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August 11, 2003

VIA OVERNIGHT COURIER

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

DOCUMENT

RECEIVED

AUG 11 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

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

Dear Secretary McNulty:

Enclosed for filing please find an original and three copies of Motion by the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for a Declaratory Order and Petition to Intervene.

I have also enclosed an additional copy of these documents, 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.

CFW:mkm
Enclosures

ORIGINAL

STATE OF PENNSYLVANIA
BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

DOCKETED
AUG 14 2003

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

RECEIVED
AUG 11 2003
PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DOCUMENT

MOTION BY THE BOROUGH OF OLYPHANT TO DENY THE PETITION OF PPL ELECTRIC UTILITIES CORPORATION FOR A DECLARATORY ORDER AND PETITION TO INTERVENE

1. The Borough of Olyphant ("Borough" or "Olyphant") hereby moves the Pennsylvania Public Utility Commission ("PUC") to dismiss the petition of PPL Electric Utilities Corporation ("PPL")[1] for a declaratory order in this docket. PPL originally filed its petition on October 18, 2002; it was removed by Olyphant to the U.S. District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. §§1441(a), 1446, and Rule 11 of the Federal Rules of Civil Procedure. The district court in its Order issued June 27, 2003, did not reach the merits of Olyphant's allegation that PPL's petition before the PUC raises issues regarding federal antitrust laws and the exclusive federal jurisdiction over wholesale sales of power in interstate commerce that should be decided in federal court, but granted a remand solely on the procedural basis that "the case before the PUC may not be removed to federal court because the PUC is not a state court" within the meaning of § 1441(a).

[1] PPL Electric Utilities Corporation claims that it is the successor in interest to PP&L, Inc., which entered the Settlement Agreement and Power Supply Agreements in 1998, approved by the Federal Energy Regulatory Commission in SC97-1-000.

Order at 2-3.

2. The Borough of Olyphant, Pennsylvania hereby petitions to intervene in this proceeding under Rule 5.74. The following persons should be notified of all proceedings in this docket:

Charles F. Wheatley, Jr.
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Annapolis, MD 21401

C.J. Mustacchio
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116 N. Washington Street
Scranton, PA 18503

Attorneys for Borough of Olyphant

3. The Borough of Olyphant respectfully requests (1) that this Commission dismiss PPL's request for a declaratory order on the ground 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 Federal Energy Regulatory Commission, and (2) that the requested declaratory order by PPL involves resolution of genuine issues of disputed fact (now in litigation before the district court) and therefore requires that the Commission schedule a hearing as a condition precedent to any decision on the merits of PPL's request.

I. THE COMMISSION SHOULD DISMISS PPL'S MOTION.

4. In PPL's original petition with the Commission on October 18, 2002, it sought a declaratory judgment on the following issues: (1) whether "the Mid-Valley Industrial Park ("Park") is within PPL's service territory pursuant to a certificate of public convenience issued by the PUC

. . . [and whether] "only the PUC can require PPL to abandon electricity service to customers in the Park"; and (2) whether "any retail customer of PPL in the Borough must continue to pay certain PUC-ordered 'stranded costs,' known as intangible transmission charges ("ITCs") and competitive transmission charges ("CTCs"), previously imposed by the PUC even if the customer were to receive service from the Borough instead of PPL."

5. The Borough's case in federal district court involves the rights of the Borough to compete with PPL for customers located within the Borough under the federal antitrust laws. The Borough has entered into a binding, FERC-approved settlement agreement and power contract requiring PPL to provide wholesale power to Olyphant to meet its full firm requirements for customers served by Olyphant from its municipal electric system within the Borough. What is more, these contracts prohibit the payment of any stranded costs at any time in the future. Accordingly, the PUC should dismiss PPL's petition on each or any of the following bases.

A. Federal Courts Have Exclusive Jurisdiction to Adjudicate the Federal Antitrust Laws.

6. United States District Courts have exclusive jurisdiction over the adjudication and enforcement of the Federal Antitrust Laws, including actions by private parties under Section 4 of the Clayton Act, 15 U.S.C. § 15. *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967); *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964); *Banana Distributors, Inc. v. United Fruit Co.*, 269 F.2d 790 (2d Cir. 1959). The United States Supreme Court has confirmed that private actions to enforce the federal antitrust laws may be brought in federal district courts under Section 4. *General Investment Co. v. Lakeshore and Michigan Southern Ry.*, 260 U.S. 1920 (1922). Neither the state utility commissions nor the FERC has jurisdiction to adjudicate claims arising out of the federal antitrust laws. *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 372-375 (1973), recently

unanimously reaffirmed in *New York, et al. v. FERC, et al.*, 122 S.Ct. 1012, 1016, 152 L.Ed.2d 47, 57 (2002).

7. The pending litigation between the Borough of Olyphant and PPL in the United States District Court in the Eastern District of Pennsylvania directly involves PPL's claims that Olyphant cannot compete with PPL to serve customers through its long-established distribution system, located within the Borough, using wholesale power to which Olyphant is entitled under the 1998 Settlement Agreement, without paying PPL an additional charge for stranded cost. This is an issue directly involving the applicability to PPL of the federal antitrust laws, which the federal district courts have exclusive jurisdiction to adjudicate.

B. The District Court Has Exclusive Jurisdiction to Enforce Final Orders of the FERC

8. Section 317 of the Federal Power Act vests exclusive jurisdiction in the federal district courts of all suits brought to enforce any liability or duty created by an order under the Federal Power Act:

> The District Courts of the United States . . . shall have exclusive jurisdiction of . . . all suits in equity or actions at law brought to enforce any liability or duty created by . . . any rule, regulation, or order thereunder. . . .

16 U.S.C. § 825p. The Borough's complaint in federal district court seeks to enforce the Commission's order approving the Settlement Agreement and Power Supply Agreement against PPL by requiring it to deliver firm electric power to the Borough at wholesale for resale by the Borough to any of its customers located within the Borough during the term of the Contract, without the imposition of any stranded-cost charges on the Borough, either directly or indirectly through the Borough's customers. The Borough also seeks to prevent PPL from in any way seeking to increase the Borough's wholesale cost of power and thereby preclude the Borough from being able to

compete with PPL for service to customers located within the Borough. The meaning and construction of the Settlement Agreement approved in final orders of the FERC in 1998 are thus pending in federal court under that court's exclusive jurisdiction.

9. In *City of Cleveland v. Cleveland Electric Illuminating Co.*, 570 F.2d 123, 128 (6th Cir. 1978) the Court held that the district court has exclusive jurisdiction under 16 U.S.C. § 825p over a claim relating to the rates approved by the FERC (and its predecessor, the Federal Power Commission ("FPC")) in an order approving a contract; *Occidental Chemical Corp. v. Power Authority of the State of N.Y.*, 758 F. Supp. 854, 861 (W.D. N.Y. 1991) (district court had exclusive jurisdiction under 16 U.S.C. § 825p of a complaint that rates affecting the plaintiffs were set by a state agency, in conflict with the requirements of the Federal Power Act relating to wholesale rates). *See also State of California, etc. v. Oroville-Wyandotte Irr. D.*, 411 F. Supp. 361, 367 (E.D. Cal. 1975), *affirmed* 536 F.2d 304 (9th Cir. 1976), *cert. denied*, 429 U.S. 922 (". . .the district courts are empowered pursuant to 16 U.S.C. § 825p to enforce violation of orders of the FPC or suits in equity to enjoin any liability or duty created by an order of the FPC. . ."). In *Montana Dakota Util. Co. v. Northwestern Public Service Co.*, 73 F. Supp. 149, 150 (D. S.Dak.) the Court ruled:

> . . .the Federal Power Act specifies a method for the establishment of the lawful rate at which electric energy can be bought and sold at wholesale in interstate commerce and imposes a statutory duty upon those who thus deal in said commodity to buy and sell the same at the rate thus lawfully established. The imposition of this statutory duty creates a right in those who thus deal in electric energy to purchase or sell the same at the rate established pursuant to the provisions of the Act.

When a federal court, as here, is exercising its exclusive jurisdiction over the enforcement of a prior final FERC order, the PUC lacks jurisdiction to unilaterally change or modify that order. *See* cases in IC, *infra*.

10. The FERC's final 1998 orders relating to the Settlement Agreement and Power Supply Agreement between the Borough of Olyphant and PPL are clearly subject to enforcement by the Borough through resort to the exclusive jurisdiction of the federal district courts under 16 U.S.C. § 825p.

C. PPL's Failure to Apply for Rehearing and Appeal the Prior Final Orders by the FERC Affirming the Settlement Agreement and Power Supply Agreement Bars PPL and the PUC From Now Seeking to Modify and Change that Order to Require the Borough to Pay Stranded Costs.

11. Under Sections 313(a) and (b) of the Federal Power Act, 16 U.S.C. 825ℓ(a) and (b), PPL, if it believed that the FERC's 1998 Orders approving the Settlement Agreement and Power Supply Agreement did not properly delineate the stranded costs that PPL could seek to recover from the Borough or the Borough's customers, was required to file a petition for rehearing within 30 days of the issuance of the FERC Orders and to seek a judicial review within 60 days if the FERC denied such rehearing. This is especially true here where the Power Supply Agreement with the Borough, dated December 8, 1998, was negotiated after PPL had committed to its plan dated August 27, 1998 before the PUC for stranded costs for certain of its retail customers, whom PPL then knew could be subject to service by the Borough under its wholesale Agreements with PPL without "any stranded costs."

12. The FERC itself is barred from vacating its decision when no petition for rehearing is filed and the prior Orders approving the Settlement Agreement and Power Supply Agreement become final. *Hirschey v. FERC*, 701 F.2d 215 (D.C. Cir.1983) (FERC cannot, in the absence of a petition for rehearing or appeal for review of a then-final order, subsequently vacate or amend that order); *see also United States v. Sea Train Lines, Inc.*, 329 U.S. 424 (1947) (final orders under the Interstate Commerce Act preclude the Interstate Commerce Commission from making any

subsequent modifications).

D. The *Mobile-Sierra* Doctrine Prohibits the PUC From Amending the Settlement Agreement and Power Supply Contract to Which Both the Borough and PPL Agreed.

13. PPL's petition to the PUC conflicts with the plain language of the final Settlement Agreement and Power Supply Agreement that it entered with Olyphant. The express language of the Settlement Agreement provides that PPL will not charge any stranded cost to the Borough at any time, and the Power Supply Agreement commits it to provide all of the firm-requirements power to the Borough for any of its customers located within the Borough. PPL's attempt to have the PUC modify or change this plain language violates a long-standing doctrine, the *Mobile-Sierra* doctrine, established by the U.S. Supreme Court. *United Gas Pipeline Co. v. Mobile Gas Corp.*, 350 U.S. 332, 339, 344, 347 (1956); *Federal Power Com. v. Sierra P. P. Co.*, 350 U.S. 348, 353, 355 (1956). These cases held that the FPC (and therefore its successor, FERC) lacks authority to approve any unilateral modification or change to an existing contract relating to electric service between the parties, unless it meets the strict terms of what is now known as the *Mobile-Sierra* burden of proof:

> . . . But, while it may be that the Commission might not normally *impose* upon a public utility a rate that would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. . . . In such circumstances, the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. . . . When § 206(a) is read in the light of this purpose, it is clear that a contract may not be said to be either "unjust" or "unreasonable" simply because it is unprofitable to the public utility. . . .

350 U.S. at 355.

14. This long-standing *Mobile-Sierra* doctrine has never been modified or changed by the Congress, and applies today. The Settlement Agreement and Power Supply Agreement set fixed

rates and terms for PPL to provide all of the power requirements of the Borough for five years for any of its customers served within the Borough. The Power Supply Agreement in Paragraph 14 expressly precludes PPL from filing under Sections 205 or 206 of the Federal Power Act for any unilateral change of any of the express rates and terms and conditions set in that Agreement. Those rates and terms expressly exclude the imposition of "any stranded cost payment" to PPL for any of the requirements power delivered to the Borough for the express purpose of serving any of its customers' requirements that may exist at any time during the contract term. Nothing in the Settlement Agreement or the Power Supply Agreement gives PPL any right to make a unilateral filing with the PUC to change the express rates set in the latter Agreement.

