

**IN THE  
SUPREME COURT OF PENNSYLVANIA**

William R. Lloyd, Jr., Small Business Advocate,	:	
	:	Docket No. _____
v.	:	Allocatur Docket 2006
Pennsylvania Public Utility Commission,	:	
	:	
From Docket No. 137 CD 2005	:	
-----	:	
Irwin A. Popowsky, Consumer Advocate,	:	
	:	Docket No. _____
v.	:	Allocatur Docket 2006
Pennsylvania Public Utility Commission,	:	
	:	
From Docket No. 144 CD 2005	:	
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Commission on Economic Opportunity,	:	
	:	Docket No. _____
v.	:	Allocatur Docket 2006
Pennsylvania Public Utility Commission,	:	
	:	
From Docket No. 275 CD 2005	:	
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PP&L Industrial Customer Alliance,	:	
	:	Docket No. _____
v.	:	Allocatur Docket 2006
Pennsylvania Public Utility Commission,	:	
	:	
From Docket No. 884 CD 2005	:	
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**PETITION FOR ALLOWANCE OF APPEAL OF  
PETITIONER/INTERVENOR PPL ELECTRIC UTILITIES CORPORATION**

**Petition for Allowance of Appeal from the Order of the  
Commonwealth Court of Pennsylvania entered  
August 4, 2006, at Docket Nos. 137 C.D. 2005, 144 C.D. 2005,  
275 C.D. 2005 and 884 C.D. 2005 (consolidated),  
which vacated in part and reversed in part  
and affirmed in part the Order of the Pennsylvania Public Utility  
Commission entered December 22, 2004 at Docket Nos. R-00049255, *et al.***

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## I. OPINIONS AND ORDERS BELOW

PPL Electric Utilities Corporation (“PPL Electric”) files this Petition for Allowance of Appeal to request review of the Order of the Commonwealth Court of Pennsylvania entered August 4, 2006, at Docket Nos. 137 C.D. 2005, 144 C.D. 2005, 275 C.D. 2005 and 884 C.D. 2005 (consolidated at Docket No. 137 C.D. 2005). *Lloyd v. Pa. P.U.C.*, \_\_\_ A.2d \_\_\_, No. 137 C.D. 2005, 2006 WL 2191336, 2006 Pa. Commw. LEXIS 438 (Pa.Cmwlth. August 4, 2006). That Order vacated in part, reversed in part and affirmed in part, an Order of the Pennsylvania Public Utility Commission (“Commission”) entered December 22, 2004, at Docket Nos. R-00049255, *et al. Pa. P.U.C. v. PPL Electric Utilities Corporation*, 237 P.U.R.4<sup>th</sup> 419 (2004); 2004 Pa. P.U.C. LEXIS 40. The Commonwealth Court’s Order states as follows:

AND NOW, this 4<sup>th</sup> day of August, 2006, the order of the Pennsylvania Public Utility Commission, dated December 22, 2004, is

- 1) vacated as to the appeals by PPLICA and the OSBA regarding the issue of the Distribution and Transmission Service Charges and is remanded to the Commission to set non-discriminatory reasonable rates and rate structure for each service;
- 2) reversed as to allowance of reimbursement of Hurricane Isabel costs to PPL; and
- 3) affirmed regarding the appeal by PPLICA regarding the SEF funding and the appeal by the CEO regarding the OnTrack program.

Jurisdiction is relinquished.

The full text of the Commonwealth Court’s Opinion and Order (the “*Order*”) is attached hereto as Appendix “A”. The Order of the Commission entered December 22, 2004, at Docket Nos. R-00049255, *et al.* (the “*Rate Order*”) is attached as Appendix “B”. Attached as Appendix “C” is the Order of the Commission entered April 1, 2005, denying three separate Petitions for Reconsideration (the “*Reconsideration Order*”).

## **II. QUESTIONS PRESENTED FOR REVIEW**

1. Did the Commonwealth Court's rejection of an electric utility's claim to recover storm damage expenses improperly depart from well-established judicial and administrative precedent which recognizes that extraordinary storm damage expenses caused by Acts of God are an exception to the general rule against recovery of past costs in prospective rates?
2. Did the Commonwealth Court improperly interpret the Electricity Generation Customer Choice and Competition Act ("Competition Act") to bar recovery of extraordinary storm damage expenses in rates established after the expiration of statutory rate caps, where the plain language of the statute applies only to rate increases during the rate cap period?
3. Did the Commonwealth Court commit legal error when it concluded that the Competition Act requires "cost of service" to be the overriding criterion in utility rate design, thereby departing from, without explanation, long-standing judicial and administrative precedent and failing to give appropriate discretion to the Commission in determining differences in rates among customer classes?
4. Did the Commonwealth Court, in a decision of first impression and of statewide significance, improperly interpret the Competition Act to prevent the Commission from considering the total rate being charged to customers for electric service when designing rates?

