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October 31, 2012

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Petition of PPL Electric Utilities Corporation for an Evidentiary Hearing on the Energy Benchmarks Established for the Period June 1, 2013 through May 31, 2016
Docket No. P-2012-2320369

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Reply Brief of PPL Electric Utilities Corporation in the above-referenced proceeding. Copies have been provided to the persons in the manner indicated on the Certificate of Service.

Respectfully Submitted,

Andrew S. Tubbs

AST/jl
Enclosures
cc: Certificate of Service
Honorable Elizabeth Barnes

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **Reply Brief of PPL Electric Utilities Corporation** has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

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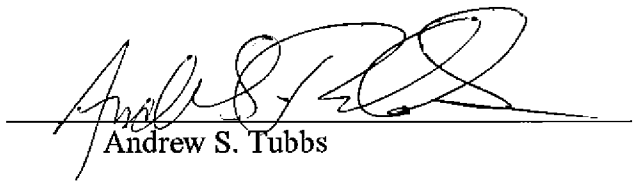

Andrew S. Tubbs

THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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I. INTRODUCTION

On August 20, 2012, PPL Electric Utilities Corporation ("PPL Electric" or the "Company") filed a Petition for an Evidentiary Hearing ("Petition") pursuant to the Implementation Order issued by the Pennsylvania Public Utility Commission ("Commission") on August 3, 2012. *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411, M-2008-2069887, 2012 Pa. PUC LEXIS 1259 (Implementation Order entered on August 3, 2012) ("*2012 Implementation Order*"). On page 20 of the *2012 Implementation Order*, the Commission states that "the application of the 25% adjustment factor allows for future TRM [Technical Reference Manual ("TRM")] adjustments on savings adjustments in future years without revising program goals." The sole issue raised in PPL Electric's Petition is whether this statement eliminates electric distribution companies' ("EDCs") legal rights to: (1) challenge the application of future changes to the TRM, Total Resource Cost ("TRC"), and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to their Phase II EE&C Plans, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known.

On October 26, 2012, in accordance with the expedited procedural schedule established at the Prehearing Conference and set forth in the Scheduling Order issued by Administrative Law Judge Elizabeth H. Barnes ("ALJ") dated September 20, 2012, several parties submitted main briefs in support of their various position. The parties that submitted briefs included PPL Electric, the Office of Consumer Advocate ("OCA"), the Sustainable Energy Fund of Central Eastern Pennsylvania ("SEF"), Citizens for Pennsylvania's Future ("PennFuture"), and the Clean Air Council and the Sierra Club (collectively "Sierra Club").

PPL Electric explained in its Main Brief that the evidence in this proceeding demonstrates that the 25% adjustment factor may not be sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions. (PPL Electric Main Brief, pp. 14-19.) The Company also explained that the Commission's attempt in the *2012 Implementation Order* to prospectively eliminate an EDC's right to petition to modify its Phase II consumption reduction target misapplies and ignores Sections 703(g) and 2806.1(b)(2) of the Public Utility Code, 66 Pa.C.S. §§ 703(g), 2806.1(b)(2), as well as Section 5.572 of the Commission's regulations, 52 Pa. Code § 5.572. (PPL Electric Main Brief, pp. 19-21.) PPL Electric further demonstrated that the potential impact of future changes to the TRM, TRC, and other market forces were not, and could not have been, considered by the Statewide Evaluator ("SWE") or the Commission in the *2012 Implementation Order* proceeding. (PPL Electric Main Brief, pp. 22-27.) The Company also explained that the remedies provided in the *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411, M-2008-2069887, 2012 Pa. PUC LEXIS 1545 (Reconsideration Order entered on September 27, 2012) ("*2012 Reconsideration Order*") are inadequate and do not provide a meaningful opportunity to review whether future changes that are *actually adopted* should be applied to the Phase II reduction targets, or whether the Phase II reduction targets should be modified to account for such changes. (PPL Electric Main Brief, pp. 27-30.) Further, PPL Electric explained that the conclusion reached in the *2012 Implementation Order* raises serious due process concerns. (PPL Electric Main Brief, pp. 30-32.) The Company also explained that the conclusion in the *2012 Implementation Order* was adopted without the formal due process requirements of a formal rulemaking and, therefore, is not binding. (PPL Electric Main Brief, pp. 33-39.) Finally, PPL Electric demonstrated that the conclusion in the *2012 Implementation Order* that the 25%

adjustment factor is sufficient to account for all future, unknown changes was based on pure speculation and, therefore, is not supported by competent and substantial evidence as a matter of law. (PPL Electric Main Brief, pp. 39-42.)