15. The *Mobile-Sierra* doctrine has been reconfirmed in numerous cases. *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 13-15 (D.C. Cir. 2002); *Texaco Inc. v. FERC*, 148 F.3d 1091, 1095 (D.C. Cir. 1998); *Towns of Wellesley, Concord, and Norwood v. FERC*, 786 F.2d 463 (1st Cir. 1986), *mandamus denied* 829 F.2d 275; *New York State Elec. & Gas Corp. v. FERC*, 712 F.2d 762 (2d. Cir. 1983); *Papago Tribal Utility Authority v. FERC*, 620 F.2d 914 (D.C. Cir. 1979); *Public Service Co. of New Mexico v. Federal Power Commission*, 557 F.2d 227 (10th Cir. 1977); *City of Cleveland, Ohio v. FERC*, 525 F.2d 845 (D.C. Cir. 1976); *Borough of Lansdale, Pa. v. FPC*, 494 F.2d 1104, 1110-1117 (D.C. Cir. 1974); *Natural Gas Pipeline Co. v. FPC*, 353 F.2d 3,7 (3d. Cir. 1958), *cert. denied* 357 U.S. 927.

16. In its petition seeking a declaratory order from the PUC, PPL makes no showing whatsoever that its proposed modification would meet the strict *Mobile-Sierra* burden of proof, which has never been addressed by the FERC. Since PPL is in effect seeking a modification of the prior Settlement Agreement by increasing the cost paid by the Borough for power to serve its customers beyond the fixed rates set forth therein, its attempt must be rejected under the *Mobile-*

Sierra doctrine.

E. The PUC Should Reject PPL's Claim that the PUC Can Impose Retail Stranded Costs on Wholesale Power Sold to the Borough for Resale to Meet the Requirements of its Municipal Distribution System Within the Borough.

17. The PUC lacks jurisdiction to impose any retail stranded costs on the Borough or its customers served with wholesale power.

18. The recent unanimous decision by the United States Supreme Court upholding the jurisdiction of the FERC with respect to Order 888 (under which the Settlement Agreement and Power Supply Agreement between PPL and the Borough were reached) is based on exclusive federal jurisdiction which neither the states nor state public utility commissions can affect. *New York v. FERC*, 122 S.Ct. 1012, 152 L.Ed. 2d 47 (2002). In that case, all nine Justices held that the states lacked jurisdiction under controlling federal law to adjudicate any issues involving wholesale sales of power in interstate commerce, such as those involved in PPL's present petition to the PUC.

19. In reaching its decision, the Supreme Court first stated the established distinction between wholesale and retail sales under the Commerce Clause of the Constitution. The Court cited *Public Utility Commission of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83-89 (1927), as holding that the Commerce Clause prohibits state regulation of wholesale electricity in interstate commerce for resale.

> . . . Creating what has been known as the "Attleboro gap," we held this interstate transaction was not subject to regulation by either Rhode Island or Massachusetts, but only "by exercise of the power vested in Congress." *Id.* at 90.

122 S.Ct. at 1017.

20. The Supreme Court then referred to the enactment of the Federal Power Act of 1935, where Congress authorized federal regulation of electricity in areas beyond the Constitutional reach

of state power, such as the gap identified in *Attleboro*. The Supreme Court held that the Act provided a clear, bright line between the authority of the States and federal authority over wholesale power in interstate commerce, citing *FPC v. Southern California Edison Co.*, 336 U.S. 215 (1964). *Id.* at 122 S.Ct. at 1018–19.

21. The Supreme Court next turned to the promulgation of Order 888 by the FERC and the Court of Appeal's decision for the District of Columbia affirming that Order as holding that exclusive federal jurisdiction included wholesale sales for resale. The Supreme Court, in its decision, noted "that no petitioner questions the validity of the Order insofar as it applies to wholesale transactions" and "we agree with FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce." 122 S.Ct. at 1022.

22. Since the 1998 Settlement Agreement and Power Supply Agreement deal with wholesale sales of power for resale that PPL has agreed to sell to the Borough to meet all of the requirements of any of the Borough's customers—whatever they would be for the term of the contract—these wholesale transactions are not subject to any retail rate-making power of the States. The Supreme Court explicitly rejected claims by New York and six other states relating to their attempt to control the transmission of power in interstate commerce, and reconfirmed the long-standing prior law that States have no jurisdiction over wholesale power for resale by entities such as the Borough. Throughout the United States, municipalities have always competed for and served customers desiring to be served through their municipal distribution systems located within their boundaries. To permit a competitor utility system to impose retail costs on such customers after they become customers served by the municipal system through its wholesale-for-resale power would grant the private utility an unlawful, unwarranted *modus operandi* to preclude competition by municipal systems. *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), unanimously

cited in *New York et al. v. FERC et al.*, 112 S.Ct. 1012, 152 L.Ed. 2d 47 at 57, n.6 (2002).

F. The Petition Should Be Dismissed Because It Seeks an Unconstitutional Advisory Opinion Based on Unresolved Disputed Issues of Fact, Now Pending Before the Federal District Court.

23. PPL's petition for declaratory order is based on a number of factual claims that are directly disputed in the district court litigation. *See* Borough's Statement of Facts in II, *infra*. Without the resolution of these disputed factual issues, the PUC, even if it had jurisdiction, is not in a position to decide that PPL has acted properly in insisting that any of its retail customers that would choose to receive their electric power from the Borough's distribution system are subject to PPL's imposition of stranded costs.

24. Without the resolution of these disputed material factual issues, a PUC decision would not be based on a "case or controversy" under Article 3, Section 2, Clause 1 of the Constitution. As described by Mr. Chief Justice Hughes in *Aetna Life Ins. Co. v. Hayworth*, 300 U.S. 227 (1937), such a case or controversy—

> . . . 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. *See Muskrat v. United States*, 219 U.S. 346 . . .; *Texas v. Interstate Commerce Commission*, 258 U.S. 158, 162 . . .; *New Jersey v. Sargent*, 269 U.S. 328, 339, 340 . . .

300 U.S. 241. An opinion not based upon "established facts" is an impermissible "advisory opinion upon a hypothetical basis." *Id.* at 242.

25. Since PPL requests the Commission to issue an opinion based on contested facts which have not been adjudicated or determined, and which it simply assumes to be true, it would be an impermissible advisory opinion which can have no credence in the pending District Court proceeding. For this reason, PPL's petition for declaratory order must be dismissed.

II. PPL'S PETITION ERRS IN REQUESTING A DECLARATORY ORDER FROM THE PUC BASED ON DISPUTED ISSUES OF FACT, WITHOUT PRIOR ADJUDICATION OF THOSE FACTS NOW PENDING IN FEDERAL DISTRICT COURT.

26. **Statement of Facts**

(a) The Borough of Olyphant has owned and operated a municipal distribution system since 1891, serving customers located within the Borough.

(b) PPL has no electric franchise to serve any customers within the Borough. An earlier franchise with a predecessor company, based on limitations of the Borough's then-existing municipal generating plant, never granted any exclusive service rights to the company and was superseded in subsequent power supply agreements between PPL and the Borough where PPL agreed to provide all of the wholesale power requirements of the Borough for any of its customers. The Borough never granted any exclusive franchise to PPL for such service and has sought to compete with PPL for customers within the Borough, to attract potential customers to locate within the Borough, and to retain existing customers.

(c) PPL knew that with the enactment of the Electricity Generation and Customer Choice Act, 66 Pa. Cons. Stat. Ann. § 2805(b)(1)(i) (effective January 1, 1997), boroughs such as Olyphant, having municipal electric systems, had the right to serve all customers located within the Borough limits, if the Borough did not seek to serve customers located outside the Borough limits.

(d) The Borough on December 16, 1997 enacted an Ordinance to exercise its rights under that Act. PPL knew of this prior to entering the Settlement Agreement of January 29, 1998 and the required Power Supply Agreement of December 8, 1998. The Settlement Agreement was intended to resolve the extensive litigation before the FERC in Docket SC97-1-000, initiated October 18,

1996. In its order in *Borough of Lansdale et al.*, 77 FERC ¶ 61,045 (1996), the FERC ruled:

> . . . a public hearing shall be held in Docket SC9[7]-1-000 *for the purpose of determining whether PP&L may recover stranded costs from the Boroughs and, if so, in what amount.*

77 FERC ¶ 61,045 at 61,159; emphasis added. A hearing was held before an Administrative Law Judge of the FERC for a number of weeks in 1997-98, which resulted in the Settlement Agreement of January 29, 1998 and the Power Supply Agreement of December 8, 1998.

(e) The Settlement Agreement expressly provided in Article 2.6 that:

> . . . 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 future rights to any such claims.

(Emphasis added.)

Article VI provided for dismissal of FERC Docket No. SC97-1-000 and in Article 6.2 provided:

> . . . 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.*

(Emphasis added.)

Article V of the Settlement Agreement, entitled "PP&L's Commitment to Provide All-Requirements Firm Power Service," provided as follows:

> . . .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.

Provisions of Article III set fixed rates for the all-requirements power to be provided under the Contract for each of the five years. Articles 3.5–3.14.

(f) The Power Supply Agreement of December 8, 1998 expressly incorporated the Settlement Agreement of January 29, 1998 and expressly required PP&L to provide all of Olyphant's

capacity and energy requirements for service to Olyphant's customers in its service territory:

> 3. *Sale of Power.* During the Term of this Agreement [5 years], *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).*

(Emphasis added.) The Power Supply Agreement relieves PP&L from any obligation to provide firm-requirements power to Olyphant for its customers only if Olyphant "seeks to serve customers *beyond its service territory*" (emphasis added). This distinction between territorial and extra-territorial service underscores the parties' intention that PP&L was required to provide firm-requirements power to Olyphant for all the requirements of Olyphant's customers within the Borough during the contract term at the fixed rates specified therein—*i.e.*, without any payment by the Borough to PP&L for "any stranded cost recovery" under Articles 2.6 and 6.2.

(g) The service territory of the Borough includes the entire area within its boundaries.

(h) The Borough serves existing or new customers within its boundaries only by connecting them to the Borough's electric distribution system. It does not serve any customers who are connected and taking electric power from PPL's distribution system. The Borough serves its customers solely with the wholesale power which PPL is required to provide to it under the Settlement Agreement and Power Supply Agreement.

(i) Under the Settlement Agreement and Power Supply Agreement, the Borough has the right to transmission service for its wholesale firm-requirements power directly from the PJM Open Access Transmission Tariff. Power Agreement, Art. 6(a); Settlement Agreement Art. 3.4.

(j) Under the terms of the Settlement Agreement and Power Supply Agreement, the Borough had the right to serve new customers at any time. PPL knew that the Borough had that right

and that PPL was under a duty to provide the firm-requirements wholesale power to the Borough for such loads under the Agreements for the future. The Borough's total customers and loads had increased previously under prior firm-requirements wholesale contracts with PPL.

(k) PPL had no exclusive service territory in the Borough at any time and its loads were not loads that PPL could reasonably expect to continue serving.

(l) Since PPL, in entering the Settlement Agreement with the Borough in 1998, knew that it was obligated under its plain language to provide the wholesale firm-requirements power to the Borough at the fixed rates therein without assessing any stranded cost charges if the Borough served any of PPL's former customers within the Borough, PPL's efforts now to claim it may assess a stranded cost against the Borough or any of its customers directly conflicts with the Borough's rights under the Settlement Agreement and Power Supply Agreement, which specifically bar the collection of "*any stranded cost recovery* or exit fee."

