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January 5, 2011

BY HAND

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

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

Dear Secretary Chiavetta:

Enclosed please find the Exceptions of PPL Electric Utilities Corporation in the above-referenced proceeding.

Copies have been provided to the persons in the manner indicated on the certificate of service.

Respectfully Submitted,

David B. MacGregor

DBM/jl

Enclosures

cc: Honorable Dennis J. Buckley
Honorable Elizabeth Barnes
Certificate of Service

CERTIFICATE OF SERVICE

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

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Date: January 5, 2011



Andrew S. Tubbs

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PPL Electric Utilities
Corporation for Approval of Changes to its
Act 129 Energy Efficiency and
Conservation Plan

Docket No. M-2009-2093216

**EXCEPTIONS OF
PPL ELECTRIC UTILITIES CORPORATION**

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I. INTRODUCTION

Pursuant to 52 Pa. Code § 5.533, PPL Electric Utilities Corporation (“PPL Electric” or the “Company”) respectfully submits these Exceptions to the Recommended Decision of Administrative Law Judges Elizabeth H. Barnes and Dennis J. Buckley (“ALJs”) issued on December 17, 2010 (“Recommended Decision” or “R.D.”) in the above-captioned proceeding.

This proceeding concerns PPL Electric’s petition for approval of certain changes to its Act 129 Energy Efficiency and Conservation Plan (“Petition”) filed with the Pennsylvania Public Utility Commission (“Commission”) on September 15, 2010.¹ In the Petition, PPL Electric proposed two modifications to its currently effective Act 129 Energy Efficiency and Conservation Plan (“EE&C Plan”):² (1) a change to its Compact Fluorescent Lighting Program (“CFL Program”); and (2) a change to the classification of direct and common costs.³

The ALJs recommend that PPL Electric’s Petition be granted. Specifically, in the Recommended Decision, the ALJs recommend that the Commission approve PPL Electric’s proposal to allocate all CFL Program sales, savings, and costs to the residential customer sector, instead of allocating 5% to the Small Commercial and Industrial sector and 17% to the low-income residential customer sector. *See* R.D., pp. 5-6, 18. The Recommended Decision states that this modification appears to be in substantial compliance with Act 129 and the Commission’s prior orders at this docket. R.D., p. 6. The ALJs also recommend that the Commission approve PPL Electric’s proposal to reclassify certain common costs and direct

¹ The Petition was filed pursuant to Section 5.41 of the Commission’s Rules of Administrative Practice and Procedure, 52 Pa. Code § 5.41, and consistent with the Commission’s annual reporting requirements in its June 24, 2010 Secretarial Letter at Docket No. M-2008-2069887 (“Secretarial Letter”).

² The Commission approved PPL Electric’s EE&C Plan, with modifications, on October 26, 2009, in *Petition of PPL Electric Utilities Corporation for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093216 (Order Entered October 26, 2009) (“EE&C Order”). The EE&C Plan was further revised by *Petition of PPL Electric Utilities Corporation for Approval of its Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093216 (Order Entered February 17, 2010).

program costs. *See* R.D., pp. 7-8, 18. The Recommended Decision states that the parties representing different customer classes were present at the November 14, 2010 hearing, and no party objected to or offered evidence to refute testimony on this modification and no party argued against this modification in its brief. R.D., p. 8. Therefore, because the shift in cost allocation does not appear to affect the overall cost of the EE&C Plan, and because there was no objection from any customer class as to the change, the ALJs recommend approval of the reclassification of certain common costs and direct program costs. *Id.* PPL Electric supports the findings in the Recommended Decision as to the allocation of CFL Program sales, savings, and costs to the residential customer sector, and regarding the reclassification of certain common costs and direct program costs.

The Recommended Decision also made certain findings as to the standard that should apply to determine when Commission review and approval is required for modifications to PPL Electric's EE&C Plan. *See* R.D., pp. 11, 12, Ordering Para. 9. In summary, the Recommended Decision agreed with certain parties in this proceeding and concluded that PPL Electric's determination as to which modifications to the EE&C Plan require Commission approval was too narrow. R.D., p. 9. Due to the fact that other parties had challenged PPL Electric's *view* as to what changes require Commission approval, and due to the shortened procedural schedule in this case, the Company, as a protective matter, submitted evidentiary support for multiple implementation changes that were not addressed in the Petition and that, in PPL Electric's view, do not require Commission approval.⁴ These implementation changes included modifications to the Company's Load Curtailment Program, which the ALJs directly discussed in the Recommended Decision. Specifically, the Recommended Decision found that PPL Electric's

³ Notably, no party objected to these proposed modifications. R.D., pp. 6, 7.

proposed modification to the Load Curtailment Program to increase the load curtailment target to 150 MW was reasonable and in compliance with the intention of Act 129. *See* R.D., Ordering Para. 5.⁵ Also, the Recommended Decision approved PPL Electric's modification of deferring the launch of the Direct Load Control Program and Load Curtailment Program from January 2010 to late 2010/early 2011. R.D., p. 15.

