BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Application of PPL Electric Utilities Corporation filed pursuant to 52 Pa. Code Chapter 57, Subchapter G, for approval of the siting and construction of transmission lines associated with the Northeast-Pocono Reliability Project in portions of Luzerne, Lackawanna, Monroe, and Wayne Counties, Pennsylvania	:	A-2012-2340872
Petition of PPL Electric Utilities Corporation for a finding that a building to shelter control equipment at the North Pocono 230-69 kV Substation in Covington Township, Lackawanna County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2012-2340871
Petition of PPL Electric Utilities Corporation for a finding that a building to shelter control equipment at the West Pocono 230-69 kV Substation in Buck Township, Luzerne County, Pennsylvania is reasonably necessary for the convenience or welfare of the public	:	P-2012-2341105
Application of PPL Electric Utilities Corporation under 15 Pa. C.S. §1511(c) for a finding and determination that the service to be furnished by the applicant through its proposed exercise of the power of eminent domain to acquire a certain portion of the lands of the property owners listed below for siting and construction of transmission lines associated with the proposed Northeast-Pocono Reliability Project in portions of Luzerne, Lackawanna, Monroe, and Wayne Counties, Pennsylvania is necessary or proper for the service, accommodation, convenience or safety of the public	:	
John C. Justice and Linda S. Justice	:	A-2012-2341107
Three Griffins Enterprises, Inc.	:	A-2012-2341114
Margaret G. Arthur and Barbara A. Saurman	:	

Trustees of the Residuary Trust of James C. Arthur	:	A-2012-2341115
Anthony J. Lupas, Jr. and Lillian Lupas John Lupas and Judy Lupas, Grace Lupas, Eugene A. Bartoli and Robert J. Fankelli	:	A-2012-2341118
Ronald G. Sidovar and Gloria J. Sidovar	:	A-2012-2341120
FR First Avenue Property Holding, LP	:	A-2012-2341123
Transcontinental Gas Pipe Line Corporation	:	A-2013-2341208
William Petrouleas and Joanna Petrouleas	:	A-2013-2341209
Peter Palermo and Francine Palermo	:	A-2013-2341211
Christopher Maros and Melinda Maros	:	A-2013-2341213
Dianne L. Doss	:	A-2013-2341214
Doanld Januszewski	:	A-2013-2341215
International Consolidated Investment Company	:	A-2013-2341216
Bradley D. Hummel	:	A-2013-2341220
Michael Palermo and Joanne Palermo	:	A-2013-2341221
Roberta Searfoss a/k/a Judy Searfoss Executrix of the Estate of Euylla Hughes a/k/a Eylla Hughes	:	A-2013-2341232
John F. and Veronica Iskra	:	A-2013-2341233
Michael A. Mitch and Sue K. Mitch	:	A-2013-2341234
Clifton Acres, Inc.	:	A-2013-2341236
Dietrich Hunting Club	:	A-2013-2341237
Art Borrower Propco 2010-5 LLC	:	A-2013-2341238
NLMS, Inc.	:	A-2013-2341239

US Industrial Reit II	:	A-2013-2341241
Ronald Solt	:	A-2013-2341249
Merel J. and Arlene J. Swingle	:	A-2013-2341250
Edward R. Schultz	:	A-2013-2341253
Donald W. Henderson and Louis Bellucci	:	A-2013-2341262
Fr E2 Property Holding LP	:	A-2013-2341263
Sylvester J. Coccia	:	A-2013-2341267
Lawrence Duda	:	A-2013-2341271
Mark M. Mack, J. Dean Mack and Heather K. Mack	:	A-2013-2341272
Blue Ridge Real Estate	:	A-2013-2341277
James L. and Michaelene J. Butler	:	A-2013-2344353
Susan Butler Reigeluth Living Trust	:	A-2013-2344604
Blueberry Mountain Realty, LLC	:	A-2013-2344605
Grumble Knot, LLC	:	A-2013-2344612
Pennsylvania Glacial Till, LLC	:	A-2013-2344616
Chris and Melinda Maros	:	
v.	:	C-2012-2305047
PPL Electric Utilities Corporation	:	

Joe and Vanessa Caparo	:	
	:	
v.	:	C-2012-227 6713
	:	
PPL Electric Utilities Corporation	:	

NORTH POCONO CITIZENS ALERT REGARDING THE ENVIRONMENT'S REPLY BRIEF

Paul M. Schmidt, Esquire
Pa. Attorney ID No. 81464
Zarwin Baum DeVito Kaplan
Schaer & Toddy P.C.
1818 Market Street, 13th Floor
Philadelphia, PA 19103
Phone: (215) 569-2800
Fax: (215) 569-1606
pmschmidt@zarwin.com
Attorney for North Pocono Citizens Alert Regarding the Environment

Dated: September 9, 2013

TABLE OF CONTENTS

TABLE OF CITATIONS

Judicial Decisions

Administrative Decisions

Regulations

I. STATEMENT OF CASE

North Pocono Citizens Alert Regarding the Environment ("NP CARE") files this Reply Brief in response to PPL Electric Utilities Corporation's ("PPL") August 26, 2013, Initial Brief filed in the above-captioned matter. Overall, NP CARE does not disagree with PPL's Statement of the Case, except to the extent PPL claims that the proposed project ("Project") will have minimum adverse environmental impacts, and that the Application satisfies applicable requirements. As NP CARE explained more fully in its Initial Brief, the proposed Project area is a unique, virtually pristine area of Pennsylvania. Preservation of the upper Lehigh River basin has occurred through the combined efforts of a number of public and private organizations working together to protect both its lands and its waters. As a result, the area provides an abundance of wildlife and plants (including extremely rare species), exceptional recreational opportunities, and numerous scenic vistas. For these reasons, the area is very popular with tourists, and has been recognized by many organizations for its outstanding natural features.