(m) PPL never sought to exclude or restrict the Borough from serving any of PPL's retail customers located within the Borough in the Settlement Agreement; to the contrary, PPL specifically agreed to provide wholesale power to the Borough, for all of the Borough's requirements within the Borough, at fixed prices which expressly excluded "*any* stranded cost recovery." Had the Borough believed that PPL sought to retain an ability to recover retail stranded costs by inserting such language in the Settlement Agreement, the Borough would never have entered the Agreement because it would have improperly barred or impaired the Borough's existing rights to compete with PPL for any of PPL's customers by offering lower-cost power service to such entities.

(n) Each of the PPL customers located in the Borough, or in PPL's other territories where PPL had an exclusive franchise, is entitled to leave PPL's distribution system and become a distribution customer of the Borough, without the Borough or the customer paying any retail

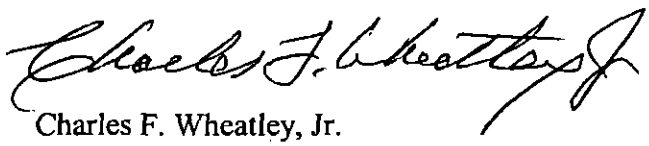
stranded cost to PPL.

15. PPL's petition for a declaratory order improperly seeks the resolution of these disputed issues of material fact by the PUC, without an adjudicatory hearing, discovery, and presentation of witnesses. Absent such procedural due process, no valid basis exists for any determination by the PUC of PPL's request for a declaratory order.

CONCLUSION

16. For the above reasons, the Borough of Olyphant moves to dismiss PPL's petition in this docket.

Respectfully submitted,



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August 12, 2003

Counsel for Borough of Olyphant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion by the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for a Declaratory Order and Petition to Intervene was served by first-class mail this 12th day of August, 2003 to the following:

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ORIGINAL

AUGUST 25, 2003

VIA HAND DELIVERY

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

Re: 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

Dear Secretary McNulty:

Enclosed, for filing, are an original and three (3) copies of the **Response of PPL Electric Utilities Corporation to the Motion By the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for a Declaratory Order and Petition to Intervene** 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, 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 /kmk
David B. MacGregor

DBM/kmk
Enclosure
cc: Certificate of Service

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 the Motion By the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for a Declaratory Order and Petition to Intervene** 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: August 25, 2003

Anthony D. Kanagy

ORIGINAL

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AUG 25 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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-00021980

RESPONSE OF PPL ELECTRIC UTILITIES CORPORATION TO THE MOTION BY THE BOROUGH OF OLYPHANT TO DENY THE PETITION OF PPL ELECTRIC UTILITIES CORPORATION FOR A DECLARATORY ORDER AND PETITION TO INTERVENE

PPL Electric Utilities Corporation ("PPL Electric") hereby submits its response to the Borough of Olyphant's ("Olyphant's") Motion to Deny PPL Electric's Petition for a Declaratory Order (the "Petition") and Olyphant's Petition to Intervene in this proceeding. Olyphant's Motion is plainly defective and should be denied. PPL Electric's Petition seeks only determinations under Pennsylvania law regarding its certificated rights under Chapter 11 of the Public Utility Code and the obligations of its customers to pay retail stranded costs imposed by this Commission under Chapter 28 of the Public Utility Code. The Public Utility Commission clearly has plenary and exclusive jurisdiction over these issues. Olyphant's Motion is particularly deficient because it fails to even disclose that the federal court which rejected Olyphant's attempt to remove this proceeding from the Commission concluded that the issues PPL Electric presents "obviously" relate to the Commission's jurisdiction. As the federal court explained:

> PPL filed a petition with the PUC in which it seeks a declaration of rights regarding its certificate of public convenience and the continued payment of ITCs and CTCs established by PUC order. *Such a declaration is obviously and intimately related to the jurisdiction of the PUC and does not directly implicate federal*

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> *jurisdiction*. Thus, we hold that the interests of Pennsylvania in this matter significantly outweigh federal interests.

Order, *Borough of Olyphant v. Pennsylvania Power and Light Company, et al.*, 2003 WL 21500324 (M.D. Pa. Jun. 27, 2003) (emphasis added) ("Removal Order," attached as Exhibit A).

Contrary to Olyphant's contentions, a declaratory judgment by this Commission of issues within its jurisdiction does not intrude upon the jurisdiction of the federal court, which will ultimately resolve Olyphant's antitrust allegations. PPL Electric's Petition raises no antitrust issues for this Commission to decide. Furthermore, PPL Electric is not asking the Commission to rewrite a Settlement Agreement between PPL Electric and Olyphant that was approved by the Federal Energy Regulatory Commission ("FERC"), as Olyphant asserts; in a separate declaratory judgment proceeding, FERC has already rejected Olyphant's construction of the settlement agreement and recognized that the agreement did not intrude upon this Commission's jurisdiction over retail stranded costs. *See* Order, PPL Electric Utilities Corporation, 101 FERC ¶ 61,370 (December 26, 2002) ("PPL Electric FERC Order," attached as Exhibit B). The Commission should deny Olyphant's Motion in its entirety.[1]

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[1] Although Olyphant's Petition to Intervene accompanying its Motion does not conform to the requirements of 52 Pa. Code § 5.73 by clearly and concisely setting forth the basis of Olyphant's intervention, PPL Electric does not oppose intervention by Olyphant in this proceeding.

PPL Electric responds to the specific paragraphs of Olyphant's Motion to Deny PPL Electric's Petition ("Olyphant Motion") as follows:[2]

1-5. Olyphant errs in concluding that the Commission is without jurisdiction over the Petition because PPL Electric purportedly "raises issues regarding federal antitrust laws" or final orders of FERC. *See* Olyphant Motion, at ¶¶ 1, 3, & 5. PPL Electric is not asking the Commission to adjudicate, in any way whatsoever, federal antitrust claims, or to assess wholesale power transactions or other subjects within the jurisdiction of FERC.

PPL Electric's Petition seeks a declaratory judgment relating solely to issues of state law: (1) whether the Mid-Valley Industrial Park in Olyphant is within PPL Electric's retail electric service territory as certified decades ago by the Commission, and whether Commission assent is required under Pennsylvania law for PPL Electric to abandon service to customers therein; (2) whether any retail customer of PPL Electric must continue to pay intangible transition charges ("ITCs") during the period in which such charges are collected even if such customer were to receive electric service from Olyphant instead of PPL Electric in the future; and (3) whether such customers have a similar obligation to pay competitive transition charges ("CTCs"). The ITCs and CTCs at issue arise out of qualified rate orders ("QROs") issued by this Commission in PPL

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[2] In preparing this response, PPL Electric notes that the Commission's regulations governing formal proceedings, 52 Pa. Code § 5.1 *et seq.*, do not provide for a "motion to deny" a petition. PPL Electric has therefore assumed that Olyphant's Motion is a preliminary motion questioning the jurisdiction of the Commission as permitted by 52 Pa. Code § 5.101(a)(1).

Electric's restructuring proceedings under the Electricity Generation Customer Choice and Competition Act, 66 Pa. C.S. § 2801 *et seq.* ("the Act"). *See* Petition at ¶¶ 32-48.

Olyphant provides no basis for its conclusory statement that PPL Electric's request for a determination of the extent of PPL Electric's certificated territory within Olyphant raises federal antitrust issues or involves any FERC order. *See* Olyphant Motion at ¶¶ 1, 3, & 5. In fact, it has long been settled that the Commission has exclusive jurisdiction to hear complaints concerning disputes over a utility's certificated territory, *see Borough of Lansdale v. Philadelphia Electric Co.*, 170 A.2d 565, 567-68, 403 Pa. 647, 650-652 (1961), and that a utility may not abandon service in certificated territory without Commission approval. *See* 66 Pa. C.S. § 1102(a)(2); *Borough of Grove City v. Pennsylvania Public Utility Commission*, 505 A.2d 346, 353 (Pa. Cmwlth. 1986), *appeal denied*, 528 A.2d 603 (Pa. 1987).

Similarly, the obligations of customers to pay retail stranded costs imposed by this Commission as part of Pennsylvania's transition to retail competition remain within the Commission's jurisdiction. *See, e.g.*, 66 Pa. C.S. § 2812(f)(2) (providing that "[t]he commission has *exclusive jurisdiction* over any dispute arising out of the obligations to impose and collect intangible transition charges of an electric utility") (emphasis added). Olyphant again provides no basis for its claim that PPL Electric's request for a declaratory order of the rights and obligations of its customers with respect to ITCs and CTCs under state law, and the obligation of Olyphant to collect and remit ITCs to a trustee for the benefit of transition bondholders if it begins to provide electric service to PPL Electric customers, *see* Petition at ¶ 40, requires determination of any issues arising under federal antitrust law. *See* Olyphant Motion at ¶¶ 1, 3 & 5.

Even though federal courts have exclusive jurisdiction to enforce the federal antitrust laws, such courts frequently defer to federal and state administrative agencies on issues as to which those agencies have special competence or experience. *E.g.*, *Associated Exchs., Inc. v. Am. Te. & Tel. Co.*, 492 F. Supp. 921, 924-25 (E.D. Pa. 1980) (staying federal antitrust proceeding pending Commission determination); see also *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 305 (1973) (explaining how prior agency adjudication of facts will be "material aid" in antitrust proceeding); *Schuylkill Energy Resources v. Pennsylvania Power & Light Co.*, 1996 WL 32891 (E.D. Pa. Jan. 23, 1996) (staying federal antitrust proceeding pending completion of Commission proceedings) (attached as Exhibit C); *Elkin v. Bell Telephone Co. of Pa.*, 491 Pa. 123, 131-34, 420 A.2d 371, 376-77 (1980) (discussing Pennsylvania doctrine of primary jurisdiction and court referral to administrative agencies).

Olyphant's request that the Commission should now dismiss this proceeding because PPL Electric is purportedly asking the Commission to resolve issues currently in federal court is particularly inapposite since a federal district court has already rejected Olyphant's notice of removal, which relied upon similar arguments to attempt to remove PPL Electric's Petition from the jurisdiction of this Commission. While Olyphant correctly notes that the Court struck its notice of removal because the PUC is not a "state court" as required by 28 U.S.C. § 1441(a), Olyphant fails to acknowledge that the federal district court also concluded that the issues presented by the Petition were "obviously and intimately" related to the jurisdiction of the Commission and did not directly implicate federal jurisdiction. Removal Order, at *2.

Olyphant also asserts that the Commission is without jurisdiction to consider the FERC-approved Settlement Agreement and the Power Supply Agreement between PPL Electric and Olyphant, which Olyphant contends preclude payment of retail stranded costs by PPL Electric customers that may be served by Olyphant in the future. Olyphant Motion, at ¶ 5.[3] However, PPL Electric is not asking the Commission to enforce, modify, interpret or change any FERC order, or to interpret the FERC-approved Settlement Agreement or the Power Supply Agreement, but only to confirm the obligations of PPL Electric customers to pay retail stranded costs under state law and the Commission-approved QROs. *See* Petition, at ¶¶ 37-41 & 45-48.

Notably, Olyphant fails to disclose that PPL Electric has no reason to seek a ruling from this Commission that the FERC-approved Settlement Agreement does not address retail stranded costs since Olyphant's interpretation of the Settlement Agreement has already been rejected in a declaratory judgment proceeding before FERC. *See generally* PPL Electric FERC Order. In that proceeding, PPL Electric requested FERC to confirm that the FERC-approved Settlement Agreement between PPL Electric and Olyphant did not address retail stranded cost obligations of PPL Electric customers under Pennsylvania law and orders of this Commission.[4] Olyphant – as here – requested that FERC not exercise its jurisdiction because of pending federal court action or, in the alternative, confirm that the FERC-approved agreement prevented PPL Electric from

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[3] The Settlement Agreement and Power Supply Agreement were entered into by PP&L, Inc., the predecessor to PPL Electric.

