



COMMONWEALTH OF PENNSYLVANIA

October 11, 2018

E-FILED

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

Re: Application of PPL Electric Utilities Corporation for Approval of Intercompany Restructuring / Docket No. A-2017-2629534

Dear Secretary Chiavetta:

Enclosed please find the Reply Exceptions, on behalf of the Office of Small Business Advocate ("OSBA"), in the above-captioned proceeding.

Copies will be served on all known parties in this proceeding, as indicated on the attached Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Sincerely,


Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538

Enclosures

cc: Robert D. Knecht
Parties of Record

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of PPL Electric Utilities :
Corporation for Approval of Intercompany : **Docket No. A-2017-2629534**
Restructuring :

**REPLY EXCEPTIONS
ON BEHALF OF THE
OFFICE OF SMALL BUSINESS ADVOCATE**

Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538

For: John R. Evans
Small Business Advocate

Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101

Date: October 11, 2018

TABLE OF CONTENTS

I.	Introduction.....	1
II.	Reply Exceptions	3
	A. Reply to PPL Electric Exception No. 1	3
	B. Reply to PPL Electric Exception No. 2	7
	C. Reply to PPL Electric Exception No. 3	10
III.	Conclusion	14

TABLE OF AUTHORITIES

CASES

PAGES

<i>Application of Duquesne Light Company to Convert to a Limited Liability Company, Docket No. A-2017-2599375</i>	12
<i>City of York v. Pa. PUC, 449 Pa. 136 (1972)</i>	3, 5, 7
<i>Joint Application of Frontier Communications of Breezewood, Inc., et al. for Approval of Restructurings from Corporation to Limited Liability Companies, Docket No. A-310400F004</i>	12
<i>Policy Statement Regarding Interpretation of 66 Pa. C.S. § 1102(a)(3), Docket M-930490</i>	<i>passim</i>
<i>Popowsky v. Pa. PUC, 594 Pa. 583 (2007)</i>	3, 5, 7

STATUTES

15 Pa. C.S. § 311 <i>et seq.</i>	12
66 Pa. C.S. § 1102(a)(3)	<i>passim</i>
66 Pa. C.S. § 1103(a)	3

REGULATIONS

52 Pa. Code § 5.533 <i>et seq.</i>	2
52 Pa. Code § 69.901 <i>et seq.</i>	5, 10, 11

I. Introduction

On October 16, 2017, PPL Electric Utilities Corporation (“PPL Electric,” “PPL EU” or the “Company”) filed an Application of PPL Electric Utilities Corporation for Approval of Intercompany Restructuring (“*Application*”) with the Pennsylvania Public Utility Commission (“Commission”).

On October 28, 2017, notice of the *Application* was published in the Pennsylvania Bulletin in accordance with 52 Pa. Code Section 5.14.

On November 21, 2017, the Office of Small Business Advocate (“OSBA”) filed a Protest and Notice of Intervention in opposition to the *Application*.

On January 22, 2018, a prehearing conference was held before Administrative Law Judges (“ALJs”) Benjamin A. Myers and Joel H. Cheskis.

On January 24, 2018, the ALJs issued their Scheduling Order.

On March 23, 2018, PPL Electric served the Direct Testimony of Alexander J. Torok.

On April 23, 2018, the OSBA served the Direct Testimony of Robert D. Knecht.

On May 9, 2018, PPL Electric served the Rebuttal Testimony of Mr. Torok.

On May 29, 2018, Counsel for PPL Electric informed the ALJs that the parties had agreed to waive cross examination of all witnesses and to admit evidence into the record by written stipulation.

On May 29, 2018, the ALJs granted the Company’s request and canceled the evidentiary hearing via email message sent at 8:49 am EDT.

On June 13, 2018, the Company filed a Stipulation for the Admission of Evidence. The Stipulation requested the admission into the record of: PPL Electric Direct Testimony; PPL

Electric Rebuttal Testimony; OSBA Direct Testimony; OSBA Exhibits IEC-1 and IEC-2; the *Application*; and PPL Electric Exhibit No. 1-A.

