OFFICIAL

STATE OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In the Matter of:

Petition of PPL Electric Utilities Corporation for a Declaratory Order to Terminate Controversies Concerning PPL's Certificated Rights to Provide Service in the Borough of Olyphant and Related Transition Charges

DOCUMENT

Docket No. P-00021986

PETITION OF INTERVENOR BOROUGH OF OLYPHANT FOR RECONSIDERATION AND AMENDMENT OF ORDER

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PETITION OF INTERVENOR BOROUGH OF OLYPHANT FOR RECONSIDERATION AND AMENDMENT OF ORDER

The Borough of Olyphant hereby respectfully petitions the Pennsylvania Public Utility Commission (the "Commission") pursuant to 52 Pa. Code § 5.572 for reconsideration in its entirety of, and, alternatively, amendment to certain paragraphs of its Order adopted in the above-captioned proceeding on December 18, 2003. In so petitioning, Olyphant is mindful of the Commission's remarks in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553, 559, 51 PUR4th 284, 289 (1982):

> A petition for reconsideration . . . may properly raise matters designed to convince the Commission that it should exercise its discretion . . . to rescind or amend a prior order in whole or in part. . . .What we expect to see raised in such petitions are new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission.

As grounds for its Petition, Olyphant states as follows:

INTRODUCTION

1. In its Opinion and Order[1] in this proceeding, granting the petition of PPL Electric Utilities Corporation for a declaratory order, the Commission, after finding that it had jurisdiction and was faced solely with issues of state law, and that it was "being asked to make legal conclusions based on uncontroverted facts," Opinion at 4, found and ordered, *inter alia*, (i) that the Mid-Valley Industrial Park in Olyphant is within PPL's certificated territory; (ii) that only the Commission, and not Olyphant, can require PPL to abandon certificated electric service to PPL's customers in the Industrial Park; and (iii) that any retail electric customer of PPL "as of January 1, 1997 or thereafter located in Olyphant" must continue to pay intangible transition charges and competitive transition charges "even if such customer were, in the future, to receive electric service from Olyphant instead of PPL." Order at 13, 14.

2. Olyphant respectfully submits that, contrary to the Commission's findings, the issues raised by PPL's Petition are inextricably intertwined with important issues of federal antitrust and energy law, and that there are genuine issues of material fact on the basis of which the Commission should have held evidentiary hearings, as Olyphant requested in the Motion of the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for a Declaratory Order and Petition to Intervene ("Motion to Deny Petition"). What is more, contrary to the Commission's belief that its Order "fosters electric competition in Pennsylvania" and is consistent with the objectives of the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801 *et seq.* (the "Competition Act"), the Order likely will have a substantial anticompetitive impact

[1] For the sake of clarity, the "Order" portion of the Opinion and Order, appearing at pages 13-14 thereof, will be referred to herein as the "Order," with citations thereto by numbered paragraph, and the remaining portion (pages 1-12) shall be referred to as the "Opinion."

on the ability of Olyphant and similar boroughs throughout Pennsylvania to compete with conglomerates like PPL and its affiliates to serve retail customers within their borders. Indeed, the Commission's Order runs counter to 100 years of historic practice in the United States of competition between investor-owned public utilities and municipal/cooperative electric systems for the service of retail customers, and over 75 years of decisions by the U.S. Supreme Court establishing and confirming the exclusive legal jurisdiction over these issues when they involve, as here, the sale of wholesale power in interstate commerce.

The U.S. Supreme Court has held in a number of cases that the states have no authority under the Commerce Clause of the U.S. Constitution to regulate wholesale sales of power in interstate commerce. *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83, 89-90 (1927) ("Plainly, however, the paramount interest in the interstate business carried on between two companies is not local to either state but is essentially national in character. The [wholesale rate] is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required, it can only be obtained by the exercise of the power vested in Congress.")

These precedents by the U.S. Supreme Court under the Commerce Clause resulted in the enactment of the Federal Power Act in 1935. The Supreme Court in *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964) confirmed that the Federal Power Commission ("FPC") had exclusive jurisdiction over sales and transportation of wholesale power in the United States ("Congress meant to draw a bright line easily ascertained between State and Federal jurisdictions..."). Since

the enactment of the Federal Power Act in 1935, the Commission has ruled in innumerable cases, affirmed by the federal courts, that the States have no jurisdiction to regulate the sale of wholesale power for resale. *FPC v. Conway Corp.*, 426 U.S. 271, 276-77 (1976) ("Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b)...confers jurisdiction on the Commission with respect to the sale of electric energy at wholesale in interstate commerce"); *United States v. Public Utilities Com.*, 345 U.S. 295, 298-304 (1953). These principles have been unanimously affirmed by the U.S. Supreme Court's holding that the Federal Energy Regulatory Commission ("FERC") has exclusive jurisdiction over the sale of wholesale power in interstate commerce. *New York, et al. v. FERC*, 535 U.S. 1 (2002).

A leading case closely in point is the Supreme Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). In this case, the Supreme Court affirmed a decision by the U.S. District Court for the District of Minnesota that Otter Tail Power Company had exercised its monopoly power in violation of Section 2 of the Sherman Act, by seeking to prevent municipalities seeking to establish exclusive service territories to compete with it for retail electric customers within the municipalities. The major means used were refusals to deal, sell or transmit wholesale power to the cities where the company sought to distribute power at retail. The district court entered a decree enjoining Otter Tail from refusing to deal, sell or transmit electric power at wholesale to such municipal electric systems.

The Supreme Court, in affirming the district court, first rejected Otter Tail's contention that by reason of the Federal Power Act it was not subject to antitrust regulation with respect to its refusals to deal, sell or transmit power to the cities. The

Court held that the existing provisions of the Federal Power Act did not immunize Otter Tail from compliance with the federal antitrust laws subject to the exclusive jurisdiction of the federal district courts. 410 U.S. 374.[2] The Supreme Court confirmed a violation of Section 2 of the Sherman Act as follows:

> ...The record makes abundantly clear that Otter Tail used its monopoly power in the cities in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws.
>
> * * *
>
> There were no engineering factors that prevented Otter Tail from selling power at wholesale to those towns that wanted municipal plants... The District Court found—and its findings are supported—that Otter Tail's refusal to sell at wholesale...[was] solely to prevent municipal power systems from eroding its monopolistic position.

410 at 377-378. The cities involved were competing to serve retail customers previously being served by Otter Tail Power Company in those cities. The U.S. Supreme Court reaffirmed the *Otter Tail* case as vesting jurisdiction in the federal district courts to adjudicate the federal antitrust laws. *New York v. FERC*, 122 S. Ct. 1012 (2002).[3]

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[2] In 1992, when Congress enacted the Energy Policy Act to grant the Federal Energy Regulatory Commission additional, but limited authority to order wheeling, it expressly provided that its enactment does not disturb the authority of the federal district courts to enforce the antitrust laws:

> Sections 824i, 824j, 824l, 824m of this title and this section shall not be construed to modify, impair, or supersede the antitrust laws.

16 U.S.C. § 824k(e). The legislative history of the amendment confirmed that under *Otter Tail*, the federal district courts have exclusive jurisdiction to adjudicate the federal antitrust laws, not the FERC, nor any state public utility commission.

[3] 122 S. Ct. 1012, 152 L.Ed.2d 49, 2002 U.S. LEXIS 1380, 122 S. Ct. 1018 at 13:

> ...in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)...the Court permitted the Government to seek antitrust remedies against a utility company which, among other things, refused to sell power at wholesale to some municipalities and refused to transfer competitors' power over its lines. *Id.* at 368. The Court concluded that the FPA's existence did not preclude the applicability of the antitrust laws. *Id.* at 372.

I. THE ORDER ENCROACHES ON MATTERS OVER WHICH FEDERAL COURTS AND FEDERAL AGENCIES HAVE EXCLUSIVE JURISDICTION, AND VIOLATES THE "*MOBILE-SIERRA*" DOCTRINE.

3. In granting the Order, the Commission found—without any discussion or analysis or mention of the points raised in Olyphant's Motion to Deny Petition—that it was confronted solely with matters of state law: "there are not any questions of federal law." Opinion at 6. In its Motion to Deny Petition, Olyphant requested that the Commission dismiss PPL's request for a declaratory order on the grounds that it seeks to determine matters now before the federal district court, which has exclusive jurisdiction to adjudicate the federal antitrust laws and final orders of the FERC. The present motion by PPL for a declaratory order to this Commission was filed *after* Olyphant's district court case was filed as an apparent collateral attack on the jurisdiction of the federal court to adjudicate the federal law issues before it.

4. In its Opinion, the Commission takes notice of what it believes are three—but in fact are two—lawsuits pending in federal district court,[4] as well as a proceeding before FERC. In both cases, Olyphant, the sole plaintiff in *Olyphant* and one of 14 borough-plaintiffs in *Lansdale*, alleges that PPL and certain of its corporate affiliates, as the sellers to the boroughs of wholesale electricity for resale by the boroughs to their retail customers, have violated Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act by the unlawful use of market power and other anticompetitive conduct that has, *inter alia*, placed the plaintiffs in a classic price squeeze. The plaintiffs in both cases also allege that the defendants have breached a FERC-ordered and approved settlement

[4] One of the two is *Borough of Olyphant, Pa. v. PP&L, Inc. et al.*, Civil Action No. 03-4023 (E.D. Pa.) ("*Olyphant*"). This is the same case as *Borough of Olyphant v. PP&L, Inc. et al.*(Civil Action No. 3:CV-01-2308) (M.D. Pa.), having been transferred from the Middle District to the Eastern District of Pennsylvania. The second case is *Borough of Lansdale, Pa., et al. v. PP&L, Inc., et al.* (Civil Action No. 02-8012) (E.D. Pa.) ("*Lansdale*").

agreement and related power supply contracts to which PPL and each of the 14 plaintiff-boroughs are parties. One of the material issues in both cases is whether the settlement agreement in tandem with the power supply contracts prohibits the payment of any stranded costs to PPL directly by the boroughs or indirectly through the imposition of an obligation on the boroughs to collect such stranded costs from the boroughs' customers.

5. The last federal proceeding noted by the Commission in its Opinion is *PPL Electric Utilities Corporation*, FERC Docket No. EL03-16-001.[5] This was the result of PPL seeking a declaratory order from the FERC to reconstrue the plain language of a settlement agreement and power supply contract between PPL and the boroughs, approved by the FERC in a final order issued in 1998. This again was an attempt by PPL to attack the federal court's jurisdiction over the pending case before it. In that proceeding, PPL sought and obtained a declaratory order from FERC in which FERC construed the settlement agreement and power contract as not precluding the imposition of stranded costs on Olyphant's customers. Olyphant, asserting that the settlement and power supply agreements by their terms clearly preclude PPL from imposing any stranded costs on the Borough or any customer of the Borough being supplied by its municipal electric system, with the wholesale electricity being purchased by the Borough at wholesale for resale, has appealed that order to the United States Court of Appeals for the District of Columbia (*Borough of Olyphant v. FERC*, Case No. 03-1284, U.S. Court of Appeals for the D.C. Circuit). What is most significant for present purposes is that if the Court of Appeals rules in favor of Olyphant, PPL would be prohibited by the FERC orders approving the settlement and power supply agreements from causing stranded costs to be imposed on Olyphant's retail customers who were the recipients of electricity

[5] 101 FERC ¶ 61,370 (2002) and 104 FERC ¶ 61,259.

purchased at wholesale by Olyphant from PPL—*no matter what Pennsylvania state law provides*. For this reason alone, the Commission should stay its Order, particularly paragraphs 6 and 7 thereof, until the Court of Appeals has ruled.

6. In its Motion to Deny Petition, Olyphant cites several legal doctrines in support of its position that the federal courts and FERC have exclusive jurisdiction over the matters that the Commission has decided in its Opinion and Order. Those doctrines, and the paragraphs of the Motion to Deny Petition in which they are discussed with supporting legal authorities, are as follows: (1) the federal courts have exclusive jurisdiction over federal antitrust laws (¶¶ 6–7); (2) the federal courts have exclusive jurisdiction to enforce final orders of FERC (¶¶ 8–10); PPL's failure to apply for rehearing and appeal of final FERC orders approving the settlement agreement and power supply agreements referred to above bars PPL—and the Commission—from modifying those orders to require Olyphant to pay stranded costs (¶¶ 11–12); the *Mobile-Sierra* doctrine of the U.S. Supreme Court prohibits the Commission from amending the settlement and power supply agreements (¶¶ 13–16); and under cases decided by the United States Supreme Court, the Commission cannot impose retail stranded costs on wholesale power sold to Olyphant for resale to meet the requirements of its municipal distribution system (¶¶ 17–22).

II. THE COMMISSION FAILED TO ACKNOWLEDGE THE EXISTENCE OF GENUINE ISSUES OF MATERIAL FACT IN ISSUING PARAGRAPHS 4 AND 5 OF THE ORDER.

7. As stated by Olyphant in its Motion to Deny Petition, PPL's petition for a declaratory order improperly asks the Commission to accept PPL's version of the facts—

which Olyphant has demonstrated are in dispute[6]—without an adjudicatory hearing, discovery, and presentation of witnesses. Olyphant submits Affidavits and Exhibits Nos. 1-20 by its Borough Manager Norbert Kosciuk and Council President Frank Borgna, the contents of which directly conflict with the unverified facts asserted by PPL in its petition to this Commission, and pose genuine issues of material fact requiring a hearing. Absent such procedural due process, no valid basis exists for issuing a declaratory order. Without proper resolution of factual issues the Commission's declaratory order is not based on a "case or controversy" under Article 3, Section 2, Clause 1 of the Constitution. *See Aetna Life Ins. Co. v. Hayworth*, 300 U.S. 227, 241 (there "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts").

8. The Commission erred in concluding that the facts as they pertain to the matter before it are uncontroverted. "No one disputes the basic facts relevant to this matter." Opinion at 3. The facts as set forth in Olyphant's attached affidavits directly conflict with the Commission's assumption on which its Order rests.

The Commission's refusal to allow Olyphant to develop relevant facts at an evidentiary hearing has resulted, for example, in paragraphs 4 and 5 of the Order, which state:

> 4. That the Mid-Valley Industrial Park in Olyphant, Pennsylvania is within PPL's certificated electric service territory.
>
> 5. That only this Commission, and not the Borough of Olyphant on its own accord, can require PPL to abandon certificated electric service to PPL's customers in the Mid-Valley Industrial Park.

[6] *See* the "Statement of Facts" section of the Motion to Deny Petition, at 12-16.

In reaching these determinations, the Commission made a series of assumptions that are not supported by the facts. First, the Commission assumed that the order that it issued in 1948 to a predecessor of PPL gave PPL an exclusive right to serve certain large (over 100 h.p.) customers not subject to any continuing competition from Olyphant as a certificate of public convenience under 66 Pa. C.S. § 1101. Opinion at 7. This conflicts with the language of the application by Scranton Electric for unique authority to serve only certain customers in the Borough who seek service from it under 66 Pa. § 1122(a) (Exhibit 5 at ¶ 9) and the actual events thereunder as set forth in Olyphant's affidavits, Exhibits 1–20 hereto. Also, the order expressly stated that Olyphant retained its authority to serve all other customers, comprising approximately 90% of the customers within the Mid-Valley Industrial Park. Second, the evidence will show that the unique 1948 order is not germane to the Industrial Park. Olyphant submits that the evidence would show that the 1946 ordinance upon which PPL's 1948 order is based has been superseded and is not applicable to the Industrial Park customers. The Borough's 1946 ordinance with PPL's predecessor, based on limitations of the Borough's then-existing municipal generating plant, never granted any exclusive service rights to PPL and was superseded by subsequent power supply agreements between PPL and Olyphant pursuant to which PPL agreed to provide all of the wholesale power requirements of the Borough for any of its customers.[7] Thus, Olyphant never granted any exclusive franchise to PPL for such service, but has sought to compete with PPL for customers within its boundaries, to

[7] *See* Exhibit No. 8, requiring PPL to provide wholesale electric power to serve any present or future customers of Olyphant located within the Borough, regardless of who previously served them, without payment of any stranded costs to PPL. PPL should have applied to the Commission for a new certificate of convenience based on the 1978 resolution adopted by Olyphant pertaining specifically to the Industrial Park.

attract potential customers to locate within the Borough, and to retain existing customers. Olyphant's efforts to foster competition through these means will be stifled by the Order, as will similar efforts being made by other similarly situated boroughs in Pennsylvania.

9. Paragraph 5 of the Order, together with certain other passages in the Commission's Opinion that Olyphant has no right to compete for any customers in the Mid-Valley Industrial Park presently served by PPL who desire to be served by Olyphant through its municipal distribution system, turns the actual facts under the alleged 1948 order upside-down. Nothing in the Competition Act precludes Olyphant from serving any customers located within its borough limits, consistent with long-established competition between municipals and private utilities. The Competition Act expressly authorizes the Borough to serve any customer located within the boundaries of the Borough. Section 2805(b). Once an entity becomes a customer of the Borough's system, it is clear that nothing in the Act requires any continued payment of any retail stranded costs. Section 2808 expressly limits retail stranded costs to customers who are "accessing the transmission or distribution network" of the "electric distribution company in whose certificated territory that customer is located."

In reality, Olyphant relied in good faith on an opinion letter dated April 12, 2000, signed by Barbara Bruin, Executive Director of the Commission and addressed to Olyphant's Borough Manager (the "Bruin Letter"). A copy of the Bruin Letter is annexed hereto as Exhibit 13. The Bruin Letter states in pertinent part:

> ...Under Section 2805(b) [of the Competition Act], a borough may prohibit electrical generation suppliers from serving end-use customers within its borough limits, so long as it is not providing generation service to end-use customers outside its borough limits...

> Based upon the information in your letter, it appears that Olyphant Borough has decided to maintain its exclusive rights to serve end-use customers within the borough...
>
> Certainly, nothing in the Competition Act or regulations limits the ability of the Borough to serve the Industrial Park.

Exhibit 13 at 1.

10. The Commission concluded too quickly that Section 2805(b) of the Competition Act, which permits a borough to prohibit an electric generation supplier ("EGS") from serving end-use customers within borough limits, is inapplicable to the instant proceeding because PPL is providing service within the Borough as an electric distribution company ("EDC") rather than as an EGS, as those terms are defined in the Act. Olyphant submits that the evidence—were it allowed to be presented—would show that PPL Electric Utilities Corporation, the petitioner here, has a sister company, PPL EnergyPlus, L.L.C., which PPL admits is an EGS[8] and which, like PPL Electric, is wholly owned and controlled by PPL Corporation, an energy and utility holding company. The plain language of Section 2805(b), as construed by the PaPUC's Executive Director in April 2000 (Exh. 13), clearly applies to PPL, which, together with PPL Energy Plus, is a wholly owned subsidiary of PPL Corporation. In these circumstances, Olyphant requests that the Commission give further consideration to whether the EDC-EGS distinction is one of form over substance. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) is instructive by analogy. In an admittedly different context—that of determining whether a parent corporation and its wholly owned subsidiary are legally capable of conspiring with one another for purposes

[8] PPL makes these admissions in its amended answer filed in *Borough of Lansdale, et al., v. PP&L, Inc. et al.*, Civil Action No. 02-8012 (E.D. Pa.), one of the two federal antitrust cases of which the Commission takes notice. Opinion at 3 n. 1.

of Section 1 of the Sherman Act, the Supreme Court engaged in a pragmatic analysis which has applicability in the instant case:

> A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.

467 U.S. at 771.

11. In any event, Olyphant and its representatives made it clear to the businesses in the Industrial Park that although Olyphant believed that it had the right to exclude PPL from within its boundaries,[9] it elected not to do so but rather sought only to compete with PPL on a level playing field. *See* Affidavits of Norbert Kosciuk and Frank Borgna with accompanying Exhibits 1–20, annexed hereto. Together with PPL's 1948 certificate of convenience and two resolutions adopted by the Olyphant Borough Council, the Commission cites certain letters sent by representatives of Olyphant, variously addressed to PPL and businesses in the Industrial Park, which the Commission believes justify its conclusion that it is "being asked to make legal conclusions based on uncontroverted facts." Opinion at 4. However, the Commission overlooked other correspondence that it would have had before it had it held evidentiary hearings. For example, by letter to Olyphant's solicitor dated April 23, 2001, an officer of WEA Manufacturing, one of the largest businesses in the Industrial Park, thanked the solicitor for his "assurances . . . should [WEA] *choose* to switch electric providers from PP&L,"

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[9] The letter from Michael Wargo, Jr., Mayor of Olyphant, cited by the Commission as an example of "uncontroverted facts," in reality places facts in dispute, because in it the Mayor states that "the Borough *desires* to provide all of your electric power within the Borough of Olyphant." (Emphasis added.) A copy of the Wargo letter is annexed hereto as Exhibit 12. This hardly amounts to action the effect of which, to quote the Order at ¶ 5, is "to require PPL to abandon certificated electrical service to PPL's customers in the Mid-Valley Industrial Park."

and went on to state WEA's lack of interest in making "any change in electric providers at this time." A copy of the letter is annexed hereto as Exhibit 14. Clearly, WEA did not think that it could be legally forced to take electricity from Olyphant rather than PPL. If the Commission is unwilling to grant Olyphant's petition to reconsider the entire order, it should stay the Order and consider, after conducting evidentiary hearings, amending the Order by deleting paragraphs 4 and 5 therefrom, because those paragraphs are based on two unwarranted assumptions: (i) that the Industrial Park is within PPL's "certificated service territory"; and (ii) that Olyphant's Borough Council by resolution or other lawful action authorized and instructed the Borough's officials to take action to substitute Olyphant for PPL as the exclusive supplier of electricity within the Borough, and that Borough officials under color of such authority took clear, unequivocal action to enforce the Council's will.

12. In short, the controversy or uncertainty required by 66 Pa. C.S. § 331(f) in order to justify the Commission's issuance of a declaratory order did not and does not exist. Paragraph 5 of the Order is inappropriate because Olyphant did nothing, "on its own accord," to "require PPL to abandon certificated electric service to PPL's customers in the Mid-Valley Industrial Park," to quote from Paragraph 5. Since the 1948 order originally allowed competition for customers between PPL and Olyphant, such customers could make the choice, and any conclusion that this requires PPL to abandon certificated territory conflicts with the evidence.

13. At a minimum, the Commission should stay the Order pending the holding of evidentiary proceedings.

III. WITH REGARD TO PARAGRAPHS 6 AND 7 OF THE ORDER RELATING TO STRANDED COSTS, THE COMMISSION OVERLOOKED OTHER RELEVANT PROVISIONS OF THE COMPETITION ACT THAT NEED TO BE CONSTRUED TOGETHER WITH SECTIONS 2808 AND 2812.

14. Paragraph 7 of the Order is based on the Commission's finding that

> PPL was and is authorized to collect non-bypassable competitive transition charges from its customers located within PPL's certificated territory on the effective date of the Competition Act (or that become a customer within such territory) and who remain within the territory, pursuant to 66 Pa. C.S. § 2808 and [the Commission Order] approving settlement of PPL's restructuring plan...

Opinion at 9. Section 2808(a) of the Competition Act provides as follows:

> § 2808. Competitive transition charge
>
> (a) General Rule.—To provide each electric utility with an opportunity to recover its transition or stranded costs following the Commission's determination under subsection (c), every customer accessing the transmission or distribution network shall pay a competitive transition charge to the electric distribution company in whose certificated territory that customer is located.

(Emphasis added.) The term "competitive transition charge" is defined in Section 2803 of the Competition Act as

> A nonbypassable charge applied to the bill of every customer *accessing the transmission or distribution network* which (charge) is designed to recover an electric utility's transition or stranded costs as determined by the commission under sections 2804 (relating to standards for restructuring of electric industry) and 2808 (relating to competitive transition charge).

66 Pa. C.S. § 2803 (emphasis added). "Electric distribution company" is defined in Section 2803 as "[t]he public utility providing facilities for the jurisdictional transmission and distribution of electricity to retail customers..." The Commission's Opinion and Order fails to take into account the fact that if Olyphant serves entities within its boundaries as Olyphant's customers, those customers would no longer be customers of

PPL because Olyphant itself would be directly responsible for "accessing the transmission or distribution network" for its wholesale supplies of power.

15. Furthermore, Section 2803 of the Competition Act defines "retail customer" as a "retail electric customer," which in turn is defined as "a direct purchaser of electric power" from a public utility. Once Olyphant begins purchasing wholesale power and reselling that power to a business in the Industrial Park, that business would no longer be a "direct purchaser of electric power from a public utility," and once it is a purchaser of wholesale electricity from the Borough, it is subject to exclusive federal jurisdiction. *See* cases cited *supra* at 3–5.

16. Under Section 2808(a), a customer's obligation to pay a competitive transition charge is further limited to the electric distribution company "in whose certificated territory that customer is located." Likewise, 66 Pa. C.S. § 2812(g) defines "intangible transition charges" as

> [t]he amounts authorized to be imposed on all customer bills and collected, through a nonbypassable mechanism by the electric utility or its successor or by any other entity which provides electric service to a person that was a customer of an electric utility *located within the certificated territory of the electric utility* on the effective date of this chapter or that, after the effective date of this chapter, became a customer of electric services *within such territory* and is still located within such territory, to recover qualified transition expenses pursuant to a qualified rate order...

(Emphasis added.) Olyphant submits—and believes the evidence would show—that the 1948 order issued to PPL's predecessor is of questionable validity and has no applicability to the businesses in the Industrial Park. PPL is serving that area only at the consent of Olyphant pursuant to a resolution adopted by the Borough on December 5, 1978. That resolution provided no set time period for such service, and established no permanent franchise or period of time during which PPL could continue to furnish such

service. The Commission has made the assumption—an assumption absolutely critical to its Opinion and Order—that the 1948 order is both valid and applicable. With so much riding on the Order for Olyphant, the Commission should conduct evidentiary hearings regarding the 1948 order as part of the reconsideration of the Order.

17. Paragraphs 6 (relating to intangible transition charges) and 7 (relating to competitive transition charges) of the Order are ambiguous. Both paragraphs contain the following language:

> That any retail electric customer of PPL as of January 1, 1997 or thereafter located in Olyphant must continue to pay...transition charges previously imposed by this Commission, during the period in which...transition charges are being collected, even if such customer were, in the future, to receive electric service from Olyphant instead of PPL.

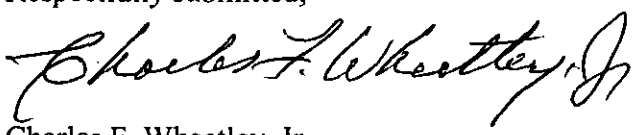
This could be read to mean that if a retail customer of PPL in another locality relocates to the Borough of Olyphant and immediately becomes a customer of Olyphant (rather than PPL), such retail customer would have to continue to pay transition charges by virtue of its previously having been a retail customer of PPL in the previous locality. This conflicts with the reality that many retail customers relocate to other systems (or states) and do not continue to pay any PPL retail stranded costs. Surely, this was not intended by the legislature in adopting the Competition Act. For example, the requirement of 66 Pa. C.S. § 2812(g) that an intangible transition charge can be imposed on a customer only if such customer "was a customer of an electric utility located within the certificated territory of the electric utility on the effective date of [the Competition Act]" or thereafter "became a customer of electric service within such territory *and is still located within such territory*" (emphasis added) supports the view that the legislature did not intend to bar the ability of a customer to relocate without having to continue to pay transition charges. Restricting the freedom of retail customers to relocate would have a

devastating impact on the competitive efforts of boroughs in Pennsylvania to attract new businesses within their boundaries and to serve the electricity needs of those businesses. In addition, it would impose an anticompetitive restriction on a customer's freedom of choice as to where its business should be located. The Commission should consider amending paragraphs 6 and 7 of the Order to clarify that such restriction was not intended.

IV. SPECIFIC REQUESTS FOR THE ORDER DESIRED.

18. As required by 52 Pa. Code § 5.572(a), Olyphant hereby makes the following specific requests with respect to the Order in descending order of preference: (1) that the Commission rescind the Order for lack of jurisdiction; (2) that if the Commission is unwilling to grant request (1), it stay the Order until such time as the federal district court rules in Olyphant and the United States Court of Appeals rules on Olyphant's appeal from the FERC order referred to in paragraph 5 of this Petition, and, to the extent appropriate, modify ¶¶ 6 and 7 of the Order consistent with those rulings; (3) that if the Commission is unwilling to grant either (1) or (2), it stay the Order pending the holding before this Commission of an evidentiary hearing on the issues referred to in this Petition as appropriate for such a hearing, and, to the extent necessary, modify the Order in whole or in part consistent with the findings made by the Commission based on such hearing; and (4) if the Commission is unwilling to grant any of (1) through (3) above, that at a minimum it amend the Order by deleting ¶ 5 thereof, inasmuch as ¶ 5 is not based on an actual case or controversy but rather on a hypothetical set of facts.

Respectfully submitted,



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Counsel for Borough of Olyphant

January 5, 2004

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order was served by first-class mail this 5th day of January 2004 to the following:

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EXHIBIT NO. 20

EXHIBIT NO. 20

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BOROUGH OF OLYPHANT, PENNSYLVANIA, :

Plaintiff :

v. :

PP&L, INC., PPL CORPORATION, PPL ELECTRIC UTILITIES CORPORATION, and PPL GENERATION, L.L.C., :

Defendants :

No. 3:CV-01-2308
Judge James M. Munley

AFFIDAVIT OF FRANK BORGNA

COMMONWEALTH OF PENNSYLVANIA :
SS.:
COUNTY OF LACKAWANNA :

FRANK BORGNA, being duly sworn according to law, states as follows, the same being true and correct to the best of his knowledge, information and belief:

1.) My name is Frank Borgna. I am over the age of eighteen years. I have never been convicted of a felony, and I am competent and authorized to make this affidavit. I am the President of Olyphant Borough Council and I have served in this capacity since January 3, 2000. I hereby make this affidavit on the basis of my personal knowledge and in opposition to Defendants' Motion for Summary Judgment as filed in the above-entitled action.

2.) Consistent with my duties and responsibilities as Council President and in pursuit of my initiatives and directives on behalf of the Borough of Olyphant, I have reviewed several files, records and

documents of the Borough of Olyphant and other sources, regarding the said Motion for Summary Judgment, including all of the Exhibits attached to this Appendix. Also, as to matters that have been undertaken by the Borough of Olyphant since I became Council President, I have had personal knowledge of several facts and events purportedly relied upon by Defendants in their Motion for Summary Judgment which Defendants incorrectly or inadequately set forth.

3.) At the Borough's request, during the years 2000 and 2001, myself and Borough representatives met on several occasions with Defendants' agents and representatives, including their legal counsel, in order to discuss the Borough's continued intention to compete to serve end-use customers within the Borough limits, including that portion of the Mid-Valley Industrial Park located in Olyphant Borough.

4.) Upon examination and review of all discussions, communications and all relevant documents (Exhibits 1 thru 19 hereto), it is clear that it has always been the intention of the Borough of Olyphant, and the Borough has always acted, to exercise its rights to compete to serve end-use customers within the borough limits of the Borough of Olyphant consistent with Act 138 of 1996, 66 Pa. C.S.A., §2801 et seq. (1996, Dec. 3 P.L. 802, No. 138, Sec. 4, eff. Jan. 1, 1997), the "Electricity Generation Customer Choice and Competition Act" (Act"), and to attract new customers to locate within the Borough.

5.) Likewise, upon examination of all relevant documents, facts and events, it is clear that no franchise, agreement, statute or law prohibits the Borough of Olyphant from exercising its rights to compete for all existing or new customers and to provide a competitive source of power to end-users in the Mid-Valley Industrial Park, located in Olyphant,

Pennsylvania.

6.) I have read the Affidavit of Norbert R. Kosciuk in Opposition to Defendants' Motion for Summary Judgment and I concur in all statements as made therein, the same being incorporated herein for all purposes as if set forth here at length.

FRANK BORGNA, President
OLYPHANT BOROUGH COUNCIL

Subscribed and sworn to before me this 14 day of May, 2002.