[4] PPL Electric filed its petition for a declaratory order at FERC on October 18, 2002, contemporaneously with its Petition in this proceeding.

recovering retail stranded costs. FERC rejected Olyphant's request that it not exercise its jurisdiction, and then rejected Olyphant's interpretation of the Settlement Agreement:

> The Settlement Agreement states, in relevant part, that PPL "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." In return, the parties agreed to execute new wholesale supply agreements. Because the parties to the Settlement Agreement were PPL's wholesale requirements customers (who initiated the proceeding in which the Settlement Agreement was approved to pursue their rights to wholesale services), we clarify, here, that *the Settlement Agreement does not address – and thus would not limit or preclude – PPL's ability to recover retail stranded costs from its existing retail customers.*

Id. at ¶ 14 (emphasis added). Furthermore, FERC clearly recognized that the Commission had jurisdiction over the retail stranded costs imposed by the Commission's orders. *Id.* at ¶ 15 (explaining that retail stranded costs were imposed by this Commission in separate proceedings, and that FERC is not addressing obligations under that "state-issued" order). Thus, there is no basis for this Commission to conclude that it is without jurisdiction over PPL Electric's Petition.

Olyphant also fails to show any reason for the Commission to schedule a hearing prior to its decision on the merits of PPL Electric's Petition. Although Olyphant contends that the Petition involves "genuine issues of disputed fact," it entirely fails to show how any such disputed fact is material to resolving PPL Electric's Petition. Olyphant does not – and cannot – show that the Commission ever rescinded or modified the certificate of convenience issued by this Commission permitting PPL Electric to serve customers in Olyphant. *See* Petition, at ¶¶ 20 & 28-30. Similarly, the obligations of PPL Electric customers require the Commission to consider only the Act and the QROs it issued. *See id.* at ¶¶ 37-41 & 45-48. For these reasons, Olyphant's Motion, including its request for a hearing, should be denied in its entirety.

6-7. The federal antitrust case law cited by Olyphant and its characterization of the antitrust issues in its federal complaint are irrelevant to this proceeding because PPL Electric's Petition does not present any issues arising under federal antitrust laws, as discussed *supra*. Furthermore, PPL Electric's Petition regarding retail stranded costs does not seek in any way to address Olyphant's claims that it cannot compete with PPL Electric; rather, it seeks to determine the obligations of PPL Electric customers with respect to retail stranded costs under state law. *See* Petition, at ¶¶ 32-48.

8-10. The case law cited by Olyphant relating to enforcement of FERC orders and Olyphant's characterization of its federal complaint, the Settlement Agreement, and the Power Supply Agreement are irrelevant to this proceeding because PPL Electric seeks a determination of PPL Electric customer obligations to pay retail stranded costs under Pennsylvania law and orders of this Commission. PPL Electric does not seek to change, modify, interpret, or enforce any order of FERC, the Settlement Agreement or the Power Supply Agreement, as discussed *supra*. PPL Electric further states that Olyphant is plainly not seeking to enforce a FERC order in federal court, but to impose its view of the "meaning and construction of the Settlement Agreement," Olyphant Motion at ¶ 8, upon PPL Electric to preclude recovery of retail stranded costs – an interpretation FERC has already rejected. *See generally* PPL Electric FERC Order.

11-12. The case law cited by Olyphant relating to the finality of FERC orders, its characterization of the Settlement Agreement and the Power Supply Agreement, and its claim that PPL Electric was required to seek rehearing or judicial review of the Settlement Agreement and Power Supply Agreement are irrelevant to this proceeding. PPL Electric's Petition seeks a determination of PPL Electric customer obligations to pay

retail stranded costs under Pennsylvania law and orders of this Commission, and PPL Electric does not seek to modify or change any FERC order, the Settlement Agreement, or the Power Supply Agreement, as discussed *supra*. Contrary to Olyphant's contention that PPL Electric believes the Settlement Agreement "did not properly delineate" retail stranded costs, the Settlement Agreement did not address those costs at all, and FERC has so held. *See generally* PPL Electric FERC Order.

13-16. Olyphant's reliance upon the *Mobile-Sierra* doctrine and related case law is irrelevant because PPL Electric does not seek to modify or change any FERC order, the Settlement Agreement, or the Power Supply Agreement, as discussed *supra*. PPL Electric further states that it is Olyphant, not PPL Electric, that is attempting to modify the Settlement Agreement to preclude recovery of retail stranded costs – an interpretation of the Settlement Agreement that has already been rejected by FERC. In addition, any stranded costs due from PPL Electric customers who subsequently choose to take service from Olyphant instead of PPL Electric do not constitute an "increase" in the cost of power that will be supplied to those customers, *see* Olyphant Motion at ¶ 16; stranded costs paid by those customers are for "costs previously incurred or obligated in a regulated environment" and are "not meant to pay for costs associated with the current delivery or generation of electricity." *ARRIPA v. Pennsylvania Public Utility Commission*, 792 A.2d 636, 667 (Pa. Cmwlth. 2002).

17-22. Olyphant's arguments relating to FERC Order 888 and the limits of the Commission's jurisdiction with respect to wholesale sales of power are irrelevant because PPL Electric's Petition seeks a determination of obligations with respect to retail stranded costs under Pennsylvania law and orders of this Commission and does not involve

wholesale power transactions. As discussed *supra*, PPL Electric's Petition seeks confirmation that current PPL Electric customers will continue to owe the retail stranded costs imposed by this Commission as part of Pennsylvania's transition to retail competition, and that if such customers were to take electric service from Olyphant, Olyphant would have an obligation to collect and remit ITCs directly to a trustee for the benefit of transition bondholders. *See* Petition, at ¶¶ 32-40. The stranded costs imposed by this Commission and owed by PPL Electric customers have no nexus to the FERC-mandated transmission access addressed in FERC Order No. 888, and are not meant to pay for the current delivery or generation of electricity. *See id.*

Olyphant again fails to note that FERC has already disagreed with Olyphant's contentions regarding the scope of FERC Order 888. In rejecting Olyphant's interpretation of the Settlement Agreement, FERC expressly stated that Olyphant's assertion that Order 888 governed retail stranded costs imposed by this Commission was "not contemplated by our policies regarding the recovery of stranded costs under Order No. 888." PPL Electric FERC Order, at ¶ 15.[5] Thus, there is no basis to conclude that this Commission is without jurisdiction over the retail stranded costs it has already imposed in accordance with Pennsylvania law.

23-25. PPL Electric denies that its Petition is based on any genuine issues of material fact in dispute in the district court litigation. In any case, there is no basis in law

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[5] Although Olyphant has sought rehearing of FERC's decision, Olyphant's assertion of its interpretation of the Settlement Agreement without reference to FERC's rejection of that interpretation is inexplicable and inexcusable.

for Olyphant's contention that this Commission is "not in a position," Olyphant Motion at ¶ 23, to determine whether PPL Electric customers must pay retail stranded costs under Pennsylvania law. The Commission is empowered to determine and adjudicate any facts that are material to resolving PPL Electric's Petition, and PPL Electric has not requested that the Commission avoid adjudicating or determining any material fact. *See, e.g.*, 66 Pa. C.S. § 335(c)(1) (providing that Commission decisions shall include findings and conclusions "on all material issues of fact, law or discretion").

26. Olyphant cites no legal basis whatsoever for its claim that this Commission must await adjudication of facts by a federal district court in order to resolve the Petition which, as discussed *supra*, does not request that this Commission address any issues arising under federal antitrust law or final orders of FERC. Furthermore, Olyphant entirely fails to show how PPL Electric's Petition "improperly" seeks resolution of disputed issues of material fact, or why a hearing is necessary in the absence of such material disputes. Olyphant has already needlessly delayed this proceeding with its meritless notice of removal, and Olyphant's Motion provides no basis for further delay in resolving PPL Electric's Petition.

Although the facts alleged by Olyphant are not relevant to this proceeding, PPL Electric responds to Olyphant's factual allegations set forth in its Motion as follows:

(a) PPL Electric admits the allegation in paragraph (a) that Olyphant has owned and operated a municipal distribution system serving customers located within Olyphant; PPL Electric lacks knowledge or information sufficient to admit or deny that Olyphant has owned and operated this system since 1891.

(b) PPL Electric denies that it is without a franchise to serve any customers within Olyphant, and states that the exclusivity of its franchise is not relevant to this proceeding. PPL Electric admits that Olyphant has sought to attract potential customers to locate within its borders, and to retain existing customers; PPL Electric lacks knowledge or information sufficient to admit or deny that Olyphant has competed with PPL Electric for customers within its borders.

(c) Paragraph (c) implies a legal conclusion to which no response is required. To the extent a response is required, PPL Electric denies the allegations of paragraph (c).

(d) PPL Electric admits that Olyphant enacted an ordinance on December 16, 1997, that the Settlement Agreement was intended to resolve litigation before FERC in Docket SC97-1-000, initiated October 18, 1996, and that a hearing was held before an Administrative Law Judge of the FERC in 1997-98. PPL Electric also admits that the FERC issued an order providing for that public hearing, which speaks for itself. PPL Electric otherwise denies the remainder of the allegations of paragraph (d).

(e) PPL Electric admits that the Settlement Agreement, which speaks for itself, contains the text quoted by Olyphant. The remainder of paragraph (e) implies a legal conclusion, to which no response is required.

(f) Paragraph (f) purports to state legal conclusions to which no response is required. To the extent a response is required, PPL Electric denies the allegations of paragraph (f).

(g) PPL Electric denies that Olyphant has a "service territory"; PPL Electric admits that Olyphant has certain rights to serve customers within its territorial boundaries.

(h) PPL Electric admits the first two sentences of paragraph (h). PPL Electric lacks knowledge or information sufficient to admit or deny the allegations of the third sentence of paragraph (h).

(i) Paragraph (i) purports to state a legal conclusion to which no response is necessary. To the extent that a response is required, PPL denies the allegations of paragraph (i).

(j) The first sentence of paragraph (j) purports to state a legal conclusion to which no response is necessary; to the extent that a response is required, PPL Electric denies the allegations in the first sentence of paragraph (j). PPL Electric lacks knowledge or information sufficient to admit or deny the allegations of the third sentence of paragraph (j). PPL Electric denies the remainder of the allegations of paragraph (j).

(k) PPL Electric denies the allegations of paragraph (k); to the extent Olyphant alleges that PPL Electric does not have an exclusive franchise within Olyphant, PPL Electric states that the exclusivity of its franchise is not relevant to this proceeding.

(l) Paragraph (l) purports to state a legal conclusion to which no response is necessary. To the extent that a response is required, PPL denies the allegations of paragraph (l).

(m) PPL Electric admits that it did not seek to exclude or restrict Olyphant from serving any of PPL Electric's retail customers located within Olyphant in the Settlement Agreement. PPL lacks knowledge or information sufficient to admit or deny the allegations of the second sentence of paragraph (m), except that PPL Electric states that the Settlement Agreement's provisions relating to stranded costs addressed only wholesale stranded costs; otherwise PPL Electric denies the allegations of paragraph (m).

(n) Paragraph (n) purports to state a legal conclusion to which no response is necessary. To the extent that a response is required, PPL denies the allegations of paragraph (n).

WHEREFORE, PPL Electric respectfully requests that the Commission deny Olyphant's Motion to Deny PPL Electric's Petition for a Declaratory Order in its entirety.

Respectfully submitted,

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Date: August 25, 2003

C
Only the Westlaw citation is currently available.

United States District Court,
M.D. Pennsylvania.

BOROUGH OF OLYPHANT, Plaintiff
v.
PENNSYLVANIA POWER & LIGHT COMPANY; PPL Corporation; PPL Electric Utilities Corporation; and PPL Generation, LLC, Defendants

No. 3:01 CV 2308.

June 27, 2003.

Borough filed petition with state Public Utilities Commission (PUC) seeking declaratory judgment on matters concerning service provided by electric utility. After utility filed notice of removal to federal court, borough moved to strike the notice of removal and/or for a remand to the PUC. The District Court, Munley, J., held that the PUC was not a "state court," and therefore the borough's petition could not be removed to federal court.

Ordered accordingly.