On June 29, 2018, PPL Electric and the OSBA submitted a Main Brief.

On July 13, 2018, the OSBA submitted a Reply Brief.

On September 11, 2018, ALJ Myers and ALJ Cheskis issued their Recommended Decision (“RD”).

On October 1, 2018, the Company filed Exceptions¹ to the RD.

The OSBA submits the following Reply Exceptions in response to the Exceptions filed by the Company.

¹ 52 Pa. Code § 5.533 governs the filing of exceptions. PPL Electric violated Section 5.533(c) (“the exceptions must be concise” and “A separate brief in support of or in reply to exceptions may not be filed with the Secretary”) by adding to its numbered exceptions an argumentative “Introduction” and “Summary of Argument” that amounted to a separate brief. PPL Electric also violated Section 5.533(b) (“Each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken...”) by embellishing its October 1st filing with these argumentative preambles that were not specifically responsive to the RD. The OSBA will not respond to these two sections, and requests that the Commission simply disregard PPL Electric’s “Introduction” and “Summary of Argument.”

II. Reply Exceptions

A. Reply to PPL Electric Exception No. 1: The ALJs properly recommended that the Company's proposed corporate restructuring requires a showing of substantial public benefit for approval under Section 1102(a)(3) of the Public Utility Code. (PPL Electric Exceptions, at 6-10)

PPL Electric's Exceptions argued that there are essentially two standards to determine whether an application may be approved. The first is that there is the substantial public benefit test enunciated by the Pennsylvania Supreme Court in *City of York v. Pa. PUC*, 449 Pa. 136, 141 (1972) ("*City of York*") and *Popowsky v. Pa. PUC*, 594 Pa. 583 (2007) ("*Popowsky*"). The Company argued that the substantial, affirmative public benefit standard is applicable only when there is a change in the "ultimate controlling owner of the utility that was seeking the Commission's approval." PPL Electric Exceptions, at 7. PPL Electric claimed that there is a second standard that should be applied to the instant case. The Company argued that this second standard would be applicable to "an internal reorganization that does not change ultimate control." *Id.*, at 8. PPL Electric argued that Section 1103(a) requires the lesser certificate of public convenience standard that "such certificate is necessary or proper for the service, accommodation, convenience or safety of the public." *Id.*, at 9-10, citing 66 Pa. C.S. § 1103(a).

Only one standard applies to determine whether an application may be approved. What constitutes a substantial affirmative public benefit may vary from case to case, but there is only one standard – the standard enunciated in *City of York* and *Popowsky*. The Commission may weigh whether PPL Electric has proven that any part of the *Application* constitutes an affirmative public benefit, which the OSBA argues it has not, but the standard remains the same.

PPL Exception No. 1 argued that the substantial affirmative public benefit standard does not apply for two reasons: first, that the proposed intercompany restructuring does not result in a

change in the “ultimate control” of the Company; and second, that the proposed intercompany restructuring will not result in a change in the management or operations of PPL Electric.

As it has done throughout this proceeding, the Company has repeatedly used and emphasized the word “ultimate,” whether discussing the “ultimate control” or the “ultimate ownership” of PPL Electric. For example, the Company stated, as follows:

Critical to the issues in this case are two facts. First, the *ultimate* ownership and control of PPL Electric and its utility property by PPL Corporation will not change as a result of the Restructuring.

PPL Electric Exceptions, at 6 (citation omitted) (emphasis added). In the Company’s misguided view of the law, since there is (supposedly) no change in the “ultimate control” of PPL Electric, it argued that the ALJs incorrectly applied the Section 1102(a)(3) legal standard to the proposed intercompany restructuring by requiring a showing of an affirmative public benefit for approval. PPL Electric Exceptions, at 7-8.²

The Company tried to support its alternative (and incorrect) “ultimate control” legal standard in a variety of ways.³ PPL Electric complained that the ALJs did not cite to *Policy Statement Regarding Interpretation of 66 Pa. C.S. § 1102(a)(3)*, Docket M-930490 (Order entered September 13, 1994), 1994 Lexis Pa. PUC 56 (“*Policy Statement*”). PPL Electric Exceptions, at 8. However, the *Policy Statement* does not support the Company’s “ultimate control” legal standard, as the *Policy Statement* never addressed or even mentioned “ultimate control.” In contrast, the Commission did discuss *de facto* control at length. *See, e.g., Policy Statement*, at 10.