NOTARY PUBLIC

My Commission Expires:

November 20, 2004

NOTARIAL SEAL
Norbert R. Kosciuk, Notary Public
Olyphant Boro., Lackawanna County
My Commission Expires Nov. 20, 2004

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EXHIBIT 19

PJM Interconnection

Market Monitoring Unit

REPORT
TO
THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

CAPACITY MARKET QUESTIONS

Market Monitoring Unit
PJM Interconnection, L.L.C.

November 2001

Summary

This report responds to the request of the Pennsylvania Public Utility Commission ("PaPUC") for a formal report on the PJM capacity credit markets ("ICAP market" or "capacity credit markets") covering the period from January through April, 2001 and is issued in accordance with the PJM Market Monitoring Plan, PJM Open Access Transmission Tariff, Attachment M. By a letter dated April 12, 2001, the PaPUC requested information and set forth questions concerning the clearing prices for installed capacity credits in the capacity credit markets administered by PJM Interconnection, L.L.C. ("PJM"). The report is provided at this time in order to permit the inclusion of detailed offer data which may only be made public by PJM six months after the fact under the Federal Energy Regulatory Commission ("FERC") Order approving the formation of the PJM Marketing Monitoring Unit ("MMU"). PJM Interconnection, L.L.C., 86 FERC ¶ 61,247, reh'g denied, 88 FERC ¶ 61,274 (1999). A copy of this report is being submitted to the FERC.

The MMU concluded, based on its analysis, that there was an exercise of undue market power, as defined below, in the PJM capacity credit markets during the first quarter of 2001. The exercise of such market power was by a single entity, acting unilaterally. The result of the exercise of market power was that the price in the capacity credit markets during this interval was higher than it would have been in a competitive market.

In response to the observed behavior, in January 2001 the MMU proposed a change to the market rules contained in the Reliability Assurance Agreement among Load Serving Entities in the PJM Control Area ("RAA"). The proposed change was to the methodology used to allocate capacity deficiency revenues. These deficiency revenues are collected, at the Capacity Deficiency Rate ("CDR"), from Load Serving Entities ("LSE") that fail to meet their capacity obligations under the RAA. During the period analyzed in this report, the methodology was to allocate deficiency revenues solely to holders of unsold capacity resources. The MMU concluded that, under the specific market conditions in place during the first quarter of 2001, this methodology encouraged holders of unsold capacity to either withhold that capacity from the market or offer it for sale at a price equal to the CDR ($177.30 per MW-day). This conduct, in turn, caused market participants short of capacity either to be deficient (and pay the CDR, which then would be distributed to the withholder of the unsold capacity resources) or to purchase the capacity at a price equal to the CDR. The MMU's proposed rule change was to revise the methodology for the distribution of capacity deficiency revenues to holders of unsold capacity so as to yield the higher of market value or an allocation which included all LSEs that had met their obligations.

Implementation of the rule change required amendment of the RAA. The amendment process entailed initial approval by the PJM Reliability Committee (comprised of LSEs) and further approval by the FERC. The Reliability Committee approved the rule change by a vote of 42 to 2 on February 28, 2001. PJM filed the associated amendment to the RAA on March 7, 2001. The FERC accepted the rule change effective June 1, 2001. PJM Interconnection, L.L.C., 95 FERC ¶ 61,175 (2001). The combination of market

conditions and the rule changes resulted in a change in market outcomes after April 1, 2001.

More specifically, in its filings with the FERC, PJM explained the need to revise the methodology for distribution of capacity deficiency revenues. In its March 7, 2001 submission of the proposed change, PJM explained,

> The amendment filed herewith revises the methodology to correct a design flaw that has stifled robust competition in the PJM Capacity Credit market. PJM's Market Monitoring Unit has determined that under circumstances where an individual capacity owner has a longer position than the aggregate pool is long (that is, it owns capacity that Load Serving Entities must acquire to avoid deficiency charges), the current methodology permits such a capacity owner unilaterally effectively to set the market price for Capacity Credits at a level equal to the [CDR]. The CDR is the rate a Load Serving Entity must pay as a deficiency charge if it lacks sufficient capacity to meet its RAA capacity obligation. Moreover, but for the design flaw, the CDR is generally, though not always, higher than the competitive market clearing price.
>
> . . . .
>
> The amendment, in some circumstances, will reduce the share of capacity deficiency revenues distributed to owners of excess capacity, but will generally ensure that the capacity owners receive at least the market value for excess capacity needed by the pool. In circumstances where the value of capacity in a competitive market is lower than the CDR and where a capacity owner has a longer position than the aggregate pool is long, this reduction will eliminate the flawed incentive, caused by the current design, for that owner to offer capacity at the CDR or higher.

March 7, 2001 submission, Docket No. ER-1-1440 (footnotes omitted) (copy attached hereto at Tab 1).

Several market participants and public agencies (including the PaPUC and the Pennsylvania Office of Consumer Advocate) intervened in the FERC proceeding in support of the amendment which PJM proposed.[1] PPL Electric Utilities Corporation and PPL EnergyPlus, LLC (jointly "PPL") intervened in opposition. A copy of PPL's filing

[1] In addition to the PaPUC and the Pennsylvania Office of Consumer Advocate, the following entities intervened in support of the rule change: GPU Energy, NJ Division of the Ratepayer Advocate, Maryland Office of People's Counsel, Mid-Atlantic Power Supply Association, and The New Power Company. The following entities intervened but stated no position: Dynegy Power Marketing, Inc., and Enron Power Marketing, Inc.

with FERC, in opposition, dated March 21, 2001, is attached at Tab 2. PJM's April 5, 2001 response to PPL's filing (Tab 3) and PPL's April 17, 2001 response to that PJM filing (Tab 4) are also attached. On April 25, 2001, the PaPUC filed Supplemental Comments in support of the amendment. The PJM filings describe the reasons for and benefits of the amendment. The additional filings are provided to assist the PaPUC's understanding of arguments made against the proposed amendment.

Responses to Questions of the PaPUC

The PaPUC asked that the MMU respond to six specific questions. The questions and responses are below.

1. **Whether any market participant has failed or refused to comply with the rules, standards, procedures, and practices of the PJM ICAP Market as set forth in the PJM Tariff, the PJM Operating Agreement, the PJM Reliability Assurance Agreement, the PJM Manuals, and/or the PJM Regional Practices Document. Please identify the market participant(s) who have failed or refused compliance with such rules, standard procedures and practices, the details of such failure or refusal, and remedies sought or applied (if any) by PJM.**

No market participants have failed or refused to comply with the rules, standards, procedures, and practices of the PJM ICAP market. The rules did not explicitly prohibit the actions identified in this report. This fact underscores the necessity of amending the RAA in order to eliminate the incentive to engage in the identified conduct.

2. **Whether there are actual or potential design flaws in the PJM ICAP market operating rules, standards, procedures, and practices as set forth in the PJM Tariff, the PJM Operating Agreement, the PJM Reliability Assurance Agreement, the PJM Manuals, and the PJM Regional Practices Document. If actual or potential design flaws do exist, please provide a detailed description of such flaws.**

PJM and the MMU have addressed these issues in several recent reports and filings. Please see the PJM Interconnection State of the Market Report 2000. Please also see PJM's filings regarding the capacity markets:

a. to address the allocation of capacity deficiency revenues, FERC Docket No. ER01-1440-000 (Tabs 1, 3 and 4);
b. to address reliance upon a daily capacity market and to propose the introduction of an interval capacity market, FERC Docket No. EL01-63-003 (Tab 5); and
c. to respond to New Power's complaint regarding market power in the PJM capacity markets, FERC Docket No. EL01-105-000 (Tab 6).

PJM has not identified other specific design flaws in the PJM ICAP market. The MMU continues to monitor the capacity credit market for design flaws, compliance with existing rules and for the potential of any market participant to exercise undue market power.

As a general matter, conditions in the capacity credit market make the potential exercise of market power a continuing concern. Demand is extremely inelastic since it is a function of 12-month historical loads and PJM's capacity requirement rules. Frequently, only a few generators have excess capacity and are therefore in a position to sell capacity. Thus, despite an installed capacity HHI consistent with "moderate concentration," capacity owners can be in a position to exercise market power. Even with more generators offering capacity into the market, economic theory suggests that significant market power may exist in the presence of the low demand elasticity that characterizes the capacity markets.[2]

PJM recognizes the need for continued improvement to the ICAP market and is working to develop new solutions that address the needs associated with retail choice as well as the unique reliability requirements of this region. For example, PJM proposed changes in the underlying structure of the capacity obligation, including revision of the daily capacity commitment to a seasonal commitment. The FERC accepted these changes effective July 1, 2001. PJM Interconnection, L.L.C., 95 FERC ¶ 61,330 (2001).

3. **Whether there exist structural problems in the PJM ICAP market which may inhibit a robust and competitive market and your proposed remedies for such structural problems.**

Please see the response to question 2.

4. **Whether there has been actual or attempted exercise of undue market power by any market participant or participants or there exists a potential for the exercise of such undue market power, and the identity of such market participants exercising or attempting to exercise undue market power.**

Please see the response to question 5.

5. **Detailed information for the PJM ICAP market for each day for the period from October 1, 2000 to the present, including but not limited to:**
   a. **Available capacity and total daily obligation for PJM as a whole, and daily obligation for each load serving entity;**
   b. **Day ahead and daily capacity position of each load serving entity;**
   c. **Capacity Deficiency Rate penalties incurred, including any escalator penalty;**
   d. **Cumulative number of deficient days for each load serving entity;**
   e. **Total capacity deficiency rate revenues collected and allocated by recipient;**
   f. **Offer and purchase bids into the day ahead and other ICAP auction markets, by Load Serving Entities.**

Market power is defined as the ability to increase the market price above the competitive level, that is, the price that would exist in a competitive market without manipulation or the exercise of market power. The exercise of undue market power is thus an action

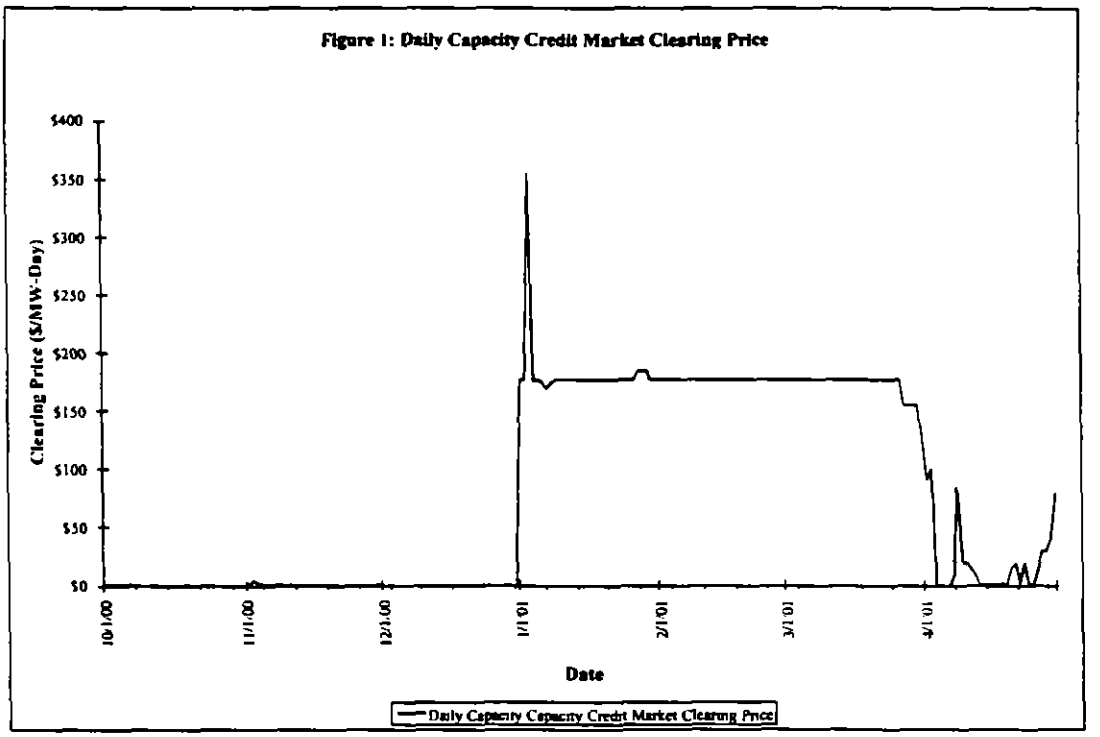
[2] See PJM Interconnection State of the Market Report 2000.

taken which results in an increase of the market price above the competitive level. This standard is broader than the legal standard for antitrust enforcement.

It is clear that during the first quarter of 2001, a participant in the PJM daily capacity market did successfully raise the market price in the daily capacity credit market above the competitive level for a portion of the period from January 1 to April 30, 2001. The rules of the capacity market stated in the RAA did not explicitly prohibit this conduct. Nonetheless, the behavior constituted the exercise of undue market power and was inconsistent with the intended consequences of the rules. The prices in the daily capacity credit market during portions of the first quarter of 2001 were higher as the direct result of actions by a participant in the PJM capacity markets. (This participant will be referred to as Entity1 or E1.) In the absence of those actions, the prices in the daily capacity markets would have been lower.

Figure 1 shows the prices in the PJM daily capacity markets from October 1, 2000 to April 30, 2001. PJM daily capacity prices were approximately zero from October 1, 2000 to December 31, 2000, increased to about $177 on January 1 and 2, increased further to about $354 for one day, January 3, and then declined to $177 where they remained until late March when the price began to decline further, reaching $0 in early April. Prices reached $354/MW-day on January 3 as a result of the capacity market rules which provided that any deficient party must pay twice the CDR on a day when the overall market is deficient, or short, and which required the entry of mandatory bids at twice the CDR for any deficient party. The overall market was deficient on January 1, 2 and 3.

Figure 1: Daily Capacity Credit Market Clearing Price



Prices in the PJM daily capacity credit markets averaged about $177/MW-day for the period from January 1 to March 31, 2001. (Figure 1.) While it is not a simple matter to define the competitive price for this period, the competitive price can be estimated within a reasonable range.

In general, high prices do not, by themselves, demonstrate the exercise of market power. For example, the MMU concluded that high prices in the PJM capacity credit market during the summer of 2000 reflected market fundamentals, not the exercise of market power.

When the pool is capacity deficient, it can be plausibly argued that the competitive price is at least $177.30/MW-day and as high as two times the daily deficiency rate, or $354.60/MW-day, based on the RAA rules in existence at that time, which doubled the deficiency payment when the pool was short. This would not be the competitive price if the pool were deficient as the result of non-economic delisting. Non-economic delisting, or economic withholding, is delisting when such delisting is not profitable on a transaction-specific basis.

When there is adequate capacity, the competitive price in the daily capacity credit market is a function of the short run cost of capacity and the other opportunities available to the owners of capacity resources. An owner of a generating unit within PJM has the ability to sell into the PJM capacity market or to sell firm energy out of PJM. The opportunity to sell firm energy outside PJM is dependent on adequate transmission service within PJM and into the contiguous control area.[3] The value of the opportunity to sell firm energy outside PJM is a function of a number of factors including the expected external price for firm energy, both daily and longer term, the expected internal PJM price for energy, the probability of an unanticipated price spike in the external and internal markets, the probability of recall and the cost of transmission. The value of the opportunity also depends on the availability of transmission service. If transmission is not available, the external energy price is irrelevant. For a daily capacity market, a conservative approximation of the competitive price can be calculated by multiplying the differential between the external forward energy price and the internal forward energy price by the 16 on peak hours, as that is a conservative estimate of the value of the opportunity foregone by selling capacity in the PJM capacity market.[4]

In the last quarter of 2000, the net PJM capacity position was approximately 2,000 MW long. Thus, the available supply of capacity exceeded the obligation to purchase capacity. (Figure 2.) However, the PJM capacity credit market was tighter (the excess of available supply over demand was smaller) after January 1, 2001 than it had been in the fourth quarter of 2000.

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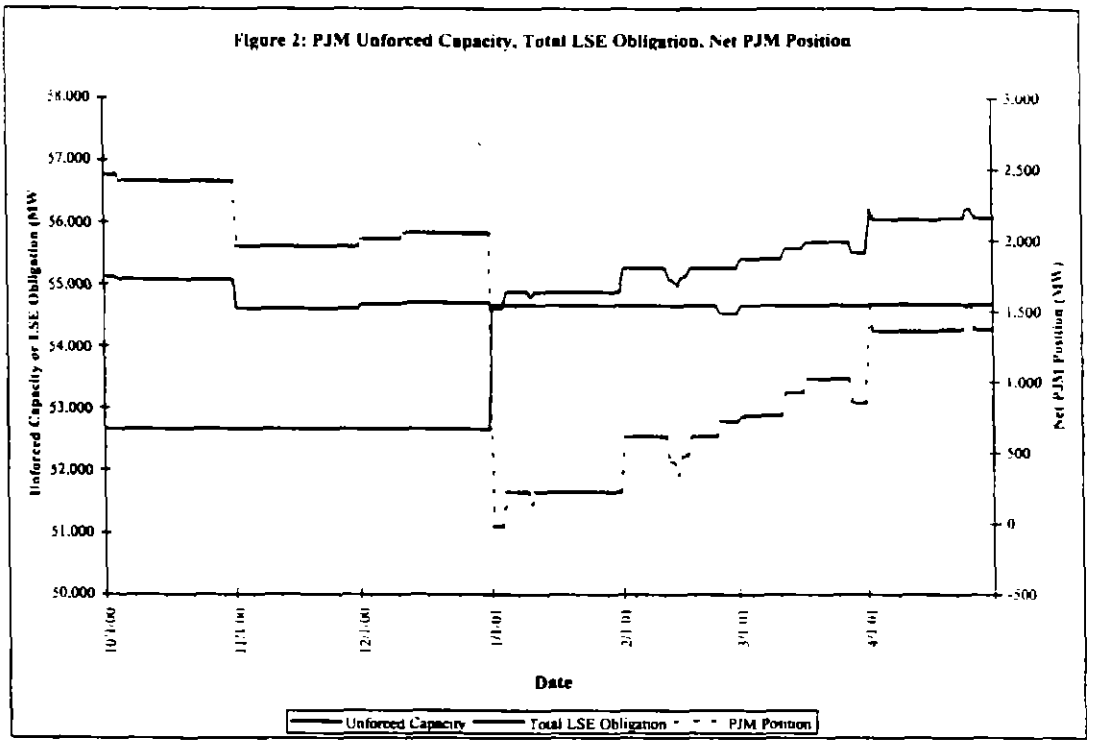
[3] Transmission service within PJM needs to be firm in the sense that there is a low probability of being interrupted and not necessarily firm in the tariff sense. There is no requirement that exporters of capacity have firm transmission service within PJM.

[4] The 16 on peak hours are used because the forward price contracts in the energy price comparison are priced over 16 hours.

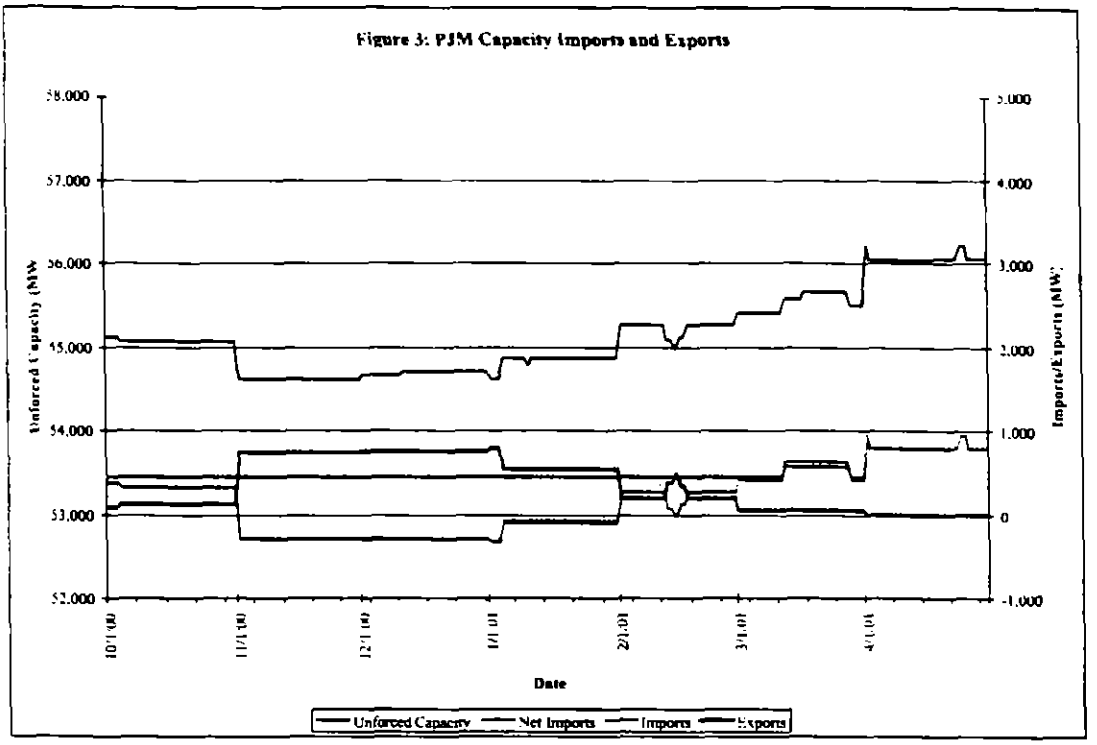


The reasons for the changed balance between supply and demand are straightforward. On the demand side, the capacity obligations of LSEs grew by nearly 2,000 MW or almost 4 percent on January 1. This increase was the result of the process by which capacity obligations are determined under the RAA. Capacity obligations are primarily a function of the weather adjusted peak load for the prior summer and become effective on January 1 of each year.[5]

On the supply side, the result of decisions by PJM generation owners to delist capacity or to return delisted capacity in January reduced the net supply of capacity by a small amount (37 MW) on January 1. (Figure 3.) On January 4, 246 MW of capacity, which had been delisted for the first three days of January, returned to the pool and the pool was capacity sufficient as a result. The pool remained capacity sufficient for the balance of the quarter.

In summary, PJM was capacity deficient (Figure 2) on January 1, 2 and 3, 2001 by about 30 MW. That is, on these three days there was slightly less capacity available for sale in the pool than the capacity purchase obligations of the LSEs in the pool. On subsequent days, the net PJM position was positive and grew steadily more positive through the end of April. In December 2000, the average net PJM position was about 2,000 MW, in January 2001 about 200 MW, in February about 600 MW, in March about 900 MW and in April about 1,400 MW.

[5] The January 2001 increase in capacity obligation had been made public by PJM in October 2000, so both capacity owners and LSEs were aware of the pending increase.



When the daily capacity market price is compared to the alternative opportunities available for selling capacity, or its equivalent, firm energy, it becomes clear that, based on the available data for the identified alternatives, the price in the PJM daily capacity markets exceeded the competitive level, for the period after January 3. The alternative to selling capacity and energy in the PJM market for the next day is to sell the firm energy output from the capacity resource to a purchaser outside PJM. The owner of capacity faces a range of alternatives including selling the firm energy forward for the next day or selling the firm energy for the balance of the month including the next day. Figure 4 shows the prices in the PJM daily capacity markets compared to the value of selling firm energy into Cinergy or N.Y. Zone A (West) for the next day. The value of selling daily firm energy outside PJM for the next day is calculated, in Figure 4, as the difference between the external daily forward price and the PJM daily forward price for the sixteen on peak hours reflected in the forward prices.

For the period from January through the beginning of April, the price in the daily PJM capacity credit market exceeded the spread between the PJM West hub and both Cinergy and N.Y. Zone A, valued over 16 hours. In other words, the price of capacity credits in the daily market exceeded the additional value of selling firm energy from that capacity to the Cinergy hub or N.Y. West Zone A for the next day rather than selling energy to the PJM West hub and capacity to the PJM capacity credit market. This opportunity cost calculation is conservative in that it does not include any transmission costs or transaction

costs and does not account for the fact that capacity can be sold in the PJM capacity market and, at the same time, the firm energy from that capacity can also be sold outside PJM on a firm basis, subject to the risk of recall, which is low during this period. This opportunity cost calculation does not include any value associated with the probability that there could be a spike in the differential between the external real time price and the internal real time price for the operating day. This probability was also relatively low during the period under review.

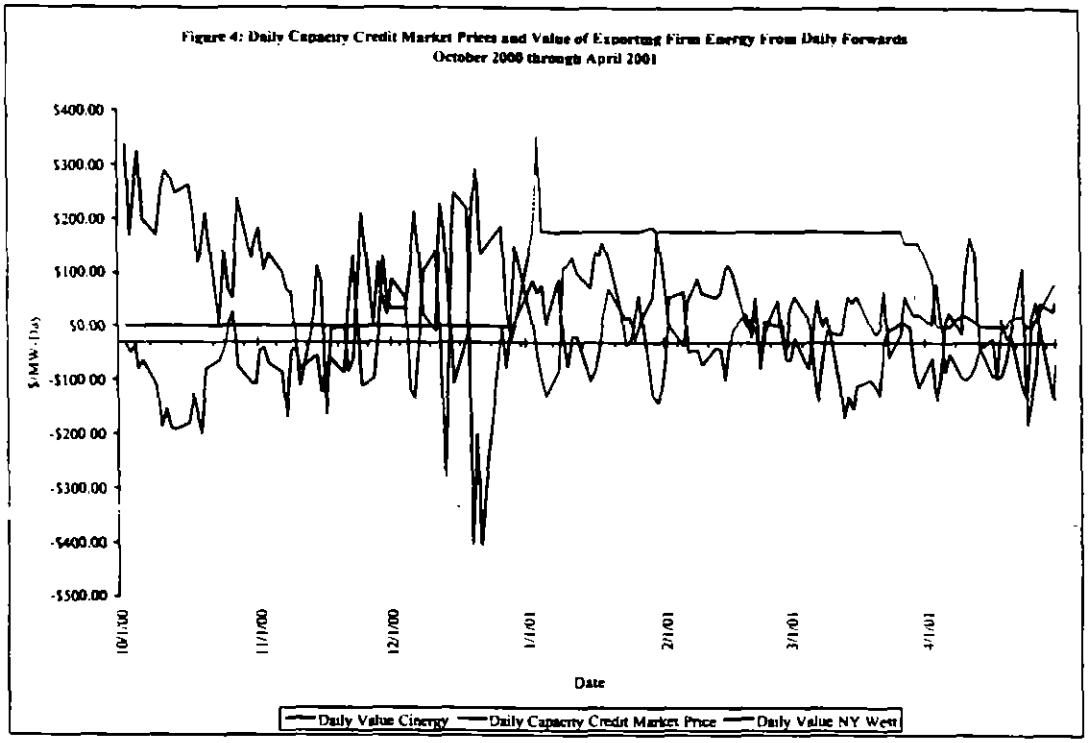
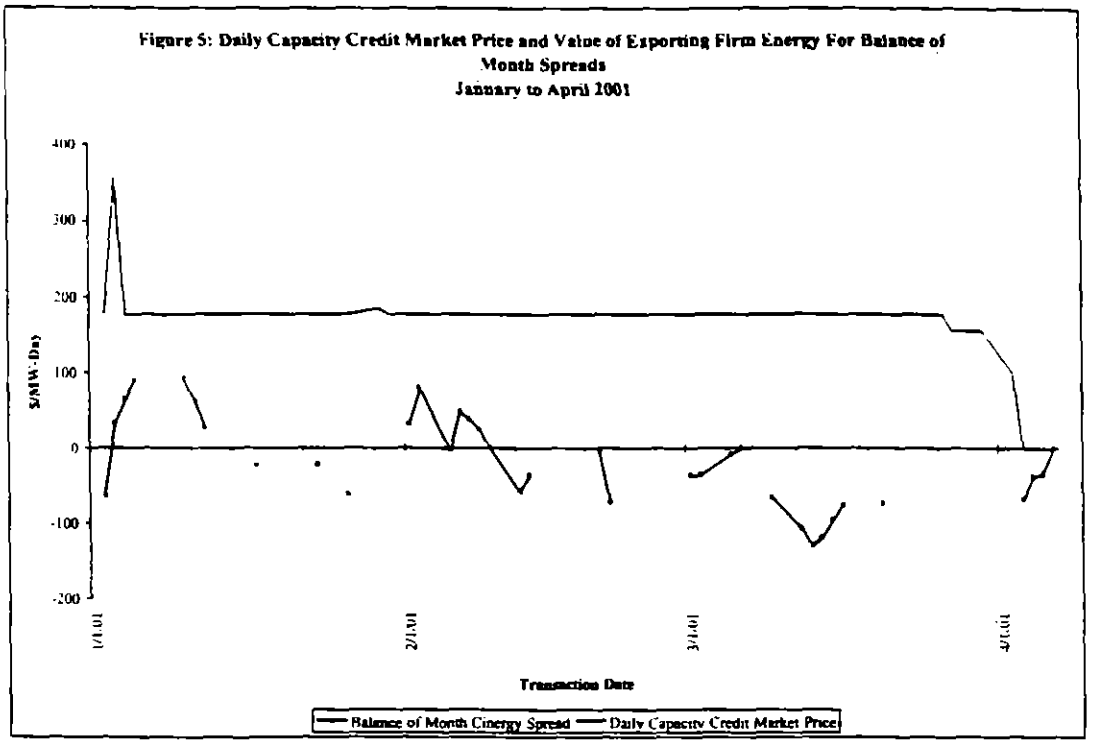


Figure 5 shows a similar comparison for balance of the month forward prices at Cinergy. Again, for the period from January to April, the price in the daily PJM capacity credit market exceeded the spread between the PJM West hub and Cinergy, valued over 16 hours. In other words, the price of capacity credits in the daily market exceeded the additional value of selling firm energy from that capacity to the Cinergy hub for the balance of the month rather than selling energy to the PJM West hub for the balance of the month.[6]

[6] There was inadequate published data for balance of month contracts for sales into New York to include in the graph.

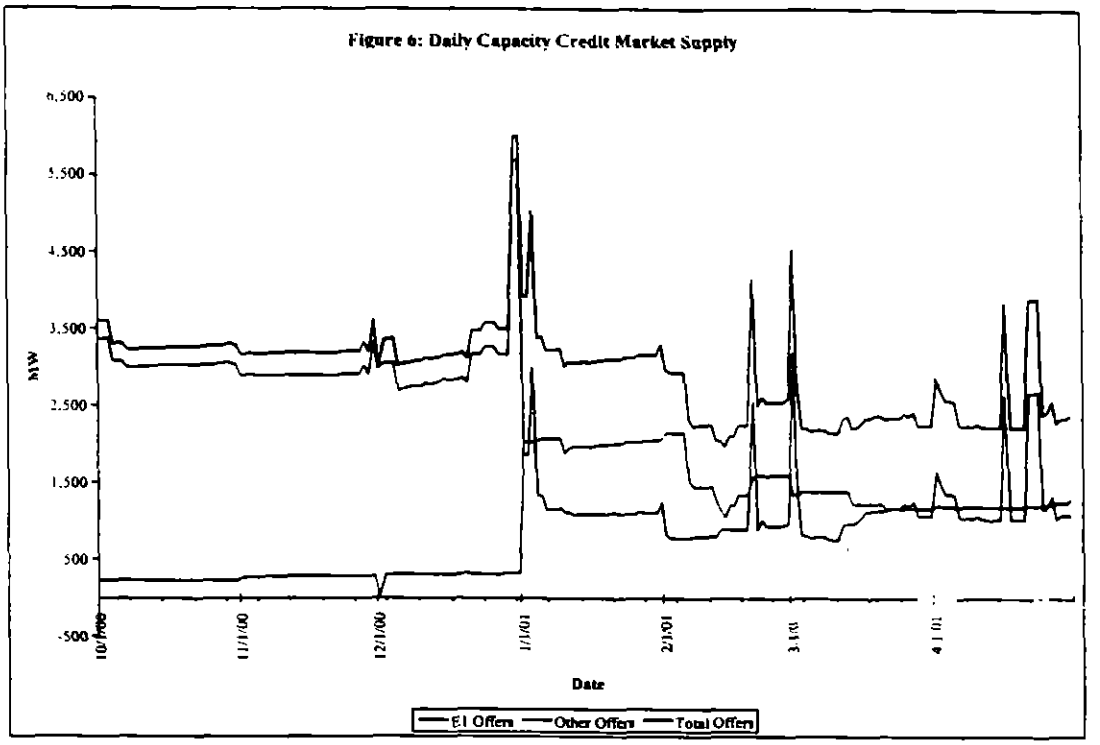


The ability of a seller to unilaterally exercise market power in the daily market is a function of the seller's available capacity compared to daily demand and the available capacity of other sellers. If the seller's available capacity exceeds the difference between the daily demand for capacity and the available capacity of all other sellers, the seller has the ability to exercise market power. In effect, such a seller has an effective monopoly position in that it is the only seller of capacity to the residual market demand.