PPL's proposed Project will have profound and irreversible adverse impacts on the upper Lehigh River basin. Unfortunately, PPL has not adequately evaluated those impacts, and does not plan to sufficiently minimize them. Therefore, NP CARE conducted its own research of the adverse environmental impacts of the proposed Project, using experts whose qualifications PPL does not contest. NP CARE has provided the Public Utility Commission ("Commission") with sufficient evidence to determine that the Commission should not allow the proposed Project. Should the Commission nonetheless decide to allow the proposed Project, NP CARE has

provided the Commission with sufficient evidence to impose conditions on the proposed Project.[1]

As explained *infra*, in many ways PPL has misstated applicable authority and failed to make the demonstrations necessary for the Commission to approve the above-captioned applications and petitions (together the "Applications"). Therefore, the Commission should deny the Applications. Should the Commission nonetheless approve the Applications, the Commission should only do so subject to the conditions recommended by NP CARE.

II. SUMMARY OF ARGUMENT

PPL's Initial Brief fails to sufficiently demonstrate that the Commission should approve the Application. At its outset, PPL's Initial Brief misstates the burdens which the Commission's rules place on each party. PPL has failed to satisfy its burden of going forward with evidence to refute NP CARE's evidence of adverse environmental impacts which PPL is not minimizing. Ultimately, PPL has not satisfied its burden of persuasion, *i.e.*, PPL has failed to satisfy its burden of proving that the Commission should grant PPL's Application.

PPL's Initial Brief fails to refute that not a single document in the record justifies PPL's late-coming plan to conduct full-scale initial clearing of the entire Right-of-Way to create a wire zone and a border zone. Nor does PPL's Initial Brief justify why these practices are at all necessary from either a legal or practical standpoint. PPL's Application included Selective Clearing and Restrictive Clearing protocols which significantly minimize environmental impacts protect the Wire Safety Zone ("WSZ") around conductors and, at the same time, carve out exceptions allowing full clearing where truly necessary. Yet, PPL refuses to budge from its

[1] As NP CARE explained in its Initial Brief, NP CARE has limited its review and testimony to: 1) the West Pocono to North Pocono Segment, 2) the West Pocono Substation and its associated 69/138 kV Connector Lines, and 3) the North Pocono Substation and its associated 69/138 kV Connector Lines. NP CARE St. 2-R, p.1. By so doing, NP CARE is focusing its case in the area it has worked diligently to protect from environmental degradation – the North Pocono area. *Id.*

position, with the exception of now agreeing to use Selective and Restrictive Clearing on the Border Zone within 150 feet of streams. The Commission should deny the Applications; however, if the Commission approves the Applications, the Commission should do so only on the condition that PPL only use its Selective Clearing and Restrictive Clearing protocols.

PPL's Initial Brief also fails to refute that PPL has failed, and will continue to fail, to evaluate the adverse impacts of the proposed Project on Species of Special Concern and Communities of Special Concern. PPL does not dispute that NP CARE undertook its own field studies and identified these species and communities within and near the Right-of-Way. Nor does PPL contend that it will evaluate and minimize adverse impacts to them. Instead, PPL erroneously argues two inconsistent positions: that they are not protected by other agencies, and that the Commission can do nothing to protect them because the Commission must defer to other agencies. PPL is asking the Commission to make a bold leap by holding that the Commission cannot require any minimization of adverse environmental impacts (and, by analogy, other impacts including impacts to historically significant features), except to require that PPL promises that it will obtain applicable permits from other agencies, and even though PPL will do nothing more.

The Commission should deny PPL's Applications, due to the adverse impacts on Species and Communities of Special Concern. However, if the Commission decides to approve the Applications, the Commission should reject PPL's untenable contentions about the Commission's authority, and should require PPL to evaluate the presence of the Species and Communities of Special Concern enumerated by NP CARE, and to assess and minimize adverse impacts of the proposed Project.

In addition to failing to properly address the broad issues set forth above, PPL has also failed to demonstrate why it cannot do more to protect streams, wetlands and vernal pools. Specifically, PPL has not demonstrated why, within 150 feet of these aquatic features, it must clear all vegetation, use herbicides, use heavy equipment, and place concrete washouts and staging areas. Finally, PPL has failed to justify its refusal to conduct monitoring before and after construction of the proposed Project, and to use that monitoring to identify and minimize adverse environmental impacts. For these reasons, the Commission should deny the Applications. If the Commission nonetheless decides to approve them, it should do so only subject to conditions prohibiting the above activities within 150 feet of streams, wetlands and vernal ponds, and only subject to the condition that PPL conduct stream monitoring before and after construction and use those data to minimize adverse environmental impacts.

III. ARGUMENT

A. PPL BEARS THE BURDEN OF PROOF THROUGHOUT THIS MATTER, CONTRARY TO PPL'S ASSERTION THAT THE BURDEN OF PROOF SHIFTS

PPL misrepresents the applicable legal burdens in this matter. PPL admits that it has the burden of proof to establish by a preponderance of the evidence that it has satisfied the Commission's Siting and Construction Regulations at 52 Pa. Code § 57.71, *et seq.* *See* PPL Initial Br., p.13. However, PPL then mistakenly states that "the burden shifts to the opponent" once the applicant establishes a *prima facie* case. *See id.* at p.14 (*citing MacDonald v. Pennsylvania R. Co.*, 36 A.2d 492 (Pa. 1944)). On the contrary, the burden of proof never leaves the applicant; instead, only the burden of going forward with opposing evidence shifts to opposing parties. The Court in *MacDonald* made this very clear, stating:

> "The burden of going forward with evidence may shift often from side to side, while the duty of establishing his proposition is always with the actor and never shifts": Thayer's

> 'Preliminary Treatise', post, p. 378. *See also* Chief Justice Shaw's opinion in *Powers v. Russell*, 13 Pick., Mass., 69. In *Henes v. McGovern*, 317 Pa. 302, 310, 176 A. 503, 506, we pointed out the difference between the 'burden of proof' (which always 'remains on the party affirming a fact in support of his case') and 'the burden of going forward with evidence' to meet the evidence already produced by the opposing party, which burden shifts from side to side in the progress of the trial. *See also Hill v. Smith*, 260 U.S. 592, 43 S.Ct. 219, 67 L.Ed. 419.