² The OSBA addressed the Section 1102(a)(3) legal standard in its Main Brief. OSBA Main Brief, at 6-8.

³ One way was by sheer repetition. PPL Electric used the word “ultimate” 41 times in its Exceptions.

PPL Electric also cited to 52 Pa. Code § 69.901 in apparent support of its argument. PPL Electric Exceptions, at 8. However, the phrase “ultimate control” does not appear in that regulation, but *de facto* control does. 52 Pa. Code § 69.901(a)(2). And, unlike the irrelevant issue of ultimate control, the ALJs properly and reasonably evaluated the issue of *de facto* control. *See*, RD at 12-13 and 16.

Furthermore, the Company’s citations to *City of York* and *Popowsky* are equally flawed and do not support its argument. PPL Electric Exceptions, at 7. The Pennsylvania Supreme Court never addressed the concept of “ultimate control” in either case.

The Commission should unambiguously reject PPL Electric’s fictitious “ultimate control” legal standard. It has no legal basis and it thwarts Section 69.901 by ignoring the *de facto* control of PPL Electric that would result from the proposed intercompany restructuring. OSBA Main Brief, at 4-5.

The Company’s second reason that the substantial affirmative public benefit standard should not apply was stated by PPL Electric, as follows:

Second, the Restructuring will not, in any way whatsoever, change the management or operations of PPL Electric.

PPL Electric Exceptions, at 6 (citation omitted). PPL Electric continued:

The evidence in this case is that the proposed Restructuring will not affect management or operations and such evidence is undisputed.

PPL Electric Exceptions, at 9. This statement is simply false.

The OSBA submits that the proposed transaction will necessarily involve a change in managerial control of the Company, since PPL Electric will be under the control of intermediary companies Newco 1 and Newco 2. There is simply no way for PPL Electric to prove that this change in ownership and managerial control will have no impact on the operations and

management of PPL Electric. The sworn testimony of PPL Electric's own witness described the proposed intercompany restructuring, as follows:

PPL Corp. formed two new Delaware holding companies, PPL Subsidiary Holdings, LLC ('Newco 1') and PPL Energy Holdings, LLC ('Newco 2').

Newco 1 is owned directly by PPL Corp. and Newco 2 is owned directly by Newco 1.

PPL Corp. plans to contribute *all of the interests* it holds in certain of its direct, wholly owned subsidiaries, *including its shares in PPL EU* and PPL EF, to Newco 1.

Newco 1 will then contribute all of the shares received of these companies from PPL Corp. to Newco 2.

Under the proposed corporate structure, PPL EU will be a direct subsidiary of Newco 2 and an indirect subsidiary of Newco 1 and PPL Corp.

PPL Electric Statement No. 1, at 4 (formatting added for clarity) (emphasis added).

Devastating to the Company's argument in Exception No. 1, PPL Electric's witness continued, as follows:

PPL Corp. will be positioned as a pure holding company. Intercompany financing, including managing the capital structures of the regulated utilities to comply with regulatory requirements, will be facilitated through the lower tier holding companies rather than PPL Corp.

PPL EU Statement No. 1, at 4. *See also, Application*, at Paragraph 18.

Thus, the Company's own witness demonstrated that there will be a change in management control, and that the new holding companies will be involved in facilitating PPL Electric's compliance with regulatory requirements. The OSBA submits that these organizational changes constitute a change in the management of PPL Electric.

In addition to the change in management control, the Company readily admits that the increased cash flexibility purportedly afforded by the proposed intercompany restructuring will allow it to pursue acquisitions and mergers. PPL EU Statement No. 1, at 4-5. This would represent a significant change in the Company's strategy as presented in its application to spin off its generation assets (Docket Nos. A-2014-2435752 and A-2014-2435833) and could readily result in reduced management attention to the regulated utility business. OSBA Statement No. 1, at 7. Such a reduction in the focus on the regulated business could easily result in policy and managerial changes affecting PPL Electric.