West Headnotes

Removal of Cases 9
334k9

State Public Utilities Commission (PUC) was not a "state court," and therefore borough's petition with the PUC seeking declaratory judgment on matters concerning service provided by electric utility could not be removed to federal court. 28 U.S.C.A. § 1441.

Sal Cognetti, Jr., Foley, Cognetti & Comerford, Scranton, PA, for Defendants.

Cosmo J. Mustacchio, Scranton, PA, Charles F. Wheatley, Jr., Annapolis, MD for Borough of Olyphant.

Edward H. Rippey, Covington & Burling, Washington, DC, Glen R. Stuart Morgan Lewis & Bockius, Philadelphia, PA for PPL Corp.

MEMORANDUM

MUNLEY, District Judge.

*1 Before the Court is defendants' Motion to Strike Notice of Removal and/or to Remand to State Agency and for an Award of Costs. Defendants are Pennsylvania Power & Light, PPL Corporation, PPL Electric Utilities Corporation, and PPL Generation, LLC (collectively "PPL"). Plaintiff is the Borough of Olyphant. PPL's motion has been fully briefed and is ripe for disposition. For the reasons that follow, we will grant its motion to strike Olyphant's Notice of Removal and deny its motion for an award of costs.

I. Background

PPL filed a petition with the Pennsylvania Public Utilities Commission ("PUC") on October 17, 2002. In that petition, PPL seeks declaratory judgment on the following issues: (1) whether "the Mid-Valley Industrial Park ("Park") is within PPL's service territory pursuant to a certificate of public convenience issued by the PUC ..." and [whether] "only the PUC can require PPL to abandon electricity service to customers in the Park;" and (2) whether "any retail customer of PPL in the Borough must continue to pay certain PUC-ordered "stranded costs," known as intangible transition charges ("ITCs") and competitive transition charges ("CTCs"), previously imposed by the PUC even if the customer were to receive service from the Borough instead of PPL." (PPL Br. at 2). The PUC Office of Trial Staff ("OTS") answered PPL's petition on October 28, 2002. In its answer, the OTS recommends that the PUC enter an order in PPL's favor. (PPL Br., Ex. A at 5).

On November 12, 2002, Olyphant filed Notice of Removal of the PUC proceeding to this Court pursuant to 28 U.S.C. § § 1441(b), 1446, and Rule 11 of the Federal Rules of Civil Procedure. In its removal notice, Olyphant alleges that PPL's petition before the PUC raises issues regarding federal antitrust law that should be decided in federal court. In response to Olyphant's removal notice, PPL has filed the instant motion pursuant to 28 U.S.C. § 1447(c), arguing, among other things, that cases may not be removed to federal court from state administrative agencies, such as the PUC.

II. Discussion

The PUC is not a state court, and therefore 28 U.S.C. § 1441 does not permit removal of cases before it to federal court. The removal statute 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. All doubts concerning the removal of a case should be resolved in favor of remand. *Abels v. State Farm*, 770 F.2d 26, 29 (3d Cir.1985). In this matter, there is little doubt that the case before the PUC may not be removed to federal court because the PUC is not a state court. *See Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1267 (3d Cir.1994) (holding that the Pennsylvania Board of Vehicles, a state administrative agency, was not a state court and declining to exercise jurisdiction over a removed case).

Olyphant argues that the PUC is the functional equivalent of a state court and should be treated as such for the purposes of removal. It urges that we follow the lead of the Seventh Circuit in *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100, 1102 (7th Cir.1979) and employ a "functional test" to determine the equivalency of the PUC to a state court. *Floeter* held that cases could be removed from state administrative agencies if those agencies are "vested with 'judicial power.' " *Id.* at 1102 (internal citations omitted). In making such a determination, *Floeter* evaluated the "functions, powers, and procedures of the state tribunal" in conjunction "with the respective state and federal interests in the subject matter and in the provision of a forum." *Id.*

*2 At the outset, we note that the Third Circuit has questioned the validity of the functional test and its adoption in other circuits. *See Sun Buick*, 26 F.3d at 1263, 1264 (stating "We have found no case from the Supreme Court, nor have the parties cited one, holding that a case can be removed from an administrative agency to federal court on the grounds that the administrative agency is functionally a court."); *see also DeLallo v. Teamsters Local Union*, 1994 WL 423873 (E.D.Pa. Aug. 12, 1994) (predicting Third Circuit would refuse to adopt functional test if squarely presented with the issue). Nevertheless, the functional test is of no help to Olyphant's removal argument as the PUC is not vested with state judicial power.

The PUC is an administrative body vested with the power to regulate public utilities doing business within the Commonwealth, and in furtherance of that charge it may make necessary regulations and enforce those regulations. 66 PA. CONS. STAT. § 501(a)(b). Such regulatory powers, as *Sun Buick* noted with regard to the Pennsylvania Board of Vehicles, are those of an administrative agency, not a court. *Sun Buick*, 26 F.3d at 1264-65. These powers alone indicate that the PUC is not the equivalent of a state court. *Id.* at 1265- 67. Moreover, the PUC has limited ability to award damages and injunctive relief. It can award damages of no more than $1,000 and must invoke the power of the Commonwealth's courts when seeking to enforce the Public Utility Code or one of its orders or regulations. *Feingold v. Bell of Pennsylvania*, 477 Pa. 1, 383 A.2d 791, 794 (1977); 66 PA. CONS. STAT. § § 502, 3301(a). An administrative agency cannot be the functional equivalent of a court if it does not have the power to grant relief available from a court. *Sun Buick*, 26 F.3d at 1265 (citing *Proffitt v. Comm'rs, Township of Bristol*, 754 F.2d 504, 506-07 (3d Cir.1985) *abrogated on other grounds by Hallstrom v. Tillamook County*, 493 U.S. 20, 25 n. 2, 110 S.Ct. 304, 107 L.Ed.2d 237 (1989)). All of these factors lead us to hold that the PUC is not the equivalent of a state court.

With regard to the weight of state and federal interests, Pennsylvania has a significant interest in resolving matters before the PUC without interference from the federal courts. As noted above, PPL filed a petition with the PUC in which it seeks a declaration of rights regarding its certificate of public convenience and the continued payment of ITCs and CTCs established by PUC order. Such a declaration is obviously and intimately related to the jurisdiction of the PUC and does not directly implicate federal jurisdiction. Thus, we hold that the interests of Pennsylvania in this matter significantly outweigh federal interests. [FN1]

III. Conclusion

For the above stated reasons, we will grant PPL's motion to strike Olyphant's Notice of Removal and deny its motion for costs. An appropriate order follows.

ORDER

AND NOW, to wit, this _____ day of June 2003, it is hereby **ORDERED** that defendants'

Motion to Strike Notice of Removal and/or to Remand to State Agency and for an Award of Costs (Doc. 63) is **GRANTED** in part and **DENIED** in part, as follows:

*3 1. Defendants' Motion to Strike Notice of Removal is **GRANTED**; and

2. Defendants' Motion for an Award of Costs is **DENIED.**

> FN1. PPL also moves for all costs and attorney's fees associated with Olyphant's Notice of Removal. Given the relative lack of law on the removal of cases from state administrative agencies, we decline to award costs and attorney's fees to PPL.

2003 WL 21500324, 2003 WL 21500324 (M.D.Pa.)

END OF DOCUMENT

FEDERAL ENERGY REGULATORY COMMISSION
*1 Commission Opinions, Orders and Notices

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell

PPL Electric Utilities Corporation

Docket No. EL03-16-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued December 26, 2002)

1. On October 18, 2002, PPL Electric Utilities Corporation (PPL) filed a petition for a declaratory order pursuant to section 206 of the Federal Power Act (FPA), [FN1] concerning the scope of a Settlement Agreement entered into between PPL and the Borough of Olyphant, Pennsylvania (Olyphant), among others. [FN2] PPL requests an order from the Commission stating that if Olyphant, a municipal utility and a wholesale customer of PPL, secures the right to provide electric service to certain of PPL's existing retail customers, the Settlement Agreement would not address (and would not otherwise govern) the obligation of those retail customers to pay retail stranded costs to PPL. For the reasons discussed below, we will grant PPL's petition. The Settlement Agreement, while addressing PPL's rights to recover wholesale stranded costs from the parties to that proceeding, including Olyphant, does not address PPL's rights to recover retail stranded costs from its existing retail customers, who were not parties to the Settlement Agreement.

Background

2. PPL states that in May, 1996, Olyphant filed a petition with the Commission, pursuant to section 211 of the FPA, seeking to require PPL to provide an unbundled transmission service to Olyphant following the termination of the parties' then-existing wholesale requirements service agreement. PPL states that an order addressing Olyphant's petition was issued by the Commission in Borough of Lansdale et al, [FN3] in which we dismissed Olyphant's section 211 request for transmission service as moot, given: (1) the issuance of Order No. 888; [FN4] (2) PPL's subsequent filing of an open access transmission tariff; and thus (3) the entitlement of Olyphant to obtain the requested service without recourse to the procedures specified under section 211. In addition, PPL states that the Commission, in its order, set for hearing PPL's entitlement to recover wholesale stranded costs from Olyphant in the event that PPL's wholesale bundled service to Olyphant was terminated.

3. PPL states that the Settlement Agreement addressed all issues set for hearing in the Stranded Cost Order by requiring Olyphant, upon termination of its then-current service agreement, to enter into a new five-year power supply agreement with PPL. In return, PPL states that it agreed to waive its "right to seek[] any stranded cost recovery or exit fee against any of the parties to th [e] Settlement Agreement."

4. PPL states that while the Settlement Agreement resolved all issues relating to its wholesale stranded cost claims, the stranded cost obligations of PPL's retail customers were separately addressed by the Pennsylvania Public Utility Commission (Pennsylvania Commission). PPL states that in April, 1997, it applied to the

Pennsylvania Commission for approval of a restructuring plan that included a request for the recovery of certain costs that it claimed had become stranded due to the enactment of Pennsylvania's retail unbundling statute. [FN5] PPL states that on August 27, 1998, the Pennsylvania Commission issued an order authorizing PPL to collect up to $2.97 billion in stranded costs from all retail customers located in its certificated service territory, as of the effective date of Pennsylvania's retail unbundling.

*2 5. PPL states that among the retail customers from whom it is entitled to collect retail stranded costs are approximately 75 customers located in an Industrial Park within PPL's existing service territory. PPL states, that since 1997, however, Olyphant has been taking steps to acquire these customers and has filed a lawsuit relating to these matters in the United States District Court for the Middle District of Pennsylvania. PPL states that in its lawsuit, Olyphant has alleged, among other things, that the Settlement Agreement frees PPL's retail customers from their obligations to pay retail stranded costs if these retail customers terminate their service from PPL and become, instead, customers of Olyphant.

6. To clarify the intended reach of the Settlement Agreement, under these circumstances, PPL seeks confirmation that the Settlement Agreement addresses only the wholesale stranded cost obligations of the parties to that agreement, including Olyphant, and do not affect the retail stranded cost obligations of PPL's retail customers (who were not parties to the Settlement Agreement). PPL asserts that a contrary ruling, as advocated by Olyphant, would have the unbargained for (and wholly illogical) consequence of shifting costs now paid by PPL's retail customers in the Industrial Park to other retail customers in PPL's service territory. PPL further argues that such an interpretation of the Settlement Agreement would undermine the retail stranded cost compensation plan approved by the Pennsylvania Commission on which the Pennsylvania Commission, PPL, and PPL's retail customers throughout its service territory have justifiably relied.

Notice of Filing and Responsive Pleadings

7. Notice of PPL's petition was published in the Federal Register, [FN6] with interventions and protests due on or before November 18, 2002. Motions to intervene and protests were timely filed by Olyphant and the PP&L Industrial Customer Alliance (Industrial Customers).