MacDonald v. Pennsylvania R. Co., 36 A.2d at 496, n.2. *See, Thomas v. Pennsylvania Human Relations Com'n*, 527 A.2d 602, 605 (Cmwlth. 1987) (explaining these shifting burdens in the context of an employee discrimination case). The only exception noted in which the opponent of an application bears a burden of proof is where that party asserts an affirmative defense. *MacDonald* at 495. That exception has no bearing on the instant Application by PPL.

As PPL acknowledges, PPL has the burden of going forward with sufficient evidence to establish a *prima facie* case. *See* PPL Initial Br., p.14. Only if PPL succeeds do the opposing parties have any burden of going forward with evidence. Thereafter, the matter essentially turns into a weighing of evidence to determine whether the applicant has met its burden of persuasion. As the Commonwealth Court explained in the context of a complaint against a utility for excessive charges (in which the complainant, rather than the utility, bore the burden of proof):

> Once it is determined that the complainant has made out his *prima facie* case, the burden of going forward shifts to the utility, but the ultimate burden of persuasion remains with the complainant. The Commission must measure the weight and credibility of all the evidence, and simply because the ratepayer has presented a prima facie case does not obligate the Commission to credit this evidence or to give it any special weight. If the utility presents evidence found to be of co-equal (or greater) weight with that of the complainant, the complainant will not have met his burden of proof.

Milkie v. Pennsylvania Public Utility Com'n, 768 A.2d 1217, 1220 (Cmwlth. 2001) (emphasis added). *See In re Fink's Estate*, 21 A.2d 883, 888-89 (Pa. 1941) (similarly explaining that establishing a *prima facie* case is no guarantee of success on the merits; once the burdens of going forward with evidence have been met, the court must then weigh the evidence). As

discussed below, in the instant case, on many issues PPL has neither come forward with sufficient evidence to establish a *prima facie* case nor has PPL satisfied its burden of persuasion that its Application should be granted as filed.

B. NP CARE HAS SUFFICIENTLY SATISFIED THE BURDEN OF GOING FORWARD WITH EVIDENCE OF IMPACTS PPL HAS NOT SUFFICIENTLY MINIMIZED, AND PPL HAS FAILED TO SATISFY ITS BURDEN OF GOING FORWARD WITH OPPOSING EVIDENCE

1. PPL Has Failed to Justify Its Plan to Initially Clear All Vegetation Everywhere Within the Entire Right-of-Way

PPL attempted to amend its Application late in the proceeding (2 days before the hearing) by filing rejoinder testimony stating that it planned to initially clear the entire right-of-way of all woody vegetation. Yet, as PPL admitted, there is not a single document that exists that requires PPL to initially clear all vegetation everywhere within the entire Right-of-Way. However, this belated addition by PPL fails to satisfy its burden. PPL itself admits that no document requires PPL to employ full-scale, initial clearing to achieve these two zones.

PPL's Stephen Dahl testified about PPL's plans for clearing vegetation, relying on 3 documents: The Settlement Agreement between PPL and ReliableFirst, PPL's transmission vegetation management plan ("TVMP") and FAC-003-1. With respect to both the settlement agreement between PPL and ReliableFirst and the TVMP, he admitted on cross-examination that nothing in those documents required PPL to conduct its planned initial clearing.

Q: Would you agree that with respect to the settlement agreement, there is no language in there that requires PPL to conduct [initial] clearing of all woody vegetation within the right-of-way, there isn't language to that effect?
A: That is correct.
Q: And would you agree to the same with respect to the transmission vegetation management plan?
A: That is correct.

(Tr. at pages 421-422.)

Nor does FAC-003-1 mandate initially clearing the entire Right-of-Way. As PPL admits in its Initial Brief, FAC-003-1 only mandates "a formal tranmission vegetation management program". PPL Initial Br. at p.137. In fact, Mr. Dahl further conceded that no document included in the application or made available in this proceeding discussed initially clearing the entire Right-of-Way:

> Q: So do you agree that there are no documents in the application or that have been made available in this current proceeding that describe the process of initial clearing of right-of-way?
> A: I would agree with that.

(Tr. at page 423.) Accordingly, there exist no documents that require PPL to employ full-scale initial clearing, nor even any documents that explain that PPL intends to conduct full-scale initial clearing.[2]

PPL has also failed to demonstrate any practical grounds to substantiate full-scale initial clearing. For example, Barry A. Baker conceded that in the Application PPL has not demonstrated any of the "construction activity" PPL contends will require initial clearing. Mr. Baker testified as follows:

> Q: Fair enough. And we don't have, in the application or the testimony, any specific discussions about what machinery is going to be needed at any specific location, or the amount of machinery, or the numbers of people that are going to be in an area, or the schedule for particular parts of work on the right-of-way; is that correct?

---

[2] This takes us back to PPL's original Application, wherein PPL never mentioned other documents, and instead stated:

> Vegetation clearing processes and measures are found in PPL Electric's "Specifications for Initial Clearing and Control of Vegetation On or Adjacent to Electric Line Right-of-Way Through Use of Herbicide, Mechanical and Hand-Clearing Techniques. (Attachment 11 (sic))."

See Application Attachment 4, Section 3.3.2. Attachment 12 (which PPL incorrectly cited as Attachment 11 in the above reference) does not mention, and therefore cannot justify, any initial, full-scale clearing.

A: That information would be supplied as part of the permit applications to DEP and the associated conservation districts.

Q: So, if I'm correct, you would agree that's not in this application right now, that type of details; correct?

A: That type of detail is not included in the application; that's correct.

