

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PPL Electric Utilities Corporation :
For an Evidentiary Hearing on the Energy : P-2012-2320369
Efficiency Benchmarks Established for the Period :
June 1, 2013 through May 31, 2016 :

**MAIN BRIEF OF CLEAN AIR COUNCIL AND SIERRA CLUB
IN OPPOSITION TO PPL ELECTRIC UTILITIES CORPORATION'S
PETITION FOR EVIDENTIARY HEARING**

Date: October 26, 2012

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I. INTRODUCTION

Clean Air Council (“Council”) and the Pennsylvania Chapter of the Sierra Club (“Sierra Club”) (collectively, “Intervenors”), on behalf of their respective members and the public interest, oppose PPL Electric Utilities Corporation’s (“PPL”) Petition for Evidentiary Hearing and PPL’s attempts thereby to revise the Phase II Implementation Order issued by the Pennsylvania Public Utility Commission (the “Commission” or the “PUC”) under Act 129. The evidentiary hearing process is narrowly limited to challenging factual issues relied upon by the Commission in setting energy efficiency targets for companies like PPL. In the face of this, PPL fails to present any evidence that the targets the Commission set were based on incorrect evidence—indeed, PPL has testified that it believes that the targets are entirely achievable. Instead, PPL argues that the Commission should preemptively grant PPL the authority to challenge those targets in the future. Not only is this the very same argument that the Commission just rejected in its September 27, 2012 Reconsideration Order, but it is both premature and beyond the narrow scope of the evidentiary hearing. Moreover, even if the issue

were properly before the Commission, PPL has failed to carry its burden in establishing that the relief it seeks is warranted. For all these reasons, PPL's petition should be denied.

II. BACKGROUND

A. The Public Utility Commission's Phase II Implementation Order

On August 3, 2012, the PUC issued its Implementation Order, setting forth the requirements for Phase II implementation of Act 129, Pennsylvania's energy efficiency law.¹ *See generally* Public Utility Commission Phase II Implementation Order, Docket Nos. M-2012-2289411, M-2008-2069887 (Aug. 2, 2012) ("Implementation Order"). This Implementation Order sets the follow-up to the first phase of implementation of Act 129, called "Phase I," and builds upon and incorporates gains made during that Phase. In the Implementation Order, the Commission set an energy efficiency reduction target for PPL of 2.1% over three years, or a total of 821,072 megawatt-hours ("MWh") in energy savings, at a calculated acquisition cost of \$224.71 per MWh. Implementation Order at 24, tbl. 1. This acquisition cost was calculated from PPL's historical acquisition cost from Phase I with a "25% adjustment factor . . . used to account for future uncertainties when establishing program goals." *Id.* at 19.

In addition, the Implementation Order observed that "it is very important that cost-effective Act 129 Phase I programs continue until the beginning of Phase II programs," to avoid "disruptive gaps in programs that could create confusion to customers, retailers and contractors, resulting in harm to the existing market transformation achievements of Act 129." *Id.* at 60. As a result, the Implementation Order specifically allows EDCs to "credit all of those savings above the three percent Phase I target towards Phase II targets" going forward. *Id.* at 58.

¹ Act 129 is codified at 66 Pa. C.S. § 2806.1.

As a further part of the Implementation Order, the Commission established a narrow pathway for EDCs like PPL “to contest the facts the Commission relied upon in adopting the consumption reduction requirements” in the Implementation Order, by filing “a petition requesting an evidentiary hearing on its specific consumption reduction target.” *Id.* at 31. The Commission went on to state that “[t]he scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue.” *Id.*

B. PPL’s Act 129 Experience in Phase I

As regards energy efficiency, PPL was tasked in Phase I with saving 1,146,000 MWh by May 31, 2012. PPL Electric Utilities Corporation Phase I Energy Efficiency and Conservation Plan at 7. To achieve this, as well as to achieve its Phase I demand response targets, PPL was budgeted approximately \$246 million. *Id.* at 7. As of September 1, 2012 PPL has saved 1,073,645 MWh, or 94% of its total target. Quarterly Report to the Pa. PUC (Preliminary Annual Report) For the Period June 2012 through August 2012 Program Year 4, Quarter 1, at 4-5. However, to achieve this, PPL has only spent \$181,601,000, which amounts to less than 74% of its total budget. *Id.* at 16.

