



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA PUBLIC UTILITY COMMISSION  
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IN REPLY PLEASE  
REFER TO OUR FILE

April 11, 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) **Reply 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,

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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**

<b>Pennsylvania Public Utility Commission</b>	:	
	:	
v.	:	<b>Docket No. R-2011-2264771</b>
	:	
<b>PPL Electric Utilities Corporation</b>	:	

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**REPLY BRIEF  
OF THE BUREAU OF  
INVESTIGATION AND ENFORCEMENT**

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Dated: April 11, 2012

**TABLE OF CONTENTS**

- I. INTRODUCTION ..... 1
- II. SUMMARY OF ARGUMENT ..... 3
- III. ARGUMENT ..... 5
  - A. Revenue Deficiencies Must Not Be Recovered From Non-Participating Ratepayers ..... 5
  - B. The Company’s Time of Use Program Is Not Default Service ..... 6
  - C. Recovery of Prior Period Revenue Deficiencies Must Be Rejected..... 9
- IV. CONCLUSION..... 12

**TABLE OF CITATIONS**

**Cases**

*Dutchland Tours, Inc. v. Pennsylvania Public Utility Commission*,  
19 Pa. Cmwth. 1, 337 A.2d 922 (1975) ..... 2

*Norfolk & Western Railway Co. v. Pennsylvania Public Utility Commission*,  
489 Pa. P.U.C. 109, 128 (1980) ..... 2

*Pennsylvania Public Utility Commission v. Equitable Gas Co.*,  
57 Pa. P.U.C. 423, 444 (fn. 37) (1983) ..... 3

**Statutes**

66 Pa. C.S.A. § 1301 ..... 2

66 Pa. C.S.A. § 2801 et al. .... 7

66 Pa. C.S.A. § 2807(e)..... 7, 9, 10

66 Pa. C.S.A. § 2807(f) ..... 4

**Regulations**

52 Pa. Code §§ 54.181 et al..... 7

52 Pa. Code §§ 54/184 ..... 7

## **I. INTRODUCTION**

The Procedural History of this proceeding has been adequately presented in the Main Brief of the Bureau of Investigation and Enforcement (“I&E”) and does not need to be repeated in any detail in this Reply Brief. In the alternative, I&E offers the following brief summary of the procedural status of this proceeding to this point.

On September 26, 2011, PPL Electric Utilities Corporation (“PPL” or “Company”) filed Supplement No. 110 to Tariff Electric – Pa. P.U.C. No. 201 (“Supplement No. 110”) proposing to implement a new Time of Use (“TOU”) program for its residential and small commercial and industrial classes. Supplement No. 110 was filed with the Pennsylvania Public Utility Commission (“Commission”) with an effective date coinciding with the customer’s first billing cycle commencing after March 1, 2012.

The Bureau of Investigation and Enforcement (“I&E”) filed its Notice of Appearance 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”). 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”). All intervening parties remained active throughout the proceeding.

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. 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 Evidentiary Hearing in this proceeding was conducted on February 22, 2012 and included the presentation of evidence and cross-examination of all witnesses.

Main Briefs were submitted on March 21, 2012 by I&E, PPL, OSBA, OCA, Dominion, SEF and Mr. Epstein. In further support of the arguments presented in its testimony and Main Brief, I&E offers the following comments.

As the Company’s proposal impacts its rates, I&E maintains that the Company has the burden of proving the reasonableness of each and every element of its claim as provided for under the Public Utility Code.<sup>1</sup> It has not been disputed that the Company bears the burden of proof in this proceeding. Satisfaction of the burden of proof in regulatory proceedings brought before the Commission requires the presentation of substantial evidence. As has been presented in the I&E Main Brief, substantial evidence has been defined as “...that quantum of evidence which a reasonable mind might accept as adequate to support a conclusion.”<sup>2</sup>

In the instant proceeding, we are reminded that the Commission and the Courts have clearly held that the burden of proof does not shift to the party

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1 66 Pa. C.S.A. § 1301.

2 I&E Main Brief, p. 4, citing *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).

challenging a proposed action. The Commission has presented its position on this issue in its statement that “[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.<sup>3</sup> In other words, I&E does not need to prove that the Company’s TOU program is not a default service program. Nor must I&E prove that PPL failed to properly design the rates associated with this offering, resulting in the failure to generate sufficient revenue to support this program through rates from only the beneficiaries of the plan, i.e., the TOU participants.

## **II. SUMMARY OF ARGUMENT**

The Bureau of Investigation and Enforcement argues that the proposed recovery of the revenue deficiency from rate schedules that did not participate in the TOU program is improper. It is fundamentally unfair to include ratepayers that did not enjoy the benefits of participation in the recoupment of the Company created revenue deficiency. This proposal is nothing more than asking non-participating ratepayers to subsidize a poorly designed program. I&E maintains that such a request is not in the public interest.