(Tr. at page 396.) Thus, PPL's assertions in its Initial Brief that any of these considerations require an initial, full-scale clearing of all vegetation ring hollow. *See* PPL Initial Br. at p.140 and PPL Proposed Finding of Fact No. 121 ("If selective or restricted clearing was applied to a new right-of-way, this could significantly increase the cost of the project and, more importantly, could create safety hazards during construction....") (emphasis added). A mere assertion, and a speculative one at that, is not tantamount to evidence, and does not satisfy PPL's burden of persuasion. As discussed in more detail *infra*, the Selective Clearing and Restrictive Clearing methods are far more appropriate.

2. PPL Has Failed to Justify Its Plan to Use the Wire Zone/Border Zone Method Along the Entire Right-of-Way During Maintenance Vegetation Management

Following initial, full-scale clearing of all vegetation, PPL seeks approval to use its "Wire Zone/Border Zone method. *See* PPL Initial Br. at p.137. In the "Wire Zone", PPL would begin to allow grasses, herbaceous plants, and small shrubs to exist, and in the Border Zone, PPL would additionally begin to allow "compatible" and to some ambiguous degree "non-compatible" species ot trees to exist. *See* PPL Initial Br. at n.52. However, PPL fails to satisfy its burden of proving that this approach is necessary or reasonable. PPL never produced a single document that confirmed a requirement to create these zones.

3. PPL Has Failed to Demonstrate that It Cannot Use its Selective Clearing and Restrictive Clearing Methods Along the Entire Right-of-Way, Both Initially and During Maintenance Vegetation Management

PPL conceded, as it must, that its goal is to minimize environmental impacts "while still maintaining the technical and economic viability of the Project. PPL Initial Br. at p.95. This is exactly what 52 Pa. Code Section 57.76 requires – that the Project will "have minimum adverse environmental impact, considering":

1) The electric power needs of the public,
2) The state of the available technology, and
3) The available alternatives.

52 Pa. Code § 57.76(a)(4). Yet PPL has not made any demonstration that one of those three bases compel PPL to use either full-scale initial clearing or the wire zone/border zone method. Nothing about these three bases renders unreasonable NP CARE's recommendation that PPL instead employ, initially and during maintenance vegetation management, its Selective Clearing or Restrictive Clearing[3] protocols throughout the Right-of-Way, as PPL had indicated it could in Attachment 12 to the Application. These protocols state that vegetation would be managed only if it would interfere with the Wire Security Zone by the time of the next three-year maintenance event and, importantly, also allow PPL to fully clear defined areas needed for access roads, work areas, and structures. See Attachment 12, p.7. PPL never demonstrates why, in the virtually pristine environment of the upper Lehigh River basin, PPL cannot generally employ Selective or Restrictive Clearing, which its own Application indicates is appropriate for use in areas of environmental concern. *See* Application, Attachment 12; NP CARE St. 1-R, p.4.

[3] PPL curiously claims that removing compatible species "may promote the establishment of compatible species." *See* PPL Initial Br. at p.140 and PPL Proposed Finding of Fact No. 123 (emphasis added). *See also* PPL Initial Br. at pp. 151 and PPL Proposed Finding of Fact Nos. 136 and 142. PPL is not thinking through its assertions – nothing would better foster re-population of compatible species more than actually leaving them in place.

Using the Selective Clearing and Restrictive Clearing methods allows a significant amount of vegetation to remain in place. Exhibit DA-R-1, shows the maximum heights of trees that could be preserved on a sample cross-section of the right-of-way using the Selective Clearing and Restrictive Clearing vegetation management procedures set for in Attachment 12. NP CARE St. 1-R, p.5. The diagram presents one scenario at the lowest point of the conductor, based on several assumptions, which are listed on the diagram, including level ground across the entire section. *Id.* As illustrated on the diagram, the vegetation that could remain, while still protecting the WSZ, is significant. *Id.* PPL does not dispute these calculations.

The importance of using Selective or Restrictive Clearing initially is profound. As discussed herein and in NP CARE's Initial Brief, doing so will minimize environmental degradation caused by removing cover which provides shade, habitat, precipitation runoff control, and pollution filtering. It also will preserve native vegetation, which will curb the introduction and spread of invasive species. Finally, it will minimize the adverse impacts on scenic vistas. On the contrary, PPL's proposed initial "scorched earth" clearing and its subsequent wire zone/border zone protocols will undeniably impact not only existing wildlife, but also environmental tourism critical to the local economy. For example, as PPL itself must concede, the Lackawanna State Forest in Thornhurst is a popular destination, with extensive recreational trails enjoyed by the public for hiking, biking, hunting, skiing, snowmobiling, birding and other passive recreation. NP CARE St. 2, p.12. The area of the Lackawanna State Forest through which the Project is proposed is heavily used. It is frequented by hikers, mountain bikers, anglers and those who just enjoy being in nature. This area will be used even more heavily in the future because the Bureau of Forestry has recently acquired two additional tracts of land in this area – designated as Parcels 37 and 38 on PPL Map Extent 3. NP CARE

St.2-R, p.6. Its rustic roads and shaded trails will be severely impacted by the proposed transmission line. NP CARE St.2, p.12.

Even PPL admits that it has the capability to use the Selective Clearing and Restrictive Clearing methods. PPL explained that "the ultimate determination of compatible species during vegetation management cycles is done on a case-by-case basis taking into account the maximum height, growth rate, and invasiveness of the encountered species, as well as the location, topography, and maximum sag of the transmission line." PPL Initial Br. at p.143 and PPL Proposed Finding of Fact No. 127. Nothing about what NP CARE seeks is technologically impracticable or precludes PPL from satisfying the public's electricity needs, and nothing about it requires the Commission to "establish a new set of environmental rules and regulations for this Project". *See* PPL Initial Br. at p.24. Therefore, if the Commission approves the project, the Commission should reject PPL's request for approval to use full-scale initial clearing and the wire zone/border zone method, and instead condition approval on PPL using Selective or Restrictive Clearing throughout the Right-of-Way. [4]

4. PPL Has Failed to Justify Its Refusal to Sufficiently Assess the Presence of Species and Communities of Special Concern, and Evaluate and Minimize Potential Impacts to those Species and Communities

As NP CARE demonstrated, within the proposed Project area, significant natural resources, including Species and Communities of Special Concern in Pennsylvania, occur and will be impacted by the proposed Project. NP CARE St. 3, pp.2-3. These species and community types have been ranked by the Pennsylvania Natural Heritage Program and identified for protection by the Pennsylvania Wildlife Action Plan, which was compiled by the

[4] Of course, if the Commission rejects NP CARE's request, the Commission should at a minimum include a condition that PPL implement its concession to use the Selective Clearing protocol in Attachment 12 of the Application within 150' of all streams within the Border Zone of the Right-of-Way, and not to remove any stumps in the Wire Zone and Border Zone that are within 150' of any EV stream. PPL Initial Br. at p. 147.