The way in which Entity1 exercised market power in the daily capacity markets is clear. Entity1 offered more total available capacity in the daily market than the total net capacity offers in the total PJM daily market. In other words, Entity1 was longer than the total market. Entity1's offers of capacity were greater than the daily demand for capacity less the capacity offered by all other suppliers.[7] In order to cover their obligations, LSEs had to buy capacity from E1. Entity1 held this market position, in which E1 offered more capacity than the total net excess capacity offers in PJM, for the period from January 1 to March 30, 2001.

[7] Some LSEs that relied upon the daily market to meet their obligations could have purchased a portion of the capacity needed to meet their obligation for the months of January to April for less than $177/MW-day, if they had purchased in a monthly or multi-monthly auction prior to January 1. In particular, Entity1 offered some capacity in the January to May capacity credit markets, run in October, November and December 2000, at less than $177/MW-day.

Entity1 substantially increased its offers of capacity in the daily market as of January 1, 2001 as shown in Figure 6. Figure 7 shows that E1 offered capacity amounts well in excess of the total excess offers in PJM, beginning in January and continuing through the end of March 2001, although the difference narrowed from late February through late

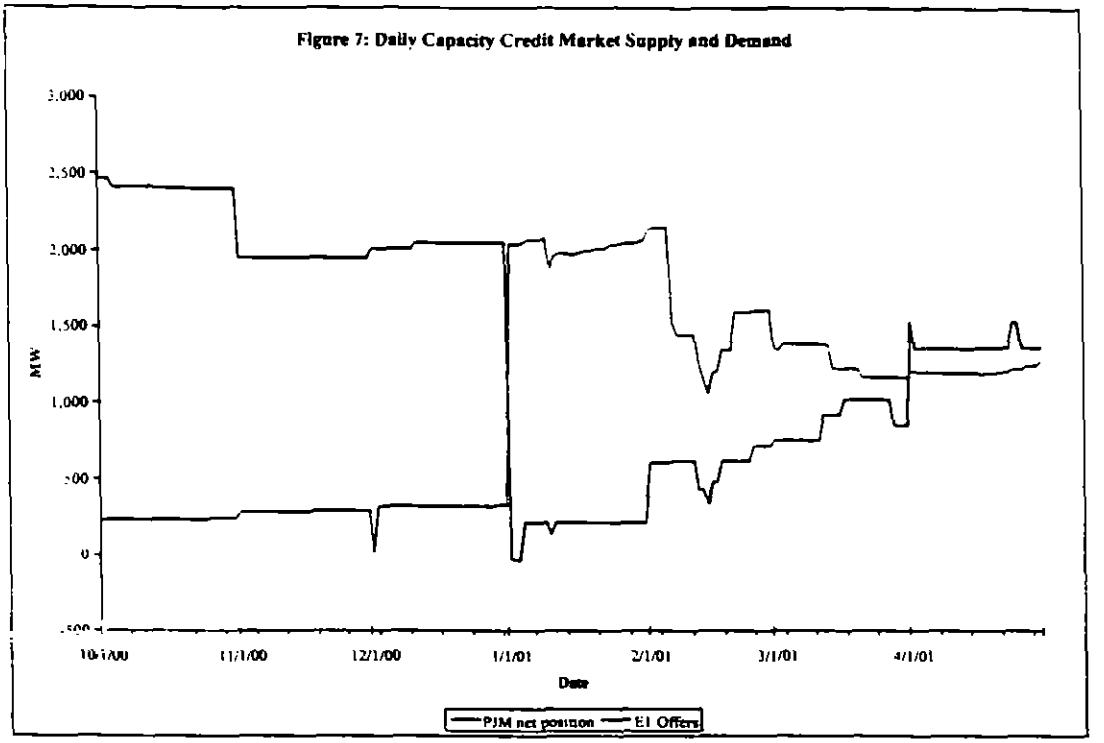


March. Entity1 offers comprised more than half the total offers for the January to March period while the balance of the capacity offers were made by a number of other suppliers.

Figure 8 compares the daily capacity, in MW, offered by E1 to the level of demand, in MW, which had to purchase capacity from E1 or be deficient. This residual demand was at its highest levels in January, when it averaged about 1,800 MW/day. The average level of residual demand was 965 MW in February, 381 MW in March and –170 MW in April. The average monthly level of residual demand was between -1,700 MW and -2,200 MW in the months from October through December.

Figures 6, 7 and 8 show that as a result of the fact that E1 offers of capacity were substantially greater than the total PJM net capacity offers, some buyers of capacity had to buy capacity from E1 if they did not wish to be deficient. If these LSEs did not buy from E1, there were no other alternative sellers available and the LSEs would have become deficient and paid the capacity deficiency rate of $177.30/MW-day as a result. Entity1's share of total capacity offers put E1 in a position to set the market price at $177.30. However, if E1 offered capacity to the market at a price greater than $177.30/MW-day, capacity buyers would be better off if they were deficient and paid the $177.30 rather than purchasing capacity at a price greater than $177.30. If buyers were deficient due to inadequate supply offers at a price less than or equal to $177.30, E1

would receive most or all of the deficiency revenues due to the RAA allocation rules in effect at the time, which determined the allocation of the deficiency revenues based on the shares of the total excess capacity.[8]

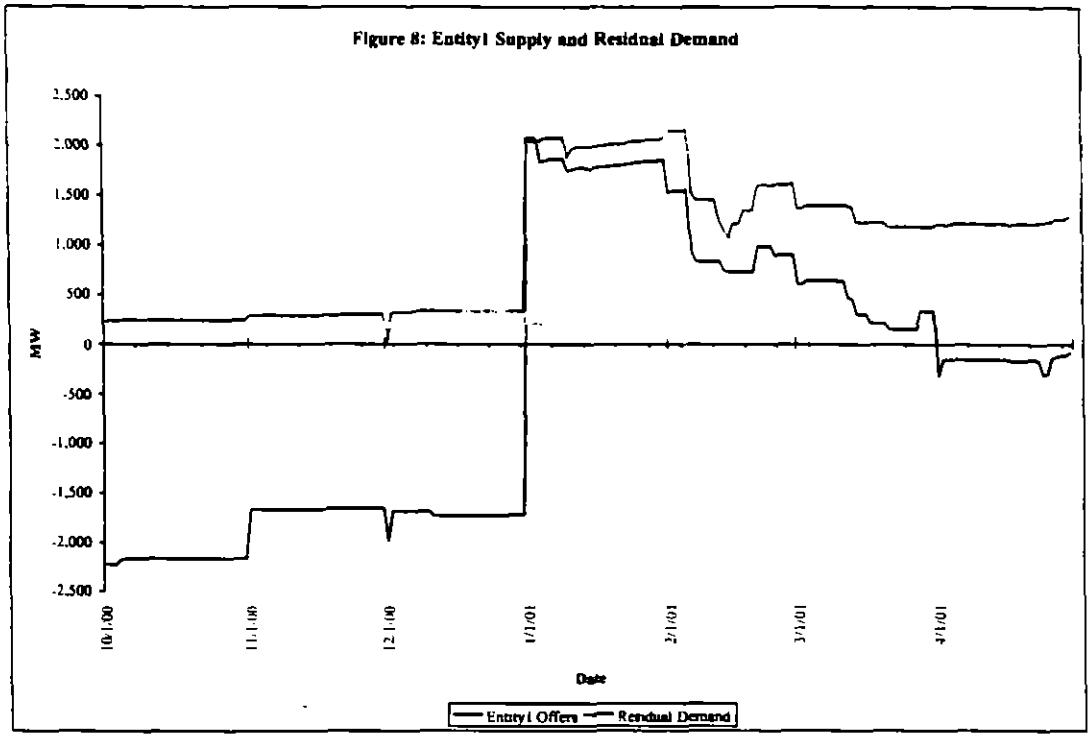


As long as the overall market was extremely tight, in the sense that total supply was very close to total demand, the deficiency revenues accruing to E1 would not be affected if other suppliers priced below $177.30 or if other suppliers decided to follow the same strategy as E1. If other suppliers sold all their MW at $177.30 or below, some buyers would still need to buy from E1. If other suppliers offered capacity at greater than $177.30, every additional MW priced at greater than $177.30 would result in an LSE being deficient by a MW and adding $177.30 to the deficiency payment revenues for distribution across excess MW which would have also increased by 1 MW. The essential fact is that E1 would receive $177.30/MW-day as long as it did not offer capacity at a price below $177.30. There was no competition to constrain E1's ability to set the market price.

While no single other supplier had the ability to unilaterally set the market price, the result of even one supplier offering capacity at a price of $177.30, with economic withholding by E1, was a market clearing price equal to $177.30. Rational sellers,

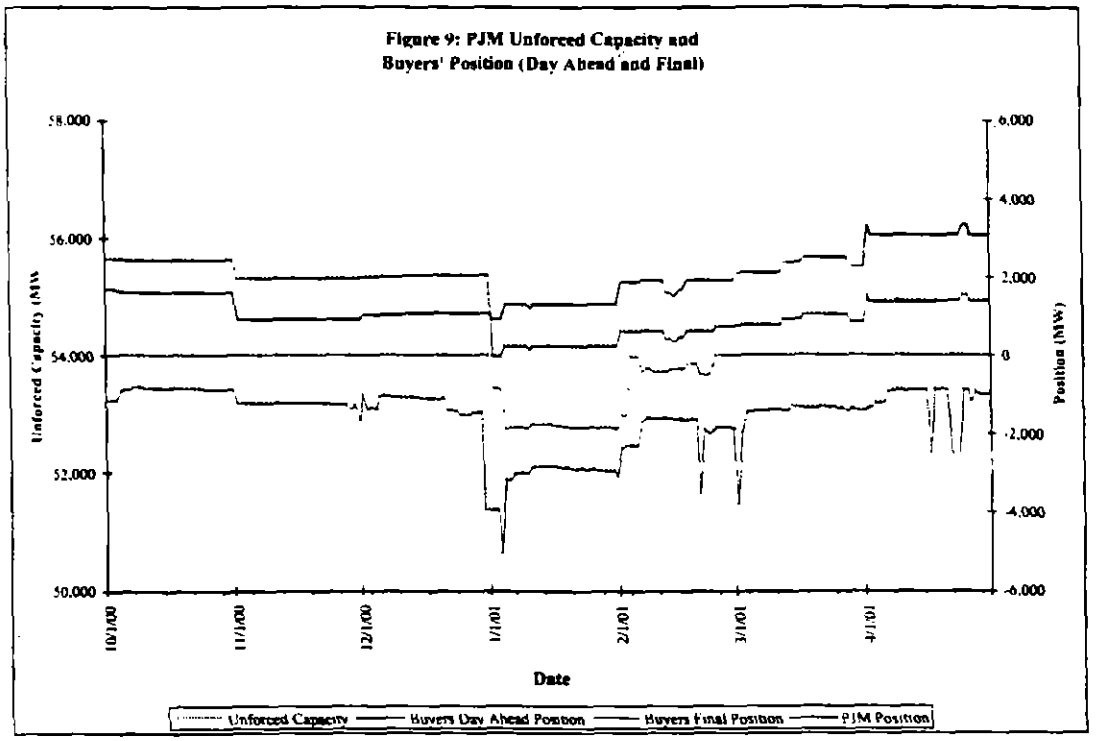
[8] In fact, E1 was in a better position if they offered capacity at a price in excess of $177.30 because the RAA rules in effect at the time penalized LSEs who were deficient for more than 30 days by increasing the capacity deficiency rate that they must pay. Thus by forcing LSEs deficient, E1 would ultimately increase the capacity deficiency revenues available.

recognizing that purchasers were being forced to be deficient, even at elevated prices, offered at least some capacity at a price of $177.30. Rational purchasers, faced with the risk of being deficient, offered to purchase at least some capacity at $177.30. The result was a market clearing price of $177.30. If the supply curve of all other offers was unaffected by E1's behavior, offers by E1 at a lower price would have reduced the price on every day in January, although by a relatively small amount, in general. The offers of other suppliers might have been a function, at least in part, of the offers from E1. The degree to which the daily market prices in January would have been reduced by lower offers from E1 is a function of the behavior of other suppliers. If other suppliers reacted to lower E1 offers, the price reduction in January that resulted from lower E1 offers could have been significant. In February and March, offers by E1 at a lower price, with no change in the supply curve of all other offers, would have set the market clearing price.



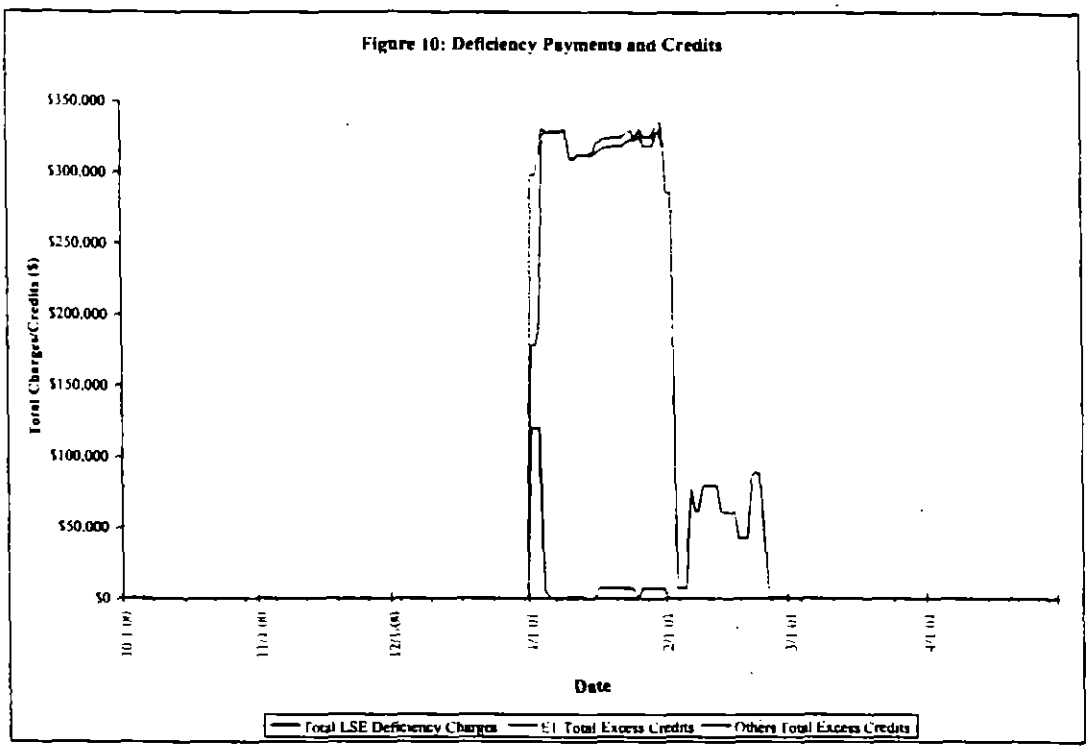
Buyers of capacity relied on the daily market more heavily in January and February 2001 than in late 2000, as shown in Figure 9. The Buyers' Day Ahead Position line in Figure 9 shows the extent to which LSEs needed to purchase in the daily market in order to avoid being deficient. From October 1 to December 31, 2000, capacity buyers relied on the daily market for about 1,200 MW of capacity on average. During January, capacity buyers purchased about 3,000 MW in the daily market, in February about 1,900 MW, in March about 1,500 MW and in April about 1,200 MW in the daily market on average. While capacity buyers purchased their requirements at a price less than $177.30/MW-day in the daily market in the period from October 1 to December 31, 2000 that was not the case during January and February 2001. In the January to February period, short capacity purchasers were not able to purchase their full capacity requirements in the daily capacity

market at a price less than or equal to $177.30/MW-day and were deficient as a result, in aggregate, by an average of 1,732 MW per day in January and 346 MW per day in February (Figure 9). Capacity purchasers were not deficient in March and April. Figure 9 also shows the extent to which capacity purchasers met their obligations in the daily capacity markets. The Buyers' Final Position line shows the net position of capacity purchasers in the daily market after the daily market has cleared. The Buyers' Final Position line shows that buyers were not deficient after February 24 as the buyers' aggregate net position is zero after February 24.



The deficient LSEs paid capacity deficiency charges equal to $177.30/MW-day for all days on which they were deficient except the day the pool was deficient, when they paid $354.60/MW-day. The total amount of capacity deficiency charges paid and collected was $1,000 or less for the period from October 1 to December 31, 2000 and for the period from March 1 to April 30, 2001. However, total deficiency charges were $11,767,541 from January 1, 2001 to February 24, 2001.

Entity1 captured virtually 100% of the revenues resulting from capacity deficiency charges during the period from January through February, as shown in Figure 10.



Prices through March 2001 stayed near the CDR of $177.30/MW-Day (Figure 1). However, as E1's market position weakened somewhat (Figure 8), E1's strategy changed. E1 reduced the offer price on a portion of its available daily capacity to $177.30 and the MW offers cleared. In March, E1 offered more capacity at $177.30 and as a result all demand bids cleared but the market price remained at $177.30.

In April, PJM's excess capacity increased for a number of reasons including new construction, capacity imports, the rerating of existing units and the reduction of forced outage rates (Figure 2). Some capacity purchasers bought capacity bilaterally and reduced their participation in the daily markets. For the first time since January, the capacity offered by E1 was no longer required in order to meet capacity requirements in the daily market after April 1 (Figure 8). The residual demand was negative. At the same time, Entity1 changed its offer strategy, offering more capacity at lower prices. Prices declined as a result of these factors.

6. **Please state whether the Market Monitoring Unit lacks adequate authority or resources to investigate or remedy any problems it has identified in the PJM Installed Capacity Market. If so, what additional authority or resources would be necessary?**

The MMU continuously evaluates the need for additional enforcement authority. While at this time the MMU has adequate authority and resources to investigate and report on problems in the capacity credit markets, the MMU is evaluating the need for additional authority to address ongoing issues in the capacity markets. Regarding the issues identified in this report, the MMU identified the problem and proposed a solution to PJM, to the appropriate PJM member committees and ultimately to the FERC. Pursuant to its Operating Agreement, the RAA, and FERC guidance, PJM relies on its stakeholder process to develop solutions which reflect the input and perspectives of various participants and market sectors and on which there is frequently consensus among market participants. Through this process, PJM is generally able to present solutions to the FERC that engender little or no dispute. In this case, the stakeholder process yielded near unanimous agreement that the amendment to the RAA was an appropriate response and solution. On the other hand, the process was time-consuming.

Conclusion

The MMU concludes that Entity1 did unilaterally exercise undue market power during the first quarter of 2001, resulting in higher prices than would otherwise have occurred. The capacity credit market rules did not expressly prohibit the actions of Entity1. The exercise of market power took the form of economic withholding. Entity1 was able to successfully withhold capacity by offering the capacity at prices greater than the CDR because Entity1 held capacity that LSEs needed to purchase in order to meet their capacity obligations. Entity1 held more net capacity than the total excess capacity in the market.

As the result of changes in underlying market conditions, of actions by market participants and of rule changes proposed by PJM and accepted by the FERC, prices have declined in the daily, monthly and multi-monthly markets. (See Figure 11.) The capacity credit market continues to be the focus of significant attention by PJM and its members.

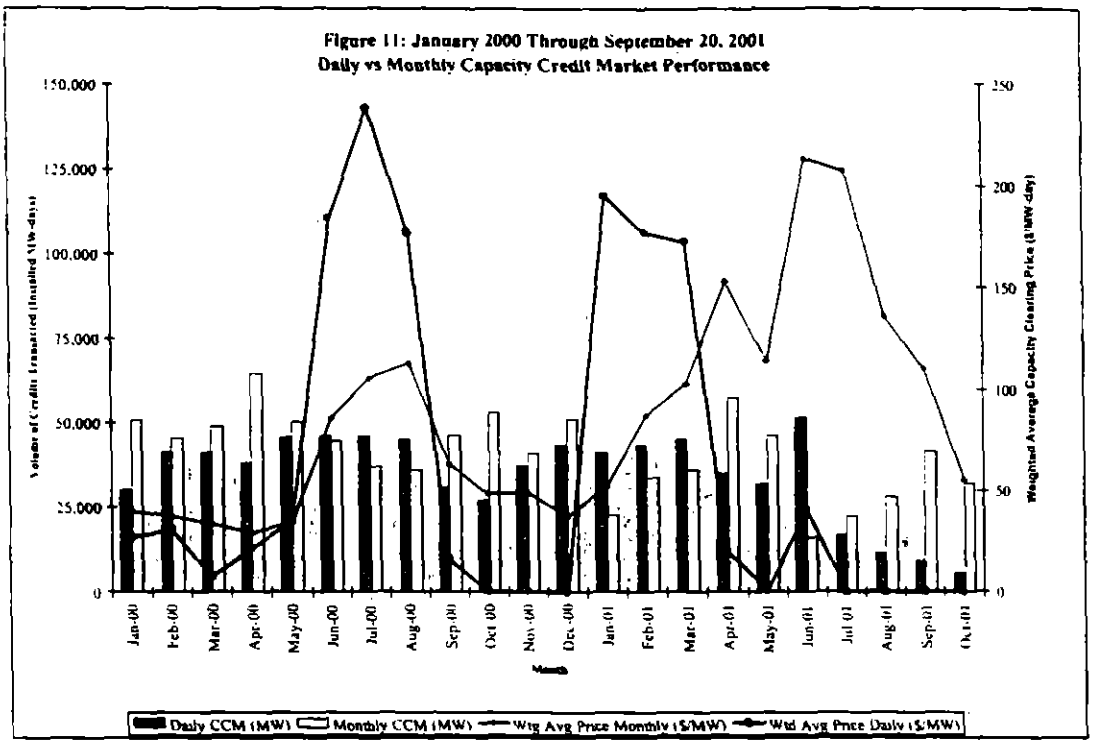


Figure 11: January 2000 Through September 20, 2001
Daily vs Monthly Capacity Credit Market Performance
150,000
125,000
100,000
75,000
50,000
25,000
0
250
200
150
100
50
0
Jan-00
Feb-00
Mar-00
Apr-00
May-00
Jun-00
Jul-00
Aug-00
Sep-00
Oct-00
Nov-00
Dec-00
Jan-01
Feb-01
Mar-01
Apr-01
May-01
Jun-01
Jul-01
Aug-01
Sep-01
Oct-01
Daily CCM (MW)
Monthly CCM (MW)
Wtg Avg Price Monthly ($/MW)
Wtd Avg Price Daily ($/MW)

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EXHIBIT 18

Tele

Renters' information page 2

Summer savings page 3

Price protection page 4

connect

ppl

AUGUST 2001

PPL Electric Utilities

ocked in for long term

PPL Electric Utilities has awarded a long-term energy supply contract that helps to protect customers from the risk of higher electricity supply costs for the rest of this decade.

The contract, which has been approved by the Pennsylvania Public Utility Commission, provides PPL Electric Utilities all of the electricity it needs for the next eight years for customers who do not shop for a new supplier, or who choose a supplier then return to PPL Electric Utilities.

The price PPL Electric Utilities charges for this "Provider of Last Resort" service is regulated by the Pennsylvania Public Utility Commission and capped until the end of 2009.

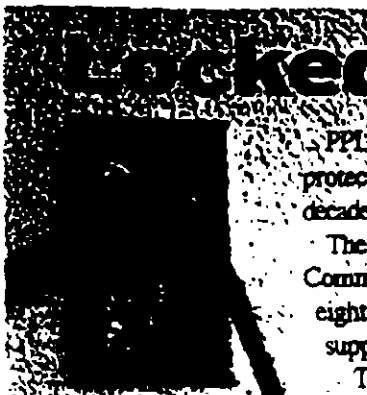
Because of the new supply agreement, PPL Electric Utilities will not need to request an increase in rates for the Generation Charge portion of your electric bill above the capped level because of purchased power costs.

PPL Electric Utilities' rates for two other components of your electric bill, Transmission and Distribution Charges, are capped through 2004.

Provider of Last Resort service is a mechanism built into Pennsylvania's Electric Choice program.

When wholesale electricity prices are high – as they are today – consumers have the option of choosing regulated, capped rates for energy supply from their local electric utility. When wholesale electricity prices are low, consumers may shop among competing suppliers based on price or other features.

Several competitive electricity suppliers submitted power supply bids. PPL EnergyPlus, a separate subsidiary of PPL Corporation, was the low bidder and was awarded the contract.



ACSI

American Customer Satisfaction Index

PPL Electric Utilities tied for first among utility companies ranked in the 2001 American Customer Satisfaction Index.

how to get in touch

Customer service:
1-800-342-5775
Automated phone lines are open 24 hours a day, seven days a week. Customer service representatives are available Monday through Friday, 8 a.m. to 5 p.m.

Telecommunications Device for the Deaf:
1-800-231-7288 TTY

Write to us at:
Connect
GENTW4
2 N 9th St
Allentown PA 18101-1179

Visit us on the Internet at
www.pplweb.com

2-1-9

08/07 '01 11:00 NO.665 01/04

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EXHIBIT 17

CFW

William E. Bottke
Customer Support Engineer
Tel.570/348-1587 Fax 570/348-4670
E-mail: webottke@pplweb.com

PPL Electric Utilities
600 Larch Street
Scranton, PA 18509-2899
Tel. 570/348-1522
http://www.pplweb.com

July 12, 2001

Mr. Robert Hudak, Co-Chairman
Olyphant Borough Light Committee
113 Willow Avenue
Olyphant, PA 18447-1498

Dear Mr. Hudak:

Rich Beasley asked me to reply to your concerns expressed to him in your July 9 letter regarding the reliability of our 12.47 KV feeder that supplies power to Olyphant.

The Borough is supplied from our Eynon #2, 12 KV feeder. The route of this feeder is along Main Street in Blakely to the Archbald line then along our transmission corridor to our Eynon Substation. Eynon Sub is on Main Street in the Eynon Section of Archbald, approximately 3.5 miles from your main switching station. Aside from Olyphant, this feeder supplies electric service to most of Jessup Borough.

This feeder is one of the most reliable feeders in our Scranton Operating Area. A search of outage records for the last ten years reveals only two outages. One for eleven minutes on April 25, 1996, on the orders of the fire chief due to a structure fire near our line. The second outage was for three minutes on September 1, 1996, while we switched loads to adjoining lines due to an animal contact in our Throop Substation. The total outage time for the last ten and one-half years amounts to only fourteen minutes. I'm sure you will agree that this is a very reliable service.

In addition to these two 'permanent' outages we recorded thirteen momentary outages (less than one minute) when our circuit breaker operated at Eynon Substation. These trips and recloses are usually due to lightning storms, vehicles bumping poles, or faults on fused single-phase taps fed from this feeder.

The 12 KV supply to Olyphant is not a two-way supply. There are field ties to our Eynon #2 Feeder from three other adjoining feeders. By using these field ties, we were able to restore your power in eleven minutes for the above mentioned fire rather than leaving the Borough in the dark until the fire was extinguished.

1211-9

Ltd

07/16 '01 10:17 NO.499 20/10

Our Local System Operator and Troubleman make every effort to transfer your feed to adjoining lines during emergencies when the load on these lines permits such transfer. The addition of 1,500 KW load to your system can be supplied via the existing Eynon #2 feed. There are times when we may not be able to transfer your existing load and this proposed load to adjoining feeders. The decision to do this is entirely dependent on loading of the adjoining feeders plus the Borough's load at the time of an emergency transfer.

If the Borough desires a two-way supply or a two-line service, our System Development and Technical Support Section will have to do a detailed study of the various options available. Should you feel the need for this upgrade to your supply system, please contact your Account Representative, Vince Bartkus at 570/459-7483. His mailing address is PPL Electric Utilities, Hazleton Service Center, 344 S. Poplar Street, 2nd Floor, Hazleton, PA 18201-7199.

Please feel free to contact me at 348-1587 if you have further questions regarding the reliability or quality of the service you are receiving from PPL Electric Utilities.

Sincerely,

William E. Botke

William E. Botke, P.E.
Customer Support Engineer
Scranton Operating Area

WEB/cag

cc: Mr. R. Beasley
Mr. V. Bartkus

07/16 '01 10:17 NO.489 02/20 5703837818

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EXHIBIT 16

Vincent E. Bartkus
Regional Service Supervisor
Tel. 570.459.7483 Fax 570.459.7273
E-mail: vebartkus@pplweb.com

PP&L, Inc.
344 S. Poplar Street
Hazleton, PA 18201
Tel. 800.732.2227
http://www.pplweb.com/

July 13, 2000

Mr. Robert Hudak
Olyphant Borough
113 Willow Avenue
Olyphant, PA 18447-1498

69 kV Electric Service Information

Dear Mr. Hudak:

In response to your request for information for your 69 kV feasibility study, I have compiled the following response to your questions:

- Two-line 69 kV is available at the site you indicated on your drawings, near PPL pole 59824N47774.
- PPL owns the transmission line but not the property on which it is located.
- Since our transmission line is located in an easement and not on property owned by PPL, we cannot grant others permission to use this easement. Olyphant Borough must secure permission from the property owner to install new facilities in this easement. Because of safety issues, PPL reserves the right to review any proposal to install a new line near our transmission lines and poles.
- Our cost estimates for the 69 kV construction work and also our substation recommendation are not yet complete. I will forward that information to you at a later date. The proposed schedule for conversion to 138 kV is also being re-evaluated and is not yet available.
- The current Power Supply Agreement (PSA) between PPL Electric Utilities Corporation and the Borough of Olyphant terminates no later than January 31, 2004. When the current PSA terminates, the appropriate PPL Corporation subsidiary may decide to make a new offer to the Borough. The pricing, structure, terms and other conditions of any offer will be determined in large measure by the prices and conditions of the wholesale market at the time any such offer might be made. The competitiveness of the offer would be for the Borough to decide, when compared with other offers it might receive.

Thank you again for your patience in this matter. I will contact you as soon as our cost estimates are completed, hopefully by the end of next week. Until then, if you have any questions, please call me at (570) 459-7483.

Sincerely,

Vincent E. Bartkus

Vincent E. Bartkus, P.E.
Regional Service Supervisor

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EXHIBIT 15

April 19, 2000

PP&L, Inc.
344 South Poplar Street
Hazleton, PA 18201-7199

Attn: Mr. Vincent E. Bartkus, P.E.
Account Manager

Re: Olyphant Borough Electric Company
69KV Sub-station Study

Dear Mr. Bartkus:

We wish to thank you and Mr. Dave Schleicher for meeting with Olyphant Borough officials on Thursday, April 13, 2000. The meeting was very productive and the information which you and Mr. Schleicher provided was very helpful.

Since one of the options in Olyphant Borough's long range planning is the building of a new sub-station and purchasing power at a higher voltage. To further assist us in evaluating this option, we are requesting the following information:

1. Would two-line supply be available from PP&L at 69KV (or 138KV) from the existing 69KV two-line supply tap to the WEA sub-station?

2. Who is the present owner of the tap?

3. If a sub-station could be built adjacent to the right-of-way for the tap to the WEA sub-station, could Olyphant Borough obtain an easement from PP&L to install Olyphant's 12KV feeders from the proposed sub-station location to Mid-Valley Drive?

