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November 30, 2010

VIA ELECTRONIC FILING

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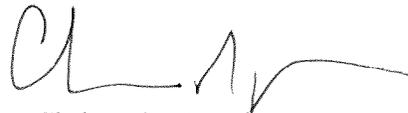
Re: **Petition of PPL Electric Utilities Corporation for Approval of
Changes to its Act 129 Energy Efficiency and Conservation Plan
Docket No. M-2009-2093216**

Dear Secretary Chiavetta:

Enclosed please find the Main Brief of Intervenor Constellation NewEnergy, Inc.
electronically filed today.

If you have any questions, please contact me.

Respectfully submitted,



Christopher R. Sharp

Enclosures

Cc: Administrative Law Judge Dennis J. Buckley
Administrative Law Judge Elizabeth J. Barnes

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**PPL Electric Utilities Energy Efficiency
and Conservation Plan**

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Docket No. M-2009-2093216

**MAIN BRIEF OF
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1. *Act 129 of 2008*, 2008 Penn. Act 129 (enacted Oct. 15, 2008).
2. *Opinion and Order*, Commission Docket No. M-2009-2093216 (entered Oct. 26, 2009).
3. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A. 2d 600, 602 (Pa. Cmwlth. 1990).
4. *Implementation Order*, Commission Docket No. M-2008-2069887 (entered Jan. 16, 2009).

I. INTRODUCTION

Constellation NewEnergy, Inc. (“Constellation”) hereby submits its Main Brief for consideration by the Pennsylvania Public Utility Commission (“Commission”), with regard to the *Petition of PPL Electric Utilities Corporation for Approval of Changes to its Act 129 Energy Efficiency and Conservation Plan* (“Petition”) filed by PPL Electric Utilities Corporation (“PPL Electric”) on September 15, 2010,¹ including PPL Electric’s revised *Energy Efficiency and Conservation Plan* (“Revised Plan”),² and PPL Electric’s supporting testimony filed thereafter.³

A. SUMMARY AND STATEMENT OF POSITION

As part of its Petition, PPL Electric discusses, generally, revisions to its goals for its Load Curtailment Program. However, PPL Electric – in its Petition, Revised Plan and pre-filed and live testimony in the instant proceeding – provides only limited details surrounding these topics that are particularly important to parties that may participate in its Load Curtailment Program, including potential conservation service providers (“CSPs”) and customers, and seeks changes that substantially alter its Program.

Constellation submits that it is critical that each electric distribution company’s (“EDC”) load curtailment plan seeks CSPs to implement its program through an appropriately competitive request for proposals (“RFP”) process, with well known rules and selection criteria, and well-defined products, in line with both the spirit and explicit provisions of Commonwealth law and

¹ See *Petition of PPL Electric Utilities Corporation for Approval of Changes to its Act 129 Energy Efficiency and Conservation Plan*, Commission Docket No. M-2009-2093216 (Sept. 15, 2010) (“Petition”).

² See *PPL Electric Utilities Corporation Energy Efficiency and Conservation Plan – Proposed Changes*, Commission Docket No. M-2009-2093216 (Sept. 15, 2010) (the “Revised Plan”).

³ See *PPL Electric Utilities Corporation Statement No. 5 Direct Testimony of Peter D. Cleff*, Commission Docket No. M-2009-2093216 (Nov. 15, 2010) (“PPL Electric St. No. 5”).

the Commission's rules, regulations, policies and other decisions. Adopting Constellation's suggestions with respect to these topics will best ensure that PPL Electric's Revised Plan is likely to effectively do so, and will be in the public interest.

B. PROCEDURAL HISTORY

On or about July 1, 2009, PPL Electric filed a Petition requesting approval of its Energy Efficiency and Conservation Plan ("EE&C Plan") with the Commission, pursuant to *Act 129 of 2008* ("Act 129").⁴ Constellation intervened in that proceeding on August 3, 2009. By Order entered October 26, 2009, the Commission approved PPL Electric's EE&C Plan, with modifications.⁵ On September 15, 2010, PPL Electric filed its Petition requesting approval of its Revised Plan regarding its energy efficiency and conservation ("EE&C") measures under Act 129.

A comment period followed, and the Commission referred the matter to the Office of Administrative Law Judge for a hearing. A Prehearing Conference Order was filed on November 4, 2010, scheduling a Prehearing Conference, and requiring filing of a Prehearing Memorandum no later than November 10, 2010. On Friday, November 12, 2010, a Prehearing Conference was held, with Administrative Law Judges Dennis J. Buckley and Elizabeth H.