Pennsylvania Game Commission ("PGC") and the Pennsylvania Fish and Boat Commission ("PFBC") to provide "a statewide overview of the integrated efforts needed to sustain wildlife and habitat." NP CARE St.3-R, p.4. In the last several months, Richard Koval has found all but three of these listed species and communities at or near the proposed Project route. The other three, as NP CARE explained in its Initial Brief, are especially significant and inhabit vegetation of the type present along the proposed route. Therefore, PPL should be required to conduct appropriate surveys for them as part of PPL's obligation to minimize environmental impacts.

PPL offers two flawed reasons for its failure to assess and minimize impacts to Species and Communities of Special Concern. First, PPL maintains that they are not protected under Commonwealth or Federal law. *See* PPL Initial Br. at p.152. To be clear here, as PPL concedes in its Initial Brief, "Although the Commonwealth may request actions to mitigate negative impacts to [non-threatened and non-endangered] species, such requests are voluntary, not mandatory." PPL Initial Br. at p.153. Additionally, the Commonwealth agencies only make such non-mandatory recommendations[5] in areas subject to their jurisdiction, *i.e.*, areas at which PPL requires a permit of those agencies. *See Id.* PPL's Mr. Baker admitted that the proposed project will involve areas that are not subject to any DEP permitting requirements. (Tr. at page 398.) This is exactly why PPL, and the Commission, must ensure that PPL is reasonably minimizing impacts to them, as required by 52 Pa. Code Section 57.76(a)(4).[6]

---

[5] The Commission has held that its authority is not impacted by non-binding, advisory views of other state agencies. *See, e.g., O'Connor v. Pa. PUC,* 582 a 2 427, 432 (Pa. Cmwlth. 1990) ("In our view, the provisions of the History Code noted above support the PUC's position that the role of the Historical Commission is advisory and that it lacks the authority to make determinations binding upon other agencies, such as the PUC."). Thus, in the instant case, the Commission may issue whatever conditions it deems appropriate with respect to species and communities of special concern, regardless of the advisory requests of other agencies.

[6] PPL's additional assertion that it is only asked to mitigate impacts to enumerated species and communities of special concern is misleading: the Commonwealth agency letters to PPL specifically require that PPL report any additional species of special concern PPL finds. *See* Application, Attachment 4, agency letters. However, if the Commission allows PPL not to look for the additional species NP CARE requests, PPL will never find and report them.

PPL's second flawed argument is that Species and Communities of Special Concern are not worthy of protection, because they are not globally rare. *See* PPL Initial Br. at p.155. This ignores the species' and communities' status in the Commonwealth of Pennsylvania. The fact that a species or community might be abundant in another state, or in another country, says little about its importance and status to the citizens and the Commonwealth of Pennsylvania. The relevant fact about each of the species and communities which NP CARE enumerated is their lack of abundance in the Commonwealth of Pennsylvania. It is due to their lack of abundance that they already have been listed on the Natural Heritage Program lists, and it is due to their lack of abundance that Commonwealth agencies recommend in the Wildlife Action Plan that they be protected.

The need to assess the Species and Communities of Special Concern identified by NP CARE is real. Now that NP CARE has conducted its own field surveys and identified these species on and near the proposed Project route, the burden of persuasion has shifted back to PPL to demonstrate why <u>not</u> to further survey their presence and evaluate and reasonably minimize impacts. Presently, PPL has no idea of the extent of their presence, or of their susceptibility to impacts. For example, Richard Mellon testified that PPL does not know what disturbance would affect the Fly Poison Borer Moth or the Slender Clearwing Moth:

> Q: So as we sit here today, you're not sure what, exactly the clearing for this proposed right-of-way would do, if anything, to the borer moth populations, if they exist, along the right-of-way; correct?
> A: That's correct.
> Q: Would you say that the same statement would be true with respect to the slender clearwing moth?
> A: Yes, that would be correct.

(Tr. at page 410). Both of these are Species of Special Concern.

The Slender Clearwing is so rare that until the last several years it was considered extinct. It has a global ranking of GS3/G4. G3 means Globally Vulnerable. G4 means Apparently Secure - Uncommon but not rare; some cause for long-term concern due to declines or other factors. NP CARE St.3-R, at p.10. More importantly, however, the Slender Clearwing's Pennsylvania status is SH – Possibly Extinct (Historic). Furthermore, according to the Pennsylvania State Wildlife Action Plan (http://www.naturalheritage.state.pa.us/RankStatusDef.aspx) the Slender Clearwing Moth with a Global rank of G3/G4 falls into the categories of Conservation Tier 1: Immediate Concern , Conservation Tier 2: High-level Concern and Conservation Tier 3: Responsibility Species. NP CARE St.3-R, p.10. In the last several decades, it has only been found on two other occasions. Its recent discoveries within the past 10 years should remove its historic status and cause it be ranked as either S1- Critically Imperiled or S2- Imperiled. NP CARE St.3-R, p.10.

