

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PPL Electric Utilities Corporation :
for Approval of its Act 129 Phase III Energy : M-2015-2515642
Efficiency and Conservation Plan :

**RECOMMENDED DECISION GRANTING PETITION FOR
LEAVE TO WITHDRAW WITHOUT PREJUDICE**

Before
Benjamin J. Myers
Administrative Law judge

HISTORY OF THE PROCEEDING

On November 30, 2015, PPL Electric Utilities Corporation (PPL) filed its initial Phase III Energy Efficiency and Conservation Plan (EE&C Plan) with the Pennsylvania Public Utility Commission (Commission) pursuant to Act 129 and various related Commission orders. On March 17, 2016, the Commission approved PPL's initial Phase III EE&C Plan with certain modifications. Pursuant to the Commission's March 2016 order, PPL submitted a compliance filing on April 22, 2016 as well as an errata to its filing on May 24, 2016. The Commission approved PPL's compliance filing, as amended, on June 27, 2016.

On September 21, 2016, PPL filed a petition for approval of a minor plan change to its Phase III EE&C Plan (Revision I). On November 4, 2016, the Commission issued a secretarial letter advising that its staff had approved of the minor plan change. On November 14, 2016, the PP&L Industrial Customer Alliance (PPLICA) filed a petition for appeal of the Commission staff's decision. PPL filed an answer to PPLICA's petition on November 28, 2016. On January 26, 2017, the Commission denied PPLICA's petition for appeal.

On June 6, 2017, PPL filed a petition for approval of major and minor changes to its Phase III EE&C Plan (Revision II). Because the June 6, 2017 petition included both major and minor changes, PPL opted to proceed under the Commission's review procedures for major changes.

On November 21, 2017, the Commission entered an order approving most of the proposed changes, as clarified by PPL. One proposed minor change however, Proposed Change No. 10, the Enhanced Localized Incentives Pilot (Pilot Program), was referred to the Office of Administrative Law Judge (OALJ) for hearings and a recommended decision. This proposed minor change is the only remaining aspect of the June 6, 2017 petition pending before the Commission.

On December 7, 2017, a notice was issued assigning Administrative Law Judge Benjamin J. Myers (ALJ) to this matter and scheduling a prehearing conference for February 7, 2018, at 10:00 a.m. in Hearing Room 2 of the Commonwealth Keystone Building in Harrisburg, Pennsylvania. On December 8, 2017, a prehearing conference order was issued directing the parties to file prehearing memoranda on or before January 31, 2018.

On January 25, 2018, PPLICA served its first set of interrogatories on PPL concerning the Pilot Program. On January 31, 2018, the Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania (CAUSE-PA) filed its prehearing memorandum. On that same date, counsel for PPL sent an email to the ALJ and the parties indicating that the parties were actively involved in settlement discussions and requesting that the deadline to submit prehearing memoranda be extended to February 5, 2018. It was further indicated that counsel would provide the ALJ with an update on the status of the settlement discussions by February 2, 2018. This request was granted.

On February 5, 2018, prehearing memoranda were filed by PPL, PPLICA, the Office of Consumer Advocate (OCA), the Office of Small Business Advocate (OSBA), the Commission on Economic Opportunity (CEO), and the Sustainable Energy Fund of Central Eastern Pennsylvania (SEF).

Due to inclement weather and closure of the Capitol Complex, the prehearing conference scheduled for February 7, 2018 was cancelled. On February 8, 2018, the parties were contacted via email regarding the rescheduling of the prehearing conference. It was noted that PPL had stated in its prehearing memorandum that it intended to withdraw the proposed change relating to the Pilot Program from consideration before the Commission without prejudice to a future filing or proceeding. The parties were asked: (1) whether any parties would oppose PPL's withdrawal; and (2) whether rescheduling the prehearing conference was necessary given the apparent intent to withdraw the proposed change.

The following parties responded by indicating that they did not oppose PPL's withdrawal: (1) OCA; (2) OSBA; (3) CAUSE-PA; (4) CEO; (5) SEF; (6) Wal-Mart Stores East, LP and Sam's East, Inc. (collectively, Walmart); and (7) the Retail Energy Supply Association (RESA). As discussed further below, only PPLICA responded that it would object to PPL's withdrawal of the proposed change to the extent that PPL sought to withdraw the proposed change without prejudice.