⁴ *Press Release, Governor Rendell Signs Energy Conservation Bill to Save Consumers Millions on Electricity; Urges Legislature to Pass Rate Mitigation Bill*, Pennsylvania Office of the Governor (Oct. 15, 2008) (http://www.portal.state.pa.us/portal/server.pt?open=512&objID=2999&PageID=431162&mode=2&contentid=http://pubcontent.state.pa.us/publishedcontent/publish/global/news_releases/governor_s_office/news_releases/governor_rendell_signs_energy_conservation_bill_to_save_consumers_millions_on_electricity_urgues_legislature_to_pass_rate_mitigation_bill.html).

⁵ *See Opinion and Order*, Commission Docket No. M-2009-2093216 (entered Oct. 26, 2009) ("Oct. 2009 Order").

Barnes (together, the “ALJs”) presiding. A Second Prehearing Conference Order was issued on November 12, 2010, including a Procedural Schedule.

In addition to PPL Electric and Constellation, appearances were entered by the Office of Trial Staff, the Office of Consumer Advocate, the Office of Small Business Advocate, Pennsylvania Communities Organizing for Change, the PPL Industrial Consumer Alliance (“PPLICA”) and the PA Department of Environmental Protection.

PPL Electric filed supporting testimony on November 15, 2010. On November 17, 2010, the ALJs presided over an Initial Hearing in this matter.⁶

A hearing was held before the ALJs on November 3, 2009, at which time PPL Electric’s pre-filed written testimony and exhibits were admitted into the record, and parties conducted limited cross-examination of PPL Electric’s only witness, Mr. Peter D. Cleff.

II. ARGUMENT

A. LEGAL STANDARDS

1. Burden of Proof.

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the party seeking a rule or order from the Commission has the burden of proof in that proceeding. Further, it is axiomatic that “[a] litigant’s burden of proof before administrative tribunals as well as before most civil proceedings is satisfied by establishing a preponderance of evidence which is substantial and legally credible.”⁷

⁶ See *November 17, 2010 Hearing Transcript*, Commission Docket No. M-2009-2093216 (Hearing held Nov. 17, 2010) (“Hearing Transcript”).

⁷ *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A. 2d 600, 602 (Pa. Cmwlth. 1990).

2. Standards Applicable to EE&C Plans.

The requirements for utilities' EE&C plans can be found in the Commission's January 16, 2009 *Implementation Order*⁸ ("Implementation Order") and Act 129's revisions to Section 2806, *Implementation, pilot programs and performance-based rates*, of Title 66 of the Pennsylvania Consolidated Statutes (66 Pa.C.S. § 2806). The Commission's requirements for PPL Electric's specific EE&C programs are further included in its Oct. 2009 Order.

With respect to EE&C plans, Act 129 lays out requirements for the Commission's program for EDCs in 66 Pa.C.S. § 2806(a), provides the duties of EDCs in 66 Pa.C.S. § 2806(b), states requirements for Commission approval in 66 Pa.C.S. § 2806(e) and includes particular, applicable definitions in 66 Pa.C.S. § 2806(m).

With respect to these issues, the Commission's Implementation Order affirms these requirements and provides additional details, stating, for instance, that:

- "The Act requires the Commission to establish procedures to require EDCs to competitively bid all contracts with conservation service providers";⁹
- "The Act further requires the Commission to establish procedures to review all proposed contracts with conservation service providers prior to execution of the contract";¹⁰

⁸ *Implementation Order*, Commission Docket No. M-2008-2069887 (entered Jan. 16, 2009) ("Implementation Order").

⁹ Implementation Order at p.9.

¹⁰ Implementation Order at p.9.

- “[T]he Commission notes that it retains its statutory authority to conduct investigations and initiate statutory and regulatory compliance proceedings against jurisdictional utilities”;¹¹ and
- The Commission’s “minimum criteria” for “reviewing and approving proposed CSP contracts prior to execution” include a requirement for “[c]ertification that the proposed CSP is not an EDC affiliate.”¹²

The Oct. 2009 Order provides even further details with respect to PPL Electric’s specific programs including, for instance, statements by the Commission that “any marketing by PPL [Electric should] be competitively neutral so as not to prefer the use of one CSP over another,” and that “[n]o marketing advantage should be given to any CSP participating in the PPL [Electric] curtailment program.”¹³

B. WHETHER PPL ELECTRIC’S ACTIONS REGARDING AND PROPOSED CHANGES TO THE LOAD CURTAILMENT PROGRAM, INCLUDING ITS PROPOSAL TO INCREASE THE PROGRAM FROM 100 MW TO 150 MW, ARE IN A MANNER CONSISTENT WITH THE AIMS OF ACT 129.