4. If 69KV (or 138KV) could be supplied from the tap serving WEA, what would PP&L's preliminary estimated facilities charges be for:

   Single line supply?
   Two-line supply?

5. If 69KV (or 138KV) could not be supplied from WEA's tap, could PP&L suggest a location for a new sub-station near PP&L's lines which would be the most advantageous and least costly for both PP&L and Olyphant Borough? What would be PP&L's preliminary estimated facilities charges for:

   Single line supply?
   Two-line supply?

6. What would be the estimated lead time required by PP&L for planning, obtaining necessary approvals, and for installing a tap to Olyphant's proposed sub-station?

7. When does PP&L expect to make the conversion from 69KV to 138KV?

8. Since PP&L's present demand charges for wholesale customers with a demand under 8MW makes ownership of a 69KV sub-station much less attractive, would PP&L consider offering Olyphant Borough a restructured rate that would be competitive with other energy suppliers when Olyphant's present 5 year contract expires?

I realize we are asking for a considerable amount of information but it is necessary in order for us to make a feasability study. Thank you for your continued cooperation.

Very truly yours,

Robert Hudak, Co-Chairman,
Olyphant Borough Light Committee

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EXHIBIT 14

wea Manufacturing

WEA Manufacturing
1400 East Lackawanna Avenue
Olyphant, PA 18448
(570) 383-3291

April 23, 2001

C.J. Mustacchio, Esquire
Kane Professional Building
Suite 2E
116 North Washington Avenue
Scranton, PA 18503

RE: ELECTRIC POWER PROPOSAL

Dear Mr. Mustacchio:

Thank you for forwarding me the letter from the Borough's consultant, Charles Wheatley, regarding assurances for WEA Manufacturing ("WEA") should we choose to switch electric providers from PP&L. I have enclosed a letter from David Kleppinger of McNees, Wallace & Nurick, who represents the PP&L Industrial Customer Alliance ("PLICA"). As David points out, there has been no litigation of the issues WEA is concerned with and all of Mr. Wheatley's interpretations of ambiguous language is favorable to our position.

One of the two biggest issues for WEA is the stranded costs. Mr. Wheatley's letter fails to hit on the issue of WEA's prior obligation to pay those costs under the statute as well as the restructuring settlement agreement signed by PLICA on behalf of WEA. I realize that Mr. Wheatley has his opinion, but the term unbypassable as cited by David certainly clouds the issue. WEA does not wish to become a test case for this as yet undecided point.

The issue of rates is also of major concern for us. Mr. Wheatley implies that PP&L could achieve a rate increase despite the rate cap provided by the restructuring proceeding. I agree with David when he says that that event is less likely than that Olyphant might not be able to keep its rate below the cap upon the termination of its service agreement with PP&L. The Borough's argument that it can be a strong customer with respect to shopping for rates does not come into play for WEA until 2009 and, at that time, with the type of load we have, we feel we will be as strong a customer as the Borough, even when the Borough negotiates with other municipalities.

In sum, PP&L has not shown itself to be the kind of company to concede to Mr. Wheatley's version of how the law should be interpreted. WEA does not wish to take this risk and lose its comfortable position.

WEA has an obligation to its parent company to maintain low and predictable costs. The favorable treatment we receive with the rate cap militates against any change in electric providers at this time. We greatly appreciate all the efforts of the Borough to educate us in this matter.

Please call if you have any questions.

Very truly yours,

Jeffrey M. Raider
Vice President of Legal Affairs

Enc.

c: Ellis Kern
David Silvon
Sean Mancuso

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EXHIBIT 13

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

OFFICE OF
EXECUTIVE DIRECTOR

April 12, 2000

RECEIVED
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PA P.U.C.
LAW BUREAU

Norbert R. Kosciuk, Borough Manager
Borough of Olyphant
113 Willow Avenue
Olyphant, PA 18447-1498

Re: Electric Choice Regulations

Dear Mr. Kosciuk:

This is in response to your letter of March 20, 2000, inquiring about the Commission's regulations relating to retail electric choice. You explain that Olyphant Borough is the exclusive provider of electric service for residents within the borough boundaries and that you purchase wholesale supply from PP&L, Inc. Further, you note that pursuant to a Resolution passed by Borough Council in 1979, PP&L is authorized to serve the Mid-Valley Industrial Park Area (Industrial Park) within the boundaries of Olyphant Borough. Your recent efforts to approach PP&L with the objective of regaining exclusive rights to serve that area have been unsuccessful. Through your inquiry, you request copies of Commission regulations that may address this situation.

As you are aware, the Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§2801-2812, was signed into law by Governor Ridge on December 3, 1996. Under that legislation, most retail customers in Pennsylvania have the opportunity to choose an electric generation supplier. However, under Section 2805(b), a borough may prohibit electric generation suppliers from serving end-use customers within its borough limits, so long as it is not providing generation service to end-use customers outside of its borough limits. A copy of this section of the law is enclosed.

Based upon the information in your letter, it appears that Olyphant Borough has decided to maintain its exclusive rights to serve end-use customers within its borough limits. Specifically, assuming that the borough is not serving customers beyond its boundaries, it may prevent alternative suppliers from serving customers within its limits. Although PP&L is serving the Industrial Park as the electric distribution company and provider of last resort, rather than as an alternative supplier, the language in Section 2805(b) of the Competition Act is helpful. By making it clear that a borough can preserve exclusive rights to serve customers within its boundaries, Section 2805(b) would seem to support your attempt to regain the ability to serve the Industrial Park.

I am unaware of any other provisions of the Competition Act or the Commission's electric choice regulations that apply to this situation. Certainly, nothing in the Competition Act or regulations limits the ability of the borough to serve the Industrial Park. You should be aware, however, that the Commission does not have jurisdiction to address contractual disputes between the borough and PP&L. Therefore, if PP&L claims a contractual right to serve the Industrial Park, that is a matter that would have to be pursued through the civil court system.

I trust this is responsive to your inquiry. If you have any further questions concerning this matter, please feel free to contact Deputy Chief Counsel Karen Moury at 717-772-8883.

Sincerely,

Barbara Bruin
Executive Director

Enclosure

cc: Deputy Chief Counsel Moury

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EXHIBIT 12

Borough of Olyphant

Mid-Valley Industrial Park Business

Re: BOROUGH OF OLYPHANT SUPPLYING ELECTRIC POWER TO MID-VALLEY INDUSTRIAL PARK BUSINESSES WITHIN IT'S BOUNDARIES

Dear Business Owner:

This is to advise you that the Borough of Olyphant is undertaking steps to provide electric power from its municipal electric system to users in the Mid-Valley Industrial Park located within the Borough. This action has been authorized by the Pennsylvania Legislature. Section 2805(b)(1)(i) of the "Electricity Generation Customer Choice and Competition Act", 66 Pa. C.S.A. Section 2802, authorizes a Borough which is engaged in distributing electricity to end-use customers within the Borough to prohibit electric generation suppliers from serving such customers within its Borough limits. Since the Mid-Valley Industrial Park is within the Borough limits, this provision of the Pennsylvania law authorizes the Borough to serve entities such as your company, located within the Park. The Borough has received confirmation from the Executive Director of the Pennsylvania Public Utilities Commission that it has exclusive rights to serve end-use customers within the Borough.

The Borough of Olyphant presently has a wholesale power contract with PP&L that requires PP&L to supply all of Olyphant's capacity and energy requirements for service to its customers in its service territory. The Borough's contract expressly precludes the imposition of any stranded cost on the Borough relating to the wholesale power purchased by the Borough for its retail customers.

PP&L is presently providing electric service to you and other commercial and industrial customers located in the Mid-Valley Industrial Park in Olyphant pursuant to a 1978 Resolution which the Borough has the right to change at any time. The Borough now has facilities in place which can provide your electric service requirements, and it now desires to provide all of your electric power requirements located within the Borough of Olyphant.

113 Willow Avenue, Olyphant, Pennsylvania 18447-1498
(570) 489-2135
FAX (570) 383-7818

Mid-Valley Industrial Park Business

Re: BOROUGH OF OLYPHANT SUPPLYING ELECTRIC POWER TO MID-VALLEY INDUSTRIAL PARK BUSINESSES WITHIN IT'S BOUNDARIES

We believe that the service and rates for electric power by the Borough to your company will be reliable and reasonable. In order to provide a rate for you, we request that you provide us with a copy of your monthly electric power bills for the past year, as well as any information about any projected increases or decreases in your usage for the next two years. Once we have this information, we will provide you with detailed rates and information for your future power service from the Borough.

If you have any questions, please contact me or the Borough manager, Norbert Kosciuk at 489-8503.

We are looking forward to providing your electricity service for the future.

Sincerely,

Michael Wargo Jr.

Michael Wargo Jr.
Mayor of Olyphant

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EXHIBIT 11

MEB

RECEIVED
APR 27 2001
EXECUTIVE
VICE PRESIDENT'S OFFICE

Borough of Olyphant

April 25, 2001

Certified Mail:
7099 3400 0003 6966 6985

Mr. F. A. Long
Executive Vice-President and COO
PP&L, Inc.
Two North Ninth Street
Allentown, PA 16101-1179

Re: Mid-Valley Industrial Park in Olyphant

Dear Mr. Long:

This is to advise you that the Borough of Olyphant is undertaking steps to provide electric power from its municipal electric system to users in the Mid-Valley Industrial Park located within the Borough. This action has been authorized by the Pennsylvania Legislature, §2805(b)(1)(i)of the "Electricity Generation Customer Choice and Competition Act", 66 Pa. C.S.A. Section 2802, which authorizes a borough which is engaged in distributing electricity to end-use customers within a borough to prohibit electric generation suppliers from serving such customers within its borough limits. Since the Mid-Valley Industrial Park is within the borough limits, this provision of the Pennsylvania law authorizes the Borough to serve entities located within the Park. The Borough has received confirmation from the Executive Director of the Pennsylvania Public Utilities Commission that it has exclusive rights to serve PP&L's customers within the Borough.

PP&L is presently providing electric service to commercial and industrial customers located in the Mid-Valley Industrial Park in Olyphant pursuant to a 1978 Resolution which the Borough has the right to change at any time. The Borough would like to have negotiations with PP&L as soon as possible to coordinate a cooperative transition in placing our poles and transformers relating to the Borough providing future electric service to the Mid-Valley Industrial Park.

113 Willow Avenue, Olyphant, Pennsylvania 18447-1498
(570) 489-2135
FAX (570) 383-7818

Re: Mid-Valley Industrial Park in Olyphant

As you know, the Borough of Olyphant presently has a wholesale power contract with PP&L whereby has agreed to supply all of Olyphant's capacity and energy requirements for service to its customers in its service area. The Borough now has facilities in place which can provide service to most of the customers in the Park, and contemplates arrangements, which it would like to discuss with PP&L, for obtaining all of its power service from PP&L at 69kv.

Please contact me at (570) 489-8503, as when we can get together with our appropiate legal experts and electrical engineers to coordinate a smooth transition pertaining to this matter.

The Borough has appreciated its long-standing power supply arrangements with PP&L and look forward to their continuation in the future.

Sincerely,

Norbert R. Kosciuk
Borough Manager

RECEIVED
2004 JAN -5 PM 3:28
SECRETARY'S BUREAU

EXHIBIT 10

RESOLUTION #16 of 1997

A RESOLUTION OF THE BOROUGH OF OLYPHANT, LACKAWANNA COUNTY, COMMONWEALTH OF PENNSYLVANIA, DECLINING TO BECOME AN ELECTRICAL GENERATION SUPPLIER TO ELECTRIC CUSTOMERS NOT PRESENTLY SERVED WHO ARE LOCATED OUTSIDE THE BOUNDARIES OF TH E BOROUGH OF OLYPHANT AND DIRECTING THE MANAGER OF THE BOROUGH OF OLYPHANT TO ADVISE ELECTRICITY SUPPLIERS ACCORDINGLY.

WHEREAS, the Borough of Olyphant, Lackawanna County, Commonwealth of Pennsylvania, (Hereinafter the "Borough of Olyphant"), is an electricity provider within the limits of the boundaries of the Borough of Olyphant; and

WHEREAS, the General Assembly of the Commonwealth of Pennsylvania has enacted the "Electricity Generation Customer Choice and Competition Act, being a portion of Act 138 of 1996, codified at 66 Pa. C.S.A. Section 2801 et seq. (1996, Dec. 3, P. L. 802, No. 138, Section 4. Effective January 1, 1997) (herein the "Act"); and

WHEREAS, it is in the best interest of the Borough of Olyphant to be the exclusive electric supplier within the Borough Limits of the Borough of Olyphant.

NOW, THEREFORE, BE IT RESOLVED, by the Council of the Borough of Olyphant, Lackawanna County, Commonwealth of Pennsylvania, and is hereby resolved and adopted by the committee of the same, that the Borough of Olyphant does hereby exercise its rights pursuant to the Act, 66 Pa. C.S.A. Section 2805 (b)(1)(i), to prohibit electrical generation suppliers from serving end-use customers within the Borough Limits of the Borough of Olyphant; and

BE IT FURTHER RESOLVED, that the Borough Manager of the Borough of Olyphant be, and said Manager hereby is, authorized and directed to take such action as may be necessary to advise the Commonwealth of Pennsylvania Public Utility Commission and all appropriate electrical generation suppliers of the foregoing.

Peter P. Kolcharno,
President of Council

Michael Wargo Jr.
Mayor, Borough of Olyphant

ATTEST:

William G. Shigo,
Secretary

CERTIFICATION

NOW, this 16th day of December, 1997, I hereby certify that the foregoing Resolution was adopted at a regular meeting of Council of the Borough of Olyphant where a quorum was present and was passed unanimously and made a part of the minutes of said meeting.

William G. Shigo, Secretary
Olyphant Borough

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2004 JAN -5 PM 3:28
SECRETARY'S BUREAU

EXHIBIT 9

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Boroughs of Lansdale, *et al.*	)	Docket No. SC97-1-000
	)	

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into between PP&L, Inc. (formerly known as Pennsylvania Power & Light Company) and the following fifteen of its wholesale requirements power supply customers (hereinafter collectively "the Boroughs"):

Served at 69 kV: The Pennsylvania Boroughs of Weatherly (Rate Schedule Federal Energy Regulatory Commission ("FERC") No. 50), Schuylkill Haven (Rate Schedule FERC No. 51), Perkasie (Rate Schedule FERC No. 54), Mifflinburg (Rate Schedule FERC No. 70), Quakertown (Rate Schedule FERC No. 71), Kutztown (Rate Schedule FERC No. 79), and Lansdale (Rate Schedule FERC No. 88); and

Served at 12 kV: The Pennsylvania Boroughs of Watsontown (Rate Schedule FERC No. 28), Duncannon (Rate Schedule FERC No. 32), St. Clair (Rate Schedule FERC No. 56), Catawissa (Rate Schedule FERC No. 57), Lehighton (Rate Schedule FERC No. 63, Hatfield (Rate Schedule FERC No. 69), Olyphant (Rate Schedule FERC No. 86), and Blakely (Rate Schedule FERC No. 101).

EXHIBIT A

ARTICLE I
Recitals

WHEREAS, PP&L currently supplies capacity, energy, and transmission service to the Boroughs pursuant to a Settlement Agreement dated March 15, 1994 and the power supply agreements executed thereunder that are identified above according to the respective FERC rate schedule number for each Borough, all of which were approved by the FERC in an Order issued July 11, 1994, (identified in this Settlement Agreement as the "current agreements");

AND WHEREAS, all of those current agreements became effective on February 1, 1994 and are for an initial term of five years;

AND WHEREAS, PP&L asserted that the Boroughs could not terminate those agreements by giving the required notice specified therein at the end of the Initial Term without the payment of stranded costs;

AND WHEREAS, the FERC proceeding captioned Boroughs of Lansdale, et al., Docket No. SC97-1-000, was filed on May 8, 1996, by the Boroughs and by the Borough of Ephrata to determine their liability, if any, to PP&L for "stranded costs" if they were to stop purchasing capacity and energy from PP&L following the initial 5-year terms of their current agreements with PP&L;

AND WHEREAS, PP&L and the Boroughs wish to settle and terminate this proceeding, and to finally resolve all stranded cost issues between them by entering into this Settlement Agreement and by modifying their current agreements, all as further described below;

NOW, THEREFORE, as a result of settlement negotiations and in consideration for the mutual promises set forth herein, and with the intent to be bound thereby, PP&L and the Boroughs promise and agree as follows:

ARTICLE II
Current Agreements Between PP&L and the Boroughs

Article 2.1: PP&L agrees to make a filing with the FERC and request approval to delete the fuel adjustment clause ("FAC") now in effect between PP&L and each of the Boroughs in the current agreements, effective as of April 1, 1997. PP&L agrees to no longer charge and/or credit the Boroughs for any amounts that otherwise would be charged or credited pursuant to the FAC, subsequent to April 1, 1997, for the remaining term of the current agreements (i.e., through January 31, 1999), and no FAC will apply to the new power supply agreements provided for in Article III. The elimination of the FAC will not affect the charges to the Boroughs for the fuel costs that are included within the currently-effective and FERC-approved base rates for the Boroughs.

Article 2.2: To the extent that PP&L, beginning April 1, 1997, has billed the Boroughs under the FAC any amounts above its currently effective base rates in the current agreements, PP&L agrees to refund these sums to the Boroughs in one lump sum within 15 days after FERC's final approval of this Settlement Agreement, without interest. The Parties to this Settlement Agreement agree that no such party will seek to recover or shall accept any additional charges, credits or refunds, pursuant to the FAC under the current agreements for any time periods or service before April 1, 1997.

Article 2.3: PP&L and the Boroughs agree to the modification of their current agreements to effect the changes to those agreements described in Articles 2.1 and 2.2 above.

Article 2.4: The March 15, 1994 Settlement Agreement (identified in Article I) and the current agreements between PP&L and the Boroughs give PP&L the unilateral right to make application to FERC for a change in rates under Section 205 of the Federal Power Act, provided that any increase in rates shall not exceed the wholesale base rates then in effect by 5% on an individual customer basis, and shall be nondiscriminatory and not exceed the Company's average embedded system-wide allocated cost of service that would take effect no earlier than February 1, 1998. PP&L agrees that it will neither exercise this right nor seek nor accept any increase in rates under the current agreements.

Article 2.5: Other than the changes to the current agreements discussed in Articles 2.1 through 2.4 above, and the changes that may be necessary to fully effectuate Article III of this Settlement Agreement, the March 15, 1994 Settlement Agreement and the current agreements between PP&L and the Boroughs shall continue in effect without change until terminated, as provided in Article 2.6.

Article 2.6: PP&L and the Boroughs agree that the current agreements between them shall terminate at the end of their initial 5-year terms (i.e., the current agreements will terminate on January 31, 1999). By execution of this Settlement Agreement, each of the Boroughs shall be deemed to have given to PP&L the one year's notice of termination required by the current power supply agreements so that such agreements

shall terminate on January 31, 1999. PP&L will not seek any stranded cost recovery or exit fee against any of the Parties to this Settlement Agreement, and hereby waives any present or future rights to any such claims. If any of the Boroughs breaches this Settlement Agreement and/or fails to fully perform its obligations thereunder, PP&L's remedy will only be for such breach of contract and attorney's fees and costs related thereto.

ARTICLE III
New Power Supply Agreements

Article 3.1: PP&L and each of the Boroughs, subject to Articles 3.3.1 and 3.3.2 of this Settlement Agreement, agree to enter into new power supply agreements, subject to the terms of this Settlement Agreement, which will take effect February 1, 1999, immediately after the termination of their current agreements, which will supersede all prior agreements between PP&L and the Boroughs (except this Settlement Agreement). The new power supply agreements between PP&L and the Boroughs shall be for their firm power requirements (capacity and energy) for a term of five years, unless terminated earlier or extended later, in accordance with the terms of this Settlement Agreement and of those new power supply agreements. PP&L also agrees to work with and negotiate in good faith with any of the Boroughs that wish to obtain from PP&L a supply of non-firm power (energy only) for the purposes of the Borough being able to serve an interruptible customer. PP&L agrees to promptly quote a rate for such power to any of the Boroughs that makes a bona fide request for such a quote, and agrees to reasonably cooperate with any such Borough in the Borough's effort to obtain the business of an

interruptible load as an electric supply customer. The economic development credit set forth in Article IV of this Settlement Agreement shall not apply to sales by PP&L to the Boroughs of non-firm power (energy only).

Article 3.2: PP&L and each of the Boroughs agree to promptly finalize, execute, approve, and file with FERC the new power supply agreements; in no event shall such agreements be filed with the FERC later than November 30, 1998. The Boroughs agree to take all necessary actions to obtain approval by their respective Borough governing bodies of this Settlement Agreement and their new power supply agreements with PP&L.

Article 3.3.1: PP&L and the Boroughs agree that, not withstanding any deadline set forth in Article 3.2 of this Settlement Agreement, PP&L and Kutztown will execute a new agreement either simultaneously with, or prior to, their execution of this Settlement Agreement.

Article 3.3.2: Unlike the other 14 Boroughs that are parties to this Settlement Agreement, the Borough of Lehighton under the Power Supply Agreement with PP&L dated March 28, 1994 has agreement provisions specifically providing for conversion of service from 12,470 volts to 69,000 volts and concerning certain other transmission upgrade matters. Nothing in this Settlement Agreement shall affect the existing rights and obligations in paragraphs 3(b) and 4(a) and 4(b) of the current agreements between PP&L and the Borough of Lehighton, and the provisions of Article VI of the March 15, 1994 Settlement Agreement insofar as such Article may apply to or affect the rights and obligations of PP&L and Leighton set forth in such paragraphs 3(b), 4(a) and 4(b). The

rights and obligations of PP&L and Leighton under such paragraphs 3(b), 4(a), 4(b) and Article VI shall be preserved and shall carry forward into the new power supply agreement between PP&L and Lehighton that they are required to enter into under this Settlement Agreement. Nothing in this Article 3.3.2 shall prohibit PP&L and Leighton from mutually agreeing to supersede and/or modify the rights and obligations set forth in this Article 3.3.2 and in the paragraphs 3(b), 4(a) and 4(b) identified herein, without the need for any agreement or consent by the other Boroughs, and without affecting the other rights and obligations of PP&L and the Boroughs under this Settlement Agreement.

Article 3.4: The new power supply agreements between PP&L and the Boroughs will apply only to the energy and capacity being provided by PP&L to the Boroughs, including all losses. Rates will be unbundled to separately state charges for demand, energy, and the pass-through of charges for transmission and ancillary services. The rates for demand and energy are set forth below in this Article III of this Settlement Agreement. The rates for transmission and ancillary services will be based on those established by the FERC, as may be changed or modified from time to time, subject to the ceiling on ancillary service costs set forth herein. The Boroughs may procure their own transmission and ancillary services for the delivery of capacity and energy to be supplied by PP&L or, for any of the Boroughs that so desire, PP&L agrees to act as the Borough's agent in procuring transmission service (for delivery at the applicable 69 kV or 12 kV voltage) and ancillary services from the Pennsylvania-New Jersey-Maryland-Interconnection ("PJM"), its successor and/or PP&L. For the Boroughs that so designate

PP&L as their agent, PP&L agrees to provide all scheduling services to the Boroughs at no charge to them, except for the passthrough from PJM to the Boroughs of any charges assessed by PJM for the Scheduling, System Control and Dispatch ancillary service.

The rates and charges for transmission and ancillary services shall be those set by PJM (or its successor) and/or PP&L under the applicable open access transmission tariff and pursuant to a duly filed service agreement. To the extent PJM's and/or PP&L's rates and charges to a Borough for the six ancillary services set forth in the applicable open access transmission tariff(s) exceed $0.61 per kW/mo., PP&L shall give such Borough a credit against that Borough's demand and energy charges equal to the amount by which the PJM and/or PP&L ancillary service rates/charges exceeded $0.61 per kW/mo. Such credit shall be given on a monthly basis.

Article 3.5: The demand and energy rates under the new power supply agreements between PP&L and the Boroughs, for the first three years of those agreements (i.e., February 1, 1999 through January 31, 2002), shall be as follows:

For each Borough that takes delivery at 69 kV:

	12 months beginning		
	2/1/99	2/1/00	2/1/01
Demand up to 8 MW	$6.25/kW-mo	$5.80	$5.35
Demand over 8 MW	$2.29/kW-mo	$2.04	$1.79
Energy	$0.02620/kWh	0.02489	$0.02360

For each Borough that takes delivery at 12 kV:

	12 months beginning		
	2/1/99	2/1/00	2/1/01
Demand	$4.58/kW-mo	$4.11	$3.64
Energy	$0.02800/kWh	$0.02660	$0.02520

Article 3.6: Any or all of the Boroughs may make a request to PP&L no earlier than May 1, 2001 and no later than May 31, 2001, that the rates for demand and energy to be supplied by PP&L to such Borough, beginning February 1, 2002, be reduced to the following rates:

For each Borough that takes delivery at 69 kV:

	12 months beginning 2/1/02
Demand up to 8 MW	$ 4.91/kW-mo
Demand over 8 MW	$ 1.54/kW-mo
Energy	$ 0.02230/kWh

For each Borough that takes delivery at 12 kV:

	12 months beginning 2/1/02
Demand	$ 3.175/kW-mo
Energy	$ 0.02380/kWh

Article 3.7: If any or all of the Boroughs make a request for a lower rate pursuant to Article 3.6 of this Settlement Agreement, then PP&L, at its sole option, must by July 1, 2001: (a) agree to the request of any or all such Boroughs that made a request, in

which case the new rates requested by any such Borough and agreed to by PP&L will take effect for such Borough on February 1, 2002; or (b) decline the request, in which case PP&L and/or the Borough that made the request may unilaterally terminate their power supply agreement, effective January 31, 2002, provided that the notice of such termination is given no later than the close of business, July 31, 2001 (if PP&L wishes to terminate) or October 31, 2001 (if a Borough wishes to terminate).

Article 3.8: PP&L may make a request to any or all of the Boroughs no earlier than May 1, 2001 and no later than May 31, 2001, that the rates for demand and energy to be supplied by PP&L to such Borough, beginning February 1, 2002, be increased to the rates that were in effect for the 12 months beginning February 1, 2000, as set forth in Article 3.5 above.

Article 3.9: If PP&L makes a request to any or all of the Boroughs for a higher rate pursuant to Article 3.8 of this Settlement Agreement, then the Borough(s) to which such a request is made, at the Borough's sole option, must by July 1, 2001: (a) agree to the request, in which case the new rates requested by PP&L and agreed to by the Borough will take effect for such Borough on February 1, 2002; or (b) decline the request, in which case PP&L and/or the Borough to which the request was made may unilaterally terminate their power supply agreement effective January 31, 2002, provided that notice of such termination is given no later than the close of business, July 31, 2001, (if PP&L wishes to terminate), or October 31, 2001 (if the Boroughs wish to terminate).

Article 3.10: If neither PP&L nor the Borough that is a party to a power supply

agreement exercises its right to request a rate change pursuant to Articles 3.6 and/or 3.8 above, or neither party exercises any right it may have to terminate its power supply agreement pursuant to Articles 3.7 and/or 3.9 above, then the power supply agreement between PP&L and such Borough will continue in effect for the twelve-month period beginning February 1, 2002, at the same rates for demand and energy that were in effect for PP&L and such Borough from February 1, 2001 through January 31, 2002.

Article 3.11: Any or all of the Boroughs that remain PP&L requirements customers under this Settlement Agreement and their new power supply agreements on and after February 1, 2002 may make a request to PP&L no earlier than May 1, 2002 and no later than May 31, 2002, that the rates for demand and energy to be supplied by PP&L to the Borough, beginning February 1, 2003, be reduced by the following amounts from the rates in effect from February 1, 2002 through January 31, 2003:

For each Borough that takes delivery at 69 kV:

	For the period beginning 2/1/03
Demand up to 8 MW	$ 0.45/kW-mo
Demand over 8 MW	$ 0.25/kW-mo
Energy	$ 0.00131/kWh

For each Borough that takes delivery at 12 kV:

	For the period beginning 2/1/03
Demand	$ 0.47/kW-mo
Energy	$ 0.0014/kWh

Article 3.12: If any or all of the Boroughs make a request for a lower rate pursuant to Article 3.11 of this Settlement Agreement, then PP&L, at its sole option, must by July 1, 2002: (a) agree to the request of any or all such Boroughs that made a request, in which case the new rates requested by any such Borough and agreed to by PP&L will take effect for such Borough on February 1, 2003; or (b) decline the request, in which case PP&L and/or the Borough that made the request may unilaterally terminate their power supply agreement, effective January 31, 2003, provided that notice of such termination is given no later than the close of business, July 31, 2002 (if PP&L wishes to terminate) or October 31, 2002 (if a Borough wishes to terminate).

Article 3.13: With respect to the Boroughs that remain PP&L requirements customers under this Settlement Agreement and their new power supply agreements on and after February 1, 2002, PP&L may make a request to any or all such Boroughs no earlier than May 1, 2002 and no later than May 31, 2002, that the rates for demand and energy to be supplied by PP&L to such Borough, beginning February 1, 2003, be increased by the following amounts from the rates in effect from February 1, 2002 through January 31, 2003:

For each Borough that takes delivery at 69 kV:

	For the period beginning 2/1/03
Demand up to 8 MW	$ 0.45/kW-mo
Demand over 8 MW	$ 0.25/kW-mo
Energy	$ 0.00131/kWh

For each Borough that takes delivery at 12 kV:

	For the period beginning 2/1/03
Demand	$ 0.47/kW-mo
Energy	$ 0.0014/kWh

Article 3.14: If PP&L makes a request to all of the Boroughs for a higher rate pursuant to Article 3.13 of this Settlement Agreement, then any Borough to which such a request is made, at the Borough's sole option, must by July 1, 2002: (a) agree to the request, in which case the new rates requested by PP&L and agreed to by the Borough will take effect for such Borough on February 1, 2003; or (b) decline the request, in which case PP&L and/or the Borough to which the request was made may unilaterally terminate their power supply agreement, effective January 31, 2003, provided that notice of such termination is given no later than the close of business, July 31, 2002 (if PP&L wishes to terminate) or October 31, 2002 (if a Borough wishes to terminate).

Article 3.15: If neither PP&L nor the Borough that is a party to a power supply agreement exercises its right to request a rate change pursuant to Articles 3.11 and/or 3.13 above, and neither party exercises any right it may have to terminate the power supply agreement pursuant to Articles 3.12 and 3.14 above, then the power supply agreement between PP&L and such Borough will continue in effect for the twelve-month period beginning February 1, 2003, at the same rates for demand and energy that were in effect for PP&L and such Borough from February 1, 2002 through January 31, 2003.

Article 3.16: Any power supply agreement between PP&L and a Borough entered into pursuant to this Settlement Agreement that has not been terminated on or before January 31, 2004, shall continue in effect on and after February 1, 2004, for successive one-year terms, at the same rates for demand and energy that were in effect from February 1, 2003 through January 31, 2004. Either PP&L or a Borough may terminate their power supply agreement on January 31, 2004, or January 31 of any year after 2004, by giving the other party notice of termination by July 31 of the preceding year (if PP&L wishes to terminate) or October 31 of the preceding year (if the Borough wishes to terminate).

Article 3.17: All notifications and/or notices by the Boroughs to PP&L or by PP&L to the Boroughs under this Settlement Agreement must be in writing and received by the deadlines specified in this Settlement Agreement.

ARTICLE IV
Economic Development Credit

Article 4.1: Effective for the twelve-month period beginning February 1, 1999, and for each year thereafter that one of the Boroughs takes service from PP&L under its new power supply agreement with PP&L executed pursuant to this Settlement Agreement, PP&L shall give to such Borough an economic development credit, to be computed as set forth below. This economic development credit shall be composed of two parts, and shall be given to each such Borough in a single, annual lump sum credit on the first bill that is rendered by PP&L to the Borough after February 1 of each year. The first such credit

shall be given in February, 1999. The two parts of this economic development credit are, and shall be computed, as follows:

Part One: An amount equal to $0.16 per MWH for all megawatt hours purchased by the respective Borough from PP&L during the preceding twelve-month period (February though January). The first credit shall be paid in February, 1999, for energy purchases during the twelve months from February, 1998 through January, 1999.