Clearly, the evidence and arguments set forth in PPL Electric's Main Brief demonstrates that the conclusion reached in the *2012 Implementation Order* has serious legal, policy, factual, and evidentiary flaws. The parties opposing PPL Electric's Petition simply ignore these serious and fatal flaws in the *2012 Implementation Order*. Further, none of the parties have introduced any evidence to support the conclusion reached in the *2012 Implementation Order* that the 25% adjustment factor approved by the Commission is sufficient to account for all future, unknown changes, or to refute the evidence and arguments presented by PPL Electric at the hearing and in its Main Brief.

In its Main Brief, PPL Electric anticipated and responded to many of the arguments that have been raised by other parties. In several instances, PPL Electric's position is fully set forth in its Main Brief and further response is not necessary. Certain arguments of other parties, however, require further response. In responding to other parties, PPL Electric will cross-reference its Main Brief where appropriate to minimize repetition of arguments.

For the reasons explained below, as well as those more fully explained in the Company's Main Brief, the conclusion reached in the *2012 Implementation Order* constitutes an error of law, abuse of discretion, violates due process requirements, is non-binding, and is not supported by evidentiary evidence. Accordingly, the Commission should correct these errors and make it clear that the *2012 Implementation Order* and *2012 Reconsideration Order*, including, but not limited to, the 25% adjustment factor, do not restrict PPL Electric's right to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine

compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known.

II. ARGUMENT

A. PPL ELECTRIC'S EVIDENCE AND ARGUMENTS ARE WITHIN THE SCOPE OF THIS PROCEEDING

The Sierra Club argues that the relief requested by PPL Electric is beyond the scope of the purpose of this proceeding. According to the Sierra Club, the purpose of this evidentiary hearing is limited to the factual determinations supporting the consumption reduction target adopted by the Commission in the *2012 Implementation Order*. The Sierra Club contends that PPL Electric has failed to present any facts related to the 2.1% consumption reduction target and, instead, only presented legal arguments regarding the ability to challenge future changes to the TRM. (Sierra Club Main Brief, pp. 6-7.) PPL Electric disagrees with the Sierra Club's overly narrow reading of the *2012 Implementation Order*, and the Sierra Club ignores the evidence that the Company did present.

Preliminarily, it must be noted that the Sierra Club did not present any testimony in this proceeding, and that the first time it raised this issue was in its Main Brief. As the Sierra Club concedes, PPL Electric clearly identified in its Petition that it was challenging whether the Commission's statement on page 20 of the *2012 Implementation Order* that "the application of the 25% adjustment factor allows for future TRM adjustments on savings adjustments in future years without revising program goals" eliminates EDCs' legal rights to file certain specified legal challenges and requests in the future. (Sierra Club Main Brief, p. 7.) To the extent that the Sierra Club believes that PPL Electric's Petition is beyond the scope of this proceeding, the

Sierra Club should have raised this issue at the earliest opportunity rather than waiting to raise this issue in its Main Brief, thereby depriving PPL Electric of any meaningful opportunity to respond. Raising arguments for the first time in a post-hearing brief is a violation of due process in a contested proceeding. *Enron Capital & Trade Resources Corporation v. The Peoples Natural Gas Company, et al.*, Docket No. R-00973928C0001, 1998 Pa. PUC LEXIS 199 (August 24, 1998); *Petition of Duquesne Light Company for Approval of Plan for Post-Transition Period Provider of Last Resort Service Petition for Reconsideration of Duquesne Light Company Petition for Reconsideration of Constellation NewEnergy, Inc. and Constellation Power Source, Inc.*, Docket No. P-00032071, 2004 Pa. PUC LEXIS 42 (October 5, 2004); *Dee-Dee Cab, Inc. v. Pa. PUC*, 817 A.2d 593, 598 (Pa. Cmwlth. 2003), *appeal denied*, 575 Pa. 698, 836 A.2d 123 (2003).

Notwithstanding the foregoing, the *2012 Implementation Order* clearly contemplated a proceeding to address the evidence and arguments presented by PPL Electric in this proceeding. The *2012 Implementation Order* provides, in pertinent part, as follows:

> The Commission, however, recognizes that the EDCs' face potential penalties if they fail to meet the Commission-determined consumption reduction targets. As such, the Commission will tentatively adopt the EDC specific consumption reduction targets set forth in Table I above, subject to challenge by an EDC in accordance with the process described below. These consumption reduction targets will become finale for any EDC that does not petition the Commission for an evidentiary hearing by August 20, 2012.
>
> *If an EDC desires to contest the facts the Commission relied upon in adopting the consumption reduction requirements* contained in Table 1, it has until August 20, 2012, to file a petition requesting an evidentiary hearing on its specific consumption reduction target. The EDC contesting the consumption reduction requirement shall have the burden of proof in accordance with 66 Pa. C.S. § 332(a). The scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue. If an EDC does not file a petition by August 20, 2012, *it will have been deemed to have*

> *accepted the facts and will be bound by the consumption reduction requirement* contained in Table 1 for that EDC as there would be no remaining disputed facts.
>
> * * *
>
> At such hearings, the EDC will *have the opportunity to present evidence and argument* as to its reasonable consumption reduction target for Phase II. While the Commission will not entertain petitions from other parties, any other party may intervene in the EDC-requested hearing and present evidence.