The OSBA therefore respectfully requests that the Commission reject PPL Electric Exception No. 1 in its entirety and confirm that there is only one standard, the substantial affirmative public benefit standard, as determined by the Pennsylvania Supreme Court in *City of York and Popowsky*.

B. Reply to PPL Electric Exception No. 2: The ALJs properly determined that the proposed intercompany restructuring did not provide sufficient affirmative public benefits to justify approval. (PPL Electric Exceptions, at 10-13)

PPL Electric stated, as follows, in its Exception No. 2:

PPL Electric submits that the benefits from the internal restructuring are clearly sufficient to justify approval even if the substantial public benefit test is applied.

PPL Electric Exceptions, at 10. The Company then attempted to describe those substantial public benefits, as follows:

Following the Restructuring, PPL Corporation will be better able to manage the cash flows and tax liabilities of its non-regulated subsidiaries.

This will result in more funds available to PPL Corporation for the entire range of its activities including payments of dividends and investment in utility and non-utility projects.

A financially stronger PPL Corporation benefits PPL Electric by improving its ability to raise capital at reasonable terms for PPL Electric and its other subsidiaries.

PPL Electric Exceptions, at 11 (citations omitted) (formatting added for clarity).

The proposed intercompany restructuring, however, provides *no* affirmative public benefits. The ALJs agreed with the OSBA. RD, at 20-21. *See also* OSBA Main Brief, at 11-16; OSBA Reply Brief, at 11-14.

Cash Flow: The record evidence demonstrates that this “benefit” does not accrue to the public. The *Application* stated that the proposed restructuring will help with the “mobilizing” of cash. *Application*, at Paragraph 17. In testimony, PPL Electric clarified that the proposed intercompany restructuring would allow PPL Corporation to allow “PPL Corp. and its *shareholders* more efficient, lower cost access to cash distributions.” PPL EU Statement No. 1, at 5 (emphasis added). In contrast to this vague statement, the Company admits that no cash distributions related to PPL Electric are contemplated as a result of the proposed transaction, implying that there is no cash benefit to PPL Electric. OSBA Statement No. 1, at 6-7.

Tax Liabilities: Reducing PPL Corporation’s tax liabilities is not a public benefit. The *Application* stated that the proposed restructuring will help with the avoidance of state and federal taxes. *Application*, at Paragraph 17. In testimony, PPL Electric stated that the proposed intercompany restructuring would allow PPL Corporation (not PPL Electric) to avoid “unnecessary Pennsylvania state tax liability.” PPL EU Statement No. 1, at 5. However, the Company readily admitted that none of this tax reduction “benefit” will inure to PPL Electric ratepayers. OSBA Statement No. 1, Exhibit IEc-2, response to OSBA-I-1(c). It is therefore very difficult to understand how reducing tax payments to the Commonwealth of Pennsylvania without any commensurate reduction in taxes paid by PPL Electric ratepayers would constitute a

public benefit. OSBA Statement No. 1, at 6. If anything, the tax savings represent a negative benefit to the public, since the tax authorities will need to recover this lost revenue elsewhere.

More Funds: This is a generalized claim that has no basis in the record evidence. PPL Electric, in an interrogatory response, assumed that any tax savings resulting from the restructuring would stay with PPL Corporation and would not be explicitly reflected in reduced equity costs recoverable from PPL Electric ratepayers. PPL Electric Exhibit 1-A, Company Response to OSBA-II-2. The record evidence is devoid of any guarantee by PPL Electric that the tax benefits of the proposed transaction will improve the financial health of PPL Corporation. In fact, it is at least as likely that any “benefits” will be dissipated through dividend payments or alternative investments. Specifically, the Company admits that one of the reasons for the transaction is to facilitate future acquisitions. *Application*, at Paragraph 18. In addition, PPL Electric has made it abundantly clear that the proposed intercompany transaction is designed to enrich the corporation’s shareholders. PPL Electric Statement No. 1, at 5.