Part Two: An amount equal to 10% of the energy (not demand) charge from PP&L to the Borough for the preceding twelve-month period (February through January) for all kilowatt hours metered in excess of a load calculated at one percent annual compounded growth, as calculated from the actual energy consumed by each respective Borough during the base year of February 1, 1996 through January 31, 1997. The first such credit shall be given by PP&L in February 2000 for energy purchases during the twelve-month period from February 1999 through January 2000. The following table specifies the projected load and energy consumption of each Borough, through 2003, to be used in determining whether such Borough is entitled to the "Part Two" credit specified in this Article 4.1:

MINIMUM ENERGY CONSUMPTIONS FOR ECONOMIC DEVELOPMENT CREDITS (MWH)

	12 Months Ending January 31						
Borough	1997	1998	1999	2000	2001	2002	2003
Blakely	35.388	35.722	36.079	36.440	36.804	37.172	37.544
Catasauqua	12.148	12.269	12.392	12.516	12.641	12.768	12.895
Duncannon	9.353	9.447	9.541	9.636	9.733	9.830	9.928
Hartwick	18.803	18.991	19.181	19.373	19.566	19.762	19.960
Lehighton	40.130	40.531	40.937	41.346	41.759	42.177	42.599
Olyphant	20.893	21.102	21.313	21.526	21.741	21.959	22.178
St. Clair	14.279	14.422	14.566	14.712	14.859	15.007	22.178
Watsontown	12.935	13.064	13.195	13.327	13.460	13.595	13.731
Eurtown	58.373	59.957	60.566	61.172	61.784	62.402	63.026
Lansdale	124.332	125.474	126.729	127.996	129.276	130.569	131.875
Mifflinburg	47.496	47.971	48.451	48.935	49.425	49.919	50.418
Perkasie	56.843	57.411	57.986	58.565	59.151	59.743	60.340
Quakertown	100.668	101.675	102.691	103.718	104.756	105.803	106.861
Schuylkill Haven	46.388	46.832	47.300	47.773	48.251	48.733	49.221
Weatherly	20.868	21.077	21.287	21.500	21.715	21.932	22.152

ARTICLE V
PP&L's Commitment To Provide All-Requirements Firm Power, Notice and Termination

Article 5.1: Through at least January 31, 2002, PP&L shall provide all of the Boroughs' capacity and energy requirements, except for any current or future contract the Boroughs may have with the New York Power Authority for hydroelectric preference power, and except for any capacity or energy that the Boroughs are required to purchase,

under existing law, from a "qualified facility" under the Public Utility Regulatory Policies Act. After January 31, 2002, the service provided to the Boroughs pursuant to this Settlement Agreement and the new power supply agreements shall continue until terminated, in whole or in part, as set forth in this Settlement Agreement and in the new power supply agreements.

Article 5.2: If PP&L terminates its obligation to provide capacity and energy to a Borough and that Borough, despite its best efforts, cannot find an alternative supplier for capacity and energy, PP&L will continue to supply capacity and energy to that Borough, until the Borough finds an alternative supplier and subject to each party's rights under then existing law, at rates as follows: (a) demand charges at the greater of either (1)the then-current PJM (or its successor) capacity deficiency rate, or (2) the demand rates as specified in Article 3.5 of this Settlement Agreement effective 2/1/99; and (b) energy charges at the then-current PJM's (or its successor's) Market Clearing Price of generation plus 10%.

ARTICLE VI
Dismissal of This Proceeding

Article 6.1: The Boroughs will take all actions of which they are legally capable that are necessary to obtain dismissal of the proceeding between themselves and PP&L that is captioned Boroughs of Lansdale, et al., FERC Docket No. SC97-1-000, on the ground that the issues therein have been settled by the parties, based on the terms of this Settlement Agreement. PP&L and the Boroughs will cooperate with each other in the efforts to obtain dismissal of this proceeding.

Article 6.2: Based on the terms and conditions of this Settlement Agreement, PP&L will not seek, and hereby waives the right to seek, any stranded cost recovery or exit fee against any of the parties to this Settlement Agreement. If a Borough breaches the Settlement Agreement and/or fails to fully perform its obligations thereunder, PP&L may seek damages from such breaching Borough only for such breach of contract and PP&L's reasonable attorneys fees and costs relating thereto.

ARTICLE VII
Regulation and Amendment

Article 7.1: This Settlement Agreement and the new power supply agreements between PP&L and the Boroughs, and all rights, obligations and performances under the Settlement Agreement and the new power supply agreements, are subject to all applicable State and Federal laws and to all duly promulgated orders and other duly authorized actions of any governmental agency having jurisdiction with respect to any performance of any party. Except as provided in this Settlement Agreement, neither PP&L nor any of the Boroughs waives any of its rights under the Federal Power Act, or any successor statute, by entering into this Settlement Agreement.

Article 7.2: This Settlement Agreement, including all appendices or attachments hereto, shall not be amended except as specifically authorized under this Settlement Agreement, or by mutual agreement in writing by the parties. This Settlement Agreement is expressly conditioned upon the FERC's acceptance or approval of all of the terms and conditions hereof, without modification or omission, and upon the FERC's waiver of the

requirements of Section 35 of its regulations to the extent necessary to effectuate all of the provisions hereof and the agreements herein.

Article 7.3: This Settlement Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same Settlement Agreement. This Settlement Agreement shall not be effective as to any party to the Settlement Agreement until it has been executed by all the Boroughs and by PP&L.

IN WITNESS HEREOF, this Settlement Agreement is entered into as of this _____ day of _____, 1997, by and between PP&L and the Boroughs, by their respective attorneys, executives or representatives, each of whom represents that he is fully authorized to do so by his execution of this Settlement Agreement and his signature hereto.

PP&L, INC.

ATTEST: Patricia A. Hart BY: F. E. Long

TITLE: Executive Vice-President and Chief Operating Officer

OFFICE OF GENERAL COUNSEL
APPROVED
DATE 1/29/98

THE PENNSYLVANIA BOROUGH OF BLAKELY

ATTEST: [illegible] BY: Edward J. Gilmartin

TITLE: COUNCIL PRESIDENT

THE PENNSYLVANIA BOROUGH OF LANSDALE

ATTEST: _____ BY: _____

TITLE: _____

THE PENNSYLVANIA BOROUGH OF LEHIGHTON

ATTEST: _____ BY: _____

TITLE: _____

THE PENNSYLVANIA BOROUGH OF MIFFLINBURG

ATTEST: _____ BY: _____

TITLE: _____

THE PENNSYLVANIA BOROUGH OF OLYPHANT

ATTEST: Nellie G. Lee
Secretary Olyphant Borough
January 20, 1998

BY: Stephen Klimas

TITLE: Council President

Michael Fargo Jr.
Mayor

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EXHIBIT 8

POWER SUPPLY AGREEMENT

This power supply agreement ("Agreement"), dated this 8 day of DECEMBER, 1998, is by and between PP&L, Inc. ("PP&L", formerly known as Pennsylvania Power & Light Company), an electric public utility and a Pennsylvania corporation, whose principal address is Two North Ninth Street, Allentown, Lehigh County, Pennsylvania, and the Borough of Olyphant ("Olyphant"), a municipal corporation, whose principal address is 113 Willow Street, Olyphant, Lackawanna County, Pennsylvania, (each a "Party" and collectively, "the Parties").

WHEREAS Olyphant currently receives three-phase service from PP&L at approximately 12,470 volts, and distributes wholesale electricity purchased from PP&L to its customers; and

WHEREAS Olyphant and PP&L have agreed to terminate their existing power supply agreement and replace it with a new agreement to be filed at the Federal Energy Regulatory Commission ("FERC"); and

WHEREAS PP&L is willing to sell wholesale electric power to Olyphant commencing February 1, 1999 under the terms and conditions of this Agreement; and

WHEREAS Olyphant is one of fifteen Pennsylvania Boroughs that has executed a Settlement Agreement with PP&L dated January 29, 1998 ("Settlement Agreement") concerning litigation in the case captioned Boroughs of Lansdale, et al., FERC Docket No. SC97-1-000 as well as related matters; and

WHEREAS the Settlement Agreement, which is attached hereto as Exhibit A, requires, among other things, that PP&L and Olyphant enter into a new power supply agreement for the period beginning February 1, 1999.

NOW THEREFORE, in consideration of the mutual promises and agreements set forth herein, and with the intent to be legally bound thereby, PP&L and Olyphant promise and agree as follows:

1. ***Prior Agreements***. This Agreement supersedes the power supply agreement dated May 3, 1994, between PP&L and Olyphant, as amended and supplemented ("1994 agreement"), which was terminated by the Settlement Agreement, effective February 1, 1999; provided that the termination of the 1994 agreement shall not relieve either of the Parties of any accrued obligations thereunder. The Settlement Agreement is incorporated by this reference as though fully set forth herein, and shall control any inconsistent provisions of this Agreement.

2. *Term*. This Agreement shall become effective at 0001 hours on February 1, 1999, (the "effective date"), and shall continue in effect for a period of five (5) years from the effective date unless terminated earlier or extended later in accordance with the terms, conditions and requirements set forth in the Settlement Agreement.

3. *Sale of Power*. During the term of this Agreement, PP&L shall supply to Olyphant and Olyphant shall purchase from PP&L all of Olyphant's capacity and energy requirements for service to its customers in its service territory (provided that if Olyphant seeks to serve customers beyond its service territory, nothing herein shall preclude Olyphant from obtaining a power supply from suppliers other than PP&L for such service), measured at the Delivery Point to Olyphant defined in Section 6(d) (with PP&L to provide and be responsible for all losses to that Delivery Point), except for capacity or energy from any current or future contract with the New York Power Authority ("NYPA") for hydroelectric preference power, or from any "Qualifying

Facility" under the Public Utility Regulatory Policies Act which Olyphant is required by existing law to purchase, and except as provided in Section 5 (governing interruptible sales).

4. ***Rates for Capacity and Energy; Credits.*** The rates at which Olyphant will purchase capacity (demand) and energy from PP&L are as set forth in Article III of the Settlement Agreement, including the provisions by which the Parties may propose adjustments to said rates and may elect to terminate this Agreement under certain circumstances. These rates are also set forth in part in the Rate Schedule accompanying this Agreement. PP&L shall provide a credit against demand and energy charges for amounts in excess of $0.61 per kW/mo. billed by PJM Interconnection, L.L.C. ("PJM") for the six ancillary services set forth in the applicable PJM Open Access Transmission Tariff, and shall provide an economic development credit, all in accordance with the Settlement Agreement.

5. ***Interruptible Sales.*** PP&L shall work with and negotiate in good faith with Olyphant in the event that Olyphant wishes to obtain from PP&L a supply of non-firm power (energy only) for the purposes of Olyphant being able to serve an interruptible customer, all as further set forth in the Settlement Agreement. Any such arrangements agreed to by PP&L and Olyphant for the provision of non-firm power shall be by separate agreement between the Parties. PP&L's agreement to supply such non-firm power to Olyphant when requested shall not be unreasonably refused.

6. ***Transmission and Ancillary Services.***

(a) In General (Unless the context clearly requires otherwise, capitalized terms used in this Section 6 shall have the meanings set forth in PJM's Open Access Transmission Tariff.) PP&L shall be the supplier of all capacity and energy purchased and sold pursuant to this

Agreement, including all transmission losses for such capacity and energy to the Delivery Point to Olyphant described in Section 6(d). For all capacity and energy sold by PP&L to Olyphant pursuant to this Agreement, PP&L shall obtain Network Integration Transmission Service and Ancillary Services from PJM pursuant to PJM's Open Access Transmission Tariff, provided that Olyphant may at any time elect to obtain transmission and ancillary services directly from PJM. PP&L shall obtain such Network Integration Transmission Service and Ancillary Services either in its own name by including its Olyphant load within its Network Load, or, if requested by Olyphant, as Olyphant's Designated Agent, all pursuant to PJM's Open Access Transmission Tariff. PP&L shall also obtain transmission and ancillary services from PJM on behalf of Olyphant for all NYPA and/or "Qualifying Facility" power identified in Section 3, provided that Olyphant agrees to bear any added costs occasioned thereby.

(b) Agent for Services; Rates and Charges. At Olyphant's written request, PP&L shall act as Designated Agent for Olyphant in procuring and administering all Network Integration Transmission Service and Ancillary Services for Olyphant pursuant to PJM's Open Access Transmission Tariff and Olyphant agrees to abide by all the terms required for such service. In the event PP&L serves as Olyphant's Designated Agent, PP&L shall prepare an Application for Network Integration Transmission Service in Olyphant's name, providing for Olyphant to become a Network Customer. Whether PP&L obtains transmission and ancillary services in its own name for its Olyphant load or serves as Olyphant's Designated Agent in obtaining such services, the rates and charges to Olyphant for such services shall be those set by PJM (or its successor) under the applicable Open Access Transmission Tariff and pursuant to a duly filed service agreement, as approved by FERC and as may be changed or modified from time to time.

All such rates and charges shall be passed through to Olyphant and separately stated on Olyphant's bill, along with any credit or credits to which Olyphant is entitled pursuant to Section 4. So long as PP&L obtains the transmission and ancillary services for capacity and energy sold pursuant to this Agreement, either in its own name or as Olyphant's Designated Agent, PP&L shall provide all scheduling of power to Olyphant at no charge to Olyphant, except for the passthrough from PJM to Olyphant of any charges assessed by PJM for the Scheduling, System Control and Dispatch ancillary service. PP&L shall not be required to provide any credits pursuant to Section 4, nor shall PP&L provide or be responsible for any losses, with respect to any NYPA or "Qualifying Facility" power identified in Section 3.

(c) Fixed Transmission Rights. In the event Olyphant elects to have PP&L, as Designated Agent, obtain transmission and ancillary services in Olyphant's name, Olyphant shall be the owner of any Fixed Transmission Rights ("FTRs") received from PJM in connection with furnishing transmission service to Olyphant; provided, however, that PP&L, acting as agent, shall have the right to designate the number of FTRs requested from PJM and shall transfer any FTRs received in Olyphant's name to its own account during the remaining term of this Agreement, or until said FTRs expire, or until the transfer is terminated pursuant to this paragraph, whichever event occurs first. Accordingly, PP&L shall have the sole discretion to manage, use, and otherwise dispose of said FTRs during the period of such transfer, after which time said FTRs shall revert to Olyphant's ownership and control, without encumbrance, and may be managed, used, and otherwise disposed of by Olyphant. So long as PP&L obtains transmission and ancillary services for its Olyphant load in its own name, or, acting as Designated Agent, controls the FTRs associated with said load, Olyphant shall be neither

responsible for payment of any charges assessed nor entitled to any credits allocated under Attachment K to the PJM Open Access Transmission Tariff ("PJM Congestion Charges" and "PJM Congestion Credits," respectively). During such period, PP&L assumes responsibility for and shall bear all PJM Congestion Charges arising from or associated with transmission from PP&L to Olyphant, and shall be entitled to any PJM Congestion Credits arising from or associated with transmission from PP&L to Olyphant. Upon sixty (60) day's prior written notice to PP&L, Olyphant shall have the right to prohibit future transfer or terminate the transfer of FTRs to PP&L, and PP&L shall promptly return said FTRs to Olyphant, which Olyphant shall accept. After the termination specified in said notice and the return of any FTRs to Olyphant as described herein, Olyphant shall have full rights to designate, manage, use, and dispose of its FTRs, and PP&L shall bear no responsibility for same and for any PJM Congestion Charges associated with service to its Olyphant load throughout the remaining term of this Agreement. Likewise, after the expiration of this Agreement, any FTRs associated with service to PJM's Olyphant load shall revert to Olyphant's ownership and control as described above.

(d) Delivery Point. Capacity and energy purchased and sold pursuant to this Agreement shall be metered and delivered in accordance with the applicable FERC-approved procedures, specifications, and requirements set forth in PJM's Open Access Transmission Tariff and the Network Operating Agreement referenced therein. If Olyphant obtains its own transmission and ancillary services directly from PJM, then PP&L shall deliver Olyphant's capacity and energy requirements specified in Section 3 at Point(s) of Receipt to be mutually agreed between the Parties. If PP&L obtains transmission and ancillary services for its Olyphant load in its own name, or as Designated Agent for Olyphant, then PP&L shall arrange the delivery

of Olyphant's capacity and energy requirements specified in Section 3 at the normal supply point where PP&L's 12.470 volt overhead service wires for PP&L's 12.470 volt supply are connected to Olyphant's air break disconnect mounted on a wood pole structure located in Olyphant's electric sub-station off River Street in the Borough of Olyphant ("Delivery Point").

(e) Metering Facilities. Olyphant shall provide adequate space in its substation for any necessary metering facilities. PP&L shall provide, maintain, calibrate, and read the metering facilities required hereunder and Olyphant shall install said metering facilities per the applicable specifications and directions of PP&L and/or PJM. If at any time such metering facilities shall be found to be inaccurate by more than plus or minus 2%, PP&L shall correct the problem, and the charges for the two billing months prior to the date that the inaccuracy is found shall be adjusted by the percentage of the inaccuracy in order to be deemed correct. In addition to periodic routine tests, PP&L shall test the meter at any time upon written request from Olyphant and, if such meter proves to be accurate within plus or minus 2%, the expense of the test shall be borne by Olyphant. PP&L shall notify Olyphant seven (7) days in advance of the time PP&L plans to make any special test requested by Olyphant.

7. ***Billings and Payment.***

(a) Net Rate. All meters shall be read and bills rendered monthly. The net rate shall apply when bills are paid on or before the due date specified on the bill. The due date shall not be less than 30 days from the date the bill is mailed. Payment of bills by U.S. mail will be accepted as timely when postmarked before midnight on the due date.

(b) Gross Rate. If bills are not paid by the due date, the gross rate shall apply, which is the net rate stated above plus 9% annual interest on the then unpaid balance of the monthly bill.

(c) Non-Payment. In lieu of seeking to disconnect service pursuant to FERC procedures or requirements for nonpayment of bills, PP&L shall have the right to bring an action(s) in any court of appropriate jurisdiction to collect from Olyphant all amounts due and owing under this Agreement, plus interest calculated from the due dates of such amounts at an annual interest rate of 9%.

8. ***Billing Disputes.*** In the event any portion of any bill is in dispute, the undisputed amount shall be paid to PP&L and a detailed written explanation of the basis for the dispute shall be submitted within the time periods specified for payment in Section 7(a). The Parties shall use their best efforts to attempt to resolve such disputes on a timely basis. Upon determination of the correct billing amount, the adjusted bill shall be paid or refunded promptly after such determination with interest at the interest rate accrued in accordance with Section 7(b) and computed from the date payment was due to the date the adjustment is made. If the Parties are unable to resolve the dispute using the dispute resolution procedures set forth in Section 9, either Party may exercise its available administrative or legal remedies.

9. ***Dispute Resolution.*** In the event of a dispute between the Parties arising under this Agreement, the Parties will work together in good faith to resolve the dispute. If the Parties are unable to resolve such dispute between themselves within five days after written notification by one Party to the other of the existence of such dispute, they shall immediately refer such matter to their internal upper management for resolution. If the management of the Parties is unable to resolve the dispute within ten days after the matter is brought to that level for review either Party may bring a claim or suit in accordance with applicable law.

10. *Continuity of Service*. PP&L shall use reasonable diligence to maintain uninterrupted supply of electric power and energy to Olyphant. However, PP&L shall not be subject to any liability, penalty, or payment for, or on account of, any interruption to or curtailment of electric power or energy supplied hereunder due to accident, strike, riot, war, fire, explosion, storms, lightning, orders from governmental authorities, an act of court, Act of God, failure to secure necessary right-of-way, delay of necessary equipment or material, fuel shortages, or PP&L's obligations to curtail, interrupt, or reduce service under the agreements with other members of PJM during periods of shortages of PJM capacity of either generation or transmission, energy, fuel, or as a result of governmental action, unless, but only to the extent that, such interruption or curtailment is caused by the negligence or willful misconduct by PP&L, its agents or employees; provided that Olyphant shall be treated as having equal priority to power supply service as PP&L's native load customers, and that PP&L shall not charge Olyphant for any capacity and energy that is not provided.

11. *Remedies*. No remedy conferred upon or reserved to the Parties hereto is intended to be exclusive of any other remedy or remedies available hereunder or now or hereafter existing at law, in equity, by statute or otherwise, but each and every such remedy shall be cumulative and shall be in addition to every other such remedy.

12. *Laws, Regulations, and Orders*. This Agreement is subject to all applicable State and Federal laws and to all duly promulgated orders and other duly authorized actions of any governmental agency having jurisdiction with respect to any performance of any Party.

13. *System Operation*. Olyphant and PP&L recognize that PP&L's electric service facilities are normally operated as part of an interconnected and coordinated system and that disturbances

originating in one area can affect operations in another area. In the event of such disturbances, Olyphant shall reduce or interrupt service to one or more of its customers in a manner similar to PP&L's reduction or interruption of service to its retail and other wholesale customers. Liability for any interruption of service shall be governed by Section 10.

14. ***Regulatory Restrictions***. For the first five years of this Agreement and any extensions of this Agreement, the Parties waive any right to make a unilateral filing with FERC, under either Section 205 or Section 206 of the Federal Power Act and pursuant to the FERC's or its successor's rules and regulations promulgated thereunder, for a decrease or increase in rates or for changes in terms and conditions, to the extent such rates, terms and conditions are expressly set forth in the Settlement Agreement. Nothing in this Agreement shall affect a Party's unilateral and exclusive right to seek and obtain, at any time, FERC approval for other changes in the terms and conditions, or to resolve disputes as to the proper rates to be applied under the Settlement Agreement, and for any changes in the rates, terms and conditions contained in the PJM's (or its successor's) open access transmission tariff filed at FERC.

15. *Reserved.*

16. *Notices*. Any notice, request, demand, or statement provided for in this Agreement shall be made in writing, unless otherwise expressly set forth herein, and shall be made as specified below; provided, however, that notices of interruption may be provided orally and confirmed in writing. A notice sent by facsimile transmission shall be deemed received by the close of the business day on which such notice was transmitted or such earlier time as confirmed by the receiving Party. Notice by overnight mail or courier shall be deemed to have been received two (2) business days after it was sent or such earlier time as is confirmed by the receiving Party.

Notices shall be addressed to the Parties as follows or to such other address as Olyphant or PP&L shall from time to time designate by letter properly addressed:

(a) Borough of Olyphant:

NOTICES & CORRESPONDENCE
Mr. Norbert Koscluk
Borough Manager
Borough of Olyphant
113 Willow Street
Olyphant, PA 18447

Attn:
Fax:

INVOICES
Borough of Olyphant
113 Willow Street
Olyphant, PA 18447

Attn:
Fax:

(b) PP&L, Inc.:

NOTICES & CORRESPONDENCE
PP&L, Inc.
Two North Ninth Street
Allentown, PA 18101-1179
Attn: Energy Marketing Center (GENTW15)
FAX: (610) 774-6523

PAYMENTS
PP&L, Inc.
Two North Ninth Street
Allentown, PA 18101-1179
Attn: Energy Operations (GENN2B)
FAX: (610) 774-4446

17. *Miscellaneous*.

(a) Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the Parties. This Agreement shall not be assigned by any Party without the written consent of the other, which consent shall not be unreasonably withheld. No consent to assignment is necessary for an assignment by a Party to a successor corporation to which substantially all of such Party's electric utility rights, obligations, business, and assets are transferred.

(b) Headings. The headings in this Agreement are for ease of reference only and shall not affect the construction or interpretation of the provisions of this Agreement.

(c) Integration. This Agreement and the Settlement Agreement dated January 29, 1998, and the documents referenced or incorporated in this Agreement and the Settlement Agreement dated January 29, 1998, constitute the entire agreement of PP&L and Olyphant with respect to the provision by PP&L of electric service to Olyphant.

(d) Counterparts. This Agreement shall be executed in several counterparts, each of which shall be an original, but all of which shall constitute but one and the same instrument.

(e) Amendments. This Agreement may be amended only with the express written consent of the Parties, or by lawful order of a tribunal having jurisdiction.

IN WITNESS HEREOF, the Parties have caused this Agreement to be executed as set forth below.

ATTEST:

Borough Secretary

BOROUGH OF OLYPHANT

BY: _____
(Signature)

Name: STEVEN KLEIN 2

Title: COUNCIL PRES

ATTEST:

Assistant Secretary

PP&L, Inc.

BY: _____
(Signature)

Name: F. A. Long

Title: Executive Vice President & COO

PP&L, Inc.

PP&L RATE SCHEDULE FERC NO. ____

BOROUGH OF OLYPHANT

APPLICATION OF SCHEDULE

Service of all requirements capacity and energy by PP&L, Inc. (referred to herein as "Company" and formerly known as Pennsylvania Power & Light Company) to the Borough of Olyphant, Pennsylvania ("Customer"), pursuant to that certain Power Supply Agreement dated _____ ("Power Supply Agreement") and the Settlement Agreement dated January 29, 1998 ("Settlement Agreement"), for resale by Customer to its customers in its service territory (provided that if Olyphant seeks to serve customers beyond its service territory, nothing herein shall preclude Olyphant from obtaining a power supply from suppliers other than PP&L for such service), except for (1) any PURPA-qualified generation which Customer is required to purchase by existing law, (2) Customer's allocation of New York Power Authority (NYPA) hydroelectric power, and (3) any interruptible service purchased from Company under separate agreement. Service is to be provided at 12,470 volts or higher. Customer is responsible for furnishing and maintaining all equipment to transform the energy from line voltage. Company is responsible for transmission losses to the point of delivery at 12,470 volts or higher. This Rate Schedule shall become effective as of February 1, 1999.

NET MONTHLY RATE FOR POWER SUPPLIED BY COMPANY

(Effective 2-1-99, unless modified for periods after
1-31-02 pursuant to the Power Supply Agreement and the Settlement Agreement)

	12 months beginning		
	2-1-99	2-1-00	2-1-01
Demand	$4.58/kW-mo	$4.11	$3.64
Energy	$0.02800/kWh	$0.02660	$0.02520

CREDIT FOR EXCESS ANCILLARY SERVICE CHARGES

To the extent the rates and charges to Customer of PJM Interconnection, L.L.C. ("PJM") (or its successor) and/or the Company for the ancillary services set forth in the applicable open access transmission tariff(s) exceed $0.61 per kW/mo. in connection with capacity and energy purchased by Customer from the Company, the Company shall give Customer a credit against Customer's demand and energy charges equal to the amount by which said PJM and/or Company

ancillary service rates/charges exceeded $0.61 per kW/mo. Such credit shall be given on a monthly basis, and shall apply to the following six ancillary services:

1. Scheduling, System Control and Dispatch Service
2. Reactive Supply and Voltage Control from Generation Sources Service
3. Regulation and Frequency Response Service
4. Energy Imbalance Service
5. Operating Reserve - Spinning Reserve Service
6. Operating Reserve - Supplemental Reserve Service

BILLING ADJUSTMENT FOR DELIVERY OF NYPA POWER

For monthly billing computation, the kilowatt and kilowatt-hour NYPA allocation delivered to the Company's border is reduced by applying an adjustment for losses of 0.9473, or any subsequent loss factor used by the PJM Pool. All kilowatt demand and kilowatt-hour use in excess of this adjusted allocation is billed at the Net Monthly Rate.

BILLING KW

The minimum Billing kW is 150 kilowatts.

In the event that the Customer is completely without service, demands recorded during the twenty-four (24) hours immediately following full restoration of service are disregarded for the determination of Billing kW.

The Billing kW is the sum of (A) and (B) below:

(A) The average number of kilowatts supplied during the 15 minute period of maximum use during the on-peak hours of the current billing month.

(B) One-fifth of the amount by which the average number of kilowatts supplied during the 15 minute period of maximum use during other than on-peak hours exceeds the number of kilowatts determined in (A) above. Item (B) may not be less than zero.

ECONOMIC DEVELOPMENT CREDIT (Effective 2-1-99)

For each 12-month period beginning February 1, an economic development credit shall apply that is composed of two parts and computed as follows.

Part One. An amount equal to $0.16 per MWH for all megawatt hours purchased during the preceding 12-month period (February through January). The first such credit to be paid in February 1999 for energy purchases during the 12 months from February 1998 through January 1999.

Part Two. An amount equal to 10% of the energy (not demand) charge for the preceding 12-month period (February through January) for all kilowatt hours metered in excess of a load calculated at one percent annual compounded growth, as calculated from the actual energy consumed during the base year of February 1, 1996 through January 31, 1997. Computation of this credit shall exclude nonfirm energy associated with any interruptible load. The first such credit to be paid in February 2000 for energy purchases during the 12-month period from February 1999 through January 2000.

This provision is available only where the Customer takes service for a 12-month period beginning February 1 from the Company under the Power Supply Agreement executed pursuant to the Settlement Agreement dated January 29, 1998 and approved by the Commission by letter order dated May 29, 1998.

ON-PEAK HOURS

On-peak hours for billing purposes are 7 AM to 3 PM local time, Mondays to Fridays inclusive except New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.

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EXHIBIT 7

RESOLUTION

WHEREAS, the United States Department of Housing and Urban Development has approved a grant for the development of the Mid-Valley Industrial Park; and

WHEREAS, the financial responsibility for the building of access roads, water and sewer lines for the Industrial Park will be with the Borough of Olyphant in which the park is primarily located; and

WHEREAS, manufacturing plants being located in the Mid-Valley Industrial Park will have need for electrical power; and

WHEREAS, the cost of furnishing such power will exceed a quarter of a million dollars; and

WHEREAS, the Borough of Olyphant Council and its Light Committee are financially unable to furnish the electrical power needed for the Mid-Valley Industrial Park; and

WHEREAS, the Pennsylvania Power and Light Company has indicated willingness to furnish these electric power facilities to the Mid-Valley Industrial Park.

NOW, THEREFORE be it Known this Resolution to cover only the Mid-Vallry Industrial Park.

RESOLVED, and it is resolved by the Olyphant Borough Council and by its Olyphant Borough Light Committee that the Pennsylvania Power and Light Company be and is hereby authorized to furnish the electrical power needed for the Mid-Valley Industrial Park and to expend any funds necessary to meet the electrical power needs of any and all manufacturing plants making use of the said Mid-Valley Industrial Park, and, further, to handle all of the necessary billing for such electrical service through its own facilities and not through those of the Olyphant Borough Light Committee. The responsible officials of the Borough of Olyphant are hereby authorized to notify the

Pennsylvania Power and Light Company of this decision by forwarding to them a certified copy of this resolution which is hereby adopted unanimously at a regular meeting of Olyphant Borough Council held on Tuesday, December 5, 1978, at 8:00 P.M. in the Olyphant Borough Building at which regular meeting a quorum was present and a roll call was had indicating that all of the members of Council voted in favor of the resolution.

President, Olyphant Borough Council

Attest:

Secretary

Certification

I, Joseph McNamara, Borough Secretary, certify that the above resolution was unanimously adopted by Borough Council at a regular meeting held Tuesday, December 5, 1978, and the resolution was made part of the minutes of that meeting..

Secretary

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EXHIBIT 6

Application Docket No. 71229

In re: Application of THE SCRANTON ELECTRIC COMPANY - For approval of the beginning of the exercise of the additional right, power or privilege of supplying electric service to consumers within the Borough of Olyphant, whose load requirements exceed 100 HP, and with the consent of the said borough, to consumers whose load requirements are less than 100 HP in the Borough of Olyphant, Lackawanna County.

O R D E R

BY THE COMMISSION, JUNE 28, 1948:

The Scranton Electric Company filed this application with the Commission November 20, 1947, seeking approval of the beginning of the exercise of the right to supply electric service to consumers within the Borough of Olyphant, whose load requirements exceed 100 HP, and with the consent of the borough authorities, to other consumers.

Since October 2, 1946, petitioner has supplied the entire electric requirements of the Borough of Olyphant Municipal System and now desires to supply industrial customers within the borough with loads of 100 HP direct from its lines, thereby providing more reliable service to such prospective customers.