8. In its protest, Olyphant requests that the Commission not rule on PPL's petition, because PPL should not be permitted to fragment the body of issues now pending in Olyphant's district court action against PPL (in which the meaning of the Settlement Agreement is directly at issue). In the alternative, Olyphant asserts that even if PPL does have standing to seek such a clarification, the Settlement Agreement, on its face, precludes PPL from seeking to recover stranded costs applicable to Olyphant's wholesale purchases (regardless of the loads served by these purchases and their existing status under Pennsylvania law).

9. Industrial Customers take no position regarding the meaning of the Settlement Agreement. However, Industrial Customers assert that in interpreting the Settlement Agreement, the Commission should not also interpret PPL's retail stranded cost obligations under Pennsylvania law.

10. On December 3, 2002, PPL filed an answer addressing the protest and comments submitted by Olyphant and Industrial Customers.

Discussion

A. Procedural Matters

*3 11. Pursuant to Rule 214 of the Commission's Rules of Practice of Procedure, [FN7] the timely, unopposed motions to intervene filed by Olyphant and Industrial Customers serve to make these entities parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, [FN8] prohibits an answer to a protest, unless otherwise permitted by the decisional authority. We are not persuaded to accept PPL's answer and therefore will reject it.

B. Analysis

12. We reject Olyphant's request that the Commission decline to rule on PPL's petition. In disputes involving contract claims over which we have jurisdiction under the FPA, but which are also pending in another forum, the Commission has considered three factors governing its application of its primary jurisdiction:

> Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts [or in federal courts as a diversity jurisdiction claim or federal law claim] depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) whether the case is important in relation to the regulatory responsibilities of the Commission.[[FN9]]

13. Here, we find that PPL's petition satisfies the first of these three factors. The Settlement Agreement, which PPL asks us to interpret, was approved by the Commission; it was entered into by the parties as a result of the evidentiary hearing procedures established by the Commission in the Stranded Cost Order and was negotiated and agreed to by the parties following the development of an extensive record in that proceeding. The issues addressed in the Settlement Agreement, moreover, are directly related to the stranded cost policies and guidelines set forth by the Commission in Order No. 888, where among other things, we delineated the distinction between wholesale and retail stranded costs. [FN10] Accordingly, we will exercise our primary jurisdiction, here, and thus clarify the scope of the Settlement Agreement, as requested.

14. The Settlement Agreement states, in relevant part, that PPL "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." [FN11] In return, the parties agreed to execute new wholesale supply agreements. Because the parties to the Settlement Agreement were PPL's wholesale requirements customers (who initiated the proceeding in which the Settlement Agreement was approved to pursue their rights to wholesale services), we clarify, here, that the Settlement Agreement does not address - and thus would not limit or preclude - PPL's ability to recover retail stranded costs from its existing retail customers. [FN12]

*4 15. PPL's entitlement to recover retail stranded costs from its existing retail customers was the subject of a separate proceeding before the Pennsylvania Commission, which resulted in a final order dated August 27, 1998. While we are not asked to address (and do not address) PPL's obligations under that state-issued order, we do note that Olyphant's strained interpretation of the Settlement Agreement would effectively nullify that order in a way not contemplated by the Settlement Agreement and not contemplated by our policies regarding the recovery of stranded costs under Order No. 888.

The Commission orders:

PPL's petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

(SEAL)

Linwood A. Watson, Jr.

Deputy Secretary

FN1. 16 U.S.C. § 824e (2000).

FN2. See Letter Order, Borough of Lansdale et al., Docket No. SC97-1-001 (May 29, 1998).

FN3. 77 FERC ¶ 61,045 (1996) (Stranded Cost Order).

FN4. See Promoting Wholesale Competition Through Open Access Non- Discriminatory Transmission Services by Pubic Utilities and Recovery of Stranded Cost by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,730-32 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and rev'd in part sub nom.Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom., New York v. FERC, 122 S. Ct. 1012 (2002).

FN5. See PPL Petition at 8, citing Electricity Generation and Customer Choice Act, 66 Pa. Cons. Stat. Ann. § § 2801, et seq. (West. Supp. 2001).

FN6. 67 Fed.Reg. 67,169 (2002).

FN7. 18 C.F.R. § 385.214 (2000).

FN8. Id. at § 385.213(a)(2).

FN9. Arkansas Louisiana Gas Company v. Hall, 7 FERC ¶ 61,175, at 61,322, reh'g denied 8 FERC ¶ 61,031 (1979). Accord Southern California Edison Company, 85 FERC ¶ 61,023, at 61,069 (1998); Portland General Electric Company, 72 FERC ¶ 61,009 at 61,021-22 (1995).

FN10. Order No. 888 at 31,814.

FN11. See Settlement Agreement at Article 6.2 (emphasis added).

FN12. In fact, in the Stranded Cost Order, we set for hearing no issues relating to PPL's recovery of retail stranded costs from its existing retail customers, nor were we asked to otherwise address those issues. See Stranded Cost Order, 77 FERC at 61,157 ("Because the [power supply contracts] at issue in this case . . . [do] not contain an exit fee or other explicit stranded cost provision, [and were executed on or before July 11, 1994, they] fall within the category of wholesale requirements contracts for which a utility may seek stranded cost recovery [under Order No. 888]."") (emphasis added). PPL's retail customers, moreover, were not parties to the proceeding.

101 FERC P 61,370, 2002 WL 31975213 (F.E.R.C.)

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Only the Westlaw citation is currently available.

United States District Court, E.D. Pennsylvania.

SCHUYLKILL ENERGY RESOURCES, INC.
v.
PENNSYLVANIA POWER & LIGHT COMPANY.

CIV. A. No. 95-4885.

Jan. 23, 1996.

Mary Huwaldt, Richard Caplan, Michelle Davis, Caplan & Luber, Paoli, PA, for Schuylkill Energy Resources, Inc.

Glen R. Stuart, David B. Mac Gregor, Morgan, Lewis and Bockius, Philadelphia, PA, for Pennsylvania Power & Light Company.

Michelle Davis, Caplan and Luber, Paoli, PA, for Reading Anthracite Company.

MEMORANDUM

CAHN, Chief Judge.

***1** On October 10, 1995, Plaintiff Schuylkill Energy Resources, Inc. ("SER") filed an Amended Complaint alleging federal claims under the Sherman Antitrust Act, 15 U.S.C. § § 1-7 (1994), and several pendant state law claims against Defendant Pennsylvania Power & Light Company ("PP&L"). Currently before the court is PP&L's motion to dismiss the amended complaint. Upon consideration of Defendant's Motion to Dismiss the Amended Complaint, Plaintiff's response thereto, and Defendant's Reply Brief in Support of Motion to Dismiss the Amended Complaint, this court denies the Motion to Dismiss without prejudice and stays the proceedings in this case pending an evaluation by the Pennsylvania Public Utility Commission ("PUC"). In addition, evaluation and resolution of any and all discovery issues are deferred until the PUC completes its evaluation.

I. Background

SER is an independent power producer that owns and operates an anthracite coal refuse powered cogeneration plant in Shenandoah, Pennsylvania that produces approximately eighty megawatts of saleable electricity ("the Plant"). The Plant is a qualifying cogeneration facility ("QF") as defined by the Federal Power Act, 16 U.S.C. § 796(18)(A)-(B) (1994), the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3 (1994), and 52 Pa. Code § 57.31 (1995). Pursuant to PURPA, Federal Energy Regulatory Commission ("FERC") regulations enacted pursuant thereto, 18 C.F.R. § § 292.101-.602 (1995), and regulations promulgated by the PUC, 52 Pa. Code § § 57.31-.39, PP&L is required to purchase electric energy from and sell electric energy to the Plant under certain conditions.

On October 17, 1986, SER and PP&L entered into a twenty-year Power Purchase Agreement to effectuate the electric energy purchase requirements of PURPA and the relevant state regulations. Pursuant to the Power Purchase Agreement, SER is required to sell exclusively to PP&L, and PP&L is required to purchase SER's net energy output up to 79.5 megawatts. PP&L is permitted to purchase less than SER's total energy output only when curtailed purchases are necessary for PP&L "to make repairs, changes, tests or inspections, or for reasons of an actual or potential System Emergency, Forced Outage, Force Majeure or PP&L System operating condition which necessitates such disconnections or curtailments...." (Amended Complaint ¶ 31, quoting Power Purchase Agreement, art. 9, ¶ E.) A "system emergency" is defined in the Agreement as "any condition on the PP&L system or PJM System [FN1] which, in PP&L's opinion, may disrupt service to customers or endanger life or property." (Amended Complaint ¶ 32, quoting Power Purchase Agreement, art. 1, ¶ CC (footnote added).) However, PP&L is not permitted to curtail purchases of SER's energy output "for reasons of economic dispatch." (Amended Complaint ¶ 42, quoting Power Purchase Agreement, art. 9, ¶ E.)

Plaintiff SER alleges that beginning in July, 1994, PP&L began to curtail purchases from SER much more frequently than it had in the past, causing SER to lose a great deal of revenue, to be forced to purchase oil and electricity to keep the Plant operating, and to purchase expensive equipment to minimize physical damage to the Plant during curtailments. (Amended Complaint ¶ ¶ 48, 56, 58.) SER alleges that most of PP&L's curtailments have been for reasons of "economic dispatch" rather than for the reasons permitted under the Power Purchase Agreement. (Amended Complaint ¶ 53.) As a result,

SER alleges six separate claims for relief. [FN2]

*2 Defendant PP&L has moved for dismissal of the Plaintiff's amended complaint on two grounds. First, PP&L argues that the central issues in this case are within the authority and expertise of the PUC such that the PUC, not the district court, should resolve them. Second, PP&L argues that Plaintiff fails to state any claim upon which relief may be granted. This court agrees that the central issues in this case concern matters within the unique expertise of the PUC. However, this court is reluctant to dismiss the amended complaint out of hand. Therefore, this court denies the motion to dismiss without prejudice and stays all proceedings in this case pending an evaluation by the PUC. At this time, this court will refrain from ruling on PP&L's arguments that SER has not stated any claim upon which relief may be granted.

II. Discussion

The Pennsylvania Public Utility Code provides the PUC with broad authority to "supervise and regulate" public utilities doing business in Pennsylvania. 66 Pa. Cons. Stat. § 501(b) (1993). Among other powers, the PUC has authority to review and modify contracts entered into by public utilities. 66 Pa. Cons. Stat. § 508. The PUC is also responsible for ensuring that utilities provide safe and reliable service to their customers. 66 Pa. Cons. Stat. § 1501.