Financially Stronger: This is simply a variation on the “more funds” argument, adding the claim that a financially stronger PPL Corporation benefits PPL Electric by improving its ability to raise capital at reasonable terms for PPL Electric and its other subsidiaries. However, this claim contradicts the sworn testimony PPL Electric’s own witness regarding financing:

Moreover, at page 5 [of his Direct Testimony], Mr. Torok indicates that *the proposed transaction will not result in any change to the financing of PPL Electric.*

OSBA Statement No. 1, at 6-7 (emphasis added). Consequently, Mr. Torok refutes any argument by the Company that the proposed intercompany restructuring will improve the financing terms offered to PPL Electric.

The OSBA therefore respectfully requests that the Commission reject PPL Electric Exception No. 2 and conclude that the proposed intercompany restructuring is devoid of any affirmative public benefits.

C. Reply to PPL Electric Exception No. 3: The ALJs properly recommended that the Company's proposed corporate restructuring requires approval under Section 1102(a)(3) of the Public Utility Code. (PPL Electric Exceptions, at 13-15)

PPL Electric Exception No. 3 is a variation of its Exception No. 1, in that the Company again relied on the incorrect *ultimate control* argument and the unproven claim that there will be *no change in utility management or operations*. In this exception, PPL Electric supplemented its earlier arguments and advances case law that purportedly supports its conclusions. Given the repetitive nature of this exception, the OSBA will not repeat all of its arguments set forth in Subsection A, *supra*.

The Company sets forth its Exception No. 3 legal reasoning, as follows:

In its Policy Statement Order quoted previously, the Commission concluded that intercompany reorganizations should be reviewed because they could affect management or operations of a utility. This review has been undertaken in this proceeding and it has been established that no change in management or operations of PPL Electric will occur as a result of the Restructuring. (PPL Electric Statement No. 1-R, p. 3)

PPL Electric Exceptions, at 13. As discussed above, the “no change in managements or operations of PPL Electric” conclusion is unsupported by the record evidence. *See* Subsection A, *supra*. PPL Electric continued, as follows:

The RD concludes that the Restructuring is a change in control because a new entity will own PPL Electric's stock and that technically falls within the terms of the Policy Statement.

PPL Electric Exceptions, at 13. The ALJs were correct. The *Policy Statement* and Section 69.901 both conclude that the proposed intercompany restructuring *is* a change in control. The

use of the word “technically” simply means that the Company acknowledged that the ALJs were correct in their conclusion.

PPL Electric goes on to propose an untenable interpretation of the *Policy Statement* and Section 69.901 well outside of the plain language of each:

However, it is clear that the *Policy Statement* was focused on changes in the ultimate owner of utility property through mergers with, or acquisitions of, a parent or grandparent of the utility.

* * *

Thus, it is not what entity owns the utility directly that is important, but a change in the entity that is the ultimate owner that triggers Section 1102(a)(3) approval. Here, the ultimate owner does not change and a certificate should not be required.

PPL Electric Exceptions, at 13-14. The Company is simply wrong.

The *Policy Statement* and Section 69.901 focus on *de facto* control of PPL Electric after the proposed intercompany restructuring, not the ultimate control.⁴ The Commission should reject the Company’s proposed interpretation of the *Policy Statement* and Section 69.901.

Next, PPL Electric turns to the tactic of dismissing the relevance of the *Policy Statement*. The Company wants the Commission to “remember” that “policy statements do not have the force of law” but are merely “expressions” of the Commission’s future behavior. PPL Electric Exceptions, at 14. After denigrating the *Policy Statement* and Section 69.901, the Company wants the Commission to ignore Section 69.901 and rubber stamp the *Application*. *Id.* The OSBA respectfully disagrees that neither the *Policy Statement* nor Section 69.901 are irrelevant to this proceeding.