### III. STATEMENT OF THE CASE

PPL Electric has been delivering electricity to retail customers in eastern and central Pennsylvania, subject to the regulatory jurisdiction of the Commission and its predecessors, for more than 80 years. Presently, PPL Electric serves more than 1.3 million customers in its service territory, which spans approximately 10,000 square miles and includes all or portions of twenty-nine counties. R. 18a,<sup>1</sup> PPL Electric Ex. Future 1 (Revised), Statement of Reasons.

On January 1, 1997, the Competition Act became effective, adding Chapter 28 to the Public Utility Code (“Code”). 66 Pa. C.S. Chapter 28. Chapter 28, *inter alia*, deregulated the generation of electricity, established certain caps on rates charged by electric distribution companies (“EDCs”) and permitted EDCs to recover stranded costs during transition periods that extend, in some cases, until the end of 2010. To implement these various changes, Section 2806(d) required all EDCs in Pennsylvania to file restructuring plans with the Commission. 66 Pa. C.S. § 2806(d). As part of its 1998 restructuring plan, PPL Electric separated, or “unbundled,” its rates for electric service into separate components for generation, transmission and distribution services. *Application Of Pennsylvania Power & Light Company For Approval Of Its Restructuring Plan Under Section 2806 Of The Public Utility Code*, Docket No. R-00973954, 1998 Pa. P.U.C. LEXIS 197 (August 27, 1998) (“*Restructuring Order*”).<sup>2</sup>

On March 29, 2004, PPL Electric filed with the Commission a proposed general increase in rates for distribution services pursuant to Section 1308(d) of the Public Utility Code, 66 Pa.C.S. § 1308(d). Specifically, PPL Electric proposed an increase in annual jurisdictional operating

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<sup>1</sup> Citation to R. \_\_\_ refers to the Reproduced Record before the Commonwealth Court, which has been provided concurrently with this Petition.

<sup>2</sup> Electric generation service is the actual energy supply consumed by customers. Transmission service moves energy supply from generating stations through high voltage transmission systems to local, low voltage distribution systems. Distribution service moves electric energy supply from high voltage transmission systems to customers’ premises.

revenues for distribution services of \$164.4 million, based on an historic test year ended December 31, 2003 and a future test year ended December 31, 2004, as adjusted for ratemaking purposes. In addition, PPL Electric notified the Commission and its customers of a \$57.2 million increase in transmission charges that PPL Electric pays for transmission services it purchases from the PJM Interconnection, Inc. (“PJM”) under tariffs regulated by the Federal Energy Regulatory Commission (“FERC”). Included in PPL Electric’s claimed revenue increase was a proposal to amortize over five years approximately \$15 million in extraordinary operating expenses incurred during the historic test year as a result of Hurricane Isabel.<sup>3</sup> PPL Electric proposed that the rate increase be allocated among rate classes in a manner that would move each rate class toward the cost of service for distribution service as determined by a cost of service study, and that no rate class would receive, on a total bill basis, an increase in rates in excess of 10 percent. R. 61-62a, PPL Electric St. 4.<sup>4</sup>

PPL Electric’s filing thereafter was suspended by operation of law until January 1, 2005,<sup>5</sup> and the Commission, in an Order entered May 7, 2004, initiated an investigation of the filing, as well as existing rates, rules and regulations, and assigned the proceeding to the Office of Administrative Law Judge for hearings and issuance of a Recommended Decision. A full record was developed, and on December 22, 2004, the Commission issued its final *Rate Order*. The Commission, among other things, approved an increase in rates designed to produce \$137.1 million in annual operating revenues for distribution service, approved the projected \$57.2 million increase in transmission charges, and approved a proportional scale back of the allocation of the revenue

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<sup>3</sup> Details concerning Hurricane Isabel and the Company’s claim to recover costs incurred as a result of this storm are provided in Section IV. B.1, *infra*.

<sup>4</sup> Details concerning the allocation of the revenue increase among customer classes are provided in Section IV.C.1, *infra*.

<sup>5</sup> As noted previously, because of the applicable rate caps, PPL Electric’s distribution and transmission rates could not be increased until January 1, 2005.

requirement among the rate classes that had been proposed by PPL Electric.<sup>6</sup> In determining PPL Electric's revenue requirement, the Commission adjusted the Company's claim for storm damage expense and authorized PPL Electric to recover, over a ten-year period, \$11.2 million in costs resulting from Hurricane Isabel.

