states:

Rate RTS TOU customers: (1) the average summer and non-summer months' on-peak usage and off-peak usage; (2) an estimate of how this on-peak/off-peak usage relationship would change using the proposed on-peak and off-peak parameters; (3) an estimate of the impact upon an average summer and non-summer bill for Rate RS and Rate RTS customer; and (4) actual data for 2010 showing the number of newly enrolled customers for each rate class and the number of re-enrolled customers for each class. *Pennsylvania Public Utility Commission v. PPL Electric Utilities Corporation*, Docket No. R-2009-2122718 (entered March 9, 2010 ("2011 TOU Order"), Order at p. 28. (Emphasis added). It does not appear that PPL Electric filed this data for purposes of this proceeding.

²⁴ Tr. p. 87.

²⁵ Tr. p. 88.

²⁶ PPL Electric St. 1, p. 8.

²⁷ PPL Electric St. 1, p. 9.

Based upon our review of the record evidence we do not agree with the ALJ's finding that PPL has demonstrated that current TOU customers' *usage and demand was reduced due to participation in the Program. PPL acknowledged that net usage and demand reductions were not analyzed under its current TOU Program and that only the shifting of energy usage that resulted in revenue shifts was analyzed.* [Citation omitted] *We believe that given the demand and energy reduction goals of Act 129 these parameters should be better studied. Included within this study should be the reductions to Peak Load Contribution as well as total electricity usage.*²⁸

There is a similar lack of evidentiary support for PPL Electric's claims in this proceeding that PPL Electric customers who shift their usage from on-peak periods to off-peak periods will have the opportunity to save money. In this regard, Company witness Mr. Kleha states that "the proposed TOU default service program will provide participating customers with an understanding of the cost and rate differentials between on-peak and off-peak periods. This knowledge will assist participating customers as they consider opportunities to shop for their electric supply in the competitive retail market and opportunities to undertake energy efficiency and conservation measures."²⁹

In fact, SEF witness Mr. Costlow has concluded that since PPL Electric has proposed inappropriate on-peak and off-peak periods, the Company will send false price signals to its customers. He states "[t]he 12 hour peak period as proposed by PPL Electric creates a false impression that energy rates are high from 7 a.m. to 7

²⁸ 2011 TOU Order, Order at p. 37. (Emphasis added).

²⁹ PPL Electric St. 1, p. 16.

p.m. all year. A peak, by definition, is the highest or maximum point. Mr. Woodruff states that “[t]he objective of any state TOU program is to reduce usage during time of highest demand”[SEF Ex. 1, Sched. 7] PPL Electric’s proposed program gives energy users the false perception that energy rates are high or at their peak from 7 a.m. to 7 p.m. all year long. This is far from true.³⁰ In this regard, SEF witness Mr. Costlow observes “[f]alse knowledge will not assist customers in shopping; to the contrary, it will harm them by providing a false understanding of when the market is truly high as these customers negotiate with Energy Generation Suppliers.”³¹

2. PPL Electric Should Be Ordered To Assign The TOU Program To A Third Party.

After measured consideration of the issue, SEF witness Mr. Costlow has testified that the Commission should order PPL Electric to hire, through an RFP approved by the Commission, a third party Conservation Service Provider or Wholesale Default Service Provider, to work with stakeholders to create a TOU program that will benefit ratepayers by providing the least cost service to ratepayers over time.³²

³⁰ SEF St. 1, p. 11. Also, see Chart 1, SEF St. 1, p. 10.

³¹ SEF St. 1, p. 11.

³² SEF St. 1, p. 15. Input from stakeholders could be accomplished by being provided the opportunity to comment upon a Third Party RFP TOU proposal by PPL Electric. Mr. Costlow has also testified that the Company should not

In response to SEF witness Mr. Costlow's statement that the Company has failed to make a "good faith" effort in designing its TOU program, PPL Electric witness Mr. Woodruff argues that "SEF does not describe what, if any, on-peak and off-peak periods it would consider to be reasonable. SEF also does not describe how on-peak and off-peak prices should be set."

However, Mr. Woodruff is apparently confused about the SEF position in this proceeding. As discussed above, SEF witness Mr. Costlow has testified that because of the Company's abject failure and intransigence concerning its TOU proposals, the Commission should order the Company to satisfy the requirements of Act 129 by assigning the TOU program to a third party by way of the RFP process.³³ In this regard, SEF witness Mr. Costlow has stated "I believe the TOU program has been a failure. The TOU program's under recovery of more than \$1.8 million dollars, the mass exodus of ratepayers from the program, the demonstrated lack of analysis by PPL Electric and the Company's inability or unwillingness to demonstrate any positive benefits that have exceeded the program costs, clearly indicate that the TOU program has been a failure."³⁴

be allowed to recover the cost of the third party CSP in this proceeding or any future proceedings since it has already allocated cost for the design and approval of this proposed program to customers. Id.

³³ SEF St. 1, pp. 14-15.

³⁴ SEF St. 1, p. 13.

Given this clearly stated belief, there was no rational reason for Mr. Costlow to provide alternative on-peak and off-peak periods for the Company to include in an obviously flawed TOU program. Moreover, the record in this proceeding does reflect the fact that witnesses for both the Office of Consumer Advocate³⁵ and Office of Small Business Advocate³⁶ have recommended alternative on-peak and off-peak TOU periods. However, when asked under cross examination whether the Company agreed with these alternative periods, Mr. Woodruff responded that PPL Electric did not.³⁷ Thus, it appears that Mr. Woodruff is criticizing the lack of an alternative by Mr. Costlow that the Company would have summarily rejected in any event.

³⁵ See, OCA St. 1, p. 10.


³⁶ See, OSBA St. 1, pp. 17-18.

³⁷ Tr. p. 93.

IV. CONCLUSION

For the reasons set forth herein, SEF respectfully requests that the Administrative Law Judge and the Commission reject PPL Electric's proposed TOU program and require the Company to file a new TOU proposal that is consistent with the recommendations made by SEF in this Main Brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Sustainable Energy Fund Main Brief has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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