Act 129 and the Commission’s Implementation Order specifically lay out requirements and goals for all EDCs’ and the Commission’s programs and policies for load curtailment pursuant to Act 129, including PPL Electric’s Load Curtailment Program as presented in its Revised Plan. For instance, Act 129 states that:

¹¹ Implementation Order at p.25.

¹² Implementation Order at p.27.

¹³ Oct. 2009 Order at p.84.

- The Commission’s EE&C program must include “procedures to require that [EDCs] competitively bid all contracts with [CSPs]”;¹⁴
- The Commission’s EE&C program must include “procedures to review all proposed contracts prior to the execution of the contract with [CSPs] to implement the plan”;¹⁵
- A CSP must not have “direct or indirect ownership, partnership or other affiliated interest with an [EDC]”;¹⁶ and
- A EE&C plan “shall require an annual independent evaluation of its cost-effectiveness and a full review of the results of each five-year plan”¹⁷

In addition, as noted above, the Commission stated earlier in this docket that, with respect to PPL Electric’s Load Curtailment Program, “any marketing by PPL [Electric should] be competitively neutral so as not to prefer the use of one CSP over another,” and that “[n]o marketing advantage should be given to any CSP participating in the PPL [Electric] curtailment program.”¹⁸

Through parties’ data requests and cross examination of PPL Electric and its witness in this proceeding, parties sought additional detail with respect to PPL Electric’s actions regarding its Load Curtailment Program, including both its procedures for entering into an agreement with one or more CSPs to meet its load curtailment targets, and its proposal to increase the Load Curtailment Program from 100 MW to 150 MW. Through such data requests and cross

¹⁴ Act 129 at 66 Pa.C.S. § 2806.1(a)(7).

¹⁵ Act 129 at 66 Pa.C.S. § 2806.1(a)(8).

¹⁶ Act 129 at 66 Pa.C.S. § 2806.1(m) (definition of “Conservation service provider”).

¹⁷ Act 129 at 66 Pa.C.S. § 2806.1(b)(1)(i)(j).

¹⁸ Oct. 2009 Order at p.84.

examination, as well as review of PPL Electric's Revised Plan Testimony, little clarity was provided as to the reasons for and prudence of PPL Electric's actions.

For this reason, Constellation suggests that the Commission reject PPL Electric's Revised Plan's proposed changes to the Load Curtailment Program until such time that the Commission can confirm that PPL Electric, in contracting with one or more CSPs to implement its Load Curtailment Program, has acted prudently and in accordance with Act 129's aims and requirements, and that such proposed changes will also be prudent and in the public interest.

1. The Commission Should Review PPL Electric's Implementation of its Process for Selecting and Contracting with a CSP(s) for PPL Electric's Load Curtailment Program.

Whether as part of its review of the Load Curtailment Program CSP contract(s) that PPL Electric files with the Commission for approval, or as part of its decision in the instant proceeding, or through a separate proceeding, the Commission should review and confirm that PPL Electric's implementation of a process for contracting with such CSP(s) met and will continue to meet the goals and requirements of Act 129 and the Commission.

Upon questioning by counsel for the PPL Industrial Customer Alliance, PPL Electric witness Cleff provided limited explanation of PPL Electric's process for selecting a CSP for its Load Curtailment Program, stating that:

[PPL Electric] went out for bids to about 80-something bidders for the 100 [MW of load curtailment]. [PPL Electric] asked bidders to provide bids in increments of a minimum of 5 [MW] up to the maximum that they're willing to supply.

[PPL Electric] hired an independent entity to stack up those bids to come up with the least cost combination of the 100 [MW], and that gave [PPL Electric] a pool of our short-list candidates to focus [PPL Electric's] negotiations on.

During that process, [PPL Electric] asked those short-list bidders, the ones that were willing to provide the full amount of megawatts . . . what would the price be to increase to 150, and [PPL Electric] got those firm prices.¹⁹

Mr. Cleff further explained that “[l]ess than ten” bidders were on PPL Electric’s “short-list.”²⁰

Due in part to confidentiality concerns, additional details regarding the process were not provided.