Four parties, the PP&L Industrial Customer Alliance ("PPLICA"), the Commission on Economic Opportunity ("CEO"), the Office of Consumer Advocate ("OCA"), and the Office of Small Business Advocate ("OSBA"), filed Petitions for Review from the *Rate Order* of the Commission. PPL Electric intervened in each of these appeals, which were consolidated for consideration by Commonwealth Court.

By Opinion and Order dated August 4, 2006, the Commonwealth Court vacated the portion of the Commission's *Rate Order* regarding the design of distribution and transmission rates. The Commonwealth Court's *Order* also reversed the Commission's allowance of recovery of the extraordinary costs related to Hurricane Isabel. The Commonwealth Court affirmed the remainder of the Commission's *Rate Order*. In accordance with the provisions of Pa.R.A.P. 1113, PPL Electric now petitions the Supreme Court of Pennsylvania for Allowance of Appeal.

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<sup>6</sup> A proportional scale back reduces the amount of the increase allocated to each rate case in proportion to the Commission's reduction to the requested increase, thereby approving PPL Electric's proposed revenue allocation at the allowed revenue increase.

#### **IV. REASONS SUPPORTING ALLOWANCE OF APPEAL**

##### **A. Summary**

This case presents two important issues of first impression relating to the interpretation and application of the Competition Act. The Commonwealth Court has concluded that the Competition Act compels it to overturn decades of established precedent of this Court and the Commonwealth Court on two issues of critical importance to utilities and their customers: (1) the Commonwealth Court has concluded that the Competition Act reverses long-established precedent permitting recovery of extraordinary storm damage costs in utility rate proceedings; and (2) the Commonwealth Court has concluded that the Competition Act severely restricts the Commission's discretion to consider and weigh a broad array of factors in designing rates for electric utility service.

This case clearly satisfies the standard for review by this Court under Pa. R.A.P. 1114. The Commonwealth Court has decided substantial issues of first impression in a manner inconsistent with the plain language of the Competition Act and in a manner that is plainly at odds with and effectively overturns long-standing precedent of this Court and the Commonwealth Court. Moreover, by failing to properly apply the plain language of the statute and by failing to accord any deference to the administrative agency with delegated expertise in matters of public utility regulation, the Commonwealth Court has departed from the normal course of judicial proceedings in such a way as to require this Court to exercise its supervisory powers. The decision of the Commonwealth Court, unless reviewed and reversed by this Court, will have far-reaching statewide effects on customers' utility bills and the proper recovery of costs by utilities.

1. Storm Damage.

The Commonwealth Court's decision to reverse the Commission's ratemaking allowance for the extraordinary costs incurred by PPL Electric as a result of Hurricane Isabel represents a radical departure from its own precedent and this Court's precedent as applied by the Commission in many cases through now standard ratemaking procedures. Long-standing precedent has recognized that unpredictable costs caused by Acts of God, such as major storm damage expenses, are to be deferred and recovered, through an amortization allowance, in the first rate case following their incurrence. Pennsylvania Courts have recognized that, once an expense is recognized as qualifying for such treatment, the costs are no longer to be considered prior-period costs and that recovery of those costs at a later time does not violate the general rule against retroactive ratemaking.

The Commonwealth Court's sole justification for its departure from this long-standing precedent was that PPL Electric's claim was barred by the rate cap provisions of the Competition Act. Such conclusion, however, is directly contrary to the plain language of the Competition Act. The statutory rate caps bar rate increases during the rate cap period, but do not bar recovery of costs that, under prior precedent and standard ratemaking practice, would not be recovered in rates until after the rate caps have expired.

This decision has important policy implications. When hurricanes and other Acts of God occur, electric utilities, such as PPL Electric, expend extraordinary amounts of money and effort to restore electric service to customers as quickly as possible, not just as a matter of convenience, but as a matter of public health and safety. The Pennsylvania Appellate Courts have long recognized that such costs normally would not qualify for rate recovery if they are incurred when a utility is not otherwise filing for a rate increase. However, recognizing the Herculean efforts undertaken by electric utilities to restore service after major storms, the courts have held that the costs incurred to restore service can be deferred and recovered in the utility's next rate case. The Commonwealth

Court has abrogated this practice, leaving utilities who incur major storm damage expense during a rate cap period without a mechanism to recover these extraordinary costs, incurred to restore service to customers after major storms.