2012 Implementation Order, pp. 30-31 (emphasis added). Clearly, the *2012 Implementation Order* provided that an EDC may petition for a hearing to contest the facts the Commission relied upon in adopting the consumption reduction requirements and to present both "*evidence and arguments*" related to the consumption reduction target. This is precisely what PPL Electric has done here.

The Sierra Club overlooks one crucial facet of the consumption reduction target adopted by the Commission. The 2.1% consumption reduction target cannot, as the Sierra Club suggests, be viewed in isolation of the rest of the *2012 Implementation Order*. The Commission did not simply adopt a consumption reduction target. Rather, the Commission adopted a consumption reduction target that purports to account for all future changes and that excludes the Company's rights to: (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that are not, and cannot be, presently known. According to the Commission's direction in the *2012 Implementation Order*, PPL Electric is entitled to present both evidence and arguments related to the reasonableness of the Phase II consumption reduction target, including the adoption of a Phase II consumption

reduction target that excludes these rights. Clearly, the elimination of these rights is directly related to the consumption reduction factor adopted in the *2012 Implementation Order*.

The Sierra Club's argument also overlooks that PPL Electric did present extensive factual evidence as to the Company's ability to meet the 2.1% consumption reduction target if substantial changes occur in the future. The evidence presented by PPL Electric demonstrates that the 25% adjustment may not be sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions. (PPL Electric Main Brief, pp. 14-19.) This evidence is clearly within the scope of this proceeding as contemplated by the *2012 Implementation Order*.

PPL Electric also presented arguments that: (1) the *2012 Implementation Order* misapplies and ignores Section 703(g) of the Public Utility Code, Section 2806.1(b)(2) of Act 129, and Section 5.572 of the Commission's regulations, 52 Pa. Code § 5.572 (PPL Electric Main Brief, pp. 19-21); (2) the potential impact of future changes to the TRM, TRC, and other market forces were not, and could not have been, considered by the SWE or the Commission in the *2012 Implementation Order* proceeding (PPL Electric Main Brief, pp. 22-27); (3) the conclusion reached in the *2012 Implementation Order* has serious due process implications (PPL Electric Main Brief, pp. 30-32); and (4) the conclusion in the *2012 Implementation Order* was adopted without the formal due process requirements of a formal rulemaking and, therefore, is not binding (PPL Electric Main Brief, pp. 33-39). Clearly the aforementioned arguments are within the scope of this proceeding as contemplated by the *2012 Implementation Order*.

If PPL Electric had not filed its Petition for this evidentiary hearing, the Company would have been "deemed to have accepted the facts" in the *2012 Implementation Order*. *2012 Implementation Order*, p. 31. PPL Electric clearly does not accept the facts, or lack thereof,

purportedly supporting the conclusion that the 25% adjustment factor is sufficient to account for all future, unknown changes. The Sierra Club disregards that PPL Electric is directly challenging the lack of facts or evidence of record to support this conclusion. (PPL Electric Main Brief, pp. 39-42.) Therefore, in order to avoid being deemed to have accepted the facts in the *2012 Implementation Order*, the Company was required to file the instant Petition.

Similarly, if PPL Electric had not filed its Petition for this evidentiary hearing, the Company would "be bound by the consumption reduction target." *2012 Implementation Order*, p. 31. For the many reasons explained in its Main Brief, the Company objects to being bound by a consumption reduction target that excludes the right to (1) challenge the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets, and (2) request, if necessary, modifications to its Phase II EE&C Plan, including, but not limited to, the Phase II consumption reduction target, to account for any such future changes. (*See* PPL Electric Main Brief, *passim*.) Therefore, in order to avoid being bound by a consumption reduction target that excludes these rights, the Company was required to file the instant Petition.

In addition, even if the *2012 Implementation Order* is to be construed as narrowly as the Sierra Club suggests, this does not mean that PPL Electric is somehow prohibited from petitioning the Commission to review the *2012 Implementation Order*. PPL Electric has explained that EDCs have the right under Sections 703(g) and 2806.1(b)(2) of the Public Utility Code and Section 5.572 of the Commission's regulations to petition the Commission at anytime asking that it exercise its authority to modify the consumption reduction targets adopted in a Phase II EE&C Plan. (PPL Electric Main Brief, pp. 19-21.) To hold that PPL Electric is not permitted to raise these important legal and evidentiary issues in this proceeding but can raise

them anytime under Sections 703(g) and 2806.1(b)(2) is simply nonsensical, and it is a waste of resources for the parties and the Commission to have to address such frivolous issues. These issues are properly within the scope of this proceeding and should be fully and finally resolved.