PPL indicated that it would file a petition to withdraw the proposed change by February 16, 2018 and did not believe a prehearing conference was necessary unless its request were ultimately denied. On February 9, 2018, the parties were advised that a prehearing conference would not be rescheduled pending the outcome of PPL's request to withdraw its proposed minor change.

On February 16, 2018 PPL filed a petition for leave to withdraw without prejudice the remainder of its June 6, 2017 EE&C change petition – that remainder being the proposed minor change relating to the Pilot Program previously described. PPL made several arguments in support of allowing the withdrawal without prejudice. In addition to saving additional time and expense associated with litigation, PPL argued that the withdrawal of the minor change without prejudice would be consistent with Commission precedent and would be consistent with the Commission's Minor EE&C Plan Change Order. PPL asserts that if a proposed minor change is referred to the Office of Administrative Law Judge for hearings, "parties have the opportunity to request permission to withdraw their objection or the proposed change without

prejudice after such referral, if they choose.” Minor EE&C Plan Change Order, Docket No. M-2008-2069887 (Order entered June 10, 2011).

PPL’s petition also argued that PPLICA’s opposition to the withdrawal of the minor change without prejudice was contrary to similar relief PPLICA had previously sought in another proceeding. PPL explained that on January 19, 2010, PPLICA had filed a complaint against PPL regarding its Transmission Service Charge (TSC) Reconciliation for 2009 and the Final TSC for 2010. A prehearing conference in that matter was held on April 15, 2011, and a litigation schedule was established at that time. PPL further indicated that on June 15, 2011, five days before PPLICA’s direct testimony in that matter was due, PPLICA filed a petition for leave to withdraw its complaint without prejudice. PPL objected and argued that such withdrawal should be with prejudice because of how far along the parties had reached in the litigation process. PPLICA was however permitted to withdraw its complaint without prejudice because in the Commission’s view, “PPLICA’s request to withdraw its complaint should be viewed as a simple procedural request and should be granted without conditions or Commission pronouncements related to the merits of the issues raised by the Complaint, or issues that may or may not be raised in other proceedings.” PPLICA v. PPL Elec. Util. Corp., Docket No. C-2010-2153656 (Order entered Jan. 12, 2012). PPL now requests that its petition to withdraw the remaining minor change be granted without prejudice.

On February 26, 2018, PPLICA filed its answer to PPL’s petition to withdraw. In its answer, PPLICA indicated that it did not object to the withdrawal of PPL’s remaining proposed minor change in and of itself. However, PPLICA did object to the withdrawal being without prejudice. PPLICA argued that if the remaining proposed minor change was withdrawn without prejudice, the parties would be without assurance that they would not be forced to relitigate the proposed minor change as part of another PPL petition for EE&C plan changes. PPLICA further argued that PPL should be permitted to withdraw its proposed minor change under the condition that it would not refile a proposal relating to the Pilot Program during the remainder of its Phase III Plan which is scheduled to end on May 31, 2021. PPLICA’s answer to PPL’s petition raised several other arguments against a withdrawal without prejudice and

distinguished PPL's current circumstance from those in other matters where a party was able to withdraw a petition without prejudice.

The petition for leave to withdraw is ready for decision. The record closed on February 26, 2018, the date PPLICA filed its answer to PPL's petition to withdraw the remainder of its June 6, 2017 Phase III EE&C change petition. For the reasons set forth below, it is recommended to the Commission that PPL's petition for leave to withdraw be granted without prejudice.

FINDINGS OF FACT

1. The Petitioner in this case is PPL Electric Utilities Corporation.
2. On June 6, 2017, PPL filed a petition for approval of major and minor changes to its Phase III EE&C Plan.
3. On November 21, 2017, the Commission entered an order referring Proposed Change No. 10, the Enhanced Localized Incentives Pilot, to the Office of Administrative Law Judge for hearings and a recommended decision.
4. A prehearing conference was scheduled to occur on February 7, 2018 but was cancelled due to inclement weather.
5. On February 16, 2018, PPL filed a petition for leave to withdraw without prejudice the remainder of its June 6, 2017 EE&C change petition - Proposed Change No. 10, the Enhanced Localized Incentives Pilot.
6. On February 26, 2018, PPLICA filed an answer to PPL's petition for leave to withdraw which indicated that PPLICA did not object to the withdrawal in and of itself but did object to the withdrawal being without prejudice.