2. Rate Design.

The Commonwealth Court's decision to vacate the Commission's rate design in this proceeding effectively overrules decades of well-established precedent. The Commonwealth Court has erroneously concluded that such result is required by the Competition Act. This conclusion is a matter of first impression and calls for the exercise of the Supreme Court's supervisory authority. The Commonwealth Court declares "cost of service" to be the "polestar" of rate design, thereby stripping from the Commission its long-standing administrative discretion to consider, and give equal or greater weight to other well recognized factors, such as recent rate history, the practicality of administering rate schedules, and the ongoing transition of the electric industry from a fully regulated to a restructured rate environment.

The Commonwealth Court's decision reads into the Competition Act a requirement that the generation, transmission, and distribution components of electric rates must each be set separately and primarily on the basis of a cost-of-service study without consideration of the impact on a customer's total bill for electric service. Such interpretation, unless reversed, will likely have a dramatic, adverse effect on PPL Electric's customers, and particularly its 1.1 million residential customers. In this case, the Commission, after considering a variety of factors, including cost of service, and applying its delegated authority and administrative discretion and expertise, approved a combined distribution and transmission rate increase of \$91.4 million for PPL Electric's residential customers. If the Commission were instead constrained to rigidly follow "cost of service," the increase to residential customers would have been \$172.6 million, or \$81.2 million more than that actually imposed by the Commission. The import of the Commonwealth Court decision is not

limited to PPL Electric. Indeed, the Commonwealth Court's decision can be expected to have similar effects across the state as other electric utilities file rate cases over the next several years as their rate caps expire. There is simply no basis in the Competition Act to support the conclusion that the General Assembly intended to impose this substantial additional burden on Pennsylvania residential customers.

**B. The Commonwealth Court's Conclusion That The Competition Act Bars PPL Electric's Recovery Of Extraordinary Storm Damage Costs Is Inconsistent With Long-Standing Judicial And Administrative Precedent And The Plain Language Of The Act.**

1. Introduction

During the evening of September 19 and the morning of September 20, 2003, Hurricane Isabel struck PPL Electric's service territory. As Hurricane Isabel departed from PPL Electric's service territory, more than 500,000 or 38 percent of PPL Electric's 1.3 million customers were without service. The damage to PPL Electric's facilities was caused by high winds, with gusts over 60 miles per hour, which caused limbs and whole trees to fall on PPL Electric's facilities. R. 74-75a, PPL Electric St. 4. This storm caused PPL Electric to incur increased operation and maintenance expenses, customer expenses and general administrative expenses in preparing for and responding to the storm, repairing facilities, restoring service to customers and assisting customers during service interruptions. R. 73a, PPL Electric St. 4.

In order to repair the damage caused by Hurricane Isabel and restore service, PPL Electric undertook the largest restoration effort in its history. PPL Electric made almost 4,000 individual system repairs, and replaced 174,000 feet of wire and 244 poles. PPL Electric's customer service center answered 161,000 calls from customers in the three days following the storm. PPL Electric made more than 42,000 outreach calls to inform customers of the status of repairs and the availability of free ice and water. PPL Electric arranged for the distribution of 3,000 gallons of drinking water, nearly 5,000 pounds of dry ice and 4,000 bags of ice at no cost to recipients.

Approximately 2,750 people were involved in service restorations, including 1,800 employees of the PPL corporate system and approximately 900 additional personnel from other utilities and contractors from Canada, New England, New York, Iowa and Illinois. R. 75-76a, PPL Electric St. 4. In total, PPL Electric incurred costs of \$17.2 million in responding to Hurricane Isabel. Of that total, \$15 million were operating expenses. The remaining \$2.2 million were for capital items.

PPL Electric filed the instant rate proceeding on March 29, 2004. For ratemaking purposes, PPL Electric adjusted these Hurricane Isabel costs out of its historic test year expenses, and claimed the costs as an amortized expense. Under the Commission's *Rate Order*, PPL Electric was permitted to amortize \$11,245,000 over a ten-year period. *Rate Order*, Appendix B, pp. 29-30. The Commonwealth Court reversed the Commission, stating that recovery of the costs violated the rate cap provisions of the Competition Act. In so doing, the Commonwealth Court has effectively overturned long-established precedent which permits extraordinary past costs to be recovered in prospective rates and has ignored the plain language of the Competition Act.