I&E further maintains that the Company has not presented the type of substantial evidence contemplated by the Courts to support its claim that its TOU program represents Default Service. The Company’s argument continues to suggest that there can be two different default services. One based on inaction, the

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<sup>3</sup> I&E Main Brief, p. 4, citing *Pennsylvania Public Utility Commission v. Equitable Gas Co.*, 57 Pa. P.U.C. 423, 444 (fn. 37) (1983).

other on an affirmative customer decision. In addition, PPL relies on an overly broad definition of the term default service provider. The Company's default service provider interpretation suggests that only another supplier can be considered an alternative. A more contemporary definition acknowledges alternative services offered by the distribution company. I&E maintains that you can only "default" to one service. Anything after that is a choice. As presented in the I&E testimony, PPL Electric Utilities Corporation's proposed Time of Use program lacks all the necessary characteristics of Default Service and, therefore, should not be recognized as such. As required by the Public Utility Code, PPL's TOU program is an offering available to its customers with smart meters and participation requires an affirmative election on the part of the customers.<sup>4</sup>

Default Service, on the other hand, remains the incumbent plan for customers not making a choice. This choice includes alternative suppliers or alternative service from PPL. The necessary act of an affirmative election is a key distinguishing characteristic eliminating its classification as default service. Inaction results in placement in the Company's fixed price default service. Action enables customers to choose an alternative service.

Furthermore, even if the Company's TOU program was considered to be Default Service, the Company's attempt to recover its prior period under-collection is not supported by credible evidence and violates reasonable regulatory principles. The Company maintains the burden of proving that the costs

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4      66 Pa. C.S.A. § 2807(f)

associated with its prior period TOU under-collection are reasonable and that its rates were properly designed to recover these costs. I&E has not challenged whether the costs associated with acquiring generation supply in the TOU program were reasonable. Rather, I&E maintains the program design that created an entire classification of “free riders” was the critical component in the resulting revenue deficiency.

### **III. ARGUMENT**

#### **A. Revenue Deficiencies Must Not Be Recovered From Non-Participating Ratepayers.**

The Company has not presented a compelling argument as to why customers that chose not to participate in the Time of Use program must now contribute to the resulting revenue deficiency. The proposal to recover deficiencies associated with the optional Time of Use program from fixed rate default service customers is improper and must be rejected. As presented in the I&E Main Brief, it is a widely accepted ratemaking principle that the production of revenue for a particular service must be received from the ratepayers enjoying the benefits of the program offering.<sup>5</sup> In this proceeding, the Company seeks recovery of the prior period, and future, revenue deficiencies from non- participants. PPL’s claimed justification is that it is unlikely that it could recover the outstanding deficiency created by its program from the limited number of remaining TOU

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<sup>5</sup> I&E Main Brief, p. 13. See also, I&E Statement No. 1, p. 5.

participants.<sup>6</sup> The crux of the Company's argument is that even though these default service customers did not enjoy the benefits of a rate design that endorsed "free riders" they should contribute to 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. To allow the Company to seek recovery from non-participants for every flawed program design removes any incentive for the Company to properly design its rates to maximize the opportunity to generate sufficient revenue to support its programs. Ratepayers cannot continually be used as the Company's safety net.

**B. The Company's Time of Use Program Is Not Default Service**

PPL has not provided substantial evidence to describe how its TOU program satisfies all 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 opines that this interpretation alone is improper. As presented in the I&E Main Brief,<sup>7</sup> recognition and understanding of what constitutes default service requires the

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6 PPL Main Brief, pp. 34-35.

7 I&E Main Brief, pp. 6-7, 9.

evaluation of several sources including the Commission's Regulations<sup>8</sup> and Chapter 28 of the Public Utility Code.<sup>9</sup>

It has not been disputed that the obligation of a Default Service Provider is to provide electric generation supply service to customers that do not choose an alternative supplier.<sup>10</sup> I&E opines that PPL has consistently fulfilled that obligation with its default service offering as contained in its fixed rate plan. The PPL fixed rate plan is the default service that is provided to customers that do not take any affirmative action as to alternatives. Logic dictates that one defaults to a particular service and then can choose an alternative if they desire. This is precisely the case in this proceeding. Customers that do not make a choice default to fixed rates. They are then eligible to choose the alternative of a Time of Use option. This is no different than exercising the option to choose an alternative supplier. At no point can a customer be required to take Time of Use rates. On the other hand, returning customers that do not choose an alternative are required to take service under fixed rates. This statement is supported by the Company's witness wherein it was stated that added that the TOU program is an optional program that customers are not required to participate in.<sup>11</sup> Furthermore, PPL's witness has indicated that "[a] customer receiving competitive supply who returns to Basic Utility Supply Service will return to fixed price default service."<sup>12</sup> I&E

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8 52 Pa. Code §§ 54.181 et al.

9 66 Pa. C.S.A. §§ 2801 et al.

10 66 Pa. C.S.A. § 2807(e), 52 Pa. Code § 54.184.

11 PPL Electric Utilities Corporation Statement No. 2, p. 11.

12 PPL Electric Utilities Corporation Statement No. 1, p. 13.

offers that it is the characterization that an affirmative action that must be taken to participate in the Time of Use program that exemplifies the difference between the Company's fixed rate Default Service and this optional Time of Use service.