7. No other parties to this proceeding have objected to PPL's withdrawal of the remaining proposed minor change without prejudice.

DISCUSSION

The Commission's Rules of Practice and Procedure at 52 Pa. Code §5.94 permit parties to withdraw pleadings in a contested proceeding. The provision at 52 Pa. Code §5.94(a) allows withdrawal of pleadings by a petition for leave to withdraw the pleading. The petition is granted only by permission of the presiding officer or the Commission. The presiding officer or Commission must consider the petition, any objections thereto and the public interest in determining whether to permit withdrawal of the pleading.

Here, it must be noted that PPLICA is the only party to raise any objections to PPL's withdrawal of its remaining minor change. In fact, PPLICA's only objection is not to the withdrawal itself - but to PPL's request that it be without prejudice.

A factor to be considered in the EE&C plan approval process, and the Commission's overarching mission, is the public interest. In the EE&C plan process the various phases may include both major and minor proposed changes - which are then subject to comment from the public as well as review and potential approval by the Commission. Here, as part of Phase III, PPL proposed both major and minor changes to its plan. Various parties, including PPLICA, then filed comments to those changes. In one form or another, most if not all of the parties expressed arguments which ultimately have the effect of questioning whether some or all of PPL's proposed plan changes were in, or not in, the interest of the public.

After giving serious consideration to many factors, including the comments made by the parties, the Commission remained unresolved on PPL's remaining plan change – Proposed Change No. 10 relating to the Pilot Program previously described. The matter was referred to OALJ to conduct hearings and issue a recommended decision for the Commission's further consideration of the issue. No recommended decision would be complete without an analysis of whether this remaining proposed plan change was in the public interest. Public interest is the commonality between PPL's proposed change, and the request to withdraw that

proposed change, that must ultimately be considered in determining whether PPL's withdrawal should be with or without prejudice.

Commission precedent offers little in the way of determining when a pleading should be acted on with or without prejudice. The majority of the precedent relating to the question of prejudice centers on consumer complaint cases in which a complaint is being dismissed - typically as a result of a consumer failing to prosecute the complaint. In such cases, the Commission has considered whether the consumer made a good faith effort to attend the evidentiary hearing in the matter. If not, the question then becomes whether the failure to attend was the result of good cause and did the consumer make any attempt to contact the ALJ prior to the scheduled hearing. *See, Paul Kopanycia v. PECO Energy Company*, Docket No. C-2016-2526619 (Opinion and Order entered March 1, 2017) (Kopanycia).

In Kopanycia, the Commission also considered the timing of a withdrawal request. There, the consumer sought to withdraw his complaint just one day prior to the evidentiary hearing. Id. at 7. The Commission noted that allowing the contested withdrawal of complaints on the eve of evidentiary hearings could foreseeably establish precedent by which parties could exploit the Commission's procedural rules to indefinitely delay a decision on the merits of an underlying dispute. Id. at 9.

The Commission has also addressed the withdrawal of pleadings outside of the consumer complaint process. The Commission has permitted the withdrawal of applications, instead of denials, where the applicant had properly filed the withdrawal with the Commission's Secretary and there was no sign of abuse of the Commission's processes. Id. at 7; *Citing Application of Comfort Trans, LLC*, Docket No. A-2016-2549430 (Order entered January 6, 2017); *Application of Blessed Transportation, LLC*, Docket No. A-2015-2549943 (Order entered January 6, 2017).

Based on this limited precedent, factors to consider when determining whether a pleading may be withdrawn and whether it will be with or without prejudice, include: (1) the behavior of a party, (2) the timing of the request, and (3) whether Commission processes may be abused. Here, no such red flags have been raised by PPL during the Phase III approval process.