2. The Commonwealth Court Decision Is Inconsistent With Long-Standing Judicial and Administrative Precedent.

As a general rule, ratemaking is prospective; retroactive ratemaking and line item recovery of past costs are not permitted. *National Fuel Gas Distribution Corp. v. Pa. P.U.C.*, 76 Pa. Cmwlth. 102, 147, 464 A.2d 546, 567 (1983). The Commission and Pennsylvania Appellate Courts, however, have recognized an exception to this general prohibition for non-recurring, extraordinary expenses. Under this exception, public utilities are permitted to defer such extraordinary expenses and recover them over an appropriate period of time in rates established in a subsequent base rate proceeding. The Commonwealth Court, in *Popowsky v. Pa. P.U.C.*, 868 A.2d 606, 610 (Pa.Cmwlth. 2004), provides the following description of this recognized ratemaking procedure:

[W]e discussed the extraordinary expenses that qualified as an exception to the prohibition against retroactive ratemaking. As examples, we referenced weather-related expenses caused by what is

commonly referred to as an “act of God,” such as flood damages and cold weather maintenance expenses for thawing and repairing frozen mains.

Storm damage expenses are the prototype of this exception to the rule against retroactive ratemaking. *See, e.g., Pa. P.U.C. v. The Bell Telephone Co.*, 55 Pa. PUC 97, 109-10 (1981) (hurricane) (“*Bell*”); *Pa. P.U.C. v. Pennsylvania Gas & Water Co.*, 57 Pa. PUC 204, 229 (1983) (freezing); *Pa. P.U.C. v. Pennsylvania Gas & Water Co.*, 52 Pa. PUC 77, 102 (1978) (flood from a hurricane). As the Commission stated in *Bell*, 55 Pa. PUC, *supra* at 109-10:

“We have, as a general practice, permitted utilities to amortize extraordinary storm or flood damages over a period of years. In our order at [*Pa. P.U.C. v. The Bell Telephone Co.*] RID 57 (1973) 47 Pa. PUC 247, 279, 280, we did, in our view, allow the respondent to amortize the storm damages associated with Tropical Storm Agnes over a ten-year period . . . .”

This is precisely the action taken by the Commission in this proceeding, which has been overturned by the Commonwealth Court.

It is undisputed that PPL Electric’s claim for recovery of storm damage expenses met all of the criteria for the exception to the general rule against retroactive ratemaking. The expenses are extraordinary and non-recurring. Further, PPL Electric claimed recovery of the expenses at its first opportunity. No party contended that the expenses did not meet the well-established exception for rate recovery of extraordinary expenses. The Commonwealth Court, by denying PPL Electric’s claim, departed from this well-established precedent, including its own prior decisions. Such decision was clearly erroneous and should be reviewed by this Court.

3. The Commonwealth Court’s Decision Is Inconsistent With the Plain Language Of The Competition Act.

The Competition Act established caps on the rates for generation, transmission and distribution service for specified periods of time. 66 Pa.C.S. § 2804(4). The full text of 66 Pa.C.S. § 2804 is attached as Appendix “D” to this Petition. The Commonwealth Court, relying

substantially upon its prior decision in *ARIPPA v. Pa. P.U.C.*, 792 A.2d 636 (Pa. Cmwlth. 2002), held that the rate caps under the Competition Act barred recovery of these expenses under standard ratemaking procedures. *Order*, Appendix A, pp. 21-22.

The error in the Commonwealth Court's decision is that it ignores the plain language of the rate cap provisions in the Competition Act as well as the facts and holding in *ARIPPA*. This Court has previously explained the need to follow the "plain language" of the law, and not read into the law restrictions on the Commission's general authority that are not specifically delineated. *Elite Industries, Inc. v. Pa. P.U.C.*, 574 Pa. 476, 481-82, 832 A.2d 428, 431 (2003) ("*Elite*").

Here, the plain language of Section 2804(4) of the Competition Act bars rate increases in rates during the rate cap period. It clearly does not prohibit recovery of costs outside the rate cap period using normal ratemaking procedures. The presiding ALJ, in her Recommended Decision, provided a clear analysis of the issue:

"Here, with the rate cap, the plain language is clear, and there is no need to read meaning into the statute. There is no disjunctive word or phrase in this provision. There are exceptions for certain kinds of expenses which may, if permitted by the Commission, be collected before the rate cap expires. There is no limitation expressed on rate case claims that may be made after the rate cap expires. Under the plain language of the statute [Competition Act] and the [Restructuring] settlement, the rate cap exists and then it expires. After expiration, all expenses normally included for ratemaking purposes may be included in rates to be put into effect after the rate cap expires. Before expiration, none may be collected unless they fit under an exception."