The Fly Poison Borer Moth is also extremely rare. It is found in four counties in Pennsylvania, and nowhere else in the world. NP CARE St.3, p.11; NP CARE St.3-R, p.9. Its global rank is G2/G3 – Imperiled/Vulnerable, and its Pennsylvania rank is S2 – Imperiled. See NP CARE St. 3-R, pp.3 and 7. As Mr. Koval explained, according to the Pennsylvania State Wildlife Action Plan (http://www.naturalheritage.state.pa.us/RankStatusDef.aspx) the Fly-poison Borer Moth with a Global rank of G2/G3 falls into the categories of Conservation Tier 1: Immediate Concern and Conservation Tier 2: High-level Concern. NP CARE St.3-R, p.11.

As Mr. Koval explained, a species may not be listed as threatened or endangered for various reasons, including simply ignorance of their condition. NP CARE St.3-R, p.5. The failure to be listed may also simply be due to the listing process not catching up to current data. Regardless, PPL does not dispute the rarity of many of the species NP CARE has identified. Nor

does PPL make even the slightest suggestion that what NP CARE seeks is technologically impracticable or precludes PPL from satisfying the public's electricity needs. Therefore, PPL has failed to satisfy its burden of persuasion and burden of proof that these species and communities should not be assessed, and impacts to them evaluated and mitigated, as required by Section 57.76(a)(4).

5. PPL Has Failed to Justify Its Refusal to Maintain Riparian Buffer Areas, and Buffers at Wetlands and Vernal Pools, Within the Right-of-Way

In its Initial Brief, PPL continues to refuse to maintain riparian buffers, instead desiring to implement initial full-scale clearing and then its wire zone/border zone method. Yet, much of the evidence against the idea comes from PPL's own witnesses. Peter Foote testified on behalf of PPL regarding thermal impacts to streams. He conceded that the clearing of trees adjacent to a stream could result in some degree of thermal impacts. (Tr. at page 415.) In fact, as NP CARE pointed out in its Initial Brief, Mr. Foote's testimony indicates that forty percent of the streams the proposed Project will cross might by significantly impacted (the obvious converse to PPL's assertion that sixty percent of the streams would not be significantly impacted). *See* PPL Initial Br. at p.145 and PPL Finding of Fact No.132.[7] He testified that the impacts would be resolved as the water flowed down stream, but admitted "it would take some distance downstream." (Tr. at page 416.) He did not, as PPL claims, testify that these impacts would "quickly dissipate." *See* PPL Initial Br. at p.24. Even Mr. Foote conceded that PPL should reduce its impacts at stream margins and stream buffers to the extent practical.

> Q: Your testimony in your rebuttal on page 16 indicated that you believe that PPL should stay out of the stream margins and stream buffers to the extent practical; correct?
> A: Correct. That's what I said, yes.

[7] PPL's dissection of various studies on the topic are merely a distraction from the ultimate point to which Mr. Foote agrees – that there will be significant impacts to forty percent of the streams.

(Tr. at page 417.)

PPL has admitted it intends to invoke an exception to maintaining riparian buffers at stream edges in the DEP permitting process, and to instead use engineered Best Management Practices ("BMPs"). This will undoubtedly cause avoidable adverse impacts. As NP CARE pointed out in its Initial Brief, PPL's use of engineered BMPs will never make up for the loss of riparian buffer. But nowhere does PPL demonstrate that BMPs can adequately replace riparian buffer areas. Similarly, PPL has failed to demonstrate a need to clear vegetation near wetlands and vernal pools. Having failed to make these demonstrations, PPL should not be permitted to clear riparian buffer areas or within 150 feet of wetlands and vernal pools, except to the extent necessary using PPL's Selective Clearing and Restrictive Clearing methods. As required by Section 57.76(a)(4), if the Commission approves the Application, it should only do so with the condition that PPL not conduct initial clearing of these areas and not implement its wire zone/border zone protocols in these areas, and that PPL instead use Selective and Restrictive Clearing.[8]

6. PPL Has Failed to Justify Its Refusal to Conduct Monitoring Before and After Construction of the Project and to Identify and Minimize Adverse Environmental Impacts Revealed Through That Monitoring

As indicated above, PPL's own witnesses agree that the proposed Project will impact streams in the project area. But PPL has failed to suggest what it would do to prevent impacts to these Special Protection (Exceptional Value and High Quality) trout streams caused by PPL's activities not regulated by other agencies, or conducted outside areas subject to the jurisdiction of other agencies. These include not only its vegetation management and other land disturbance

[8] Again, though, as noted above, if the Commission rejects NP CARE's request, the Commission should at a minimum include a condition that PPL implement its concession to use the Selective Clearing protocol in Attachment 12 of the Application within 150' of all streams within the Border Zone of the Right-of-Way, and leave stumps in the Wire Zone.

activities, but also its use of herbicides[9] and heavy equipment, its placement of concrete washout and staging areas, and other activities. At the end of the day, a project of this magnitude in an area of this sensitivity should be accompanied by a reasonable effort to determine and alleviate long-term cumulative impacts. PPL has not pointed to any regulation that will accomplish this, and has not suggested any reason why doing so is technologically impracticable or will reduce PPL's ability to satisfy the public's energy needs. Nor would such an effort require the Commission to adopt detailed standards – all NP CARE is asking the Commission to require PPL to do is design and implement a reasonable study of its own, and use the results to determine and implement reasonable mitigation. The Commission should ignore PPL's suggestion that, despite the existence of Section 57.76(a)(4), the Commission is powerless to require anything. The Commission should instead, if it grants the Application, condition its approval on PPL designing and implementing a study of the stream impacts of the proposed Project, and on PPL implementing reasonable mitigation of those impacts.