Based on the foregoing, the Sierra Club's contention that PPL Electric's Petition is beyond the scope of this proceeding is without merit and should be rejected. The issues raised by PPL Electric are clearly within the scope of this proceeding as contemplated by the *2012 Implementation Order*. As explained in the Company's Main Brief, there are numerous legal, policy, factual, and evidentiary errors with the *2012 Implementation Order*. Through this proceeding, the Commission has the opportunity to correct these errors.

B. THERE WAS NO EVIDENCE IN THE *2012 IMPLEMENTATION ORDER* THAT THE 25% ADJUSTMENT FACTOR ADEQUATELY ACCOUNTS FOR FUTURE UNCERTAINTIES

The OCA, SEF, and PennFuture all contend that the 25% adjustment factor adopted in the *2012 Implementation Order* is adequate to account for all future, unknown changes in the TRM, TRC, other Commission actions, and other future market conditions that are not presently known. These parties' contentions miss the point and are contrary to the record.

Preliminarily, it must be noted that the arguments of the OCA, SEF, and PennFuture in support of the 25% adjustment factor ignore the legal requirement that the Commission's decision in the *2012 Implementation Order* must be based upon substantial evidence. *Met-Ed Indus. Users Group v. Pa. PUC*, 960 A.2d 189, 193 n.2 (Pa. Cmwlth. 2008) (citing 2 Pa.C.S. § 704). In its *2012 Implementation Order*, the Commission concluded that the 25% adjustment factor is sufficient to account for all future, unknown changes.[1] However, PPL Electric

[1] This conclusion is the sole basis to support the Commission's position that EDCs are precluded from (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets, and (2) requesting, if necessary, modifications to their

explained that there is nothing of record in the *2012 Implementation Order* proceeding to suggest that these future, unknown changes were considered by the Commission in adopting the *2012 Implementation Order*. (PPL Electric Main Brief, pp. 39-42.) Thus, there was simply no evidentiary basis for the Commission to conclude in the *2012 Implementation Order* that the 25% adjustment factor will be adequate to account for all future TRM or savings adjustments that are unknown and unknowable at this time. None of the parties in this proceeding have pointed to any evidence from the *2012 Implementation Order* proceeding that supports the Commission's conclusion. For this reason alone, the arguments of the OCA, SEF, and PennFuture must be rejected. Notwithstanding, PPL Electric will separately address these parties' contentions.

The OCA and PennFuture both argue that the 25% adjustment factor was designed to account for all future uncertainties. (OCA Main Brief, p. 6, PennFuture Main Brief, pp. 6, 12.) This argument is contrary to the SWE's testimony, which admitted that it did not perform any analysis of future changes to the TRM, TRC, or other future market conditions. (SWE St. No. 4, p. 3.) It is undisputed that neither the SWE, the Commission, PPL Electric, nor any other party knows what future changes may be made to the TRM or the impact those changes may have on savings reductions, acquisition costs, and PPL Electric's ability to meet its Phase II target. (PPL Electric Main Brief, pp. 22-27.) There simply is no factual or logical basis to conclude that the 25% adjustment factor will be adequate to account for all future TRM or savings adjustments that are unknown and unknowable at this time.

In an effort to show that the Commission's conclusion is supported by the record, the OCA and PennFuture both cite to the testimony of PennFuture witness Courtney Lane in this

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Phase II consumption reduction targets to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known.

proceeding and argue that SWE overestimated the acquisition costs. The OCA and PennFuture therefore conclude that the 25% adjustment factor provides ample cushion to account for all future, unknown changes. (OCA Main Brief, p. 7, PennFuture Main Brief, p. 6.) The reasons given by Ms. Lane to support her conclusion are simply a restatement of PennFuture's comments to the *Energy Efficiency and Conservation Program*, Docket Nos. M-2012-2289411, M-2008-2069887, 2012 Pa. PUC LEXIS 759 (Tentative Implementation Order entered May 11, 2012) ("*2012 Tentative Order*"), which, as Ms. Lane conceded, were rejected by the Commission in *2012 Implementation Order*. (Tr. 57.) Clearly, statements that were rejected by the Commission *in the 2012 Implementation Order* cannot now be used to support the Commission's conclusion in that very same *Order*. Further, this argument ignores the unrebutted evidence that, although the 25% adjustment factor may cover the reduced savings and increased acquisition costs associated with the Energy Independence and Security Act ("EISA"), it does not cover reduced savings and increased acquisition costs associated with future changes to the TRM, TRC, other Commission action, and other future changes in market conditions. (PPL Electric Main Brief, pp. 17-18.)