R. 752a, Recommended Decision. The Commission accepted this reasoning by the ALJ. *Rate Order*, Appendix B, p. 29.

The Commonwealth Court's reliance on its *ARIPPA* decision is in error. In *ARIPPA*, the Commonwealth Court held that the affected electric utilities did not qualify for one of the specific exceptions to the rate caps set forth in Section 2804(4)(iii)(d) of the Competition Act, 66 Pa.C.S. § 2804(4)(iii)(d), because increases in the purchased power costs at issue were not beyond their

control, or, in the Commonwealth Court’s own words, “an act of God.” Here, in contrast, PPL Electric is not seeking any exception to the rate caps. PPL Electric seeks to follow standard ratemaking practice to recover costs incurred due to a violent storm, i.e., an act of God, which was beyond its control, through an amortization for ratemaking purposes that did not commence until January 1, 2005, after the rate caps had expired.

In summary, the Commonwealth Court’s decision is clearly erroneous because the rate caps, on their face, do not bar recovery of expenses. Instead, they bar rate increases during the rate cap period, but not thereafter. PPL Electric’s recovery of storm damage expenses commenced after the rate cap period had expired, and therefore does not violate the rate cap provisions of the statute. Recovery by PPL Electric of its deferred storm damage expenses is proper and consistent with substantial authority and practice cited above. Most particularly, it is fully consistent with the Commonwealth Court’s own holding in *Pike County Light & Power Co. v. Pa. P.U.C.*, 87 Pa. Cmwlth. 451, 456, 487 A.2d 118, 121 (1985), that once an expense has been determined to be extraordinary, its later recovery through amortization does not violate the general rule against retroactive ratemaking. This Court should accept review of the Commonwealth Court’s decision and correct this departure from accepted precedent, which was based upon a clearly erroneous interpretation of the plain language of the Competition Act.

C. **The Commonwealth Court Has Misinterpreted The Competition Act To Overrule Prior Precedent Concerning The Commission’s Discretion In Designing Rates.**

1. **Introduction**

In its *Rate Order*, the Commission allocated the allowed revenue requirement for PPL Electric based upon two principal objectives. First, no rate class should receive a rate increase on a total bill basis, including the pass through of the transmission charge increase, that exceeded ten percent. Second, on a cost-of-service basis, the rate of return from each customer class for

distribution service should be moved toward the system average rate of return. *Rate Order*, Appendix B, pp. 78-82.

In addition, the Commission adopted PPL Electric's proposal to recover its transmission costs, including the proposed \$57.2 million increase, from all of its customers who obtain electric generation supplies from PPL Electric (*i.e.*, non-shopping customers) through a uniform charge of 0.564¢ per kWh.<sup>7</sup> *Rate Order*, Appendix B, pp. 75-78. PPL Electric explained that this approach was appropriate because it produced a charge that was more stable from year to year, unlike the proposals of other parties that rely upon PJM's cost allocations, and which could result in substantial rate volatility from year to year depending in part upon whether PPL Electric's annual peak occurs in the winter or summer. R. 48-49a, PPL Electric Exs. DAK3, DAK4. In addition, PPL Electric explained that its uniform charge approach was reasonable because it is efficient to administer, because it is easy for customers to understand, and because it is a practical approach to reconcile revenue collected from customers with actual transmission costs. R. 68a, PPL Electric St. 4. In addition, the recovery of transmission costs through a uniform amount per kWh furthered the objective of limiting the rate increase for all rate classes to a maximum of ten percent. R. 363a, PPL Electric St. 4-R.

In vacating the Commission's Order, the Commonwealth Court reached two conclusions. First, the Court concluded that "cost of service" was the "polestar" of rate design, and that the Commission could not supersede that "polestar" by considering other ratemaking and policy objectives. *Order*, Appendix A, p. 16. Second, the Court held that Section 2804(3) of the Competition Act mandates that rates for transmission, distribution and generation each be set primarily on the basis of a cost of service study. *Order*, Appendix A, p. 16. In reaching these conclusions, the Commonwealth Court has elevated "cost of service" to a prominence never before

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<sup>7</sup> Shopping customers, who obtain electric generation supplies from a competitive Electric Generation Supplier, also obtain transmission services from the Electric Generation Supplier.

required in Pennsylvania. Moreover, the Commonwealth Court has read into the Competition Act a mandate for a specified rate design that does not exist in the statute, and which ignores the fact that PPL Electric's rates remain in a period of transition because one of the three rate components – generation – remains subject to a rate cap.

2. The Commonwealth Court Decision Departs From And Effectively Overrules Long-Standing Judicial Precedent Regarding Utility Revenue Allocation and Rate Design.