Hearing was held at Scranton on February 3, 1948, at which time witnesses were presented by both the petitioner and the Borough of Olyphant.

Upon full consideration of all the matters and things involved, we find and determine that the granting of said petition is necessary or proper for the service, accommodation, convenience or safety of the public and that a certificate of public convenience issue; THEREFORE,

IT IS ORDERED: That the application of The Scranton Electric Company for approval of the beginning of exercise of the additional right, power or privilege of supplying electric service to consumers within the Borough of Olyphant, whose load requirements exceed 100 HP,

RECORD

and with the consent of the said borough to consumers whose load requirements are less than 100 HP in the Borough of Olyphant, Lackawanna County, be and is hereby approved and that a certificate of public convenience issue evidencing such approval.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

Chairman

ATTEST:

Secretary

Commissioner Morgal being absent did not participate in the vote on this order.

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EXHIBIT 5

BEFORE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: Application of The Scranton Electric Company for approval of the beginning of the exercise of the right, power or privilege of selling, supplying, transmitting, and distributing electric current and electric energy for power purposes to such individuals, partnerships, or corporations within the territorial limits of the Borough of Olyphant whose load requirements exceed 100 H.P. or, with the consent of the Borough of Olyphant, to such persons whose load requirements are less than 100 H.P. on the demand of such persons, individuals, partnerships or corporations, and to sell, supply, transmit and distribute electric current for electric lighting to such individuals, partnerships or corporations, not including the sale, supply, transmission or distribution of electric current or electric energy for lighting purposes generally to the inhabitants of said Borough of Olyphant; and to construct, operate and maintain in, on and over, under and along any or all of the streets, highways, lanes, alleys, and public areas of places within the Borough of Olyphant, County of Lackawanna, State of Pennsylvania, such poles, wires, crossarms, conduits and appliances, as may be necessary or apropriate for the supply and distribution of electric current and electric energy for electric lighting, heat, power and any other purpose for which electric current or electric energy may now or hereafter be used, and for the transmission of the same within, through or across said Borough.	APPLICATION DOCKET NO. 71229 1947

TO PENNSYLVANIA PUBLIC UTILITY COMMISSION:

1. The name and address of applicant are: The Scranton Electric Company, Scranton Electric Building, 507-509 Linden Street, Scranton, Pennsylvania.

DOCKETED
APPLICATION
NOV 20 1947

2. The name and address of applicant's attorneys are: O'Malley, Harris, Harris & Warren, 700 Scranton Electric Building, Scranton, Pennsylvania.

3. The nature and character of the service to be rendered is: The sale, supply, transmission and distribution of electric current or electric energy for power purposes to such individuals, partnerships or corporations within the territorial limits of the Borough of Olyphant whose load requirements exceed 100 H.P. or, with the consent of the Borough of Olyphant, to such persons whose load requirements are less than 100 H.P., on the demand of such person, persons, individuals, partnerships or corporations, and to sell, supply, transmit and distribute electric current for electric lighting to such individuals, partnerships or corporations, not including the sale, supply, transmission or distribution of electric current or electric energy for lighting purposes generally to the inhabitants of said Borough of Olyphant; and to construct, operate and maintain in, on and over, under and along any or all of the streets, highways, lanes, alleys, and public areas or places within the Borough of Olyphant, County of Lackawanna, State of Pennsylvania, such poles, wires, crossarms, conduits and appliances, as may be necessary or appropriate for the supply and distribution of electric current and electric energy for electric lighting, heat, power and any other purpose for which electric current or electric energy may now or hereafter be used, and for the transmission of the same within, through or across said Borough.

The population of the Borough of Olyphant is 9,252, according to the United States Census of 1940.

The municipal authorities of the Borough of Olyphant have granted to the applicant, The Scranton Electric Company, a franchise and permission to exercise the rights, powers, and privileges hereinbefore described in paragraph 3, by ordinance enacted the 11th day of September, 1946, approved by the Burgess on the same date The said ordinance was accepted by the applicant on September 25, 1946, and was filed with the Public Utility Commission in October of 1946, and is indexed P.U.M.C. 1433. Proceedings are now pending before the Public Utility Commission against the Borough of Olyphant and The Scranton Electric Company to determine the reasonableness, legality, or any other matters affecting the validity of the ordinance-agreement.

A copy of the said ordinance is attached hereto as Applicant's Exhibit "A".

4. Applicant will employ, in furnishing the proposed service, the following facilities: The facilities contemplated will be the usual transmission lines to be installed within the Borough of Olyphant when necessary to furnish power to customers in accordance with the ordinance of the Borough of Olyphant and in accordance with this application. There is at the present time no pending demand by any proposed power consumer for any installation of facilities for the supply of electric energy. It is, therefore, impossible to state more definitely the probable time when service will be furnished, because it depends entirely on a potential demand by a consumer. For the same reason, it is impossible to estimate the cost of such facilities.

5. It is proposed to finance the contemplated service from current treasury funds, in the same manner as other extensions of distribution lines are financed in order to furnish service to consumers.

6. No corporation, partnership or individual is now furnishing or has the corporate or franchise right to furnish, service similar to that desired to be rendered by the applicant in the territory covered by this application, and no competitive conditions will be created thereby, except as follows: The Borough of Olyphant owns and has in the past operated a municipal electric plant for the generation of electric current and electric energy, and such energy was sold to the inhabitants of the Borough of Olyphant for lighting purposes and to users of small amounts of power. The municipal plant was shut down in the fall of 1946, for necessary repairs, but was, and after repairs will be, inadequate to supply consumers whose load requirements exceed 100 H.P. Pending repairs to the municipally owned electric light plant, the Borough of Olyphant is purchasing electric energy from The Scranton Electric Company, in accordance with the terms and conditions, and at the rates established by the tariff schedules of The Scranton Electric Company on file with the Public Utility Commission.

7. No further development is planned or in contemplation, other than the furnishing of electric current and electric energy to consumers within the Borough of Olyphant who may desire to purchase electric energy or power in excess of 100 H.P., or a lesser amount, if the Borough of Olyphant gives its consent, in accordance with the terms of the said ordinance; and other than the construction of such distribution lines and facilities as may be required to furnish such consumers, or for the transmission of electric energy in and through the Borough of Olyphant.

8. The applicant has the franchise, right and privilege of selling electric power and electric energy in contiguous municipalities, namely: Borough of Dunmore, Borough of Throop, Borough of Dickson City, and Borough of Winton, and under its franchises and corporate charters authorizing sale and distribution of electric current and electric energy in such municipalities, has the franchise right and privilege to sell and transmit such electric current and electric energy in adjacent territory, which includes the said Borough of Olyphant.

9. Approval of the application is necessary or proper for the following reasons: As required by the Public Utility Act of 1937, P.L. 1053, Article 2, Section 202 (c), as amended by the Act of 1939, P.L. 419, Section 1, Purdon's Annotated Statutes Title 66, Section 1122 (c).

WHEREFORE, applicant prays your Honorable Commission to issue a certificate of public convenience as follows: Approving of the beginning of the exercise of the right, power or privilege of selling, supplying, transmitting, and distributing electric current and electric energy for power purposes to such individuals, partnerships, or corporations within the territorial limits of the Borough of Olyphant whose load requirements exceed 100 H.P. or, with the consent of the Borough of Olyphant, to such persons whose load requirements are less than 100 H.P., on the demand of such person, persons, individuals, partnerships or corporations, and to sell, supply, transmit and distribute electric current for

electric lighting to such individuals, partnerships or corporations, not including the sale, supply, transmission or distribution of electric current or electric energy for lighting purposes generally to the inhabitants of said Borough of Olyphant; and to construct, operate and maintain in, on and over, under and along any or all of the streets, highways, lanes, alleys, and public areas or places within the Borough of Olyphant, County of Lackawanna, State of Pennsylvania, such poles, wires, crossarms, conduits and appliances as may be necessary or appropriate for the supply and distribution of electric current and electric energy for electric lighting, heat, power and any other purpose for which electric current or electric energy may now or hereafter be used, and for the transmission of the same within, through or across said Borough.

THE SCRANTON ELECTRIC COMPANY

By C. F. Hagle
President

COMMONWEALTH OF PENNSYLVANIA (
(SS:
COUNTY OF LACKAWANNA (

C. F. NAGLE, being duly sworn according to law, deposes and says that he is President of The Scranton Electric Company, that he is authorized to and does make this affidavit for it; and that the facts set forth above are true and correct to the best of his knowledge, information and belief, and he expects the said The Scranton Electric Company to be able to prove the same at the hearing hereof.

C. F. Nagle

Sworn and subscribed to
before me this 31st
day of October, 1947.

Notary Public

My commission expires: March 6, 1951.

APPLICATION DOCKET

IN RE: Application of The Scranton Electric Company for approval of the beginning of the exercise of the right, power or privilege of selling, supplying, transmitting, and distributing electric current and electric energy for power purposes to such individuals, partnerships, or corporations within the territorial limits of the Borough of Olyphant whose load requirements exceed 100 H.P. or, with the consent of the Borough of Olyphant, to such persons whose load requirements are less than 100 H.P. on the demand of such persons, individuals, partnerships or corporations, and to sell, supply, transmit and distribute electric current for electric lighting to such individuals, partnerships or corporations, not including the sale, supply, transmission or distribution of electric current or electric energy for lighting purposes generally to the inhabitants of said Borough of Olyphant; and to construct, operate and maintain in, on and over, under and along any or all of the streets, highways, lanes, alleys and public areas or places within the Borough of Olyphant, County of Lackawanna, State of Pennsylvania, such poles, wires, crossarms, conduits and appliances, as may be necessary or appropriate for the supply and distribution of electric current and electric energy for electric lighting, heat, power and any other purpose for which electric current or electric energy may now or hereafter be used, and for the transmission of the same within, through or across said Borough.

BEFORE THE
PUBLIC UTILITY COMMISSION
OF THE
COMMONWEALTH OF PENNSYLVANIA

Application No. 71229

Application of The Scranton Electric Company for approval of the beginning of the exercise of the additional right, power or privilege of supplying electric service to consumers within the Borough of Olyphant whose load requirements exceed 100 H.P. and with the consent of the said Borough, to consumers whose load requirements are less than 100 H.P. in the Borough of Olyphant, Lackawanna County.

ACCEPTANCE OF SERVICE

O'MALLEY, HARRIS, HARRIS AND WARREN
ATTORNEYS AND COUNSELORS
SCRANTON, PA.

Application of The Scranton Electric Company for approval of the beginning of the exercise of the additional right, power or privilege of supplying electric service to consumers within the Borough of Olyphant whose load requirements exceed 100 H.P., and with the consent of the said Borough, to consumers whose load requirements are less than 100 H.P. in the Borough of Olyphant, Lackawanna County	Application No. 71229 BEFORE THE PUBLIC UTILITY COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

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PUBLIC UTILITY COM.
SECRETARY'S OFFICE

ACCEPTANCE OF SERVICE

We hereby accept service of a copy of the application of The Scranton Electric Company in connection with the above entitled matter, and acknowledge that we have received a copy of the application on behalf of the Borough of Clyphant.

November 29th, 1947.

Edward R Burke
Burgess of the Borough of Olyphant

Leaton M. O'Malley
Solicitor for the Borough of Olyphant

APPLICATION DOCKET
DEC 3 1947
ENTRY No.

BEFORE

PENNSYLVANIA PUBLIC UTILITY COMMISSION

IN RE: APPLICATION OF THE SCRANTON ELECTRIC COMPANY, for approval of the beginning of the exercise of the right, power or privilege of selling, supply, transmitting and distributing electric current and electric energy, etc. : NO. 71229 1947

PROOF OF PUBLICATION

PROOF OF PUBLICATION

Olyphant Gazette

(Under Act No. 587, approved May 16th, 1929)

STATE OF PENNSYLVANIA }
COUNTY OF LACKAWANNA } ss:

H. H. Gradley

being duly sworn according to law deposes and says that

he is Publisher

paper published in the Borough of Olyphant, County and State
Gazette was established in 1883 and published continuously since
that the printed notice or publication hereto attached is exactly
of the said Olyphant Gazette on the following dates, viz:

January 30, 1948

that The Olyphant Gazette is a newspaper of general circula-
nor The Olyphant Gazette is interested in the subject matter
of the disement, and that all allegations in the foregoing statement as
to time, place and character of publication are true.

H. H. Gradley

Sworn and subscribed to before me this 2nd day of Feb. A. D. 1948.

Irene McHale

Notary Public.

My Commission Expires:

TO THE OLYPHANT GAZETTE

For publishing attached notice on above stated dates, $.

Publisher's Record for Advertising Costs:

THE OLYPHANT GAZETTE, a newspaper of general circulation, hereby acknowledges receipt of the costs as above and certifies that the same have been duly paid.

THE OLYPHANT GAZETTE,

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EXHIBIT 4

OFFICIALS

EDWARD J. BURKE, *Burgess*
LOUIS WEBER, *Controller*
P. L. WALSH, *Solicitor*
JOHN F. REBAR, *Treasurer*
SAMUEL SMAKULA, *Secretray*

BOROUGH OF OLYPHANT

OFFICE OF THE SECRETARY
OLYPHANT, PA.

COUNCIL

WILLIAM FEDORCHAK, *President*
JOSEPH MULLIGAN
JOHN RUSSEN
MICHAEL PUSKAS

July 17th, 1944.

Hon. Leland E. Olds, Chairman,
Federal Power Commission,
18th & Pennsylvania Ave. N.W.,
Washington, D. C.

Honorable Sir:

I am writing to you at the suggestion of Mr. William J. Lynott Jr., until recently employed in your office.

As the duly elected representative of the people of the Borough of Olyphant I would like to be armed with the advice and direction which I know you and the members of your Staff can furnish to me in the undertaking which I will outline in the following paragraph.

We have a Municipal light plant in this town and in the hands of the previous administration it was allowed to become run-down and when we assumed control early in this year we made a survey and found that extensive repairs and replacements were necessary but under present conditions we feel this is no time to spend large sums of money if it can be avoided for the duration. Our best course seemed to be an interconnection with the local utility, namely the Scranton Electric Company. We have been dickering with them for the past few months and they have offered us a contract which has been approved by our Council but as yet I have not affixed my signature. We want the best possible contract but with us time is a big factor and we cannot hold out for more suitable terms and the Scranton Electric is aware that we need service as soon as possible.

I will enclose copies of the contract they submitted to us as well as the Franchise Ordinance which they insisted on before they would furnish the interconnection. Advise me as soon as possible on the following points:

1. Do we have to grant them a permanent franchise?
2. Are the rates the best that we can get ?
3. Can we discontinue interconnection if adviseable and cancell all concessions granted to Utility?

Enclosed also find copy of local paper which up to this time has always been favorable to our administration. We expect more unfavorable publicity from this source. We agree with the paper to a certain extent that it is "a landlords lease" but we have no alternative and you are the only one we can turn to for help because we know we won't get much help from the Penna. Public Utility Commission.

Please favor me with a prompt reply.

Very truly yours,

Edward J. Burke

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EXHIBIT 3

C O N T R A C T

BETWEEN

THE SCRANTON ELECTRIC COMPANY

AND

THE BOROUGH OF OLYPHANT

SERVICE FACILITIES AGREEMENT

This agreement, made and entered into this _____ day of _____, 1944, by and between THE SCRANTON ELECTRIC COMPANY, hereinafter called "Company," party of the first part, and BOROUGH OF OLYPHANT, hereinafter called "Customer," party of the second part,

WITNESSETH:

WHEREAS, the Company is a public utility engaged in the business of generating, transmitting, distributing, and selling electric capacity and energy and electric service to private and public consumers in the State of Pennsylvania; and

WHEREAS, Customer wishes to shut down its generating plant and purchase electric service from the Company; and

WHEREAS, under prevailing economic conditions the duration and degree of operation of existing loads are uncertain, hence the estimated and guaranteed revenues to be received by the Company are problematical; and

WHEREAS, the cost of the necessary facilities to supply service to the Customer requires that the Company receives a guarantee of revenue in accordance with the provisions in the Company's Terms and Conditions of Service as provided inthe paragraph entitled "Extension of Service," reading as follows:

> "The transmission or distribution lines of the company will be extended to such points as provide sufficient load to justify such extensions, or in lieu of sufficient load, the company may require a long-term contract or such definite and written guarantee from a customer, or group of

customers, in addition to any minimum payment required by the rate, as may be necessary. This requirement may also be made covering the payment by the customer of the cost of tapping existing transmission or distribution lines for light or power service, or both, when such service will not provide sufficient load to justify the cost of tapping said lines."

NOW, THEREFORE, the parties hereto each in consideration of the premises and undertakings of the other, hereinafter set forth, agree as follows:

ARTICLE I

ELECTRIC ENERGY CONTRACT

The Customer has executed the Company's standard agreement embodying its Terms and Conditions of Service, together with the applicable tariff, such Terms and Conditions of Service and applicable tariff having been duly filed with the Pennsylvania Public Utility Commission, which agreement and any renewal or substitution thereof providing for the supply of service at the same point of delivery will hereafter be referred to as "Electric Energy Contract."

ARTICLE II

FACILITIES TO BE PROVIDED

Upon execution of this agreement and payment by the Customer of a Service Facilities Advance of Six Thousand Dollars ($6,000.00), the Company shall proceed to construct and install certain "Service Facilities" which are necessary to supply the electrical requirements contemplated hereunder. These Service Facilities will provide

capacity up to a maximum of 700 KVA, and the Company is not obligated to supply capacity in excess of this amount. Service Facilities shall include a 22 KV tap at some convenient point on the Company's existing transmission system and a 22 KV line from said tap to the Customer's substation at Church Avenue and Willow Street, Olyphant, Pennsylvania, where company is to install a pole structure including an airbreak switch, disconnects, lightning arresters, fuses, and a loop for the 22 KV metering.

It is mutually understood and agreed that title to said Service Facilities shall be vested in the Company and the Company shall at all times be responsible for the operation and maintenance of said Service Facilities. The Company agrees to use its best efforts to complete the said Service Facilities at the earliest possible moment.

The electric facilities and equipment installed by Customer shall be constructed and installed in such manner as to prevent interference with the operation of the Company's system and as to create no hazards thereto.

ARTICLE III

REPAYMENT OF SERVICE FACILITIES ADVANCE

Monthly bills shall be computed by the Company in accordance with the terms of the Electric Energy Contract, and, in consideration of the Service Facilities Advance, the Company agrees to return

said Service Facilities Advance, subject to cancellation hereinafter provided, through the medium of a credit of 10% of each month's bill rendered by Company, provided that in no case will a credit be allowed on a minimum monthly bill or in an amount which will bring the net billing to less than the minimum bill provided for in the said Electric Energy Contract. The first credit shall be based on the first power bill rendered after the Service Facilities described herein are placed in operation and shall continue throughout the term hereof as defined in Article IV.

ARTICLE IV

TERM

This agreement shall become effective upon its execution subject to the following conditions, viz: The enactment of a Franchise Ordinance satisfactory to the company, the final effectiveness of said Ordinance, and approval thereof by the Public Utility Commission; and it shall remain in effect until the earliest of the following, at which time it shall terminate:

1. When all of the Service Facilities Advance made hereunder has been refunded.
2. Three years after the Service Facilities contemplated hereunder are placed in operation.
3. Upon cancellation of the Electric Energy contract described in Article I.

Upon the termination of this agreement as provided for herein, the Customer shall have no further claim to the remaining amount, if any, of said Service Facilities Advance.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their duly authorized officers the day and year first above written.

BOROUGH OF OLYPHANT

By _____
President of Council

ATTEST:

_____
Secretary

_____
Burgess

THE SCRANTON ELECTRIC COMPANY

By _____
Vice President & General Mgr.

ATTEST:

_____

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EXHIBIT 2

AN ORDINANCE

AN ORDINANCE GRANTING A FRANCHISE AUTHORIZING AND PERMITTING THE SCRANTON ELECTRIC COMPANY, ITS SUCCESSORS AND ASSIGNS, TO CONSTRUCT, MAINTAIN AND OPERATE POLES, WIRES AND ELECTRIC APPLIANCES FOR THE DISTRIBUTION AND TRANSMISSION OF ELECTRIC CURRENT ON, UNDER AND THROUGH THE STREETS, ALLEYS, LANES, HIGHWAYS AND PUBLIC AREAS, AND TO SELL, DISTRIBUTE AND TRANSMIT ELECTRIC CURRENT, WITHIN THE LIMITS OF THE BOROUGH OF OLYPHANT, COUNTY OF LACKAWANNA, AND STATE OF PENNSYLVANIA; SUBJECT TO THE LIMITATIONS THEREIN CONTAINED.

BE IT ORDAINED by the Borough Council of the Borough of Olyphant, at a special meeting, and it is hereby ordained by authority of the same:

SECTION 1: That The Scranton Electric Company, its successors and assigns, is hereby granted a franchise and permission to construct, operate and maintain in, on and over, under and along any and all of the streets, highways, lanes, alleys, and public areas or places, within the Borough of Olyphant, County of Lackawanna, State of Pennsylvania, such poles, wires, cross-arms, conduits and appliances, as may be necessary or appropriate for the supply and distribution of electric current and electric energy, for lighting, heat, power and any other purpose for which electric current or energy is now or may hereafter be used, and for the transmission of the same within, through or across said Borough.

SECTION 2. That The Scranton Electric Company, its successors and assigns, is hereby granted a franchise and permission to sell, supply, transmit and distribute electric current or electric energy for power purposes to certain individuals, partnerships or corporations, within the territorial limits of the Borough, whose load

APPLICANT'S EXHIBIT "A"

requirements exceed one hundred horsepower, or, with the consent of the Borough, to those whose load requirements are less than one hundred horsepower; and to sell, supply, transmit and distribute electric current for electric lighting to such individuals, partnerships or corporations.

SECTION 3. That nothing herein contained shall be construed as a franchise or permission to The Scranton Electric Company, its successors or assigns, to sell, supply, transmit or distribute electric current or electric energy for lighting purposes generally to the inhabitants of the said Borough.

SECTION 4. All ordinances, or parts of ordinances, inconsistent herewith are hereby repealed.

ORDAINED AND ENACTED into an Ordinance the 11th day of September, 1946.

(S) WILLIAM FEDORCHAK
President of Council

ATTEST:

(S) JOSEPH SAKKO
Secretary

Approved the 11th day of September, 1946.

(S) EDWARD J. BURKE
Burgess

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EXHIBIT 1

EXHIBIT NO. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BOROUGH OF OLYPHANT, PENNSYLVANIA, Plaintiff, v. PP&L, INC., PPL CORPORATION, PPL ELECTRIC UTILITIES CORPORATION, and PPL GENERATION, L.L.C., Defendants.	No. 3:CV-01-2308 Judge James M. Munley

AFFIDAVIT OF NORBERT R. KOSCIUK

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF LACKAWANNA :

NORBERT KOSCIUK, being duly sworn duly states:

1. My name is Norbert Kosciuk. I am over the age of eighteen, have never been convicted of a felony, and am competent to make this affidavit. I am the Borough Manager of the Borough of Olyphant, 113 Willow Street, Olyphant, Pennsylvania 18447. I make this Affidavit on the basis of my personal knowledge and in opposition to Defendants' Motion for Summary Judgment Dismissing Plaintiff's Complaint filed in this case by Plaintiff, Borough of Olyphant, Pennsylvania on May 14, 2002.

2. As part of my job responsibilities, I reviewed the files and records of the Borough of Olyphant relating to the matters relied upon by the Defendants' in their Motion for Summary Judgment. Also, for matters that have been undertaken since I became Borough Manager on ___ JUNE 10, 1996 ___, I have had personal knowledge of many of the events and "facts" purportedly relied upon by Defendants in their motion which incorrectly characterize the true events that took place on which Plaintiff's Complaint is based.

3. Defendants attach as Exhibit B to their Appendix of Exhibits an Ordinance issued by the Borough of Olyphant on September 11, 1946, granting a franchise authorizing and permitting the Scranton Electric Company to construct, maintain and operate poles, wires and electrical appliances in the Borough of Olyphant, and to sell electric current within the limits of the Borough "subject to the limitations therein contained." Copy attached as Exhibit 2 hereto. At the outset, it is important to note that that Ordinance did not grant an exclusive franchise to the Scranton Electric Company to sell power within the Borough and contains no such authorization. Therefore, it does not bar competition from Olyphant for any customers in the Borough.

Further, Section 3 of the Ordinance expressly provided that:

> SECTION 3. That nothing herein contained shall be construed as a franchise or permission to The Scranton Electric Company, its successors or assigns, to sell, supply, transmit or distribute electric current or electric energy for lighting purposes generally to the inhabitants of the said Borough.

Section 2 of the 1946 Ordinance, which limited Scranton Electric Company to sell electric power "within the territorial limits of the Borough whose load requirements exceed 100 horsepower" further specifically required that the consent of the Borough was necessary "to those whose load requirements are less than 100 horsepower." Nothing in this provision gives Scranton Electric

the exclusive right to sell power to customers whose loads exceed 100 horsepower, so that the Borough retained its right to compete with Scranton Electric Company for these loads at any time. The Borough, in fact, has served a number of loads within Olyphant that exceed 100 horsepower. This history, plus the plain language of the Ordinance, demonstrates that there was to be competition between the Borough of Olyphant and Scranton Electric Company for such customers. Furthermore, as indicated in ¶¶8, 9 below, the September 11, 1946 Ordinance was, in effect, superseded and is no longer meaningful.

4. The Borough's files also demonstrate conclusively that the granting by Olyphant of the non-exclusive franchise to Scranton Electric Company in the Ordinance of September 11, 1946 resulted from the refusal by Scranton Electric to sell wholesale power to the Borough for resale by the Borough to its customers unless the Borough agreed to grant the franchise to the Company. The Borough had owned and operated a municipal electric system since 1891. The Borough accomplished this through its own municipal electric generating plant. Several years prior to the enactment of the Ordinance of September 11, 1946, the Borough had experienced problems with its generating plant which was old and had been in use for many years. The Borough sought at that time to purchase wholesale power from Scranton Electric and to shut down its generating plant. Scranton Electric was willing to provide wholesale electric power to the Borough only if the Borough enacted "a Franchise ordinance satisfactory to the Company." Article 5 of the contract proposed by Scranton Electric conditioned the entire arrangement on Olyphant enacting a franchise ordinance satisfactory to the Company:

> This agreement shall become effective upon its execution subject to the following conditions, *viz*: the enactment of a Franchise Ordinance satisfactory to the company, the final effectiveness of said Ordinance, and approval thereof by the Public Utility Commission; . . .

Emphasis added: *see* Exhibit No. 3, attached hereto. In addition, Scranton imposed a ceiling on the wholesale power it would sell to Olyphant. Accordingly, Scranton Electric refused to sell any wholesale power to the Borough, even though its old power plant had reached the end of its life, unless Olyphant agreed to the franchise ordinance demanded by the Company, and a restriction on the available wholesale power it would sell to the Borough.

5. These anticompetitive restrictions on the Borough of Olyphant proposed by Scranton Electric prompted the Borough to write a letter on July 17, 1944 to then-Chairman Leland E. Olds of the Federal Power Commission by Edward J. Burke, the Burgess of the Borough. The Burgess noted the problems with the power plant and stated:

> . . . Our best course seem to be an interconnection with the local utility, namely the Scranton Electric Company. . . We want the best possible contract but with us time is a big factor and we cannot hold out for more suitable terms and the Scranton Electric is aware that we need service as soon as possible. . . . . Advise me as soon as possible on the following points:
>
> 1. Do we have to grant them a permanent franchise?
>
> 2. Are the rates the best that we can get?
>
> 3. Can we discontinue interconnection if advisable and cancel all concessions granted to Utility?

Exhibit No. 4.

6. When the Scranton Electric Company filed the Borough's Ordinance of September 11, 1946 with the Pennsylvania Public Utilities Commission on November 13, 1947, its application expressly admitted that the franchise to it was only applicable if a proposed customer sought service from the Company:

> . . . There is at the present time no pending demand by any proposed power consumer for any installation of facilities for the supply of electric energy. It is, therefore, impossible to state more definitely the probable time when service will be furnished, because it depends entirely on a potential demand by a customer. . .

Exhibit No. 5 at ¶ 4; emphasis added. Nothing in the application by Scranton Electric to the PaPUC stated that Scranton Electric would have thereunder any exclusive right within the territorial limits of the Borough of Olyphant to serve all loads which exceed 100 H.P. On the contrary, the application expressly admitted that competitive conditions would exist within the Borough:

> The Borough of Olyphant owns and has in the past operated a municipal electric plant for the generation of electric current and electric energy, and such energy was sold to the inhabitants of the Borough for lighting purposes and to users of small amounts of power. The municipal plant was shut down in the fall of 1946, for necessary repairs, but was, that after repairs will be, inadequate to supply consumers whose load requirements exceed 100 H.P. Pending repairs to the municipally-owned electric light plant, the Borough of Olyphant is purchasing electric energy from The Scranton Electric Company, in accordance with the terms and conditions, and at the rates established by the tariff schedules of the Scranton Electric Company on file with the Public Utility Commission.

Exhibit No. 5 at ¶6. It also appears clear that the application by Scranton Electric to the Pennsylvania Public Utility Commission was conditioned on the Borough having inadequate capacity in its municipal power plant to supply consumers whose load requirements exceed 100 H.P. This clearly left it open that if the Borough in fact did have capability to provide power for such loads, competition would exist by the Borough to provide such service.

7. The order of the Pennsylvania Public Utility Commission of June 28, 1948 did not grant any exclusive right to Scranton Electric Company to serve all customers within the Borough whose load requirements exceeded 100 H.P. In its order that:

> . . . It is ORDERED: That the application of The Scranton Electric Company for approval of a beginning of exercise of the additional right, power or privilege of supplying electric service to consumers within the Borough, whose load requirements exceed 100 H.P. and with the consent of said Borough, to consumers whose load requirements are less than 100 H.P. in the Borough of Olyphant . . . be and is hereby approved and that a certificate of public convenience issue evidencing such approval.

Exhibit No. 6.

8. In 1950, the Scranton Electric Company conceded that it was subject to Federal jurisdiction of the Federal Power Act relating to its dealings with the Borough. *See Scranton Electric Company*, Docket No. E-6326. 9 FTC 1353 (1950). In 1956, when Pennsylvania Power and Light Company merged with Scranton Electric Company, the application for approval was filed with the Federal Power Commission under Section 203 of the Federal Power Act. *Re Scranton Electric Co.*, Docket No. E-6601, 13 Pur. 3d. 552 (1956). Since that time, all of the wholesale power sold by PP&L to the Borough of Olyphant for resale by the Borough to its customers, have been filed with and were subject to exclusive Federal jurisdiction, and were never filed at the PaPUC.

9. After the merger between PP&L and Scranton Electric approved by the Federal Power Commission in 1956, PP&L furnished all of the wholesale power requirements of the Borough of Olyphant and never made any reference in its dealings with the Borough, prior to the events of this case, to the old franchise ordinance of September 11, 1946 which was premised on the closing of the municipal power plant for repairs and the conditioning of wholesale power service to Olyphant on the granting of a non-exclusive franchise to Scranton Electric to serve loads over 100 H.P. in size.

In 1978, the Borough had been instrumental in seeking a grant from the United States Department of Housing and Urban Development for the development of the Mid-Valley Industrial Park located within the Borough. The Borough was financially committed for the building of access roads, water and sewer lines for the industrial park. At that point, the question came up of providing electric power to the park, and PP&L never asserted that it had the right to provide electricity to that area under the old 1946 Scranton Electric Ordinance. Because the

Borough had undertaken the financial responsibility for the building of access roads, water and sewer lines for the industrial park, it entertained a proposal from PP&L to issue a resolution to authorize it to build facilities to supply electricity for the park. *See* Exhibit No. 7. Nothing in the resolution precluded the Borough from, in the future, seeking to compete by providing electric service to the companies in the Mid-Valley Industrial Park. The resolution was specifically conditioned on the fact that the Borough was then "financially unable to furnish electric power needed for the Mid-Valley Industrial Park" and contained no provisions precluding the Borough from competing for those customers at some subsequent time. PP&L could not have deemed the original 1946 franchise to Scranton Electric as applicable to this situation because, if so, it would not have requested a new resolution to pertain to the industrial park.