From Mr. Cleff’s limited explanations, then, it is unclear whether PPL Electric’s selection process – including, but not limited to, the process for preparing a short-list and PPL Electric’s process for selecting a CSP(s) from such short-list – was in line with Act 129’s and the Commission’s requirements for selecting load curtailment CSPs. For instance, it is unclear whether any CSP has been or is being provided any “marketing advantage,”²¹ whether any of the CSPs bidding on or negotiating to contract with PPL Electric has a “direct or indirect” affiliated interest with PPL Electric,²² or whether each CSP involved in the process – including, but not limited to, those on the short-list – was provided the appropriate opportunity to “competitively bid” to serve the final contract awarded through the process.²³

It would be appropriate for the Commission to review and address each of these issues and any others related to Act 129’s and the Commission’s goals and requirements regarding load curtailment programs for EDCs. As PPL Electric’s Revised Plan and testimony was unclear with respect to these issues, Constellation proposes the following Ordering Paragraph:

¹⁹ Hearing Transcript at p.56 (lines 2-17).

²⁰ Hearing Transcript at p.57 (lines 2-5).

²¹ See Oct. 2009 Order at p.84.

²² See Act 129 at 66 Pa.C.S. § 2806.1(m) (definition of “Conservation service provider”).

²³ See Act 129 at 66 Pa.C.S. § 2806.1(a)(7).

The Commission hereby **OPENS** a proceeding to review whether PPL Electric's implementation of a process for contracting with CSP(s) for its Load Curtailment Program met and will continue to meet the goals and requirements of Act 129 and the Commission.

2. The Commission Should Reject PPL Electric's Proposal to Increase the Load Curtailment Program from 100 MW to 150 MW, Without Issuing a New RFP for CSPs to Serve the Substantially Revised Program.

The Commission should not allow PPL Electric to revise its Load Curtailment Program substantially, increasing the Program by 50% to 150 MW, without issuing a new RFP from all interested CSPs.

Briefly in its Direct Testimony, PPL Electric notes that “[t]he projected peak load reductions in the Load Curtailment Program have been increased from 100 MW to 150 MW based on bids from CSPs.”²⁴ Though the increase of 50 MW represents a substantial change to the Load Curtailment Program, little explanation is provided regarding the revision. In particular, upon questioning of PPL Electric witness Cleff by PPLICA counsel, it became apparent that the revised product being sought – i.e., 150 MW of load curtailment rather than only 100 MW – was changed only after bids had been received from CSPs for the Load Curtailment RFP and that the 150 MW-target product was offered only to the “less than ten”²⁵ bidders on the “short-list” of CSPs, rather than the “80-something”²⁶ that responded to the 100 MW-target RFP.²⁷

Based on Mr. Cleff's testimony, it appears that at least 70 bidders that showed interest in bidding on 100 MW of load curtailment were not offered the opportunity to bid on a larger

²⁴ PPL Electric St. No. 5 at p.28 (lines 7-10).

²⁵ See Hearing Transcript at p.57 (lines 2-5).

²⁶ See Hearing Transcript at p.56 (lines 2-5).

²⁷ See, generally, Hearing Transcript at p.56 (lines 2-17).

amount, though the revised amount – increased by 50% – may have, for instance, increased opportunities for economies of scale, thereby potentially reducing the amounts that such 70 plus bidders may have been willing to offer. Moreover, an increased curtailment amount of 150 MW may have attracted additional bidders beyond the “80-something” that showed interest in the original product, which bidders may have been able to provide more competitive offers, to the benefit of consumers.

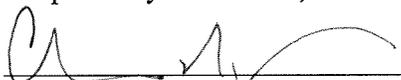
As it would be imprudent for the Commission to approve PPL Electric’s revisions to its Load Curtailment Program to increase the amounts procured, without requiring PPL Electric to issue a new RFP for interested CSPs to bid on the revised load curtailment target product of 150 MW, Constellation proposes the following Ordering Paragraph:

The Commission hereby **ORDERS** PPL Electric to issue a new RFP for CSPs to serve its Load Curtailment Program for the increased amount of 150 MW.

III. CONCLUSION

The record regarding PPL Electric’s Revised Plan before the Commission lacks important details with respect to the procurement processes for awarding CSPs for PPL Electric’s Load Curtailment Programs. Moreover, the revisions proposed with respect to the Load Curtailment Program amount to substantial changes to the Program and the products sought by PPL Electric. Constellation’s suggestions herein will provide an opportunity for additional details regarding implementation processes for the Load Curtailment Program, and potentially lower costs for consumers as a result of the Program, in order to assure that consumers receive the lowest costs for the important benefits provided by Act 129’s goals and requirements.

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November 30, 2010

CERTIFICATE OF SERVICE

I hereby certify that this day I have served a true copy of the foregoing Main Brief of Intervenor Constellation NewEnergy, Inc. upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

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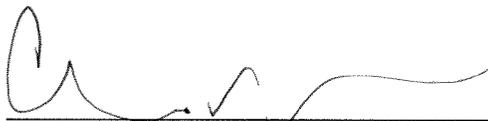
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