C. PPL MAKES SEVERAL MISTAKEN ARGUMENTS AS TO WHY PPL BELIEVES THE COMMISSION CANNOT IMPOSE THE CONDITIONS NP CARE SEEKS

1. PPL Mistakenly Argues that the Environmental Impacts it Must Minimize are Those Caused by the Line Location, Rather than the Manner of Construction and Maintenance

Due largely to PPL's concessions, NP CARE has no need to argue for the use of an alternative to the proposed route (other than complete abandonment of the Project or new Right-of-Way). PPL then obsesses on this point, stating throughout its Initial Brief that NP CARE is no longer suggests specific route changes. PPL then ignores all of NP CARE's objections to the construction and maintenance of the proposed Project, and wrongly asserts that "NPCARE only

[9] The use of herbicides is another area where NP CARE is not asking for any new standard – only that PPL employ alternative practices it already employs on a more limited basis. PPL admits in its Initial Brief that it is able to employ substitutes for herbicides under various circumstances. *See* PPL Initial Br. at p.151.

challenges the route selected...." *See* PPL Initial Br. at p.122. The reason this is so important to PPL is because PPL then wrongly asserts that, under the Commission's regulations, the only way PPL needs to minimize environmental impacts, and the only way NP CARE can challenge efforts to minimize impacts, is through the route selection process. As examples, PPL repeatedly argues that the showing it must make, and the determination the Commission must make, are that "the preferred routes...will have minimum adverse environmental impacts...." PPL Initial Br. pp. 3, 12, 30, 94, 123, 124, 148 and 155; PPL Brief Appendix D, at page 18 paragraph 73 and page 27 paragraphs 98-101; PPL Brief Appendix E, at page 8 paragraph 34. PPL also raises this argument, with slightly different wording, in other portions of its Initial Brief. *See, e.g.*, PPL Initial Br., p.23.

To support its flawed proposition, PPL narrowly cites to the Commission's regulatory language pertaining to the route location, which states that "At hearings held under this section, the Commission will accept evidence upon, and in its determination of the application it will consider, inter alia, . . . The availability of reasonable alternative routes." 52 Pa. Code § 57.75(e)(4).[10] PPL additionally cites to several electric transmission siting cases to support its proposition that minimizing impacts involves siting only; however, not a single one of those cases says so. *See, e.g.*, PPL's citation to various electric transmission line siting decisions at PPL Initial Br., p.123. PPL's position is clearly meritless.

If PPL were correct, that would render meaningless the regulatory language requiring that the Commission also consider, in additional to alternative routes pursuant to subsection 57.75(e)(4), the impacts enumerated under subsection 57.75(e)(3), which states:

> (3) The impact and the efforts which have been and will be made to minimize the impact, if any, of the proposed HV line upon the following:

[10] Of course, Section 57.75(e)(4) appears nowhere in NP CARE's brief.

(i) Land use.
(ii) Soil and sedimentation.
(iii) Plant and wildlife habitats.
(iv) Terrain.
(v) Hydrology.
(vi) Landscape.
...
(x) Scenic areas.
(xi) Wilderness areas.
(xii) Scenic rivers.

52 Pa. Code § 57.75(e)(4). PPL's position would also render meaningless the Commission's own statement that:

> It is essential in the siting, construction, and maintenance of overhead electric transmission facilities to minimize any adverse effect upon the environment and upon the quality of human life in the area in which new facilities will be located, and to minimize any potential hazards to public health and safety.

Re Proposed Electric Regulation, 49 Pa. P.U.C. 709, 710 (1976) (emphasis added).

These provisions dictate that, contrary to PPL's argument, the route selection process is only one of the means to minimize environmental impacts. The Commission's regulations expressly require that PPL minimize impacts caused by two other aspects of the proposed line – its construction and maintenance. PPL itself admits that "a statute or regulation must be construed to give effect to all of its provisions so that no provision is mere surplusage. 1 Pa.C.S. §1921(a)." PPL Initial Br. p.124, n.55 (additional citations omitted). [11]

PPL claims that NP CARE "fails to give due and appropriate consideration to all of the environmental, social, and engineering issues and concerns that PPL Electric must consider." PPL Initial Br., p.124. However, PPL has failed to demonstrate that any such considerations preclude PPL from implementing NP CARE's recommendations. PPL never argues that any of the recommendations of NP CARE will impact PPL's ability to satisfy the need PPL argues

[11] PPL's use of this rule of construction is curiously twisted, in that it would require the Commission to ignore 52 Pa. Code § 57.75(e)(4) and the Commission's discussion at 49 Pa. P.U.C. 709, 710.

exists for the proposed Project. PPL never argues that any of the recommendations of NP CARE require technology which is unavailable or impracticable. As PPL must concede, "a utility must make reasonable efforts to minimize and mitigate any impacts." *Application of Pennsylvania Electric Company For Approval to Locate and Construct the Bedford North-Osterburg East 115 kV HV Transmission Line Project Situated in Bedford and East St. Clair Townships, Bedford County, Pennsylvania*, Docket Nos. A-2011-2247862, et al., 2012 Pa. PUC LEXIS 298 at *61 (February 9, 2012). Nowhere does PPL give anything more than lip service to its claim that NP CARE's requests are unreasonable. For example, what engineering limitations preclude PPL from foregoing the use of an initial full-scale clearing of all vegetation? What engineering limitations preclude PPL from foregoing establishment of the wirezone/border zone, and instead using its available Selective Clearing and Restrictive Clearing methods? What data do PPL provide on this point? Having failed to make any such demonstrations, PPL has failed to meet its burden of demonstrating a need to use full-scale initial clearing and the wire zone/border zone methods throughout the Right-of-Way. Accordingly, if the Commission approves the Application, it should impose the condition that PPL use its Selective Clearing and Restrictive Clearing methods, not initial full-scale clearing and not the wire zone/border zone methods.

2. PPL is Mistakenly Arguing that the Commission Cannot Grant NP CARE's Requests, Because the Commission Must Defer to the Jurisdiction of Other Agencies Regarding Environmental Requirements, and Can Require Nothing Outside Their Jurisdiction

PPL's general suggestion that the Commission is without jurisdiction to look at environmental impacts is belied by the very language of 52 Pa. Code Section 57.76, as explained *supra*. Clearly, the Commission has a role, separate from other agencies. The question, then, is "What is that role?"