C. Procedural History

On August 20, 2012, PPL petitioned the Commission for reconsideration of the Implementation Order. In this petition, PPL requested that the Commission “affirmatively state” that the acceptance of the reduction targets in Phase II does not preclude EDCs from challenging potential future changes to the Technical Reference Manual (“TRM”) or prohibit EDCs from petitioning the Commission to modify those targets in response to such TRM changes or to “other future changes that are not presently known.” Petition of PPL Electric Utilities

Corporation for Reconsideration, Docket Nos. M-2012-22989411 and M-2008-2069887 (“PPL Reconsideration Petition”) at 1.

Also on August 20, 2012, PPL petitioned the Commission for an evidentiary hearing concerning the Implementation Order, initiating this proceeding. This evidentiary petition raised the identical issues raised by PPL in its reconsideration petition: it requested that the Commission “affirm” that an EDC may “challenge subsequent modifications to the TRM and request modifications to its Phase II targets.” PPL Petition at 5. Indeed, PPL made the redundancy of its petition plain, stating that should the relief it sought with its reconsideration petition be granted, “there will be no need for the evidentiary hearing requested.” PPL Petition at 5-6.² Further, PPL noted in its petition that it was filing merely “as a protective measure,” as the consumption reduction target of 2.1% in the Implementation Order was “reasonably achievable.” PPL Petition at 5.

On August 30, 2012, Intervenors petitioned for intervention into this docket; although PPL opposed intervention, intervention was subsequently granted on September 20, 2012. Scheduling Order at 4.

On September 27, the PUC issued an order addressing PPL’s petition for reconsideration. In this order, the Commission “affirm[ed] . . . that all interested parties may participate, and are encouraged to do so, in any future proceedings that propose changes or updates to the TRM,” and that “[s]uch participation may take the form of support or challenge to any proposed change

² PPL reiterated this in its prehearing memorandum, noting that the “sole issue raised by [PPL]” in its evidentiary hearing petition of “whether the Commission’s approval of the 25% adjustment factor precludes an EDC from challenging subsequent modifications to the TRM and from requesting modifications to its Phase II consumption targets based upon modifications to the TRM,” was also the subject of PPL’s petition for reconsideration, and that a potential determination on that reconsideration petition could accordingly preclude any “need for the evidentiary hearing.” Prehearing Memorandum of PPL Electric Utilities Corporation, Docket No. P-2012-2320369 (Sept. 7, 2012) (“Prehearing Memorandum”) at 6.

or update to the TRM.” Public Utility Commission Reconsideration Order, Docket Nos. M-2012-2289411, M-2008-2069887 (Sept. 27, 2012) (“Reconsideration Order”) at 14. The Commission also noted that “the TRM measures are subject to challenge in any subsequent proceeding in which an EDC’s compliance is at issue.” *Id.* at 14-15. However, it otherwise denied PPL’s petition, denying “PPL’s requests to subject Phase II required consumption reductions to potential revision to reflect any potential revisions to the TRM,” noting that granting such requests “would only add unnecessary burdens on all interested parties, create uncertainty, and in fact . . . would present the EDCs with the moving target scenario PPL’s proposal purports to cure.” *Id.* at 16.

Subsequent to having its claims resolved in the reconsideration process, PPL has continued forward with its evidentiary petition, submitting direct testimony on September 28, 2012 and rebuttal testimony on October 17, 2012, and making its testifying witness, Peter D. Cleff, available for cross-examination on October 18, 2012.

III. ARGUMENT

PPL’s evidentiary petition fails for three reasons. First, the issues raised and relief sought by PPL are completely beyond the narrow evidentiary scope of this docket as constrained by the Commission’s specific statements in the Implementation Order. Second, and related, the issues raised in PPL’s evidentiary petition are more properly brought and dealt with in a reconsideration petition—which they already have been. Finally, even if this docket were the appropriate venue to address this issue, PPL has completely failed to carry its burden in establishing that a change to the Implementation Order is necessary—PPL’s own testimony establishes that the harms it worries about are entirely hypothetical future situations which may never even take place. PPL’s

claims are extraneous to this docket, already addressed in a parallel docket, and are ultimately not ripe for determination. PPL's petition should be denied.

A. Standard of Review

A party seeking a rule or order from the Public Utility Commission bears the burden of proof. 66 Pa. C.S. § 332(a); *see also* Implementation Order at 31 (“The EDC contesting the consumption reduction requirement shall have the burden of proof”). As such, a “litigant's burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.” *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990) (denying petition where based only on substantial evidence). If a party upon whom the burden of proof is placed fails to carry that burden, denial of the relief requested is necessary. *See, e.g., Warwick Water Works, Inc. v. Pennsylvania Public Utility Com'n*, 699 A.2d 770, 774-75 (Pa. Cmwlth. 1997).