The PUC has promulgated regulations, which basically mirror the FERC regulations, that are of great relevance to this case. PUC regulations require utilities to purchase energy from QFs. 52 Pa. Code § 57.34. However, the PUC excuses utilities from this power purchase requirement under certain circumstances, specifically "during a technical system emergency," *id.* § 57.34(h), which is defined as "[a] condition on a utility's system which is likely to result in imminent significant disruption of service to customers or is imminently likely to endanger life or property." *Id.* § 57.31. Significantly, the PUC regulations provide for informal and formal PUC assistance in the resolution of disputes between an electric utility and a QF "arising from application of this subchapter." *Id.* § 57.39. [FN3] Thus, this court concludes that the PUC has the authority and expertise to deal with disputes between QFs and electric utilities, especially when, as is the case here, the dispute centers on the power purchase requirements of a utility from a QF. [FN4] Therefore, this court has decided to stay proceedings in this case pursuant to the doctrine of primary jurisdiction. [FN5]

This court's decision to stay these proceedings pursuant to the doctrine of primary jurisdiction is supported by substantial federal case law. [FN6] For example, in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), an antitrust action brought against the Chicago Mercantile Exchange for transferring the plaintiff's Exchange membership to another person without notice or hearing, the Supreme Court employed the doctrine of primary jurisdiction in affirming a court of appeals decision directing the district court to stay proceedings to permit the Commodity Exchange Commission the "opportunity for administrative consideration of the dispute." *Id.* at 290-91, 299. The *Ricci* court noted that the Commodity Exchange Commission's evaluation of whether the Exchange's actions were in compliance with Commission rules and regulations would be "a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit." *Id.* at 305. Similarly, in the instant case, a determination by the PUC as to whether PP&L was in compliance with PUC regulations will be of great assistance to the district court in determining whether or to what extent PP&L will be subject to antitrust liability. In *Associated Telephone Answering Exchanges v. American Telephone & Telegraph*, 492 F. Supp. 921 (E.D. Pa. 1980), District Judge Clifford Scott Green applied the doctrine of primary jurisdiction to deny a motion to dismiss an antitrust claim and stay proceedings pending a factual finding by the Pennsylvania PUC. *Id.* at 925. Judge Green wrote that "the threshold question presented by the case, whether [the disputed service] is a telephone service properly subject to PUC regulation, is technical in nature and thus should be decided initially by the PUC, with its 'specialized competence.'" *Id.* In the instant case, the central issues, whether certain curtailments were justified under the terms of the Power Purchase Agreement and whether legitimate system emergencies existed, are also "technical in nature" and therefore should be determined by the PUC, which possesses "specialized competence" in this subject area. Similarly, in *Industrial Communications Systems, Inc. v. Pacific Telephone & Telegraph Co.*, 505 F.2d 152 (9th Cir. 1974), an action against telephone companies that were allegedly combining in violation of antitrust laws, the court reversed the district court's order dismissing the complaint and remanded the case to the district court with instructions to stay antitrust proceedings pending the final outcome of

proceedings before the California Public Utilities Commission. One of the reasons the *Industrial Communications* court employed the primary jurisdiction doctrine was to avail itself of the PUC's knowledge and expertise in the subject matter at issue:

> *3 Another reason for deferring to the PUC is the need to obtain the benefit of that agency's expertise in ascertaining, interpreting and distilling the facts and circumstances underlying the legal issues. Where an agency is charged with responsibility for regulating a complex industry, it is much better equipped than the courts, "by specialization, by insight gained through experience, and by more flexible procedure," to gather the relevant facts that underlie a particular claim involving that industry.

Id. at 157 (quoting *Far East Conference v. United States*, 342 U.S. 570, 575 (1952)). In the instant case, this court would benefit from the PUC's expertise regarding system emergencies and power purchase curtailments. In summary, this court is convinced that under the primary jurisdiction doctrine, proceedings in this case should by stayed pending an evaluation by the PUC.

Conclusion

Plaintiff's allegations regarding PP&L's curtailment of power purchases from SER and other QFs call into question a number issues which should be decided in the first instance by the PUC. The PUC has both the jurisdiction and the expertise to evaluate the merits of Plaintiff's factual claims. Therefore, this court stays proceedings in this case pending an evaluation by the PUC. As noted earlier, the motion to dismiss is denied without prejudice, with leave for Defendant to move for dismissal following the PUC's evaluation. In addition, this court defers all outstanding discovery issues until the PUC has completed its investigation and evaluation. An appropriate order follows.

ORDER

AND NOW, this 22 day of January, 1996, upon consideration of Defendant's Motion to Dismiss the Amended Complaint, Plaintiff's response thereto, and Defendant's Reply Brief in Support of Motion to Dismiss the Amended Complaint, it is hereby ORDERED as follows:

1. the Motion to Dismiss is DENIED without prejudice;
2. the proceedings in this case are STAYED pending an evaluation by the Pennsylvania Public Utilities Commission ("PUC");
3. resolution of any and all discovery issues are deferred until the PUC completes its evaluation.

FN1. PJM is the Pennsylvania-New Jersey-Maryland Interconnection, a power pool maintained by an association of several member electric utilities, including PP&L, that are located throughout the Mid-Atlantic region. PJM member companies sell excess electric generation capacity to PJM, which PJM then sells to other PJM member companies or to other power pools.

FN2. SER alleges two separate antitrust claims under the Sherman Act as well as state law claims of intentional misrepresentation, negligent misrepresentation, breach of contract, and a breach of duty of good faith and fair dealing.

FN3. The particular subchapter referred to is Subchapter C., entitled "Purchase and Sale of Energy and Capacity--Qualifying Facilities."

FN4. This court recognizes the well-settled law in Pennsylvania that "the PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility." *DiSanto v. Dauphin Consol. Water Supply Co.*, 436 A.2d 197, 199 (Pa. Super. 1981) (citations omitted). Therefore, a central question in the case at bar, as it was in *DiSanto*, is as follows:

> [W]hether the facts of this case involve issues, be they contractual or not, concerning the reasonableness, adequacy and sufficiency of public utility service in which case the matter is within the initial jurisdiction of the Pennsylvania Public Utility Commission, or whether the facts of the case constitute only a private contractual dispute between a utility and a citizen concerning non-service related matters over which a court of general jurisdiction is empowered to act.

Id. at 200. This court believes that although contractual issues are certainly disputed in this case, the allegations regarding the existence of system emergencies clearly

implicate issues of the reasonableness, adequacy, and sufficiency of service such that the PUC should have primary jurisdiction in this matter.

FN5. The Supreme Court described the doctrine of primary jurisdiction as follows:
[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over.
Far East Conference v. United States, 342 U.S. 570, 574 (1952). The primary jurisdiction doctrine has also been applied by federal courts to stay proceedings pending review by state regulatory agencies such as the PUC. *See, e.g., Industrial Communications Sys., Inc. v. Pacific Tel. & Tel. Co.*, 505 F.2d 152, 156 (9th Cir. 1974); *Associated Tel. Answering Exchs., Inc. v. American Tel. & Tel. Co.*, 492 F. Supp. 921, 925 (E.D. Pa. 1980).

FN6. Plaintiff has cited several cases in support of its argument that the doctrine of primary jurisdiction is inapplicable in this case and that staying the proceedings would, therefore, be inappropriate. However, the cases cited by Plaintiff do not persuasively support its argument.
In *Crain v. Blue Grass Stockyards Co.*, 399 F.2d 868 (6th Cir. 1968), an antitrust action against a stockyard company that refused to allow a livestock dealer to use its facilities, the court vacated the district court's order granting defendant's motion to dismiss on the ground that the case was within the primary jurisdiction of the Secretary of Agriculture. The court of appeals remanded the case to the district court to determine whether certain regulations, which had not been considered by the district court, presented questions that would require referral to the Secretary or whether such questions could be decided by the district court. *Id.* at 874. The court of appeals, in dictum, stated that "in [its] judgment, it does not require administrative expertise to determine whether plaintiff violated rules and regulations and whether, because of such violation, defendants had the right to and did exclude plaintiff from the facilities and services of the stockyards." *Id.* In the instant case, this court believes that an evaluation of alleged system emergencies and the curtailment of power purchases can best be performed by the PUC. This decision is in accord with the views of the *Crain* court, which stated that "ordinarily where there is a factual dispute the courts will require prior consideration by the appropriate administrative agency." *Id.* at 873.
SER argues that *Litton Systems, Inc. v. Southwestern Bell Telephone Co.*, 539 F.2d 418 (5th Cir. 1976), held that "where the telephone company's own conduct was at issue rather than any active state policy, referral to the PUC under the primary jurisdiction doctrine was inappropriate." (Plaintiff's Opposition to Defendant's Motion to Dismiss at 45, citing *Litton*, 539 F.2d at 423.) SER argues that because the anticompetitive conduct at issue in this case centers on PP&L's alleged violation of the Power Purchase Agreement and improper energy purchase curtailments, staying the action pending evaluation of the PUC would similarly be inappropriate. (Plaintiff's Opposition to Defendant's Motion to Dismiss at 45-46.) However, SER has used the language of the *Litton* court outside of its proper context. In *Litton*, the court was faced with the issue of whether the district court appropriately stayed the proceedings pending an administrative review to aid the court in determining whether the telephone company would qualify for limited state action immunity from antitrust action. *Id.* at 423. In deciding that the doctrine of primary jurisdiction should not have been invoked by the district court, the *Litton* court wrote:
The doctrine of primary jurisdiction was intended to serve judicial accommodation of conflicting regulatory and antitrust policies. Such accommodation is unnecessary in this context, however, because it is Bell's conduct that is being challenged, not the conduct or policy of any state agency or official.
Id. In the instant case, although the conduct of PP&L is at issue, a central question concerns the factual inquiry of whether PP&L properly identified system

emergencies and whether PP&L curtailed energy purchases from SER at appropriate times and in an appropriate manner. The PUC's evaluation of these issues will be of great assistance to the court, a fact which stands in stark contrast to the *Litton* case, in which the court wrote that "[a] direction of prior reference here would seriously impair the ability of the district court to enforce federal antitrust policy without providing sufficient countervailing benefits." *Id.* at 424.

SER also cites *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983), in support of its argument that the proceedings in this case should not be stayed under the primary jurisdiction doctrine. However, *Kirkwood* dealt with the issue of exclusive jurisdiction, which is not at issue in this case. Therefore, SER's reliance on *Kirkwood* is inapposite.

1996 WL 32891 (E.D.Pa.)

END OF DOCUMENT

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SEP 16 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

SEPTEMBER 16, 2003

VIA HAND DELIVERY

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

DOCUMENT

Re: 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

Dear Secretary McNulty:

Enclosed, for filing, are four copies of an order issued by the Federal Energy Regulatory Commission ("FERC") on September 10, 2003, in PPL Electric Utilities Corporation, FERC Docket No. EL03-16-001 (to be published at 104 FERC ¶61,259) (the "Order"). This Order pertains to the FERC proceeding referenced in PPL Electric Utilities Corporation's ("PPL Electric's") response to Olyphant's motion to deny PPL Electric's petition for a declaratory order, which is now pending before this Commission. *See generally* Response of PPL Electric Utilities Corporation to the Motion by the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for a Declaratory Order and Petition to Intervene ("PPL Response").

In its original petition for a declaratory order and in its response to Olyphant's motion, PPL Electric explained that it had filed a separate petition for a declaratory order at FERC regarding the scope of a FERC-approved settlement agreement between PPL Electric and the Borough of Olyphant. *See* Petition of PPL Electric, at ¶ 40 n.3; PPL Response, at ¶¶ 1-5. On December 26, 2002, FERC granted PPL Electric's petition, concluding that PPL Electric's entitlement to recover retail stranded costs approved by this Commission from retail customers is not addressed by the FERC-approved settlement agreement, and recognizing this Commission's jurisdiction over such retail stranded costs. A copy of FERC's December 26, 2002 decision was submitted to the Commission by letter on January 9, 2003.

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Olyphant sought rehearing of FERC's December 26, 2002 decision, and the Order enclosed denies Olyphant's rehearing request. Notably, FERC emphasizes in the Order that the settlement agreement did not address PPL Electric's ability to recover retail stranded costs from its existing retail customers or the obligations of PPL Electric and its retail customers under the orders of this Commission. *See* Order, at ¶¶ 8-9 & 11-12. FERC also explains that in making its rulings, it was not required to decide and did not address any pending antitrust claims brought by Olyphant, but only issues which were within FERC's primary jurisdiction. *Id.* at ¶ 7.

As indicated on the enclosed Certificate of Service, a copy of the FERC order 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 the intervenors (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/ADK

David B. MacGregor

DBM/kmk
Enclosure
cc: Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the order of the Federal Energy Regulatory Commission in PPL Electric Utilities Corporation, issued September 10, 2003 (Docket No. EL03-16-000), 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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104 FERC ¶ 61, 259

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

PPL Electric Utilities Corporation Docket No. EL03-16-001

ORDER ON REHEARING

(Issued September 10, 2003)

1. On January 27, 2003, the Borough of Olyphant, Pennsylvania (Olyphant) sought rehearing of the Commission's December 26, 2002 order issued in this proceeding.[1] For the reasons discussed below, we will deny rehearing.