The OCA, SEF, and PennFuture attempt to support the Commission's conclusion by noting that updates to the TRM could result in increases to the amount of savings attributed to EE&C measures and programs. (OCA Main Brief, pp. 7-6; SEF Main Brief, p. 7; PennFuture Main Brief, pp. 5, 11.) PPL Electric acknowledges that the Commission has, on occasion, approved updates to the TRM that have increased the amount of savings attributed to EE&C measures. However, it has been far more common for the Commission's updates to significantly reduce savings for EE&C measures, including measures that are likely to be a significant portion of PPL Electric's Phase II EE&C Plan. (PPL Electric St. 1-R, pp. 14-15.) It may not be possible

to meet the compliance target if there are significant changes, such as a reduction in savings (future TRMs), lower avoided costs (TRC), changes to allowable funding levels, changes to the income set-aside savings target, or other changes. (PPL Electric St. 1-R, p. 15.) Revisions to TRMs and TRCs, following the approval of an EDC's EE&C Plan, that change the savings calculations and program acquisition costs have the potential to jeopardize an EDC's ability to achieve its target, as evidenced by the litigation surrounding the 2011 TRM update. (PPL Electric St. 1-R, pp. 16-17.)

The OCA, SEF, and PennFuture all point to the Commission's determination in the *2012 Reconsideration Order* that granting the relief requested by PPL Electric would create uncertainty and be burdensome for parties. (OCA Main Brief, pp. 6, 8; SEF Main Brief, p. 8; PennFuture Main Brief, pp. 5, 10, 12.) However, the "uncertainty" and potential "inconvenience" to other parties and/or the Commission is insignificant when compared to the significant civil penalties that would be imposed upon PPL Electric if it failed to meet its Act 129 obligations.

Moreover, these parties' concerns about "uncertainty" and potential "inconvenience" cannot trump the due process rights guaranteed by Article 1, Section 1 of the Pennsylvania Constitution and the Fourteenth Amendment to the United States Constitution. As explained in the Company's Main Brief, the conclusion in the *2012 Implementation Order* and *2012 Reconsideration Order* -- that EDCs are prospectively precluded from (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets and (2) requesting, if necessary, modifications to the Phase II consumption reduction target to account for any future changes in the TRM, TRC, other Commission actions, and market conditions that are not presently known --

amounts to a denial of due process. (PPL Electric Main Brief, pp. 30-32.) Given the prospective effect on the duties, liabilities, and obligations of the EDCs, and that EDCs do not, and cannot, know the changes that will *actually occur* or are *actually adopted*, the EDCs are without the opportunity to be heard on the issue of whether the 25% adjustment factor is sufficient to account for the future changes that will *actually occur* or are *actually adopted.*

Further, the contention that the relief requested by PPL Electric will result in numerous "perpetual proceedings" ignores the evidence in this proceeding. PPL Electric explained that it would seek to reduce its Phase II consumption reduction target only if future changes require the Company to make substantial modifications to its Phase II EE&C Plan and the Company determines that, even with those modifications, it cannot meet its Phase II consumption reduction target within the funding cap, cost effectiveness, and other compliance requirements. The Company does not plan to request changes to its target for minor changes to the TRM or other Commission actions; it would make such a filing only if the changes are so significant that the Company cannot achieve its Phase II consumption reduction target. (PPL Electric St. 1-R, p. 14.)

Based on the foregoing, the Commission's conclusion in the *2012 Implementation Order* that that the 25% adjustment factor will be adequate to account for all future TRM or savings adjustments was not supported by any evidence of record in the *2012 Implementation Order* proceeding. The OCA, SEF, and PennFuture have failed to point to any evidence from the *2012 Implementation Order* proceeding that supports the Commission's conclusion.

C. THE REMEDIES PROVIDED FOR IN THE *2012 RECONSIDERATION ORDER* ARE INADEQUATE

The parties opposing PPL Electric's request argue that the Commission has previously considered and addressed PPL Electric's issues in the *2012 Reconsideration Order*, and that PPL

Electric has adequate remedies to address future changes to the TRM. These arguments are without merit and should be rejected.