B. Because This Evidentiary Petition Docket Was Established to Deal with the Narrow Issue of the Factual Determinations Supporting the Reduction Target in the Implementation Order, PPL's Claims Are Wholly Beyond the Scope of This Proceeding

PPL fails to raise any evidentiary claims in its evidentiary petition; its arguments and issues are accordingly beyond the limited scope of the evidentiary hearing process established in the Implementation Order, and for this reason its petition should be denied.

In the Implementation Order, the Commission established the evidentiary petition process for the limited purpose of contesting the facts relied upon by the Commission in developing the Implementation Order's reduction targets, not in arguing the law: evidentiary petitions are solely “to contest the facts the Commission relied upon in adopting the consumption reduction requirements” and “[t]he scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue.” Implementation Order at 31.

However, here, PPL is neither seeking to contest the facts the Commission relied upon in setting PPL's consumption reduction requirements, nor even challenging those requirements at all. *See* PPL Petition at 5 (stating that the consumption reduction target of 2.1% in the Implementation Order is “reasonably achievable”); Hearing Transcript 38:7-13 (PPL's Phase II target is “achievable”); PPL Petition at 5 (PPL does not challenge the reduction target or the evidence supporting it, and instead merely filed its petition as a “protective measure” with respect to hypothetical future changes).

Instead, PPL is seeking a legal determination as to the propriety of potential future challenges to TRM changes. *See, e.g., id.* (PPL only seeks that the Commission “affirm” that an EDC may “challenge subsequent modifications to the TRM and request modifications to its Phase II targets.”); Prehearing Memorandum at 6 (the “sole issue raised by [PPL]” in its evidentiary hearing petition is “whether the Commission's approval of the 25% adjustment factor precludes an EDC from challenging subsequent modifications to the TRM and from requesting modifications to its Phase II consumption targets based upon modifications to the TRM”). These are not factual issues—they are questions of law. This is wholly inconsistent with the limited, narrow proceeding to evaluate *evidence* created here by the Implementation Order. PPL's petition should as such be denied.

C. The Commission Has Already Addressed PPL's Arguments in the Reconsideration Docket, Rendering this Docket Moot

The issues PPL raises in its evidentiary petition are legal issues, not evidentiary ones, and thus should be raised—if anywhere—in a petition for reconsideration. PPL did in fact raise these same issues in a petition for reconsideration, and the Commission has accordingly already dealt with them. This petition for evidentiary hearing should accordingly be denied.

In its reconsideration petition, PPL argued that the Commission should “affirmatively state” that the acceptance of the reduction targets in Phase II does not preclude EDCs from challenging potential future changes to the Technical Reference Manual (“TRM”) or prohibit EDCs from petitioning the Commission to modify those targets in response to such TRM changes or to “other future changes that are not presently known.” Reconsideration Petition at 1. As noted above, this is precisely the issue PPL raises in its evidentiary petition (*see* PPL Petition at 5; Prehearing Memorandum at 6).

But the Commission has already addressed this issue, ruling in its Reconsideration Order that although “all interested parties may participate, and are encouraged to do so, in any future proceedings that propose changes or updates to the TRM,” and “the TRM measures are subject to challenge in any subsequent proceeding in which an EDC’s compliance is at issue,” it denied “PPL’s requests to subject Phase II required consumption reductions to potential revision to reflect any potential revisions to the TRM.” Reconsideration Order at 14-16. Thus, all issues raised by PPL in its evidentiary petition have already been resolved, and that resolution is entitled to deference. *See Schuylkill Twp. v. Pennsylvania Builders Ass’n*, 607 Pa. 377, 385 (Pa. 2010) (courts must give “substantial deference to an agency’s interpretation of a statute the agency ‘is charged with implementing and enforcing.’”) (citing *Commonwealth, Office of Administration v. Pennsylvania Labor Relations Board*, 591 Pa. 176, 916 n. 11 (Pa. 2007)); *see also Cherry v. Pennsylvania Higher Education Assistance Agency*, 537 Pa. 186 (Pa. 1994) (“An interpretation by the agency charged with a statute’s implementation is accorded great weight and will be overturned only if such a construction is clearly erroneous.”). PPL’s evidentiary petition

must therefore be denied as an improper attempt to dual-track the same argument in different dockets.³

D. PPL Has Failed to Carry Its Burden in Establishing that Any Change to the Implementation Order is Necessary at this Juncture

Nonetheless, even if PPL's issues were appropriate to an evidentiary petition process, and had not already been addressed by the Commission, PPL has failed to provide evidence demonstrating that alteration of the Implementation Order is warranted. Indeed, PPL merely provides hypotheticals. However, hypothetical scenarios are not evidence.