Furthermore, the Recommended Decision recommended that PPL Electric file a black-lined version of its EE&C Plan updating, reconciling, and adjusting data and text, consistent with the Recommended Decision. *See* R.D., Ordering Para. 6. The Recommended Decision additionally made a characterization regarding PPL Electric's contracting process with Conservation Service Providers ("CSPs") for its Load Curtailment Program.

Although PPL Electric supports the specific determinations made by the ALJs in the Recommended Decision, as discussed above, the Company requests that the Commission revise the Recommended Decision with respect to certain findings. PPL Electric herein files these Exceptions to the Recommended Decision, pursuant to 52 Pa. Code § 5.533, and the Secretarial Letter dated December 17, 2010. For the reasons explained below, PPL Electric respectfully requests that the Commission adopt PPL Electric's Exceptions and revise the Recommended Decision accordingly.

⁴ *See* PPL Electric St. 5, pp. 16-31.

⁵ PPL Electric does not oppose the ALJs determination that its changes to the Load Curtailment Program are reasonable and should be put into effect; however, as discussed below, the Company excepts to the Recommended Decision's disregard for the standard articulated by the Commission in the *EE&C Order* regarding the type of EE&C Plan changes that require Commission approval.

II. EXCEPTIONS

PPL Electric respectfully submits the following exceptions to the Recommended Decision :

1. The Recommended Decision erred by not following the precedent set by the *EE&C Order* regarding EE&C Plan revisions that require Commission approval. R.D., p. 11.
2. The Recommended Decision erred in formulating an unworkable standard for changes that require Commission approval that, if adopted, would require the Commission to micro-manage PPL Electric's EE&C Plan. R.D., p. 11.
3. To the extent that a revised standard is adopted that requires review of all EE&C Plan changes, the Recommended Decision erred by not addressing all of the implementation changes to the EE&C Plan presented in PPL Electric's uncontested testimony. R.D., p. 15.
4. The Recommended Decision erred in a portion of the factual description of PPL Electric's contracting process. R.D., p. 16.

III. SUMMARY OF EXCEPTIONS

PPL Electric supports most of the recommendations made in the Recommended Decision. However, on certain key issues, PPL Electric believes that the Recommended Decision should be revised. The primary issue presented in PPL Electric's Exceptions is what types of changes to PPL Electric's EE&C Plan must be reviewed and approved by the Commission. In addressing this issue, PPL Electric has followed exactly the standard established by the Commission in the *EE&C Order*, which requires Commission approval for EE&C Plan changes that: (1) shift EE&C Plan program funds within a customer class, (2) shift

EE&C Plan program funds between customer classes, or (3) discontinue a program.⁶ The Recommended Decision incorrectly dismissed PPL Electric's interpretation of the *EE&C Order* and appears to accept the position offered by other parties that Commission approval is necessary for any mid-course changes to the EE&C Plan. PPL Electric requests that the Commission reject such a broad interpretation of the *EE&C Order* because it misinterprets the Commission's previous order, would clearly require the Commission to micromanage the EE&C Plan and would jeopardize PPL Electric's ability to comply with its Act 129 obligations.

The Recommended Decision also states that in future filings of petitions to modify the EE&C Plan, the Company shall include a request for Commission review and approval regarding proposed modifications which may affect the cost allocations among customer classes even when a program's approved budget is not altered.⁷ This directive is inconsistent with the Recommended Decision's apparent adoption of the standard that any change requires Commission approval, *i.e.*, if all changes need prior Commission approval, then the directive regarding seeking approval of only those changes that relate to cost allocations would be unnecessary. PPL Electric requests that the Commission confirm that PPL Electric's interpretation of the *EE&C Order*, is correct. Any standard that would require Commission approval for all mid-course changes to the EE&C Plan is unworkable and should be rejected.

There are many problems and risks associated with an overly broad standard that would require approval of all changes. These problems and risks are discussed in detail below and in the Company's briefs. *See* PPL Electric Main Brief ("M.B."), pp. 7, 11-12; PPL Electric Reply Brief ("R.B."), pp. 2, 3, 7-8. The EE&C Plan involves hundreds if not thousands of assumptions and estimates. Every single one of these estimates will likely turn out to be "wrong" in the sense

⁶ *EE&C Order*, pp. 92, 93.

that actual results will differ from the original estimate. Pursuant to the Recommended Decision, any change in any of these assumptions and estimates would require Commission approval. Such a result is unworkable, pointless, would undoubtedly result in an administrative and regulatory nightmare, and cannot have been intended by the Commission or the General Assembly. The standard supported by the Recommended Decision clearly constitutes just the type of “micro-management” which the Commission has previously rejected.