⁴ The dictionary at www.meriam-webster.com defines *de facto* as “actual” or “actually.” The record evidence shows that PPL Corporation will become a pure holding company, with *actual* control of PPL Electric residing in corporate subsidiaries.

Finally, the Company argued the Commission should use a “practical approach” to review the proposed intercompany restructuring. PPL Electric Exceptions, at 14. The Company claimed that this “practical approach” was used in two Commission decisions: *Joint Application of Frontier Communications of Breezewood, Inc., et al. for Approval of Restructurings from Corporation to Limited Liability Companies*, Docket No. A-310400F004, 2003 Pa. PUC LEXIS 323 (Order entered October 17, 2003); and *Application of Duquesne Light Company to Convert to a Limited Liability Company*, Docket No. A-2017-2599375 (Order entered August 31, 2017) (“*Duquesne Light*”). PPL Electric Exceptions, at 14-15.

The OSBA addressed PPL Electric’s argument with respect to these cases fully in its reply brief. OSBA Reply Brief, at 6-11. The two cases cited by the Company are merely corporate conversions, changing each from a business corporation to a limited liability company. The record evidence in this proceeding demonstrates that the proposed intercompany restructuring is a far more complex transaction than simply a corporate conversion. The ALJs carefully considered PPL Electric’s arguments in this respect, and sensibly concluded that these cases involved very different transactions than that proposed in this proceeding. RD, at 17.


In addition, the Commission should observe that PPL Electric’s Exception No. 3 failed to recognize that the *Duquesne Light* case was not adjudicated under Chapter 11 of the Public Utility Code, where affirmative public benefits are required. Rather, the *Duquesne Light* case was adjudicated under the Pennsylvania Entity Transaction Law (“ETL”) and did not involve a transfer of property, 15 Pa. C.S. §§ 311, *et seq.* OSBA Reply Brief, at 10-11. As such, this case is irrelevant to the proposed transaction.

The OSBA therefore respectfully requests that the Commission reject PPL Electric Exception No. 3 and affirm the continued relevance of its *Policy Statement* to this and similar transactions.

III. Conclusion

For the reasons set forth herein, the OSBA respectfully requests that the Commission deny PPL Electric Exceptions No. 1, No. 2, and No. 3.

Respectfully submitted,



Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538

For: John R. Evans
Small Business Advocate

Office of Small Business Advocate
300 North Second Street, Suite 202
Harrisburg, PA 17101

Dated: October 11, 2018

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of PPL Electric Utilities :
Corporation for Approval of Intercompany : **Docket No. A-2017-2629534**
Restructuring :

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served via email and/or First-Class mail (*unless other noted below*) upon the following persons, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

The Honorable Joel Cheskis
The Honorable Benjamin Myers
Pennsylvania Public Utility Commission
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17120
jcheskis@pa.gov
benmyers@pa.gov
(Email and Hand Delivery)

Christy M. Appleby, Esquire
Erin L. Gannon, Esquire
Office of Consumer Advocate
555 Walnut Street, 5th Floor
Harrisburg, PA 17101
CAppleby@paoca.org
EGannon@paoca.org
(Counsel for OCA)
(Email and Hand Delivery)

Gina L. Miller, Esquire
Bureau of Investigation & Enforcement
400 North Street
Commonwealth Keystone Building
Harrisburg, PA 17120
ginmiller@pa.gov
(Counsel for BIE)
(Email and Hand Delivery)

David B. MacGregor, Esquire
Michael W. Gang, Esquire
Lindsay A. Berkstresser, Esquire
Post & Schell, P.C.
17 North Second Street, 12th Floor
Harrisburg, PA 17101
dmacgregor@postschell.com
mgang@postschell.com
lberkstresser@postschell.com
(Counsel for PPL)

Kimberly A. Klock, Esquire
Amy E. Hirakis, Esquire
PPL Services Corporation
Two North Ninth Street
Allentown, PA 18101
kklock@pplweb.com
ahirakis@pplweb.com
(Counsel for PPL)

DATE: October 11, 2018


Steven C. Gray
Assistant Small Business Advocate
Attorney ID No. 77538