As I&E demonstrated in its testimony, “[r]etail electric customers are provided default service as a result of not electing an alternative electric generation supplier other than the incumbent EDC (in other words, due to inaction).”<sup>13</sup> PPL, on the other hand, offers that both action and inaction can result in default service. Simply because PPL offers the program to eligible participants is not, alone, sufficient to recognize it as default service. As both the Commission's regulations and the Public Utility Code demonstrate, there are additional requirements to default service. The record is void of evidence showing how the company's optional program satisfies these characteristics. For example, there isn't substantial evidence addressing how the TOU program impacts the Price to Compare nor has the filing presented substantial evidence demonstrating how the proposal satisfies the default service least cost procurement obligation. These are critical issues that must be addressed in default service plans. The proposed TOU program lacks the requisite evidence indicating these provisions have been protected in the design of the optional service. The recognized burden of proof obligation does not hold that I&E must prove that the Company has failed to demonstrate that its plan satisfies all the elements needed to be recognized as default service. It is incumbent upon PPL to present substantial evidence in

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13 I&E Statement No. 1, p. 4.

support of its proposal. I&E maintains that the failure to address key elements of default service through a showing of substantial evidence requires that the proposal be rejected. The record does not contain substantial evidence to support the premise that an optional program that requires affirmative action is default service. That statutory obligation to serve is appropriately addressed through the Company's existing fixed rate option.<sup>14</sup> Simply put, "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."<sup>15</sup> I&E does not represent that the TOU program is not viable, merely that it is not default service that requires subsequent reconciliation.

**C. Recovery of Prior Period Revenue Deficiencies Must Be Rejected**

As presented in the section above, the Company has not presented substantial evidence to support that its Time of Use program contains all the regulatory characteristics of Default Service. I&E offers no criticism of the default service as represented by the Company's fixed rate service. As such, reasonable costs associated with that 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 the revenue deficiency created by its ill designed Time of Use program, recovery should be denied.

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14 66 Pa. C.S.A. § 2807(e).

15 I&E Statement No. 1, p. 3.

As argued in the I&E Main Brief, any revenue discrepancies resulting from the optional Time of Use program should be 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. Some customers may benefit, some may not. Either way, as an elective service, the customer is free to make that choice.

It is undisputed that the Public Utility Code allows for the recovery of all reasonable costs associated with default service.<sup>16</sup> However, this provision does not supersede the evidentiary requirements of a showing of substantial evidence that the revenue deficiency was based on reasonable actions. Commission approval does not evaluate whether sufficient revenue will be generated by the plan nor are costs predetermined to be reasonable.

The I&E Main Brief has identified the flawed nature of the Company's TOU program. The TOU design for the period of January 1, 2011 through May 31, 2011 resulted in every participant being a "free rider" as defined by the Company. As a "free rider" it was theoretically possible that customers that took service 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.<sup>17</sup> The resulting dramatic influx of customers should come as no surprise. The subsequent exodus of customers should have been readily

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16 66 Pa. C.S.A. § 2807(e)(3).

17 Transcript, p. 46.

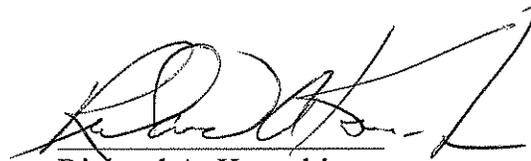
predictable as well. The design of the TOU program was, at all times, under the control of the Company. I&E maintains that PPL should have contemplated the impact that the advantageous pricing and resulting influx and subsequent departure of customers would have on its designed revenue recovery proposal. The Company's argument in its Main Brief that its Commission approved program entitles it to recovery of its claimed deficiency places only ratepayers at risk. Absent accountability, the Company has no incentive to design rates in order to generate sufficient revenue to cover all reasonable costs. I&E offers that it is not in the public interest to continually exonerate the Company from the risks of bad decisions and designs. As argued above, ratepayers must not always be the safety net. 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 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.

#### IV. CONCLUSION

For the reasons set forth above, the Bureau of Investigation and Enforcement respectfully submits that the Company has not supported all elements of its proposed Time of Use program with the types of substantial evidence anticipated by the Courts. Failing to satisfy its burden of proof, PPL's characterization of its optional Time of Use program as default service must be rejected. The resulting rates from the Company's overly broad definition of default service would not be just or reasonable. There is not substantial record evidence to characterize the Time of Use program as a default service program either historically, or prospectively. In addition, the record evidence has demonstrated that the under-collection recovery contemplated in the Time of Use program proposal is premised on a revenue deficiency that was within the control of the Company.

Respectfully submitted,



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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**CERTIFICATE OF SERVICE**

I hereby certify that I am serving the foregoing **Reply Brief** dated April 11, 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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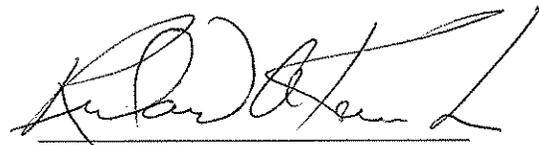
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