10. Before and after the 1978 resolution, the Borough of Olyphant had been obtaining all of its wholesale electric capacity, energy and transmission service from PP&L, together with other Boroughs in Pennsylvania, wholesale rates filed with and approved by the Federal Energy Regulatory Commission. Under date of March 15, 1994, the Borough (together with 14 other Boroughs) had a five-year contract with PP&L for its wholesale power that ended January 31, 1999. On May 8, 1996, PP&L filed a proceeding at the Federal Energy Regulatory Commission, Docket No. SC97-1-000, wherein it asserted that if the Boroughs, at the end of the contract, stopped purchasing capacity and energy from PP&L, that they would have to pay PP&L $124 million in "stranded costs." The Boroughs opposed this filing by PP&L and extensive hearings were held before the Federal Energy Regulatory Commission on the matter.

Under date of January 29, 1998, PP&L agreed with the Boroughs, including the Borough of Olyphant, to a Settlement Agreement of the stranded cost proceedings. Under a Power

Supply Agreement incorporating the Settlement Agreement. PP&L agreed to sell all of the wholesale power requirements of the Borough for a term of five years commencing February 1, 1999 to supply all of the Borough's capacity and energy requirements for service to any of its customers located within the Borough. Exhibit No. 8, ¶3. The Settlement Agreement, approved by the FERC, expressly provided that under the new Power Supply Agreements to commence on February 1, 1999, "PP&L will not seek any stranded cost recovery or exit fee against any of the Parties to this Settlement Agreement, and hereby waives any present or future rights to any such claims." Settlement Agreement of January 29, 1995. Exhibit No. 9, at Article 2.6.

11. On January 1, 1997, the Pennsylvania Legislature enacted the "Electricity and Generation Customer Choice and Competition Act", 66 Pa. C.S.A. §2802, providing that Pennsylvania Boroughs, having municipal electric systems, have the right to serve customers within its borough limits, if they did not seek to serve new customers outside the Borough. At that time, the Borough of Olyphant was in a position to seek to compete to serve customers located within the Borough limits, including the Mid-Valley Industrial Park. The Borough enacted a resolution quoting the language used in the Act, to enable it to exercise any rights thereunder. Exhibit No. 10. The Borough stated that it declined to serve electric customers not presently served who are located outside the boundaries of the Borough of Olyphant and used the words of the statute to give notice that it was going to seek to provide electric power to customers within the Borough limits of the Borough of Olyphant.

This resolution effectively superseded any restriction on the Borough's ability to compete for customers within the Borough contained in the earlier resolution of December 5, 1978 (Exhibit No. 7 hereto). This resolution, while using the language of the state statute of January

1, 1997, created a situation where Olyphant was entitled to compete with PP&L for service of customers within the Borough.

12. On April 25, 2001, I wrote to the Mr. F.A. Long, Executive Vice President and COO of PP&L, Inc. relating to the Mid-Valley Industrial Park. Exhibit No. 11. My opening sentence was "This is to advise you that the Borough of Olyphant has undertaken steps to provide electric power from its municipal electric system to users in the Mid-Valley Industrial Park located within the Borough." My letter of April 25, 2001 to Mr. Long was to give the Company notice that we were seeking to compete for customers within the Mid-Valley Industrial Park located within the Boroughs, and that we did not believe that the 1978 Resolution would preclude such competition. My letter specifically requested that:

> . . . The Borough would like to have negotiations with PP&L as soon as possible to coordinate a cooperative transition in placing our poles and transformers relating to the Borough providing future electric service to the Mid-Valley Industrial Park.

I also referred to him that although we were then taking our deliveries of wholesale power from PP&L at 12 kV that we would like to discuss obtaining all of our power from PP&L at 69 kV. This was because at least one of the customers in the Park was a 69 kV customer.

13. Subsequent to my letter, Mayor Wargo of the Borough of Olyphant sent a letter to the Mid-Valley Industrial Park businesses within its boundaries. Exhibit No. 12. Mayor Wargo's first sentence referred to competition that the Borough was going to provide for providing electric power:

> . . . This is to advise you that the Borough of Olyphant is undertaking steps to provide electric power from its municipal electric system to users in the Mid-Valley Industrial Park located within the Borough.

The Mayor's letter referred to our right to provide such service as far as the Pennsylvania laws were concerned as well as the fact that PP&L had entered a contract with us, approved by the Federal Energy Regulatory Commission, to provide all of our wholesale energy requirements for our customers in our service territory. We indicated these matters superseded the 1978 Resolution relating to the Mid-Valley Industrial Park, because we were now in a competitive position to compete for customers. The Mayor concluded by stating that the Borough intended to provide competitive rates for service to them:

> We believe that the service and rates for electric power by the Borough to your company will be reliable and reasonable. In order to provide a rate for you, we request that you provide us with a copy of your monthly electric power bills for the past year, as well as any information about any projected increases or decreases in your usage for the next two years. Once we have this information, we will provide you with detailed rates and information for your future power service from the Borough.

14. The Pennsylvania Public Utility Commission confirmed that the Borough of Olyphant had a right to seek to serve customers located within the Borough. Exhibit No. 13. In the letter of April 12, 2000 by Barbara Bruin, Executive Director of the PaPUC, to me, she stated that Section 2805(b) of the Competition Act supports the Borough's attempt to compete to serve the Industrial Park. She concluded: "Certainly, nothing in the Competition Act or regulations limits the ability of the Borough to serve the Industrial Park." She also stated that the Public Service Commission had no jurisdiction to consider any disputes between the Borough and PP&L in this regard. Exhibit No. 13 at p. 2.

15. The companies in the Industrial Park were under no illusion that the Borough of Olyphant was seeking to compete for their service by offering them lower rates and identical quality of service. On April 23, 2001, counsel for the Borough received a letter from WEA Manufacturing, a large utility taking power at 69 kV. Jeffrey M. Raider, Vice President of Legal

Affairs, advised that: "Thank you for forwarding me the letter from the Borough's consultant, Charles Wheatley, regarding assurances for WEA Manufacturing ("WEA") should we choose to switch electric suppliers from PPL." Emphasis added; Exhibit No. 14. All of the negotiations, to my knowledge, were based on the premise that the Borough was seeking to complete for supplying them with electricity at lower rates.

16. As part of the Borough's proposal to provide a competitive source of power to WEA at 69 kV, the Borough requested 69 kV service from PP&L. Robert Hudak, Co-Chairman, of the Olyphant Borough Light Committee, wrote to PP&L on April 19, 2000 seeking information for a 69 kV interconnection. Exhibit No. 15. In a reply letter dated July 13, 2000, PP&L raised a number of problems with it providing 69 kV service to the Borough. Exhibit No. 16. PP&L also raised the issue as to whether PP&L would be supplying any electric power to Olyphant after January 31, 2004. *See* Exhibit No. 16, last bullet.

Subsequently, PP&L advised the Borough that it would not provide 69 kV service to the Borough under the present wholesale power contract. We believe this is an improper attempt to preclude us from being able to serve WEA Manufacturing with power.

17. PP&L also advised its existing customers in the Mid-Valley Industrial Park that the Borough would be unable to provide equal power service to them even at 12 kV levels, where a number of them were presently taking power. The Borough wrote to PP&L about this issue and PP&L replied in a letter of July 12, 2001 confirming inadequacies in our firm 12 kV service. *See* Exhibit No. 17, hereto. This appeared to conflict with the express provisions in our Power Supply Contract whereby PP&L, Inc. agrees to provide firm wholesale power supplies to the Borough at 12 kV. *See* Exhibit No. 8, *supra*, at ¶3, and Exhibit No. 9, Settlement Agreement of January 29, 1998, Article 3.1 which provides that "the new Power Supply Agreements

between PP&L and the Boroughs shall be for their firm power requirements (capacity and energy) . . . ."

18. PP&L also has engaged in an active campaign of providing information to its existing customers in the Mid-Valley Industrial Park that its retail sales of power to those customers under its Standard Offer Rates are below market and have been fixed by it through 2009 to be below any power prices that the Boroughs now have or can obtain in the future in the open market from PP&L or any other supplier. *See* Exhibit No. 18. Olyphant believes that there have been substantial letters and correspondence between PP&L and each of the entities being served power in the Mid-Valley Industrial Park that directly communicate this information.

19. PP&L has also been advising the companies for whom the Borough was seeking to compete to supply wholesale power within the Mid-Valley Industrial Park that should they take service from the Borough, they will be subject to paying stranded costs. This directly repudiates PP&L's Settlement Agreement and Power Supply Contracts with Olyphant, affirmed by the Federal Energy Regulatory Commission, that precluded it from charging any stranded costs when the Boroughs are supplying their customers within the Borough with wholesale power subject to exclusive Federal jurisdiction. Exhibit No. 9, Article 2.6.

20. Finally, PP&L has engaged in practices whereby it has used its market power to improperly increase the price of wholesale power in the market. This increase in price adversely affects the ability of the Borough to obtain competitive prices in the wholesale-for-resale market subject to exclusive federal jurisdiction under the Federal antitrust laws and, thereafter, to

preclude the Borough from being able to compete in the wholesale power market. *See* Exhibit No. 19, Market Monitoring Unit of PJM Interconnection, LLC, dated November, 2001.

Norbert R. Kosciuk

Subscribed and sworn to before me this 9th day of May, 2002.

Notary Public

NOTARIAL SEAL
Notary Public
Lackawanna County
My Commission Expires Mar. 23, 2003

My Commission Expires:

3/23/2003

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

February 6, 2004

VIA OVERNIGHT COURIER

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor
Harrisburg, PA 17120

DOCUMENT FOLDER

Re: Docket No. P-0021986, Petition of PPL Electric Utilities Corporation

P-00021986

Dear Secretary McNulty:

Enclosed for filing please find an original and three copies of Reply of Intervenor Borough of Olyphant to Response of PPL Electric Utilities Corporation to Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order.

I have also enclosed an additional copy of this document, which I ask that you file-stamp and return in the enclosed addressed postage-paid envelope.

Thank you for your courtesy and cooperation in this matter.

Sincerely yours,

Charles F. Wheatley Jr /mkm/

Charles F. Wheatley, Jr.

CFW:mkm
Enclosures

RJP

13

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ORIGINAL

STATE OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

RECEIVED

FEB 0 6 2004

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

In the Matter of:

Petition of PPL Electric Utilities Corporation for a Declaratory Order to Terminate Controversies Concerning PPL's Certificated Rights to Provide Service in the Borough of Olyphant and Related Transition Charges

Docket No. P-00021986

DOCKETED

MAR 1 7 2004

REPLY OF INTERVENOR BOROUGH OF OLYPHANT TO RESPONSE OF PPL ELECTRIC UTILITIES CORPORATION TO PETITION OF INTERVENOR BOROUGH OF OLYPHANT FOR RECONSIDERATION AND AMENDMENT OF ORDER

The Borough of Olyphant hereby respectfully replies[1] to the Response of PPL Electric Utilities Corporation ("PPL") to Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order ("Petition"). PPL filed its Response ("PPL's Response") on January 20, 2004, five days after it was due.[2] In its Opinion and Order entered in this proceeding on December 18, 2003 (the "Order"), granting PPL's petition for a declaratory order, the Commission declared that (i) the Mid-Valley Industrial Park in Olyphant is within PPL's certificated territory; (ii) only the Commission, and not Olyphant, can require PPL to abandon

[1] Olyphant is aware that consideration of its Reply is discretionary with the Commission. In view of the importance of the issues involved, Olyphant respectfully requests that the Commission grant such consideration.

[2] 52 Pa. Code § 5.572(e) requires that an answer to such a petition be filed and served within 10 days after service of the petition. Olyphant's Petition was served on January 5, 2004. PPL's answer was therefore due on January 15, 2004.

DOCUMENT FOLDER

certificated electric service to PPL's customers in the Industrial Park; and (iii) any retail electric customer of PPL "as of January 1, 1997 or thereafter located in Olyphant" must continue to pay intangible transition charges and competitive transition charges "even if such customer were, in the future, to receive electric service from Olyphant instead of PPL." Order at 13, 14. Olyphant's Reply will address the matters raised in PPL's Response in the order that they are presented therein; numbered paragraphs herein correspond to the numbered paragraphs in PPL's Response.

I. OLYPHANT'S PETITION IS TIMELY.

Through a feat of logical legerdemain, PPL argues that Olyphant's Petition is a petition for reconsideration and not one for rescission or amendment, and therefore should have been filed pursuant to 52 Pa. Code § 5.572(c) by January 2, 2003, within 15 days following the date of entry of the Order (December 18, 2003). PPL concedes that a petition for rescission or amendment can be filed at any time pursuant to 52 Pa. Code § 5.572 (d). In support of its categorization, PPL cites *Abramson v. Pa. P.U.C.*, 489 Pa. 267, 275,414 A.2d 60, 64 (1980), for the proposition that the Commission must "look behind the title of the paper filed" to determine exactly what a petitioner is seeking. Olyphant invites the Commission's attention to section IV of its Petition, wherein, as required by 52 Pa. Code § 5.572(a), Olyphant makes the following specific requests with respect to the Order, in descending order of preference:

> 1) that the Commission *rescind* the Order for lack of jurisdiction; (2) that...it *stay* the Order until such time as the federal district court rules in *Olyphant* and the United States Court of Appeals rules on Olyphant's appeal from the FERC order referred to in paragraph 5 of this Petition, and, to the extent appropriate, *modify* ¶¶ 6 and 7 of the Order consistent with those rulings; (3) that...it *stay* the Order pending the holding before this Commission of an evidentiary hearing on the issues referred to in this Petition as appropriate for such a hearing, and, to the extent necessary, *modify* the Order in whole or in part consistent with [its] findings...; and (4) if the Commission is unwilling to grant any of (1) through (3) above, that at a minimum it *amend* the Order by deleting ¶ 5 thereof, inasmuch as

¶ 5 is not based on an actual case or controversy but rather on a hypothetical set of facts.

(Emphasis added.) Olyphant does not know how it could have made it clearer that its Petition seeks amendment or rescission as forms of relief. The two cases cited by PPL are inapposite. In both *Abramson* and *West Penn v. Pa. P.U.C.*, 659 A.2d 1055 (Pa. Cmwlth. 1995), also cited by PPL, the distinction at issue was the one between a petition for rehearing (which must allege new evidence) and a petition for reconsideration, not the distinction between a petition for reconsideration and one for rescission or amendment; indeed, the latter two were lumped together. PPL's quotation from *West Penn* ("a petition for rescission or amendment under [66 Pa. C.S] Section 703(g)...may be characterized as a petition for reconsideration") is lifted out of context to suggest that for some purposes (such as the timeliness of a petition) a petition for rescission may be magically transformed into a petition for reconsideration. The point that the court was making is that a petition for rescission or amendment is a petition for reconsideration *rather than* a petition for rehearing, and that the Commission had the discretion whether to act on a petition for rescission. That being so, the *West Penn* court held that the Commission properly acted within its discretion in refusing to allow the appellant to be heard further on the merits of its administrative complaint. If anything, *Abramson* supports Olyphant's characterization of the petition because the *Abramson* Court relied on the contents of appellant's prayer for relief in its petition to the Commission in order to divine the true nature of the petition.

PPL does not dispute that if Olyphant's Petition is properly considered a petition for rescission or amendment, it was timely filed in accordance with 66 Pa. C.S. § 703(g) and 52 Pa. Code § 5.572 (d), as it can be filed at any time. PPL's Response at 3. The question then is, as PPL also agrees, whether circumstances exist that warrant special relief or whether an error of

fact or law has occurred.[3] Olyphant submits that it satisfies these requirements. As to the existence of circumstances warranting special relief, Olyphant need only point to the pending appeal of FERC's declaratory order interpreting favorably for PPL certain aspects of the 1998 Settlement Agreement and related Power Supply Agreement to which PPL and Olyphant were parties and which were originally approved by an earlier FERC order (Borough of Olyphant v. FERC, Case No. 03-1284, U.S. Court of Appeals for the D.C. Circuit). If the Court of Appeals rules in favor of Olyphant, PPL would be prohibited by the original FERC orders approving those Agreements from causing stranded costs to be imposed on Olyphant's retail customers who were the recipients of electricity purchased at wholesale by Olyphant from PPL—*no matter what Pennsylvania state law provides.* Such considerations as federal preemption and the Supremacy Clause clearly constitute extraordinary circumstances warranting special relief in the form of a stay of the Order, which could well be voided if Olyphant is successful on appeal.

Even if the Commission concludes that Olyphant's Petition should have been filed on or before Friday, January 2, 2004, rather than the very next day on which the Commission was open (January 5, 2004), Olyphant respectfully requests that the Commission follow 52 Pa. Code §1.2, which reads in pertinent part as follows:

> § 1.2. Liberal construction.
>
> (a) This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.
>
> * * *
>
> (c) The Commission or presiding officer at any stage of an action or proceeding may waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a participant.

[3] PPL's Response at 3 and cases therein cited.

See AT & T Communication of Pennsylvania v. Pennsylvania Public Utility Commission, 568 A.2d 1362 (Pa. Cmwlth. 1990) (Commission could properly entertain exceptions to a decision of an administrative law judge filed 1 day late absent a showing of prejudice by the company); *Info Connections, Inc. v. Pennsylvania Public Utility Commission*, 630 A.2d 498 (Pa. Cmwlth. 1993) (Commission has authority to waive procedural defects when they do not affect the substantive rights of the parties).

II. OLYPHANT'S PETITION SATISFIES THE *DUICK* TEST.

Contrary to PPL's assertions, Olyphant's Petition satisfies the Commission's either-or test articulated in *Duick* which must be met by petitions for rescission as well as petitions for reconsideration: "[w]hat we expect to see raised in such petitions are new and novel arguments, not previously heard, *or* considerations which appear to have been overlooked or not addressed by the Commission." (Emphasis added.) *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553, 559 (1982). Olyphant's Petition covers both prongs of the *Duick* test. As is discussed in detail *infra* in section III of this Reply, many of Olyphant's "new arguments" are based on the respects in which the Commission's Order misconstrues the provisions of the Competition Act and how they interact with one another—particularly section 2803 (the definitions of "contract termination charge," "electric distribution company," "electric generation supplier," and "retail customer"); section 2805(b) (including but not limited to the artificial distinction between an electricity distribution company and an electricity generation supplier when both are under common corporate control); section 2808(a) (whether customers of Olyphant, rather than Olyphant itself, should be regarded as "accessing [PPL's] transmission or distribution network," as is required for them to be obligated to pay CTCs); and section 2812(g) (definition of "intangible transition charges").

PPL concedes that "Olyphant does ask for the first time for a 'stay' of the Order" in its Petition for Reconsideration, PPL's Response at 1 n.1, but believes that a stay should be denied based on the criteria for granting a stay set forth in *Pa. P.U.C. v. Process Gas Consumers Group*, 502 Pa. 545, 467 A.2d 805 (1983): (1) a strong showing of being likely to prevail on the merits; (2) irreparable injury if a stay is not granted, (3) other interested parties will not be substantially harmed and (4) the public interest will not be adversely affected. The court also quoted approvingly from *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977): "...a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." Significantly, in circumstances similar to those in the instant case, the *Process Gas Consumers* court also noted that the likelihood of prevailing on the merits "should not be an inflexible rule":

> This criterion must be considered and weighed relative to the other three criteria. Under Rule 1781 of the Pa.R.A.P., a petition for a stay is to be presented, in the first instance, to the tribunal which rendered the order being challenged. If the likelihood of success on the merits is a rigid standard, then the requirement of seeking the stay in the first instance would be a futile gesture. It is that very tribunal which has just rendered an adverse decision on the merits which would be required to consider the likelihood of success factor. It is extremely unlikely that the lower tribunal will find it likely that its order will be reversed on the merits. On the other hand, there are ample instances where the lower tribunal could find that the applicant has presented a substantial case on the merits even though it disagrees.

Id. at 554 n. 8. In upholding a stay, the *Process Gas Consumers* court found that the appellee had "raised significant legal issues involving an interpretation of the Public Utility Code," *Id.* at 554, and found that certain exempt gas users had been irreparably harmed by being "deprived of rebates of...funds [that would otherwise be spent in the absence of a stay] in the form of lower gas rates for exempt uses." *Id.* at 554. In the instant case, the loss to Olyphant is in the form of revenue from potential customers of its electric system—both businesses already in Olyphant

who might otherwise switch from PPL to Olyphant as their supplier and businesses that might otherwise relocate to Olyphant and immediately become customers of Olyphant. That revenue can never be retrieved even if the U.S. Court of Appeals rules in favor of Olyphant.

There is another compelling reason for the Commission to stay its order—comity between federal and state regulatory systems. If the U.S. Court of Appeals rules in favor of Olyphant that the FERC-ordered settlement and power supply agreements bar the imposition of stranded costs on the resale of electricity purchased by Olyphant at wholesale from PPL for the express purpose of resale, those paragraphs of the Commission's Order pertaining to stranded costs will be effectively voided as federal law will pre-empt state law. The Commission should at least wait until the U.S. Court of Appeals has ruled.

Several issues raised by Olyphant appear to have been overlooked or simply not addressed by the Commission. These include Olyphant's assertion that the Commission should stay its Order pending the decision of the United States Court of Appeals in Olyphant's appeal from FERC's declaratory order regarding interpretation of the settlement agreement and power supply agreement. In addition, as set forth in Olyphant's Petition in section II, the Commission ignored disputed issues of fact that should have been resolved by adjudicatory hearing, discovery, and presentation of witnesses before any declaratory order was issued. Furthermore, the Commission overlooked the fact that Paragraphs 6 (relating to intangible transition charges) and 7 (relating to competitive transition charges) of the Order arguably impart to certain provisions of the Competition Act a meaning that those provisions will not support or at a minimum give rise to an ambiguity that should be clarified. Thus, both paragraphs of the Order contain the following language:

> That any retail electric customer of PPL as of January 1, 1997 or thereafter located in Olyphant must continue to pay...transition charges previously imposed

> by this Commission, during the period in which...transition charges are being collected, even if such customer were, in the future, to receive electric service from Olyphant instead of PPL.

The foregoing language completely ignores the requirement of 66 Pa. C.S. § 2812(g) that an intangible transition charge can be imposed on a customer only if such customer "was a customer of an electric utility located within the certificated territory of the electric utility on the effective date of [the Competition Act]" or thereafter "became a customer of electric service *within such territory and is still located within such territory*" (emphasis added). The Order could be read to mean that if a retail customer of PPL in a certificated territory of PPL delineated by Borough X relocates to *another* certificated territory of PPL delineated by Borough Y and initially becomes a customer of Borough Y's municipal electric system rather than of PPL, such retail customer would have to continue to pay transition charges by virtue of its previously having been a retail customer of PPL in a different certificated territory. This misinterprets the language of section 2812(g) because it ignores the words "and is still within such territory" and treats them as surplusage in violation of fundamental rules of statutory construction. It also ignores the reality that many retail customers relocate to other systems (or states) and do not continue to pay any PPL retail stranded costs.

III. OLYPHANT HAS DEMONSTRATED THAT RECONSIDERATION OR AMENDMENT OF THE COMMISSION'S ORDER IS WARRANTED.

Olyphant hereby replies to the numbered paragraphs of PPL's Response as follows:

1. No response is required as PPL admits that Olyphant has accurately summarized portions of the Commission's Order.

2. PPL contends that Olyphant has not presented any new arguments regarding jurisdiction that would warrant reconsideration of the Order. However, as Olyphant has explained *supra* in section II, the *Duick* test does not require new arguments if Olyphant can

point to considerations that were overlooked or simply not addressed by the Commission. In its Order, the Commission did not address any of the arguments contained in Olyphant's Motion to Dismiss regarding the Commission's lack of jurisdiction but simply concluded without discussion that only matters of state law were before it. Order at 6. The Commission also overlooked the fact that if the U.S. Court of Appeals agrees with Olyphant's interpretation of the FERC-ordered Settlement and Power Supply Agreements, PPL is barred from collecting stranded costs from Olyphant's customers no matter what state law provides.

PPL also contends that the Commission's finding that it had before it only matters of state law is consistent with the June 27, 2003 decision of the federal district court remanding PPL's declaratory-order petition proceeding to the Commission (the "Remand Order"). However, the federal court's decision to remand was based entirely on the fact that the Commission is not a "state court" within the meaning of the removal statute, which permits defendants to remove cases "brought in State court of which the district courts of the United States have original jurisdiction. ..." 28 U.S.C. § 1441.[4] In the court's view, then, Olyphant should have waited until the matter was before the Commonwealth Court on appeal from the Commission before attempting to effect removal to the federal court.

PPL also asserts that Olyphant offers no reason for disagreeing with the Commission's belief that its Order promotes electric competition in Pennsylvania. To the contrary, Olyphant explained in detail in its Petition the chilling effect that the Order would have on the ability of municipal electric systems to compete with public utilities whose exercise of market power

[4] The language that PPL quotes is mere dicta. Olyphant had asked the court to adopt the functional test that is followed in other Circuits to determine the equivalency of the Commission to a state court and that requires the court to examine the functions and powers of the state agency together with the respective state and federal interests in the subject matter. After citing cases that indicated that the Third Circuit would not follow the functional test, the court said that even if the functional test were controlling it would rule in favor of remand. It was in that "even-if" context that the court made the comment quoted by PPL.

coupled with the ability to impose stranded costs enables them to place such municipalities in a classic price squeeze. Petition at ¶ 4. The Order also stifles competition by preventing businesses from moving their operations to more desirable localities and freely choosing their electricity supplier in their new location. Petition at ¶ 17.

3. PPL again argues that Olyphant's Petition simply repeats the same points made in Olyphant's Motion to Dismiss and that Olyphant's request that the Commission respond to Olyphant's jurisdictional arguments with some degree of legal analysis rather than dismissing them in summary fashion is "both wrong and irrelevant." Olyphant fails to see how this is so given that the Commission's lack of discussion raises the obvious question whether, for purposes of the *Duick* test, the Commission failed to address or simply overlooked one or more of Olyphant's arguments. PPL again incorrectly cites the Remand Order as rejecting the merits of Olyphant's jurisdictional arguments when the Remand Order did nothing of the sort.

4. Contrary to PPL's contentions, Olyphant's characterization of its claims in the federal proceedings referred to in paragraph 4 of its Petition is highly relevant and demonstrates the need for reconsideration or amendment of the Order. In addition to alleging violations of federal antitrust law on the part of PPL, the plaintiffs in both cases also allege that the defendants have breached the FERC-ordered and approved Settlement and related Power Supply Agreements to which PPL and each of 14 plaintiff-boroughs, including Olyphant, were parties. One of the material issues in both cases is whether the Settlement and the Power Supply Agreements prohibit the payment of any stranded costs to PPL directly by the boroughs or indirectly through the imposition of an obligation on the boroughs to collect such stranded costs from the boroughs' customers. The federal district courts hearing these cases have jurisdiction to construe these Agreements and it was part of PPL's defensive strategy in these cases to pre-empt

these courts from so doing by obtaining declaratory judgments from FERC and the Commission, the latter of which is the Order of the Commission here under scrutiny. Again, in the interests of comity, the Commission should at least stay its Order until the U.S. Court of Appeals has ruled on Olyphant's appeal of FERC's declaratory order.

5. Although PPL denies it, PPL's petition for a declaratory order did in fact request the Commission to interpret or modify FERC Orders and the terms of the Settlement and Power Supply Agreements. PPL forgets that the Settlement and Power Supply Contracts were approved by FERC order. If PPL believed that the orders approving the Settlement and Power Agreements did not properly treat the subject of stranded costs, it was required to file a petition for rehearing within 30 days of the issuance of the orders and to seek judicial review within 60 days in accordance with sections 313(a) and (b) of the Federal Power Act, 16 U.S.C. 825l(a) and (b).[5] PPL should not be excused from its failure to do so particularly given that the Power Supply Agreement was negotiated after PPL committed to its plan dated August 27, 1998 before this Commission for stranded costs for certain of its retail customers, whom PPL then knew could be subject to service by Olyphant under its wholesale Power Supply Agreement with PPL without any stranded costs.

6. Olyphant is justified in restating in paragraph 6 of its Petition certain of the legal arguments which it made in its Motion to deny Petition and which the Commission does not even acknowledge, let alone discuss or analyze. Those arguments are based on the exclusive jurisdiction of the federal courts to enforce final orders of FERC; the inability of FERC (or this Commission, for that matter) to modify FERC's earlier orders approving the Settlement Agreement and Power Supply Agreement to require Olyphant to pay stranded costs; the Mobile-

[5] FERC itself is barred from vacating decisions when no petition for rehearing is filed and prior orders (here, the orders approving the Settlement and Power Agreements) have become final. *See* ¶ 12 of Olyphant's Motion to Deny Petition and cases therein cited.

Sierra doctrine's prohibition of any attempt by the Commission to amend the settlement and power supply agreements; and the federal pre-emption doctrine that precludes any state public utility commission from imposing retail stranded costs on wholesale power sold to Olyphant for resale to meet the requirements of its municipal distribution system.

7–8. PPL blurs together two distinct legal issues, both of which involve disputed facts. The first is whether PPL's 1948 certificate of convenience is even germane to the supply of electricity to businesses in the Mid-Valley Industrial Park. The second is whether, assuming the certificate is germane, Olyphant in fact took any action to "revoke" that certificate.[6] If it took no such action—and Olyphant submits that the evidence if allowed to be presented at hearing would show that it did not—there is no uncertainty or controversy that would warrant a declaratory order. Copies of the affidavits of Norbert R. Kosciuk and Frank Borgna, in the form submitted by Olyphant in one of the federal cases in opposition to PPL's motion for summary judgment, were annexed to Olyphant's Petition in support of Olyphant's position on the first of these two issues. The fact that the federal court struck portions of these affidavits because the affiants lacked personal knowledge of events that occurred from 26 to 58 years ago is irrelevant: the court said that it would consider nonetheless the documents which the affidavits addressed. PPL acts as if an evidentiary hearing is already in progress by holding Olyphant to formal rules of admissibility while PPL has had unfettered access to the Commission with its own documents. At the same time, PPL asks the Commission to ignore documents that rebut those which PPL

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[6] *Borough of Grove City v. Pennsylvania Public Utility Commission*, 505 A.2d 346 (Pa. Cmwlth. 1986), *appeal denied*, 528 A.2d 603 (Pa. 1987), is inapposite. First, the central issue in *Grove City* was which entity, the borough or the public utility, would serve a business located in an area previously served by the utility that was subsequently annexed by the borough. No such issue presents itself here. Second, unlike Olyphant, the borough in *Grove City* took concrete legal measures to challenge the utility by formally rescinding a resolution authorizing the utility to serve the business in question and by applying to the Commission for an order authorizing it to serve the customer's facilities. Olyphant took no such legal action and has made it clear that it seeks only to compete with PPL on a level playing field. As the WEA Letter (*see* footnote 7 *infra*) indicates, businesses in the Industrial Park understood that they were free to choose who would supply their electricity.

placed before the Commission—as well as issues of fact raised by PPL's own documents.[7] This is precisely why Olyphant in its Motion to Deny asked the Commission to conduct an evidentiary hearing before ruling.

9–10. PPL's assertion that "[n]othing in the Order provides that Olyphant is precluded from competing for customers in the Park who are presently served by PPL Electric," is disingenuous. PPL knows full well that by exercising its market power to increase the price at which it sold electricity to Olyphant at wholesale, and by forcing Olyphant to pass on transition charges to its own retail customers, PPL can undercut Olyphant's retail price and effectively prevent Olyphant from competing with PPL at the retail level. What is more, PPL has argued in the federal antitrust case that Olyphant cannot invoke the antitrust laws because it is seeking to substitute one monopoly with another. This, together with PPL's dogged determination to obtain a declaratory order to the effect that Olyphant has somehow taken action to strip PPL of its certificate of convenience and prevent it from fulfilling its "obligation" to serve Industrial Park customers, would suggest that PPL thinks it has what amounts to the exclusive right to serve businesses in the Industrial Park. The simple truth is that Olyphant has taken no such action: PPL has manufactured a controversy in order to obtain a declaratory order to serve its own purposes.