PPL does correctly state that the Commission defer to that which is within the jurisdiction of other agencies. But none of the cases cited by PPL stand for the proposition PPL claims – that the Commission cannot have anything to do with environmental impacts. *See, e.g.*, PPL Initial Br. at pp.134-135. PPL misapplies and misstates the cases PPL cites for proposition that the Commission cannot involved itself with environmental matters. In its Initial Brief at p.134, PPL cites *Del-Aware, Unlimited, Inc. v. Pa. PUC*, 513 A.2d 595 (Pa. Cmwlth. 1986). In that case, Del-AWARE Unlimited, Inc. (Del-AWARE), appealed a Pennsylvania Public Utility Commission (PUC) order determining that the proposed site of the Bradshaw pumphouse was reasonably necessary for the convenience or welfare of the public, thus exempting it from local zoning ordinance provisions under Section 619 of the Pennsylvania Municipalities Planning Code (Code), Act of July 31, 1968, P.L. 805, as amended, 53 P.S. § 10619. *Del-Aware* at 595. Thus, it wasn't the fact that DER had issues permits that led the PUC to decline to consider environmental issues, it was the fact that the application was not subject to Sections 57.75 or 57.76.

In its Initial Brief, PPL also cites to *Pickford v. Pa. PUC*, 4 A.3d 707 (Pa. Cmwlth. 2010), *Rovin v. Pa. PUC*, 502 A.2d 785 (Pa. Cmwlth. 1986), and *Country Place Waste Treatment Company Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995). *See* PPL Initial Brief at pp. 134-135. However, *Pickford* and *Rovin* are inapposite because they were complaints about changes to a water utility's water treatment. Pickford at p.707; Rovin at p.785. *Country Place* is also in applicable, because it involved a complaint about deficiencies in a waste water utility's waste water treatment system. None of these matter involved the Commission's authority under Section 57.76(a)(4). Additionally, *Pickford* and *Rovin* pertained to the operation of drinking water treatment facilities (the specific degree to which certain chemicals should be used to treat

drinking water), and *Country Place* involved the operation of a water treatment facility. These are matters squarely within the jurisdiction of the Pennsylvania Department of Environmental Protection, and the Commission had no available regulatory authority over them. None of these cases are applicable to the instant Application.

PPL also erroneously cites to the *O'Connor* case for the proposition that the Commission cannot act where other agencies have jurisdiction. On the contrary, as NP CARE explained *supra*, in *O'Connor*, the Commonwealth Court only found that the Commission need not condition its approval of electric transmission line applications on compliance with advisory pronouncements of the Historical Commission. *See O'Connor,* 582 A.2d 427, 432. PPL's contrary proposition, that the Commission cannot apply conditions to PPL where another agency provides advisory pronouncements, is unreasonable. If PPL's interpretation of *O'Connor* were correct, this would mean the Commission could never require PPL to do anything, however, reasonable, to preserve an historical feature, even though PPL would not be bound by the Historical Commission's advisory pronouncements. Historical features would be unprotected, even if the Commission wanted them protected. This would eviscerate 52 Pa. Code Section 57.75(e)(3)(ix), which requires the Commission to determine "the impact and the efforts which have been and will be made to minimize the impact, if any, of the proposed HV line upon historic areas." PPL's proposition is unreasonable and not supported by any precedent.

Similarly, with respect to environmental issues, Section 57.76(a) should be interpreted to allow the Commission to require PPL to take reasonable steps to address NP CARE's requests made in this matter, whether it be to forego full-scale initial clearing of vegetation, assess and mitigate impacts to species and communities of special concern, avoid certain practices within 150 feet of streams, wetlands and vernal pools, or monitor and minimize specific and cumulative

stream impacts. As explained in NP CARE's Initial Brief and herein, none of these impacts are addressed by other agencies. PPL's contrary proposition is unreasonable and not supported by any precedent.

Citing a host of cases, PPL continues to maintain that compliance with regulations of other agencies is enough. *See, e.g.,* PPL Initial Br. at p.5, and PPL Finding of Fact No.23. However, not a single one of those cases reaches that holding. The Commission, and the Pennsylvania Courts, have never concluded that the only manner of minimizing environmental impacts is through satisfying regulations of other agencies, and that Section 57.76(a)(4) requires nothing more than that Section 57.76(a)(3) (that the proposed project "is in compliance with applicable statutes and regulations"). PPL's position ignores the Commission's authority, and in fact its duty, to involve itself with environmental impacts which are outside the jurisdiction of other agencies.

IV. CONCLUSION

For the reasons set forth above and in NP CARE's Initial Brief, PPL has failed to sufficiently demonstrate that the Commission should approve the Applications. PPL has failed to satisfy its burden of going forward with evidence to refute NP CARE's evidence of adverse environmental impacts which PPL is not minimizing. Ultimately, PPL has not satisfied its burden of persuasion, i.e., PPL has failed to satisfy its burden of proving that the Commission should grant PPL's Application.

The Commission should deny the Applications; however, if the Commission approves the Applications, the Commission should do so only on the conditions explained more fully in NP CARE's Initial Brief, including:

1. that PPL abide by the concessions it made on the record;

2. that PPL only use its Selective Clearing and Restrictive Clearing protocols;

3. that PPL to evaluate the presence of the Species and Communities of Special Concern enumerated by NP CARE, and to assess and minimize adverse impacts of the proposed Project;

4. that within 150 feet of streams, wetlands and vernal ponds, PPL only use its Selective and Restrictive clearing protocol, refrain from using herbicides and heavy equipment, and avoid placement of concrete washouts and staging areas;

5. that PPL conduct stream monitoring before and after construction and use those data to minimize adverse environmental impacts.

Respectfully submitted,

ZARWIN BAUM DeVITO KAPLAN SCHAER & TODDY P.C.

By: _____

Paul M. Schmidt, Esquire
Pa. Attorney ID No. 81464
1818 Market Street, 13th Floor
Philadelphia, PA 19103
Phone: (215) 569-2800
Fax: (215) 569-1606
pmschmidt@zarwin.com
Attorney for North Pocono Citizens Alert Regarding the Environment

Dated: September 9, 2013