SEF and the Sierra Club both argue that the Commission has already addressed PPL Electric's issues in the *2012 Reconsideration Order*. (SEF Main Brief, p. 6; Sierra Club, p. 8.) Although the Commission issued an order denying PPL Electric's Petition for Reconsideration, it is clear that the Commission failed to address the fundamental legal issue raised in PPL Electric's Petition for Reconsideration -- whether the 25% adjustment factor adopted in the *2012 Implementation Order* "for future TRM adjustments" prohibits an EDC from challenging the application of future modifications to the TRM or from seeking to modify the Phase II consumption reduction targets to account for future changes to the TRM or other future changes that are not presently known. Despite PPL Electric's request in its Petition for Reconsideration, there is nothing in the *2012 Reconsideration Order* that affirmatively states whether an EDC *can or cannot* challenge the application of future modifications to the TRM, TRC, or other Commission actions, or seek to modify the Phase II consumption reduction targets to account for future changes to the TRM, TRC, other Commission actions, or other market conditions that are not presently known.

The OCA, SEF, and the Sierra Club all contend that the *2012 Reconsideration Order* identified adequate remedies for PPL Electric to address future changes without modifying the Phase II consumption reduction target. (OCA Main Brief, p. 8; SEF Main Brief, p. 6; Sierra Club Main Brief, p. 7-8.) In denying PPL Electric's request for reconsideration, the Commission noted that EDCs and other interested parties may (1) participate in and challenge any proposed updates to the TRM, and (2) submit evidence in compliance hearings and argue that an alternative estimate of consumption or demand savings is more accurate. *2012 Reconsideration*

Order, p. 14. PPL Electric explained that the remedies provided in the *2012 Reconsideration Order* are inadequate and do not provide a meaningful opportunity to review whether future changes that are *actually adopted* should be applied to the Phase II reduction targets, or whether the Phase II reduction targets should be modified to account for such changes that are *actually adopted.* (PPL Electric Main Brief, pp. 27-30.)

Similarly, this evidentiary proceeding is not an adequate remedy to challenge unknown future changes in the TRM, TRC, other Commission actions, or market conditions. Neither the Commission, the SWE, the Company, nor any other party knows what future changes will *actually be adopted* or how they will impact the Company's EE&C Plan. Any attempt to put into evidence any such future, unknown changes would be nothing more than mere speculation. (PPL Electric Main Brief, p. 29.)

PennFuture and SEF both note that PPL Electric can, and has in the past, amended its EE&C Plan to account for changes to the TRM. PennFuture and SEF therefore contend that PPL Electric already has an adequate remedy to address future changes and uncertainties. (PennFuture Main Brief, pp. 10-11; SEF Main Brief, p. 8.) PPL Electric acknowledges that, to account for the Commission's modifications to the TRM and TRC, as well as in response to other market forces, PPL Electric has petitioned the Commission for approval to modify certain aspects of its previously approved Phase I EE&C Plan. (Tr. 34-35.) However, the Commission has not approved all of PPL Electric's requested modifications to its Phase I EE&C Plan.[2] (Tr. 35.) Further, PPL Electric explained that it would request permission to make revisions to its EE&C Plan if necessary to accommodate future changes to the TRM, TRC, or other market

[2] *See, e.g., Petition of PPL Electric Utilities Corporation for Approval of its Energy Efficiency and Conservation Plan,* Docket No. M-2009-2093216, 2010 Pa. PUC LEXIS 392 (February 17, 2010); *Petition of PPL Electric Utilities Corporation for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093216, 2011 Pa. PUC LEXIS 2009 (May 6, 2011).

forces. However, depending on the extent and timing of the modification, the Company may still not be able to achieve its Phase II consumption target even with these revisions to its EE&C Plan. It is at this point that PPL Electric could foresee the need to file a petition to request that the Commission amend or revise its Phase II consumption reduction target adopted in the *2012 Implementation Order*. (PPL Electric St. 1, p. 7.)

Finally, the Sierra Club contends that the Commission's *2012 Reconsideration Order* is entitled to substantial deference. (Sierra Club Main Brief, p. 8.) The Sierra Club's argument misapplies the deferential standard. PPL Electric acknowledges that, as the agency responsible for enforcing and implementing the Public Utility Code and the regulations promulgated thereunder, the Commission's interpretation of the Public Utility Code and its regulations is accorded deference and "given controlling weight unless it is clearly erroneous." *Riverwalk Casino, L.P. v. Pennsylvania Gaming Control Board*, 592 Pa. 505, 530, 926 A.2d 926, 940 (2007); *see also Tire Jockey Service, Inc. v. Department of Environmental Protection*, 591 Pa. 73, 110, 915 A.2d 165, 1187 (2007). However, this deferential standard is an appellate standard that is not applicable to this case.