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[7] *See, e.g.*, Olyphant's Petition at ¶ 11, describing a letter written by the Mayor of Olyphant to businesses in the Industrial Park, and cited by the Commission as an example of "uncontroverted facts." In reality, that letter places facts in dispute, because in it the Mayor states that "the Borough *desires* to provide all your electric power within the Borough of Olyphant." (Emphasis added.) A copy of the Wargo letter is annexed to Olyphant's Petition as Exhibit 12. Olyphant's Petition, at ¶ 11, also discusses a letter to Olyphant's solicitor dated April 23, 2001, from an officer of WEA Manufacturing, one of the largest businesses in the Industrial Park, thanking the solicitor for his "assurances...should [WEA] *choose* to switch electric providers from PP&L," and went on to state WEA's lack of interest in making "any change in electric providers at this time." A copy of the letter is annexed to Olyphant's Petition as Exhibit 14. Clearly, WEA did not think it could be legally forced to take electricity from Olyphant rather than PPL. These letters rebut PPL's allegations that Olyphant took any action the effect of which, to quote the Order at ¶ 5, is "to require PPL to abandon certificated electrical service to PPL's customers in the Mid-Valley Industrial Park."

PPL also argues that Olyphant cannot rely on 66 Pa.C.S. § 2805(b), which authorizes a borough to prohibit an electric generation supplier ("EGS") from supplying electricity to customers with its boundaries, because PPL is an electric distribution company ("EDC"). PPL contends that it is of no consequence that PPL's corporate affiliate is an EGS and that both companies are under the common control of their corporate parent. As the Commission can appreciate, the distinction between an EGS and an EDC is not a hard and fast one and has been blurred before. *See PPL EnergyPlus, LLC v. Commonwealth of Pennsylvania* 800 A.2d 360 (Pa. Cmwlth. 2002) (EGS's and EDCs may be grouped together for purposes of paying assessments to cover Commission's regulatory expenses). In any event, this is a non-issue because Olyphant has made it clear that it does not seek to assert any rights of exclusivity that it may have under section 2805(b) but rather seeks only to compete with PPL for the business of customers within the Industrial Park.

11–13. Olyphant does indeed contend that the controversy or uncertainty required to justify the issuance of a declaratory order is lacking. The fact that Olyphant enacted a resolution in 1997 indicating in the "whereas" clauses that it was the desire of Olyphant to be the exclusive electric supplier within the Borough does not amount to the taking of legal action to force PPL to "abandon certificated service." For example, the Borough Council did not rescind any prior resolution or ordinance authorizing PPL to provide service, or take any other legal action to that end. All of the businesses in the Industrial Park continue to be served by PPL and Olyphant believes that the WEA Letter and other evidence would show that these businesses understand that they may choose whom they want to be their electricity supplier. PPL generated a controversy and leapt at the opportunity to obtain a declaratory order that it could use as ammunition in the pending antitrust case brought against it by Olyphant.

14–17. PPL appears to agree with Olyphant that the definition of "competitive transition charge" in 66 Pa.C.S.§ 2803 and 66 Pa.C.S. §2808(a) pertaining to CTCs both limit the obligation to pay CTCs to a "customer accessing the distribution network." But PPL disputes Olyphant's contention that if Olyphant is supplying retail customers it is Olyphant, not those customers, who is accessing the transmission or distribution network of PPL.[8] PPL also disputes Olyphant's interpretation of a "retail electric customer" to include only a direct purchaser of electric power from the entity (here, PPL) that seeks to benefit from the transition charge. In addition PPL disputes Olyphant's contention that the Order, because it is ambiguous, would appear to require businesses that were retail customers of PPL in certificated territory X, relocate to PPL's certificated territory Y, but from the start take their electricity in territory Y from a supplier other than PPL, to nevertheless pay transition charges to PPL. As noted in Olyphant's Petition at ¶ 17 and *supra* in the last paragraph of section II, such an interpretation, to which paragraphs 6 and 7 of the Order freely lend themselves, renders superfluous the words "and is still located within such territory" in 66 Pa. C.S. § 2812(g). Such an interpretation is also contrary to 66 Pa.C.S. § 1101, which empowers the Commission to issue certificates of convenience for discrete geographical territories. *See Grove City*, 505 A.2d at 353. That PPL disputes Olyphant's interpretation only emphasizes that there are issues of law which the Commission either overlooked or did not address and which therefore make Olyphant's Petition appropriate.

[8] PPL's reliance on *ARIPPA v. Pennsylvania Public Utility Comm'n*, 792 A.2d 636 (Pa. Cmwlth. 2002) is puzzling and if anything proves a point made by Olyphant. That case involved a challenge to a stipulated rate cap exception in connection with the approval of a merger of public utilities. In holding that excess- provider-of-last-resort costs are not stranded costs, the court did observe that stranded costs are "backward looking." But that characterization does not dictate who is responsible for paying stranded costs. Carrying PPL's logic to its extreme, one would have to conclude that once a customer of PPL, always a customer of PPL, and that the obligation to pay stranded costs would remain even with a retail customer of PPL who moves to another State.

WHEREFORE, the Borough of Olyphant respectfully requests that the Commission grant Olyphant's Petition for Reconsideration and Amendment of Order.

Respectfully submitted,

Charles F. Wheatley Jr /mkm

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Counsel for Borough of Olyphant

February 9, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order was served by first-class mail this 9th day of February 2004 to the following:

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COMMONWEALTH OF PENNSYLVANIA

DATE: January 7, 2004

DOCUMENT

SUBJECT: P-00021986

TO: Law Bureau

FROM: James J. McNulty, Secretary KB

PPL Electric Utilities

Attached is a copy of a Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order, filed by Borough of Olyphant in connection with the above docketed proceeding.

This matter is assigned to your Bureau for appropriate action.

Attachment

DOCKETED
JAN 22 2004

ksb

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JANUARY 20, 2004

VIA HAND DELIVERY

DOCUMENT FOLDER

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Response of PPL Electric Utilities Corporation to Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order, Docket No. P-00021986

Dear Secretary McNulty:

Enclosed, for filing, are an original and three (3) copies of the **Response of PPL Electric Utilities Corporation to Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order** in the above-referenced proceeding. As indicated on the enclosed Certificate of Service, a copy of the response is being sent to the Law Bureau of the Pennsylvania Public Utility Commission, the Office of Trial Staff, the Office of Consumer Advocate, the Office of Small Business Advocate, counsel for the Borough of Olyphant, and counsel for intervenor PP&L Industrial Customer Alliance.

If you have any questions regarding the foregoing, please contact the undersigned at the address or telephone number provided above.

Respectfully submitted,

David B. MacGregor

David B. MacGregor

DBM/kmk
Enclosure
cc: Certificate of Service

RJP

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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2004 JAN 20 PM 3:40
SECRETARY'S BUREAU

Petition of PPL Electric Utilities Corporation for a Declaratory Order to Terminate Controversies Concerning PPL's Certificated Rights To Provide Service In The Borough of Olyphant And Related Transition Charges	:	Docket No. P-00021986

DOCUMENT FOLDER

RESPONSE OF PPL ELECTRIC UTILITIES CORPORATION TO PETITION OF INTERVENOR BOROUGH OF OLYPHANT FOR RECONSIDERATION AND AMENDMENT OF ORDER

On December 18, 2003, the Commission entered an opinion and order (the "Order") granting the petition of PPL Electric Utilities Corporation ("PPL Electric") for a declaratory order and declaring that the Mid-Valley Industrial Park (the "Park") in Olyphant, Pennsylvania, is within PPL's certificated service territory, and that only the Commission, not Olyphant, can require PPL to abandon certificated service to customers within the Park. The Commission also ordered that any retail electric customer of PPL as of January 1, 1997 or thereafter located in Olyphant must continue to pay both intangible transition charges ("ITCs") and competitive transition charges ("CTCs") even if such customer were, in the future, to receive electric service from Olyphant instead of PPL Electric. *See* Order, at 13.

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On January 5, 2004, Olyphant filed a "Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order" (the "Petition"). Although Olyphant states in its Petition that it is "mindful" of the Commission's standards for granting reconsideration or amendment of a previously issued order set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 533 (1982), Olyphant's Petition entirely fails to satisfy those standards. Most of the Petition is nothing more than a

restatement of Olyphant's prior arguments and an untimely request to the Commission to reconsider the Order. Even if any of Olyphant's arguments actually satisfied the Commission's requirements that a motion for reconsideration or amendment present arguments that are "new or novel," *see Duick*, 56 Pa. P.U.C. at 559, which they do not, Olyphant's arguments are wrong as a matter of law, irrelevant, or otherwise improper. Because parties "cannot be permitted, by a second motion to review and reconsider, to raise the same questions which were specifically considered and decided against them . . . ," *see id.* (*quoting Pennsylvania Railroad Co. v. Pa. P.U.C.*, 179 A. 850, 854 (Pa. Super. 1935)), and because the Commission properly granted PPL Electric's petition, the Commission should deny Olyphant's Petition.

I. OLYPHANT'S PETITION FOR RECONSIDERATION IS UNTIMELY

Although Olyphant has captioned its filing as a petition for "reconsideration and amendment of order," Pennsylvania courts – and this Commission – routinely "look behind the mere title of the paper filed" to determine exactly what a petitioner is seeking. *Abramson v. Pa. P.U.C.*, 414 A.2d 60, 64, 489 Pa. 267, 275 (1980); *see also West Penn v. Pa. P.U.C.*, 659 A.2d 1055, 1065 n. 21 (Pa. Cmwlth. 1995) (explaining that "[u]nless a petition is actually one for rehearing because it alleges new evidence is available, a petition for rescission or amendment under Section 703(g) may be characterized as a petition for reconsideration"). Because Olyphant's Petition is plainly seeking to have the Commission reconsider Olyphant's earlier arguments, it is only a petition for reconsideration, not a petition for amendment or rescission, and as such is untimely under the Commission's regulations.

The Commission has distinguished between the purposes of a petition for reconsideration and a petition for rescission or amendment, and provided appropriately

different regulations relating to the time in which such petitions must be filed. Petitions for reconsideration must be filed within fifteen days after entry of a final order of the Commission, *see* 52 Pa. Code § 5.572(c), which allows a party sufficient time to review the Commission's rulings but also establishes finality in the administrative process. *See Feleccia v. PPL Electric Utilities Corporation*, Pa. P.U.C. No. C-20016210, 2003 WL 1901914, at *2 (Mar. 6, 2003).

In contrast, a petition for rescission or amendment can be filed at any time, but "should be utilized by petitioners only when circumstances warrant special relief." *Id.* "To establish a proper basis for rescission, a petitioner must first establish the existence of newly discovered evidence, a substantial change in circumstances, or an error of fact or law." *Id.* But it is well established that parties before the Commission under either a petition for reconsideration or a petition for rescission must present "new and novel arguments, not previously heard, or considerations which appear to have been overlooked or not addressed by the Commission. Absent such matters being presented, we [the Commission] consider it unlikely that a party will succeed in persuading us that our initial decision on a matter or issue was either unwise or in error." *See Duick*, at 559.

There can be no dispute that Olyphant's petition is seeking to have the Commission reconsider its rejection of Olyphant's earlier arguments. For example, in Section IV of the Petition, Olyphant asks the Commission to "rescind" the Order for "lack of jurisdiction," but this is the same request Olyphant made when it asked the Commission to dismiss PPL Electric's petition for declaratory order because the federal courts purportedly had "exclusive jurisdiction." *Compare* Petition, at ¶ 18 *with* Motion by the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for

a Declaratory Order and Petition to Intervene, at ¶ 3 ("Olyphant Motion"). Olyphant's other requests for "amendment" of the Order are nothing more than recharacterizations of its earlier requests. *Compare* Petition, at ¶ 18 (requesting stay of Order pending federal court proceedings, evidentiary hearing, and amendment of Order based on lack of case or controversy) *with* Olyphant Motion at ¶ 3 (requesting evidentiary hearing on factual issues), ¶ 23 (asserting Commission "is not in a position" to rule "without resolution" of factual issues in district court litigation), & ¶ 25 (requesting Commission dismiss PPL Electric's petition for declaratory order because PPL Electric purportedly seeks an "impermissible advisory opinion").[1]

In this case, since Olyphant has shown no circumstances warranting special relief, its Petition is properly treated as a motion for reconsideration, not amendment. Because Olyphant's Petition was not filed on January 2, 2004, but on January 5, 2004, after the fifteen-day time period permitted for petitions for reconsideration under 52 Pa. Code § 5.572(c), Olyphant's Petition is untimely and should be denied.

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[1] In its Petition, Olyphant does ask for the first time for a "stay" of the Order until the United States Court of Appeals for the District of Columbia rules on Olyphant's appeal of FERC's rejection of its legal theories. *See* Petition, at ¶ 18. Notably, Olyphant does not identify any irreparable injury that such a stay would prevent or otherwise satisfy the requirements for a stay of the Commission's Order. *See, e.g., Pa. P.U.C. v. Process Gas Consumers Group*, 467 A.2d 805, 809, 502 Pa. 545, 553 (1983) (reviewing requirements for stay of government order). In any case, Olyphant's request for a stay based upon the pendency of its appeal of the FERC order should not be considered by this Commission where Olyphant inexcusably failed to address (or even mention) this adverse FERC ruling in its motion to dismiss PPL Electric's petition after remand. *See* Response of PPL Electric Utilities to Motion by the Borough of Olyphant to Deny the Petition, at ¶¶ 8-10, 22-25 & n.5 ("PPL Electric Response").

II. OLYPHANT HAS FAILED TO SHOW ANY BASIS FOR RECONSIDERATION OR AMENDMENT OF THE COMMISSION'S DECEMBER 18, 2003 ORDER

In the event the Commission determines that Olyphant's untimely Petition should be considered on the merits, PPL Electric responds to the Petition in accordance with the numbered paragraphs thereof as follows:

1. Olyphant has accurately summarized portions of the Commission's Order.

2. Olyphant presents no new arguments regarding the jurisdiction of this Commission to justify reconsideration or amendment of the Order. In its initial response to PPL Electric's petition for a declaratory order, Olyphant asserted that the Commission was without jurisdiction to consider PPL Electric's petition because it purportedly involved issues of federal antitrust law and orders of the Federal Energy Regulatory Commission ("FERC"). *See* Olyphant Motion at ¶¶ 3, 6, 8-10. In its response to Olyphant's Motion, PPL Electric explained that it sought only determinations under Pennsylvania law regarding its certificated territory and the obligations of its customers to pay retail stranded costs imposed under Pennsylvania law. *See* PPL Electric Response, at ¶¶ 1-5. The Commission expressly found that PPL Electric's petition raised only issues of state law, and there were no issues of federal law before the Commission. *See* Order, at 6. The Commission's findings were consistent with the June 27, 2003 decision of the federal district court which remanded PPL Electric's petition to the Commission after Olyphant attempted to remove PPL Electric's petition to federal court. *See* PPL Electric Answer, Exhibit A (attaching order of federal district court concluding that PPL Electric's petition for declaratory order is "obviously and intimately related to the jurisdiction of the PUC and does not directly implicate federal law").

Olyphant's Petition simply restates its prior arguments that PPL Electric's petition presents issues of federal antitrust and energy law. *See* Petition, at ¶ 2 (asserting that issues raised by PPL Electric's petition were "inextricably intertwined" with federal antitrust and energy law, and the Commission should have held hearings, "as Olyphant requested" in its Motion). Although Olyphant disagrees with the Commission's conclusion that the Order "fosters electric competition in Pennsylvania," *see id.*, Olyphant provides no explanation for its disagreement and, instead, devotes pages to further discussion of various court cases involving federal antitrust and energy issues, most of which were already cited in Olyphant's Motion for the same irrelevant propositions. *See, e.g.*, Motion, at ¶ 19 (discussing *Public Utilities Com. v. Attleboro Steam & E. Co.*, 273 U.S. 83 (1927)), ¶ 20 (discussing *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964)), ¶¶ 6 and 22 (discussing *New York v. FERC*, 535 U.S. 1 (2002) and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).[2]

3. As Olyphant concedes here, its Motion requested dismissal of PPL Electric's petition on the same grounds that Olyphant now seeks reconsideration or amendment of the Order. *Compare* Petition, at ¶ 18 (requesting the Commission rescind its Order for lack of jurisdiction). Olyphant's additional contentions that the Commission should have addressed Olyphant's arguments in further detail and that PPL Electric's petition was an "apparent collateral attack on the jurisdiction of the federal court" are

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[2] The two other cases relating to antitrust and energy issues cited by Olyphant in its Petition – *FPC v. Conway Corp.*, 426 U.S. 271 (1976) and *United States v. Public Utilities Com.*, 345 U.S. 295 (1953) – are cited only for the unremarkable proposition that states do not regulate the sale of wholesale power for resale. *See* Petition, at 4.

both wrong and irrelevant to establishing any basis for reconsideration or amendment of the Order. Again, the federal court has already rejected similar arguments by Olyphant when it ruled that Olyphant's effort to remove this proceeding to federal court was improper.

4. Olyphant's characterization of its claims in the federal proceedings is irrelevant to this proceeding and, in any event, provides no basis for reconsideration or amendment of the Order.[3]

5. As PPL Electric explained in its Response, its petition for a declaratory order before the Commission did not request the Commission to change, modify, interpret, or enforce any order of FERC, the Settlement Agreement, or the Power Supply Agreement, and Olyphant's characterization of FERC orders and these FERC-approved agreements are irrelevant to any reconsideration or amendment of the Order. *See* PPL Electric Response, ¶¶ 8-10. Even if FERC's ruling rejecting Olyphant's interpretation of the Settlement Agreement were relevant to any determination in the Order by this Commission under Pennsylvania law, Olyphant provides no reason whatsoever for a stay of the Commission's Order other than its hope that it may win its appeal of FERC's ruling. The Commission should therefore reject Olyphant's request for a stay,

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[3] PPL Electric notes that Olyphant is correct when it explains that there are only two federal actions involving Olyphant and PPL Electric. The case now pending in the United States District Court for the Eastern District of Pennsylvania, *Borough of Olyphant v. PP&L, Inc., et al.*, No. 03-4023, was transferred from the United States District Court for the Middle District of Pennsylvania, where it was captioned *Borough of Olyphant v. PP&L, Inc., et al.*, No. 3:CV-01-2308. However, whether there are two or three federal cases is of no relevance to the issues before the Commission.

particularly in light of Olyphant's failure to address FERC's ruling in its Motion, as discussed *supra.*

6. In this paragraph, as in earlier paragraphs of its Petition, Olyphant is only restating the arguments it made in its original Motion, which provides no basis for reconsideration or amendment of the Order by the Commission.

7-8. The Commission correctly concluded that the basic facts in this proceeding are uncontroverted. Olyphant does not – and cannot – dispute that a certificate of public convenience was issued to PPL Electric's predecessor (Scranton Electric), that the Commission has never revoked this certificate, and that Olyphant authorized PPL Electric to begin service to customers in the Park in 1978. Under *Borough of Grove City v. Pennsylvania Public Utility Commission*, 505 A.2d 346 (Pa. Cmwlth. 1986), *appeal denied*, 528 A.2d 603 (Pa. 1987) ("*Grove City*") – a case which Olyphant inexplicably continues to ignore – Olyphant cannot, on its own accord, require PPL Electric to abandon certificated service, and Olyphant's claims that the original certificate was somehow superseded by power supply agreements or anything else without Commission action are clearly wrong as a matter of law. The Commission's conclusions that the Park is within PPL Electric's certificated territory and that only the Commission can require PPL Electric to abandon certificated service to Park customers are thus fully consistent with the facts and law applicable to this dispute.[4]

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[4] Although Olyphant relies upon affidavits by Norbert R. Kosciuck and Frank Borgna to suggest that facts relating to PPL Electric's certificate are in dispute, *see* Petition Exhibits 1 & 20, the portions of those affidavits relating to the history of PPL Electric's certificate have been struck from federal court proceedings between Olyphant and PPL Electric

(continued . . .)

Contrary to Olyphant's claims, the Commission neither assumed nor decided that PPL Electric had an *exclusive* right to serve Olyphant customers, nor did PPL Electric seek such a determination. Olyphant's assertion that its ability to compete will therefore be "stifled" by the Order is clearly without merit, and its additional argument that there is no "case or controversy" for the Commission to resolve was already raised in its prior Motion and considered by the Commission. *See* Motion, at ¶¶ 23-25.[5]

9-10. Nothing in the Order provides that Olyphant is precluded from competing for customers in the Park who are presently served by PPL Electric, nor did PPL Electric seek such a determination. PPL Electric did request a determination that its customers would continue to be obligated to pay ITCs and CTCs under Pennsylvania law even if such customers were to receive electric service from Olyphant instead of PPL Electric, and the Commission properly concluded that PPL Electric's customers would continue to owe such costs.

Olyphant attempts to reargue this issue by again citing Section 2805(b) of the Public Utility Code, which permits a borough to prohibit electric generation suppliers from supplying customers within its boundaries, and contending that the Commission

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because Messrs. Kosciuck and Borgna lack personal knowledge to support their statements. *See* Order, *Borough of Olyphant v. PP&L, Inc., et al.*, No. 03-4023 (January 14, 2004) (attached as Exhibit A). Moreover, these affidavits were available to Olyphant when it first filed its Motion, and do not constitute newly discovered evidence. The Commission should give these affidavits no weight in this proceeding.

[5] Olyphant also suggests that its 1998 Power Supply Agreement precludes collection of stranded costs by PPL Electric. *See* Petition, at ¶ 8 n.7. Although FERC has concluded that Olyphant's interpretation of its FERC-approved agreements is incorrect, the Commission did not make any determination regarding the terms of these agreements, nor did PPL Electric ask it to do so.

concluded "too quickly" that Olyphant could not prohibit PPL Electric from providing service in Olyphant because the distinction between an electric distribution company ("EDC") and an electric generation supplier ("EGS") may be "one of form over substance." Petition, at ¶ 10.[6] This argument is entirely without merit. The Public Utility Code contains extensive provisions distinguishing between an EDC and an EGS, and Olyphant provides no basis whatsoever for concluding that the General Assembly intended that an EDC and an EGS – even if controlled by the same parent company – are identical for purposes of Section 2805(b).[7]

11-13. Olyphant also contends that the Commission erred in issuing a declaratory order that the Park was within PPL Electric's certificated territory and that only the Commission, not Olyphant, can require PPL Electric to abandon certificated service because (i) there is no controversy or uncertainty required for a declaratory order since Olyphant has not sought to require PPL Electric to abandon such service or, alternatively, (ii) there is a factual dispute as to whether Olyphant did seek to exclude PPL Electric which must be resolved through evidentiary hearings.

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[6] Even Olyphant concedes that the only case it cites for this proposition – *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), a case involving federal antitrust issues – is from "an admittedly different context." Nothing in *Copperweld* provides a basis for concluding that the different statutes and regulations applicable to an EDC and an EGS under Pennsylvania law can be conflated or ignored, as Olyphant suggests.

[7] Olyphant also asserts that it "relied in good faith" upon a letter from the Executive Director of the Commission. *See* Petition, at ¶ 10 and Exhibit 13. However, that letter does not conclude that an EGS and an EDC are identical for purposes of § 2805(b), and in any case, is not binding in any way upon the Commission.

Notably, Olyphant does not dispute that it enacted a resolution in 1997 stating that it was "in the best interest of the Borough to be the exclusive electric supplier within the Borough Limits of the Borough of Olyphant" or that its representatives sent the correspondence to PPL Electric customers asserting Olyphant's exclusive rights, as cited by the Commission. *See* Order, at 4-6. Moreover, there was no need for an evidentiary hearing. As Olyphant acknowledges in its Petition (¶ 11), it believed that it had the right to exclude PPL Electric from within its boundaries, and the extent to which Olyphant could do so without Commission action is one of the issues PPL Electric sought to resolve through its petition for declaratory order. In any event, Olyphant cannot and does not suggest that there is an absence of controversy regarding the collection of ITCs and CTCs in Olyphant, which was also the subject of PPL Electric's petition. Olyphant's contention that there was no controversy or uncertainty sufficient for the Commission to assert its jurisdiction is plainly wrong, and provides no grounds for reconsideration or amendment of the Order by the Commission.

14-17. Finally, Olyphant disagrees with the Commission's statutory analysis of the obligation of PPL Electric customers to pay stranded costs in the event that such customers were to take electric service from Olyphant instead of PPL Electric in the future. Olyphant contends that the Commission erred for four reasons, none of which has merit.

First, Olyphant suggests that if it serves former PPL Electric customers, those customers will no longer be obligated to pay CTCs because Olyphant will be accessing the transmission or distribution network instead of the customer. While the term "transmission or distribution network" is not defined under the Electricity Generation

Customer Choice and Competition Act, 66 Pa. C.S.A. § 2801 *et seq.* (the "Act"), there is no basis to conclude that the General Assembly intended former customers of electric distribution companies to avoid their previously incurred stranded costs by purchasing future electricity through intermediaries, such as a borough. *See ARIPPA v. Pennsylvania Public Utility Comm'n.*, 792 A.2d 636, 667 (Pa. Cmwlth. 2002) (explaining that "stranded costs" are a means to pay "costs previously incurred or obligated in a regulated environment" and "were not meant to pay for costs associated with the current delivery and generation of electricity"); *see also* 66 Pa. C.S. § 2808(a) (requiring customers who install on-site generation to continue to pay CTCs). Moreover, as the Commission correctly notes, customers receiving electric service from Olyphant are still accessing PPL Electric's transmission network, which delivers all power purchased by Olyphant. Order, at 10.

Second, Olyphant asserts that a "retail electric customer" under the Act is a "direct purchaser of electric power from a public utility," and that a PPL Electric customer who begins to receive service from Olyphant would no longer be a retail electric customer under the Act. Contrary to Olyphant's assertion, however, the term "retail electric customer" is defined only to be "a direct purchaser of electric power," not "a direct purchaser of electric power from a public utility." *See* 66 Pa. C.S. § 2803.

Third, Olyphant contends that customers in the Park have no obligation to pay ITCs and CTCs because the Park is not within the certificated territory of PPL Electric. This argument, however, is nothing more than a reargument of Olyphant's contention that the 1948 certificate of public convenience is no longer valid, which the Commission has already considered.

Lastly, Olyphant contends that the Commission's Order is ambiguous because it requires PPL Electric retail electric customers who relocate physically to Olyphant to continue to pay transition charges. Contrary to Olyphant's suggestion that this would have a "devastating impact" on boroughs, the Commission's requirement is entirely consistent with the Act: such customers continue to remain within the certificated territory of PPL Electric (which includes Olyphant), and therefore must continue to pay CTCs and ITCs.

18. For the reasons set forth in response to paragraphs 1-17 and incorporated herein, Olyphant is not entitled to any of its requested relief.

WHEREFORE, PPL Electric respectfully requests that the Commission deny Olyphant's Petition for Reconsideration and Amendment of Order in its entirety.

Respectfully submitted,

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Of Counsel:

Morgan, Lewis & Bockius LLP

Date: January 20, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BOROUGH OF OLYPHANT, PENNSYLVANIA Plaintiff,	:	CIVIL ACTION NO. 03-4023
v.	:	
PP&L, INC., PPL CORP., PPL ELECTRIC UTILITIES CORP., and PPL GENERATION, L.L.C., Defendants.	:	

FILED

JAN 14 2004

MICHAEL E. KUNZ, Clerk

By _____ Dep. Clerk

ORDER

And now on this 13th day of January, 2004, upon consideration of defendants' motion to strike affidavits, plaintiff's response in opposition thereto and defendants' reply in further support of their motion to strike affidavits, it is hereby ORDERED that defendants' motion is GRANTED and the following portions of affidavits are stricken:[1]

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[1] The Federal Rules of Civil Procedure clearly set forth the standards for submitting affidavits either supporting or opposing a motion for summary judgment. Specifically, such affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein." FED. R. CIV. P. 56(e). Defendants argue that the affidavits of Norbert R. Kosciuk and Frank Borgna, submitted by plaintiff in opposition to defendants' motion for summary judgment, should be stricken because significant portions of their affidavits are not based on the affiants' personal knowledge. More specifically, defendants' argue that the sole basis for any knowledge the affiants had about certain portions of their respective affidavits was "documentation" collected in preparation for litigation, Def. Mot. to Strike Affidavits 6, 10, which, it is contended, is insufficient to satisfy the "personal knowledge" standard of Rule 56(e). *Id.* at 6.

Plaintiff does not directly address these arguments, but rather focuses on the admissibility of the documents to which the affiants refer. Defendants do not dispute the admissibility of these documents. Defendants contend, instead, that the affiants' statements regarding the circumstances surrounding the creation of such documents and the general relationship between the Borough and PP&L during the 1940s, 1950s and 1970s are not based on personal knowledge, as they were not involved with the Borough or PP&L during that time. Hence, defendants argue,

(1) Affidavit of Norbert R. Kosciuk, ¶¶ 3 through 9; and

(2) Affidavit of Frank Borgna, ¶¶ 4 through 6.

William H. Yohn, Jr., Judge

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the affidavits are improper under Rule 56(e) and should be stricken.

In paragraphs three through nine of Kosciuk's affidavit, Kosciuk attempts to provide historical perspective on the relationship between the Borough and PP&L. However, Kosciuk was not involved with either entity prior to June 10, 1996. Def. Mot. to Strike Affidavits Ex. A. Therefore, Kosciuk could not have personal knowledge of this relationship as it existed in the 1940s, 1950s or 1970s. Kosciuk admits that his "statements are based on all the documentation that [he has] reviewed from the borough from way back in the beginning." Def. Mot. to Strike Affidavits Ex. C at 69. Courts in this jurisdiction have stated unequivocally that "an affidavit that substitutes opinions and conclusions for specific facts do not meet the requirements of Rule 56(e)." Thankachen v. Cardone Industries, 1996 WL 84270, at *2 (E.D. Pa. 1996) (citations omitted). Plaintiff concedes in its brief opposing defendants' motion to strike affidavits that "Paragraphs 3 to 9 of the Affidavit of the Borough Manager, Norbert Kosciuk . . . [are] based on documents from the Borough's files, *construed by him*." Pl. Br. in Opp'n to Def. Mot. to Strike Affidavits 6-7 (emphasis added). Kosciuk's interpretations of the documents and speculations as to the motivation for actions taken by the parties in the past, which comprise all of paragraphs three through nine of his affidavit except direct quotes from documents, are improper and will be stricken.

Similarly, paragraphs four through six of Frank Borgna's affidavit are based entirely on his "examination and review of all discussions, communications and all relevant documents" relating to periods before his employment with the borough and exceed the purview of his personal knowledge. Def. Mot. to Strike Exs. B, D. These paragraphs will also be stricken.

Even though defendants have asked the court to strike the entire affidavits of Kosciuk and Borgna, defendants have only presented evidence and arguments about the propriety of certain paragraphs of the affidavits. Only the inappropriate paragraphs of the affidavits will be stricken. *See, e.g., Carey v. Beans*, 500 F. Supp. 580, 583-84 (E.D. Pa. 1980), *aff'd by* 659 F.2d 1065 (3d Cir. 1981)).

The "plain language of the documents," which Kosciuk and plaintiff both contend supports their respective conclusions, will speak for itself. This court will consider the documents attached to both affidavits to be properly authenticated, even though some portions of the affidavit purporting to authenticate them, i.e. ¶¶ 3-9, will be stricken, because defendants do not object to the authentication or the propriety of the court considering these documents for the purposes of the summary judgment motions.

ENTERED

JAN 15 2004

CLERK OF COURT

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the **Response of PPL Electric Utilities Corporation to Petition of Intervenor Borough of Olyphant for Reconsideration and Amendment of Order** on the following parties, listed below in the manner indicated, in accordance with the requirements of § 1.54 (service by a participant).

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Date: January 20, 2004

John H. Isom