When the Commission determined that a further hearing was needed to resolve outstanding issues with Proposed Change No. 10 and its Pilot Program, PPL engaged in discussions with the other parties in an attempt to resolve those issues before a prehearing conference occurred. When those discussions had the potential to be fruitful, PPL requested a small window of additional time in the hopes of reaching a settlement – which would potentially avoid the time and expense of a prehearing conference and subsequent litigation. Likewise, when those discussions proved unfruitful, rather than proceed with the proposed change in the face of such disagreement, PPL requested that the change be withdrawn. These circumstances do not evidence a course of conduct or abuse of Commission processes that in other matters warranted the Commission’s denial of the withdrawal of a pleading or the dismissal of a pleading with prejudice.

The PPLICA v. PPL case cited above and discussed by both parties in their withdrawal pleadings involves the parties and a scenario nearly identical to the one at hand. There, a prehearing conference had been held and a litigation schedule had been established. Five days before PPLICA’s direct testimony was due, PPLICA filed a petition for leave to withdraw its complaint without prejudice. PPL objected and argued that because the parties had progressed thus far into the litigation process, such a withdrawal should be with prejudice.

In addressing the withdrawal request and associated objection, the Commission held that “PPLICA’s request to withdraw its complaint should be viewed as a simple procedural request and should be granted without conditions or Commission pronouncements related to the merits of the issues raised by the complaint, or issues that may or may not be raised in other proceedings.” Id. at 14. PPLICA argues that PPL’s emphasis on this precedent is misplaced due to distinctions between the procedural history in that matter and the present.

Commission precedent relating to the withdrawal of a pleading and whether it should be with or without prejudice, however entails a much larger and more general picture than whether two cases have identical, or even similar, procedural histories. That precedent prescribes that such a picture is painted by a number of factors including the behavior of a party, the timing of the request and whether Commission processes may be abused. The picture must

then be viewed as a simple procedural request shaded by those factors. While differences in procedural history may be present, it is merely one factor of several that must be considered.

Last, 52 Pa.Code §5.94 requires that the public interest be considered in determining whether to permit withdrawal of the pleading and whether that withdrawal should be with or without prejudice. PPLICA argues that the withdrawal of PPL's remaining proposed change should be granted, but with prejudice. At the heart of this argument is that if PPL's remaining proposed change is withdrawn without prejudice, PPL could propose this same change again, possibly within one year. PPLICA argues that it would not be in the public interest to allow such a withdrawal only to have the parties face this same or a similar proposed change again in the near future. PPLICA argues that PPL should be permitted to withdraw its proposed change but with prejudice for the remainder of the Phase III Plan - which is scheduled to end on May 31, 2021. After that date, PPL would be permitted to once again propose the same or a similar change as part of its Phase IV Plan.

PPLICA has however failed to demonstrate that its interest in not having to address this proposed change again until after May 31, 2021 rises to the level of the public interest. As previously indicated, public interest must ultimately be considered in determining whether PPL's withdrawal should be with or without prejudice. It would be somewhat contradictory for a party on one hand to make an argument that a proposed change to the EE&C plan is not sound or otherwise in the public interest and then argue that the withdrawal of that proposed change would also not be in that same interest. It is understandable that PPLICA does not wish to fight the same battle again if PPL decides to request a similar minor change to its EE&C plan at some future date. However even if PPLICA is correct and the same or similar change is proposed by PPL in the future, under PPLICA's scenario the only difference between a withdrawal with prejudice and a withdrawal without, would be whether that battle is fought before or after May 31, 2021. This fails to establish how a withdrawal of PPL's remaining proposed change without prejudice would be counter to public interest.

Having reviewed the request to withdraw, any objections to the request and the public interest, it is therefore recommended that PPL's request to withdraw its remaining proposed minor change should be granted without prejudice.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 701.

2. The Commission's Rules of Practice and Procedure at 52 Pa. Code §5.94 permit parties to withdraw pleadings in a contested proceeding by permission of the presiding officer or Commission.

3. In determining whether to permit withdrawal of the pleading, the presiding officer or Commission must consider the petition, any objections thereto and the public interest.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the petition for leave to withdraw filed by PPL Electric Utilities Corporation on February 16, 2018 be granted.

2. That PPL Electric Utilities Corporation's Proposed Change No. 10, the Enhanced Localized Incentives Pilot, to its Phase III EE&C Plan be withdrawn without prejudice.

Date: March 28, 2018

Benjamin J. Myers
Administrative Law Judge