The Pennsylvania Appellate Courts have repeatedly concluded that the Commission has very substantial discretion in determining the appropriate allocation of revenue requirement among rate classes. In *Peoples Natural Gas Co. v. Pa. P.U.C.*, 47 Pa. Cmwlt. 512, 409 A.2d 446 (1979) (“*Peoples*”), the Commonwealth Court summarized the scope of review to be accorded to Commission decisions regarding rate design:

“[T]here is no set formula for determining proper ratios among the rates of different customer classes. *Natona Mills, Inc. v. Pennsylvania Public Utility Commission*, 179 Pa. Super. 263, 116 A.2d 876 (1955). What is reasonable under the circumstances, the proper difference among rate classes, is an administrative question for the Commission to decide. This court's scope of review is limited.”

*Peoples, supra*, 47 Pa. Cmwlt. at 512, 409 A.2d at 456.

The Commonwealth Court further explained that cost of service is not to be given a priority position in designing rates:

“Petitioners have emphasized the cost-of-service study, to the exclusion of other *equally appropriate* factors. In *Philadelphia Suburban Transportation Co. v. Pennsylvania Public Utility Commission, supra*, this court approved the commission's consideration of factors including: quantity of electricity used, the nature of the use, time of the use, pattern of the use, differences in conditions of service and cost of service, in addition to economic facts and circumstances which affect rates and services.”

*Peoples, supra*, 47 Pa. Cmwlt., at 537, 409 A.2d at 458. (Emphasis added). *Accord Philadelphia Suburban Transportation Co. v. Pa. P.U.C.*, 37 Pa. Cmwlt. 173, 390 A.2d 865 (1978) (“There is

no requirement that rates for different classes of service must be either uniform or equal or that they must be equally profitable.”)

By departing from these precedents, the Commonwealth Court’s decision negates the substantial discretion historically afforded to the Commission, and declares cost of service to be the “polestar” of all rate design. Such conclusion represents a major departure from decades of established utility law, as explained above, and is deserving of Supreme Court review.

3. The Commonwealth Court, In A Matter Of First Impression, Improperly Has Read A Cost Of Service Requirement Into The Competition Act And Improperly Overturned Prior Precedent.

The Commonwealth Court’s decision to vacate the Commission’s allocation of the rate increase also is based upon the conclusion that Section 2804(3) of the Competition Act bars the Commission from considering the impact of its rate allocation upon the total rates paid by customers. The Court’s interpretation of Section 2804(3) is a matter of first impression, and improperly reads into the Competition Act a “cost of service” ratemaking requirement for separate ratemaking components, thereby concluding that the Competition Act overturns numerous of its own and this Court’s decisions. This conclusion is erroneous and should be reversed.

Section 2804(3) of the Competition Act provides as follows:

The commission shall require the unbundling of electric utility services, tariffs and customer bills to separate the charges for generation, transmission and distribution. The commission may require the unbundling of other services.

66 Pa.C.S. § 2804(3). There can be no question that the Commission complied with this requirement in the *Restructuring Order* for PPL Electric issued in 1998. However, the Commonwealth Court has now concluded that this statutory provision requires more than separation of the transmission, distribution and generation components of rates, but also “*requires* that rates and rate structures be set for *each* service primarily on a cost-of-service study.” *Order*, Appendix A, p. 16. (Emphasis added).

The Commonwealth Court’s conclusion that Section 2804(3) requires the Commission primarily to use cost-of-service in setting each of the three separate rate components ignores the plain language of Section 2804(3) and of the Competition Act as a whole. There is no provision in the Competition Act in general or in Section 2804(3) in particular that restricts the Commission’s long-acknowledged discretion, as explained previously, to consider factors other than “cost of service” in setting rates. As this Court has held, the plain language of a statute is to be followed, and the letter of a statute is not to be disregarded under the pretext of pursuing its spirit. *Delmarva Power & Light Co. v. Commonwealth*, 582 Pa. 338, 351, 870 A.2d 901, 909 (2005).

Additionally, there is a general presumption that prior judicial construction of a statute is intended to continue if the Legislature subsequently adopts a similar statute. *In re Lock’s Estate*, 431 Pa. 251, 262-63, 244 A.2d 677, 682 (1968). Similarly, under the Statutory Construction Act, 1 Pa.C.S. §§ 1501-1991 (1 Pa. C.S. Chapters 15, 17 and 19), statutory amendments, such as the addition of Chapter 28 to the Public Utility Code by the Competition Act, are to be interpreted as an integrated whole with the underlying statute being amended. 1 Pa. C.S. §§ 1953 and 1954. There is no indication in the Competition Act that the General Assembly intended to overturn long-standing precedents on rate design. To the contrary, in its Declaration of Policy adopted in the Competition Act, the Legislature stated as follows:

It is in the public interest for the transmission and distribution of electricity to *continue to be regulated* as a natural monopoly subject to *the jurisdiction and active supervision of the commission*.