Further, PPL Electric is not questioning the Commission's interpretation of the Public Utility Code or the Commission's regulations. Rather, PPL Electric is questioning the legality and evidentiary support of a general order of the Commission that seeks to eliminate EDCs' legal rights to file certain specified legal challenges and requests in the future. For the numerous reasons explained in PPL Electric's Main Brief, the *2012 Implementation Order* contains a clear error of law, is an arbitrary and capricious abuse of discretion, violates due process requirements, violates the requirements of formal rulemaking proceedings, and is not supported by substantial

evidence of record. Clearly, even if the deference standard applied, the *2012 Reconsideration Order* is clearly erroneous and, therefore, not entitled to deference as the Sierra Club suggests.

Based on the foregoing, the remedies set forth in the *2012 Reconsideration Order* are inadequate and do not provide a meaningful opportunity to review whether future changes should be applied to the Phase II reduction targets, or whether the Phase II reduction targets should be modified to account for such changes.

D. PPL ELECTRIC HAS MET ITS BURDEN OF PROOF TO DEMONSTRATE THAT THE 25% ADJUSTMENT FACTOR MAY NOT BE ADEQUATE TO ACCOUNT FOR ALL UNKNOWN, FUTURE CHANGES

SEF, PennFuture, and the Sierra Club contend that PPL Electric has failed to meet its burden of proof in this proceeding. These parties' arguments are without merit and should be rejected.

SEF contends that PPL Electric has failed to meet its burden because the TRM is a tool EDCs can use to estimate the amount of energy savings a program offering can potentially provide, and that the TRM does not establish the goal, nor do changes to the TRM move the goal; the TRM simply measures the amount of electric energy savings obtained by the installation or implementation of a measure of program. (SEF Main Brief, p. 7.) PPL Electric explained that, despite the Commission's contention that the TRM is merely guidance, it is apparent that the Commission will evaluate and verify compliance with Act 129 using the updated TRM and TRC. (PPL Electric Main Brief, p. 14-15.) The implication of this is that the Commission, by routinely updating the TRM and TRC, may materially change the rules used by an EDC to develop its Commission-approved EE&C Plan. Further, the Commission will use these revised rules to verify savings compared to the savings estimated in the EE&C Plan. However, under the *2012 Implementation Order*, the Commission will not permit an EDC to

request that its consumption reduction target be modified if such changes make it impossible for the EDC to successfully achieve its Phase II consumption reduction target. Such a result is particularly problematic give the statutorily set revenue cap and the threat of substantial civil penalties if the EDC is unsuccessful in reaching the consumption reduction target. (PPL Electric St. 1, pp. 5-6.)

SEF also contends that PPL Electric failed to meet its burden because EDCs made changes to their Phase I EE&C Plans but were not permitted to change the reduction targets. (SEF Main Brief, pp. 8-9.) SEF's argument ignores the fundamental difference between the Phase I and Phase II targets. The consumption reduction targets for Phase I were established by the General Assembly and codified in Act 129. These statutory targets are mandatory and the Commission has no discretion in their application and is without authority to amend or revise these statutory targets. Unlike the Phase I targets, the Phase II targets are not established by statute; rather, the Commission is required to exercise its expertise and discretion to establish reasonable and achievable consumption targets. 66 Pa.C.S. § 2806.1(c)(3). Further, SEF ignores that the General Assembly has specifically granted the Commission the authority to rescind, modify, or amend prior orders, including such orders as the *2012 Implementation Order* approving the Phase II consumption reduction targets. (PPL Electric Main Brief, pp. 19-21.)

PennFuture and the Sierra Club argue that PPL Electric relies on hypothetical scenarios and failed to present any evidence that the 25% adjustment factor is inadequate to account for all future, unknown changes. (PennFuture Main Brief, p. 12; Sierra Club, pp. 9-11.) This argument is without merit for several reasons.

First, the issue is not whether PPL Electric can demonstrate whether the 25% adjustment factor adopted in the *2012 Implementation Order* is inadequate to account for all future

uncertainties. Rather, the issue is whether the Commission's conclusion in the *2012 Implementation Order* is supported by the required substantial evidence of record. Although an agency may draw on its own expertise to resolve issues of fact, any inferences must, in every case, be drawn from the established facts in order to satisfy the substantial evidence test. *Pennsylvania Labor Relations Board v. Sand's Restaurant Corp.*, 429 Pa. 479, 485, 240 A.2d 801, 804 (1968). Here, PPL Electric explained that the conclusion reached in the *2012 Implementation Order* is based on pure speculation and conjecture and, therefore, is not supported by competent and substantial evidence as a matter of law. (PPL Electric Main Brief, pp, 39-42.)