PPL's argument is that future changes to the TRM necessitate its ability to challenge its reduction targets. However, PPL does not point to any such future TRM changes. Nor could it—PPL testified that it is unaware of whether or not potential future TRM changes would impact its ability to meet its reduction targets, or even whether or not those changes might make it *easier* for PPL to hit its targets. *See* Hearing Transcript 43:12-14 (“Q. . . . PPL does not know today what those future TRM changes might be; correct? A. Correct.”); *id.* at 43:19-22 (it is “possible” that “future TRM changes could result in an increase in savings that could be achieved []”); *id.* at 44:5-13 (the tentative changes to the 2013 TRM merely “could” cause PPL to exclude certain measures from its implementation plans); *id.* at 47:12-15 (“At this time, we don’t know what those future changes are. We think that we can accommodate the 25 percent and meet the current target, but we don’t know what future changes are”).⁴

³ This is especially the case given the Commission's reliance on *Duick v. Pennsylvania Gas and Water Co.* in its Reconsideration Order for the proposition that “Parties . . . cannot be permitted by a second motion to review and reconsider, to raise the same questions which were specifically decided against them . . . what we expect to see raised . . . are new and novel arguments, not previously heard.” 56 Pa. P.U.C. 553, 559, December 17, 1985 (internal citations omitted).

⁴ At best, PPL discusses the tentative 2013 TRM adjustments. However, PPL testified that it believes that its reduction target is achievable (Hearing Transcript at 38:7-10), that in developing its implementation plan to hit that target, it is incorporating the information in the tentative 2013

Instead, PPL presents hypothetical situations, but not facts. *See* Hearing Transcript at 36:20-23 (admitting that the CFL example in PPL’s written testimony is “a purely hypothetical situation”); *id.* at 36:24-37:9 (admitting that one could craft a hypothetical in which changes to the TRM regarding CFLs could result in increases in savings); *id.* at 43:2-14 (admitting that discussion in written testimony of future additional TRM changes is “hypothetical” and that PPL “does not know today what those future TRM changes might be”); *id.* at 45:19-46:1 (admitting that PPL’s discussion in its written testimony of impacts from future TRM changes on Phase II implementation if the “mix of measures from Phase I were carried forward to Phase II” is a counterfactual situation, as PPL does not actually plan to carry forward its Phase I mix of energy efficiency measures to Phase II); *id.* at 46:15-22 (admission that, although PPL in its written testimony suggests that Phase II costs will be higher because Phase I captured all the “low-hanging fruit,” PPL does not “have [the] information” as to the amount of market penetration of those Phase I measures among PPL’s customer base). While these may be interesting potential mechanisms, PPL’s hypotheticals do not constitute evidence that the Implementation Order must be modified.

In fact, the only real evidence as to whether or not PPL will need to challenge its Phase II targets (aside from PPL’s consistent testimony that it believes it actually will achieve those targets) is the fact that PPL historically has achieved and will achieve its reduction targets. *See* PPL Quarterly Report to the Pennsylvania Public Utilities Commission (Preliminary Annual Report) For the Period June 2012 through August 2012 Program Year 4, Quarter 1, at 4-5, 16 (noting that as of September 1, 2012 PPL has saved 1,073,645 MWh, or 94% of its total Phase I target, and that PPL only spent \$181,601,000, which amounts to less than 74% of its total

TRM adjustments, not the 2012 TRM (*id.* at 40:15-21), and that PPL “believe[s] we can” hit its Phase II targets thereby. *Id.* at 41:7-11.

budget, in so doing). The simple historical reality that PPL has in Phase I largely achieved its reduction targets well-within a budget significantly less on a dollars-per-MWh basis than is provided in the Phase II Implementation Order is strong evidence that no alterations to the Implementation Order are required.

At best, PPL suggests that under certain circumstances that may occur in the future—but which are unknown to PPL today—it might wish to challenge its reduction targets. But such claims are simply not ripe today, and PPL has failed to demonstrate otherwise. PPL has not carried its evidentiary burden, and thus its petition should be denied.

IV. CONCLUSION

For the foregoing reasons, PPL's petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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