66 Pa.C.S. § 2802(16) (emphasis added). The full text of 66 Pa.C.S. § 2802 is attached as Appendix “E” to this Petition. The Commonwealth Court has erroneously interpreted the Competition Act to alter decades of its own and this Court’s precedent without any direction from the General Assembly to do so.

The Court further concluded that the Commission’s adoption of a rate design criteria that limited class increases to no more than 10% on a total bill basis improperly “rebundles” distribution, transmission and generation rates. *Order*, Appendix A, p. 16. The Commonwealth Court’s criticism of the Commission’s consideration of the total effect upon customer’s bills as “rebundling” is an unfair and inaccurate characterization of what was in fact a Commission analysis of a number of competing concerns. First and foremost, the Commission recognized that restructuring remains in a period of transition. *Rate Order*, Appendix B, p. 81-82. At this time, the largest of the three rate components – generation – continues to be subject to a rate cap for most of the major EDCs in Pennsylvania.<sup>8</sup> Thus, contrary to the Commonwealth Court’s indication that all three components are to be set based primarily on cost of service, the generation component is fixed based upon a rate design that was established in 1997 and that cannot be revised by PPL Electric until 2010 to reflect the current “cost of service.” Thus, even if the Commonwealth Court were correct that each component must be considered separately, the Court has not explained how this could be done in this case, where one component remains capped.

Second, the Commission did not ignore cost of service. Indeed, the record is clear that under the rate design imposed by PPL Electric and adopted by the Commission, all rate classes move closer to cost of service. *Rate Order*, Appendix B, p. 81-82. Thus, the Commission fully considered cost of service in accordance with well-established precedent. It simply did not accord cost of service “polestar” status in accordance with the new and totally unprecedented standard adopted in the Commonwealth Court decision.

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<sup>8</sup> Metropolitan Edison Company and Pennsylvania Electric Company – generation rate caps expire December 31, 2010 (R-00974008 October 20, 1998, 1998 Pa. PUC LEXIS 242, p. 6); PECO Energy Company – expires January 1, 2009 (R-00973953 December 23, 1997, 1997 Pa. PUC LEXIS 169, p. 20); Pennsylvania Power Company – expires December 31, 2006 (R-0097419 April 1, 1999, 1999 Pa. PUC LEXIS 29, p. 9); PPL Electric Utilities Corporation – expires December 31, 2009 (R-00973954 August 27, 1998, 1998 Pa. PUC LEXIS 197, p. 10); West Penn Power Company – expires December 31, 2008 (R-00973981 November 19, 1998, 1998 Pa. PUC LEXIS 232, p. 4).

Finally, the Commission also gave appropriate consideration to the impact of the rate increase on a customer's total electric bill. No customer purchases just the delivery of electricity; one must also purchase the electricity itself, either from PPL Electric or from an unregulated supplier. The effect of a proposed rate increase on a customer's total bill is obviously relevant and indeed critically important to the customer, who the Commission is required to consider and protect. Nothing in the Competition Act, including the rate unbundling provision, was intended to change this result.

The Commonwealth Court's interpretation of the Competition Act to include a cost of service requirement for each of the three separate unbundled rate components is a matter of first impression and has potentially far reaching effects. If the residential rates in this proceeding were set, or are required to be set on remand to the full cost of service, residential customers would have received a \$172.6 million increase as compared to a \$91.4 million increase proposed by PPL Electric. Further, every electric utility in Pennsylvania is subject to the Competition Act, and the Court's ruling could force the Commission to adopt rate designs that reflect radical movements from prior rates, substantially depriving the Commission of authority to move rates gradually, in the exercise of sound administrative discretion and expertise. The Commission should not be forced by the Commonwealth Court's unsupported interpretation of the Competition Act to turn ratemaking into a mere arithmetic exercise.

## V. CONCLUSION

The Commonwealth Court's decision should be reviewed in two respects. First, the Supreme Court should review the Commonwealth Court's disregard of the plain language of the Competition Act to read into that statute a restriction against standard ratemaking procedures that allow extraordinary costs to be recovered through subsequent amortization. Second, the Supreme Court should review the Commonwealth Court's interpretation of the Competition Act which rejected long-standing precedent that gives the Commission substantial administrative discretion to consider numerous factors, other than cost of service, in setting rates.

Respectfully submitted,

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