Second, PennFuture's and the Sierra Club's criticism of PPL Electric's use of examples is nonsensical. It is undisputed that neither the SWE, Commission, PPL Electric, nor any other party knows what future adjustments may be made to the TRM or the impact those changes may have on savings reductions, acquisition costs, and PPL Electric's ability to meet its Phase II target. Future changes to the TRM, TRC, or other market conditions simply cannot be known unless and until they *actually occur* or are *actually adopted.* For this reason, the impact of such changes cannot be introduced into the record. PennFuture and the Sierra Club are attempting to put the proverbial "rabbit in the hat" by criticizing PPL Electric for not doing something that cannot be done. Under these circumstances, it is reasonable to rely on examples to demonstrate that the 25% adjustment factor may not be adequate to account for all future changes to the TRM, TRC, other Commission actions, and other market conditions that are not presently known or knowable.

Third, PPL Electric demonstrated that the risks associated with this issue are not hypothetical, as suggested by PennFuture and the Sierra Club. PPL Electric explained that the

25% adjustment factor may cover the reduced savings and increased acquisition costs associated with EISA, but does not cover the proposed reduced savings and increased acquisition costs associated with changes to the 2013 TRM. (PPL Electric Main Brief, pp. 16-18.) The 2.1% consumption reduction and the 25% adjustment factor recommended by the SWE were based on the 2012 TRM. Notably, the 2013 TRM is not scheduled to be issued until after the EDCs file their Phase II EE&C Plans. Therefore, if PPL Electric were to use the mix of measures from its Phase I EE&C Plan (measures based on the 2012 TRM), and the Commission decides to significantly modify the TRM via the 2013 TRM or subsequent Phase II TRMs, it would be difficult for the Company to achieve the 2.1% consumption reduction target. (PPL Electric Main Brief, pp. 17-18.)

Finally, PennFuture's and the Sierra Club's criticism of PPL Electric's use of examples is equally applicable to the Commission's conclusion in the 2012 Implementation Order. The *2012 Implementation Order* fails to rely on any evidence of record, hypothetical or otherwise, to support the conclusion that the 25% adjustment factor is sufficient to account for all future, unknown changes in the TRM, TRC, other Commission actions, or other market conditions that are presently unknown and unknowable.

SEF and the Sierra Club argue that PPL Electric failed to meet its burden because the Company believes that it can develop a Phase II EE&C Plan that will comply with the 2.1% target and the 25% adjustment factor. (SEF Main Brief, pp. 4-5; Sierra Club pp. 9-10.) This argument overlooks the fact that PPL Electric is using the measures and savings set forth in the *Implementation of the Alternative Energy Portfolio Standards Act of 2004: Standards for the Participation of Demand Side Management Resources – Technical Reference Manual 2013 Update*, Docket Nos. M-2012-2313373, M-00051865, 2012 Pa. PUC LEXIS 1511 (September

13, 2012) ("*2013 TRM Tentative Order*") to develop its Phase II EE&C Plan. The Company has explained that the changes proposed in the *2013 TRM Tentative Order*, in aggregate, will likely reduce PPL Electric's total EE&C Plan savings by 15% to 30% (in addition to the reduction due to EISA) and will increase PPL Electric's program acquisition costs by 15% to 30% (in addition to the increase due to EISA). (PPL Electric St. 1, p. 20.) PPL Electric is therefore using the changes proposed in the *2013 TRM Tentative Order* as the basis for its savings estimates in its Phase II EE&C Plan. (PPL Electric St. 1, pp. 12-13.) Clearly, PPL Electric will not have the luxury of developing its EE&C Plan using the 2014-2016 TRMs. If the Commission adopts significant changes to those future TRMs, the compliance target for Phase II may need to be recalculated accordingly as the TRM changes are not reflected in the results of the Market Potential Study or Phase II compliance targets. (PPL Electric St. 1, pp. 20-21.)

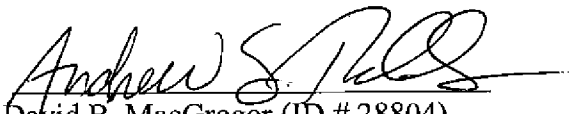
The evidence of record in this proceeding, as well as the various policy arguments, clearly demonstrates that the 25% adjustment may not be sufficient to account for all future changes in the TRM, TRC, other Commission actions, and other market conditions.

III. CONCLUSION

WHEREFORE, PPL Electric Utilities Corporation respectfully requests that the Pennsylvania Public Utility Commission grant the above-captioned Petition and enter an order that affirmatively states that the *2012 Implementation Order* and *2012 Reconsideration Order* do not prohibit an electric distribution company from: (1) challenging the application of future changes to the TRM, TRC, and other Commission actions to determine compliance with the Phase II consumption reduction targets; or (2) requesting, if necessary, modifications to their

Phase II EE&C Plans, including, but not limited to, the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and market conditions that are not presently known.

Respectfully submitted,



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