Background

2. PPL Electric Utilities Corporation (PPL) filed a petition for a declaratory order in this proceeding concerning the scope of a Settlement Agreement entered into between PPL and Olyphant (a wholesale requirements customer of PPL) and PPL's other wholesale requirements customers.[2] Pursuant to the Settlement Agreement, PPL agreed to waive its wholesale stranded costs claims against its wholesale requirements customers. In return, PPL's wholesale requirements customers (Olyphant included) agreed to enter into new wholesale supply agreements with PPL. Meanwhile, in a separate proceeding filed by PPL before the Pennsylvania Public Utilities Commission (Pennsylvania Commission), PPL also litigated its retail stranded costs claims against its retail customers, including approximately 75 retail customers in the Mid-Valley Industrial Park (Industrial Park Customers).

[1] PPL Electric Utilities Corporation, 101 FERC ¶61,370 (2002) (December 26 Order).

[2] The Settlement Agreement was approved by the Commission in a letter order dated May 29, 1998 in Docket No. SC97-1-001.

3. In its petition, PPL requested an order from the Commission stating that if Olyphant secures the right to serve PPL's Industrial Park Customers (PPL's existing retail customers), the Settlement Agreement (which concerns only PPL's wholesale stranded costs claims) does not affect the obligations of the Industrial Park Customers to pay retail stranded costs pursuant to the retail stranded costs order issued by the Pennsylvania Commission.

4. In the December 26 Order, we granted PPL's petition. We noted that under the Settlement Agreement, the parties had agreed to limit PPL's entitlement to recover stranded costs only with respect to those entities who were parties to the Settlement Agreement. We held that because the parties to the Settlement Agreement were PPL's wholesale customers (who initiated the proceeding in which the Settlement Agreement was approved to pursue their rights to wholesale services), the Settlement Agreement could not be construed to apply to PPL's existing retail customers. We also noted that while we were not asked to address (and would not address) PPL's rights and obligations pursuant to the retail stranded costs order issued by the Pennsylvania Commission, Olyphant's interpretation of the Settlement Agreement would effectively nullify that state-issued order in a way not contemplated by the Settlement Agreement and not contemplated by our policies regarding the recovery of stranded costs under Order No. 888.[3]

Olyphant's Request for Rehearing

5. On rehearing, Olyphant raises a number of legal and procedural challenges to the December 26 Order. First, Olyphant argues that the Commission lacked jurisdiction to issue its order. Olyphant submits that the exclusive jurisdiction over the settlement interpretation issues presented by PPL's petition resides in a U.S. District Court where Olyphant is now litigating an antitrust action against PPL. In addition, Olyphant asserts that the Commission was barred from interpreting the scope of the Settlement Agreement

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[3] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pubic Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), order on reh'g, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC ¶ 61,046 (1998), aff'd in part and rev'd in part sub nom.Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), aff'd sub nom., New York v. FERC, 535 U.S. 1 (2002).

pursuant to Section 317 of the Federal Power Act (FPA).[4] Finally, Olyphant submits that the Commission lacked jurisdiction to rule on PPL's petition for a declaratory ruling because the ruling sought by PPL required the Commission to vacate its prior order approving the Settlement Agreement. Olyphant asserts that the Commission is barred from vacating its prior order when no rehearing was filed in that proceeding and the order thus became final and non-appealable.

6. Olyphant further asserts that even assuming that the Commission did have jurisdiction to rule in this matter, the December 26 Order improperly construed and unlawfully modified the Settlement Agreement. Finally, Olyphant asserts as error the Commission's alleged interpretation of the retail stranded costs order issued by the Pennsylvania Commission.

Discussion

7. We will deny Olyphant's request for rehearing. First, we reject Olyphant's assertion that the Commission lacked jurisdiction in this case. In the December 26 Order, we were not required to decide and did not address any antitrust claims asserted by any party or any other issues other than those squarely presented within the four corners of the Settlement Agreement – a matter, which as we held in the December 26 Order, falls within our primary jurisdiction. Nor were we acting in contravention of Section 317 of the FPA by attempting to "enforce" a prior order or "enjoin" any party to that order. We did neither. Finally, Olyphant's argument that the Commission vacated its prior order, is misplaced. We did not vacate our prior order approving the Settlement Agreement.

8. We also reject Olyphant's assertion that the December 26 Order had the effect of modifying the Settlement Agreement. In fact, we held in the December 26 Order that we were only clarifying that the Settlement Agreement did not apply to non-parties to the Settlement Agreement and thus did not address PPL's ability to recover retail stranded costs from its existing retail customers. This clarification, moreover, was based on the express language of the Settlement Agreement, which (as we noted) limits PPL's rights to recover stranded costs only with respect to "parties to this Settlement Agreement." Thus, we did not strike any provision from the Settlement Agreement, nor did we add any new provision, i.e., we did not modify the Settlement Agreement.

9. Olyphant also asserts that the Commission erred in allegedly ruling that PPL can continue to impose retail stranded costs on its existing retail customers, even if these retail customers are subsequently annexed by Olyphant. In fact, however, we made no such ruling. To the contrary, we noted that PPL's entitlement to recover retail stranded costs from its existing retail customers was the subject of a separate proceeding before

[4] 16 U.S.C. § 825p (2000) (enforcement of liabilities and duties).

the Pennsylvania Commission. We stated clearly that we were not asked to address (and would not address) PPL's rights and obligations under this state-issued order.

10. Olyphant also argues that in the December 26 Order, "the Commission effectively modifies the scope of the Settlement Agreement by ruling that it 'does not address—and thus would not limit or preclude—PPL's ability to recover retail stranded costs from its existing retail customers."[5] According to Olyphant, any cost incurred by PPL to provide service to any retail customer that subsequently becomes a customer of Olyphant (by way of annexation) would be a wholesale stranded cost that would fall under the Settlement Agreement, not a retail stranded cost.

11. We disagree that the Settlement Agreement was intended to address PPL's stranded costs associated with its Industrial Park Customers. In Order No. 888, the Commission decided that it would allow state regulatory authorities to address any stranded costs occasioned by retail wheeling. The Pennsylvania Commission did so on August 27, 1998 in a proceeding relating to PPL and PPL's Industrial Park Customers. Accordingly, we stated in the December 26 Order that we were not asked to address (and do not address) PPL's obligations under the final order issued by the Pennsylvania Commission. As we explained, Olyphant's strained interpretation of the Settlement Agreement would effectively nullify that state-issued order in a way not contemplated by the Settlement Agreement and not contemplated by our policies regarding the recovery of stranded costs under Order No. 888.

12. Olyphant's attempt to interject into this proceeding the issue of whether the Settlement Agreement could be construed as applying not only to wholesale stranded costs associated with the wholesale requirements customers who were parties to the Settlement Agreement, but also to any wholesale stranded costs that may result from subsequent municipal annexations, is thus irrelevant. However we might resolve that issue, it would not change our conclusion in the December 26 Order that we were not asked to address (and do not address) PPL's obligations under the state-issued order.

[5] See Request for Rehearing at 21.

The Commission orders:

Olyphant's request for rehearing is hereby denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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October 2, 2003

VIA FIRST-CLASS MAIL

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

Re: Petition ("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 (the "Proceeding").

Dear Secretary McNulty:

As counsel to the Borough of Olyphant, this firm has received a copy of a letter dated September 16, 2003, addressed to the Pennsylvania Public Utility Commission ("PUC") from David B. MacGregor of Morgan, Lewis & Bockius LLP, and enclosing copies of an order issued by the Federal Energy Regulatory Commission ("FERC") on September 10, 2003, in *PPL Electric Utilities Corporation*, FERC Docket No. EL03-16-001 (to be published at 104 FERC ¶ 61,259) (the "FERC Order"). Presumably, PPL is calling this Commission's attention to the FERC Order because PPL regards the Order as relevant to the above-captioned Petition, which is pending before this Commission. The Borough has filed a motion to deny the Petition and a petition to intervene in the Proceeding, both of which are pending.

The FERC Order pertains to a petition for declaratory order filed by PPL with FERC in 2002 seeking interpretation of a FERC-approved settlement agreement among PPL and 14 Pennsylvania boroughs, including Olyphant. On December 26, 2002, FERC granted PPL's petition and concluded that PPL's ability to recover stranded costs from those of its retail customers who may become customers of Olyphant was not addressed by the settlement agreement. Olyphant petitioned for rehearing and, as reported by Mr. MacGregor, the FERC Order denied Olyphant's petition. Olyphant has since filed an appeal of the FERC Order to the United States Court of Appeals for the District of Columbia (copy of appeal enclosed herewith).

It is important to emphasize that not only is the FERC Order not final because of the appeal, but that nothing in the FERC Order is binding upon this Commission and that the Order expressly does not decide the issues which PPL seeks to place before this Commission in the Proceeding. In the FERC Order, FERC made it very clear that in its December 26 Order "we made no ruling" on the question whether "PPL can continue to impose retail stranded costs on its existing retail customers, even if these retail customers are subsequently annexed to Olyphant." FERC Order at ¶ 9. Instead, FERC stated that it would defer such issues to "state regulatory authorities." FERC Order at ¶ 11.

Thus, there is nothing in the FERC Order that dictates to PUC how to rule on PPL's Petition. However, Olyphant would hope that PUC would not make the same mistake as FERC did by ignoring the interplay of federal antitrust law and the doctrine of primary jurisdiction. FERC's explanation that it "did not address any antitrust claims asserted by any party or any other issues other than those squarely presented within the four corners of the Settlement Agreement,...which...falls within our primary jurisdiction," completely ignores that interplay and the line of cases holding that the doctrine of primary jurisdiction cannot be used to encroach upon the exclusive jurisdiction of the federal courts to decide issues arising under federal antitrust laws. *See* Motion by the Borough of Olyphant to Deny the Petition of PPL Electric Utilities Corporation for a Declaratory Order and Petition to Intervene, filed August 12, 2003, at 3-4, and cases cited therein.

The pending litigation in which Olyphant is a party plaintiff in the United States District Court for the Eastern District of Pennsylvania[1] centers upon PPL's assertion that Olyphant cannot compete with PPL to serve customers through the Borough's distribution system located within its boundaries, using wholesale power to which Olyphant is entitled under the FERC-approved settlement agreement, unless it pays PPL an additional charge for stranded costs. PPL takes this position despite PPL's commitment in its agreements with the Borough to provide all of its wholesale power requirements to serve any customers located within the Borough, without any payment of stranded costs. This foreclosure of competition gives rise to an issue under the federal antitrust laws, which the federal district courts have exclusive jurisdiction to adjudicate.

Respectfully submitted,

Charles F. Wheatley, Jr.

Charles F. Wheatley, Jr.

CFW:mkm
Enclosure

[1] *Borough of Olyphant, Pa. v. PP&L, Inc., et al.*, Civil Action No. 03-4023, and *Borough of Lansdale, Pa., et al. v. PP&L, Inc., et al.*, Civil Action No. 02-8012.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of this letter and enclosed Petition for Review of Borough of Olyphant, Pennsylvania, Case No. 03-1284 in the United States Court of Appeals for the District of Columbia Circuit, 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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October 2, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BOROUGH OF OLYPHANT, PENNSYLVANIA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Case No. 03-1284

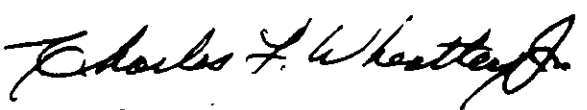
PETITION FOR REVIEW OF BOROUGH OF OLYPHANT, PENNSYLVANIA

Pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(b), Section 10 of the Administrative Procedure Act. 5 U.S.C. § 701-706, and Rule 15(a) of the Federal Rules of Appellate Procedure, the Borough of Olyphant, Pennsylvania, hereby petitions this Court for review of the following orders of the Federal Energy Regulatory Commission:

1. Order Granting Petition for Declaratory Order in PPL Electric Utilities Corporation, Docket No. EL03-16-000, 101 FERC ¶ 61,370 (2002) (December 25, 2002); and

2. Order on Rehearing, PPL Electric Utilities Corporation, in Docket No. EL03-16-001, 104 FERC ¶ 61,259 (2003) (September 10, 2003).

Respectfully submitted,



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September 17, 2003