The Recommended Decision’s discussion regarding the Load Curtailment Program provides two examples of such micro-management. First, for example, under the standard enunciated in the Recommended Decision, PPL Electric’s decision to spend its original Commission-approved budget amount on the Load Curtailment Program and achieve 150 MW of savings as opposed 100 MW would be a “change” requiring Commission approval. However, this is not a change to the program because it is has simply turned out that spending the original Commission-approved amount of money on this program will produce actual load reductions greater than originally estimated. A second example of micro-management is the Recommended Decision’s review of PPL Electric’s determination to launch the Load Curtailment Program in early 2011 as compare to January 2010. As previously explained by the Company, the CSP bidding process and contract awards have taken much longer than expected, partly because of changes to the Technical Reference Manual and the Commission-protocols for determining load reductions. See PPL Electric M.B., p. 29. Regardless, peak load reductions are not required before June 2012, so there is no benefit to pay incentives before the summer of 2012. Under the Recommended Decision’s broad interpretation of the *EE&C Order*, changing the start date of a

⁷ R.D., Ordering Para. 9.

program, even if by a few days, would require Commission approval, and the Commission's control of such aspects of a program is surely micro-management.

As discussed below, micro-management of each program and/or individual measures (via the need to approve every change) would be inconsistent with the *EE&C Order* and would be unreasonable, as it would deny PPL Electric the ability to respond quickly to events and opportunities that could both assist in achieving energy saving and peak load reduction goals or events that could hinder achieving the goals prescribed by Act 129. PPL Electric is the party that bears the risk of penalties in the event of non-compliance with the mandates of Act 129 and it should be given substantial discretion to manage the EE&C Plan in order to have a realistic chance of meeting the requirements of Act 129 and should not be subject to the type of micro-management prohibited by the *EE&C Order*.

In the alternative, if the Commission determines that all changes to EE&C plans must be approved by the Commission, PPL Electric requests that the Commission affirm the approval of all of the implementation changes supported by PPL Electric's testimony, and correct a factual error in the Recommended Decision's description of PPL Electric's contracting process

IV. ARGUMENT

A. The Recommended Decision Erred By Not Following The Precedent Set By The *EE&C Order* Regarding The EE&C Plan Revisions That Require Commission Approval

In the *EE&C Order*, the Commission identified EE&C Plan revisions that require Commission approval; however, the Recommended Decision did not follow this precedent. In its brief, PPL Electric explained that in the *EE&C Order*, the Commission stated that approval is required to: (1) shift EE&C Plan program funds within a customer class, (2) shift EE&C Plan program funds between customer classes, and (3) discontinue a program. PPL Electric M.B., pp. 5, 7-12; PPL Electric R.B., p. 1.

In the *EE&C Order*, the Commission explained that it would “not micro-manage the Company’s compliance efforts.” *EE&C Order*, p. 88. This statement was in recognition of the fact that “...PPL [Electric] is the Party that bears the risk of penalties in the event of non-compliance with the mandates of Act 129.” *Id.* In addition, the Commission stated that:

With respect to changes to the plan, we find that an EDC cannot shift program funds within a customer class, or between customer classes without prior Commission approval. Doing so would constitute a modification of the EDC’s approved plan. The General Assembly authorized the Commission, not the EDC, to make decisions in regard to modifying an approved Act 129 Plan.

EE&C Order, p. 92. Moreover, in describing the required contents of an EDC’s petition to modify an approved plan, the Commission stated that:

The EDC’s petition should explain the specific reasons supporting its requested modifications to its approved plan, i.e., the shifting of funds between programs or customer classes, the discontinuation of a program, etc.

EE&C Order, p. 93. Consistent with this, the Commission also stated that PPL Electric “may not shift EE&C Plan program funds within a customer class, or between customer classes, without prior Commission approval.” *EE&C Order* Ordering Para. No. 34. Language similar to that quoted above was also included in other EE&C plan orders.⁸

⁸ *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans*, Docket Nos. M-2009-2092222, M-2009-2112952 and M-2009-2112956 (Order Entered February 26, 2010), p. 17 (“Even though we approved the evaluation provisions in the Revised Plans, we agreed with the OSBA that the Revised Plans must be modified to acknowledge that an EDC cannot shift program funds within a customer class, or between customer classes, without prior Commission approval.”); *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company for Consolidation of Proceedings and Approval of Energy Efficiency and Conservation Plans*, Docket Nos. M-2009-2092222, M-2009-2112952 and M-2009-2112956 (Order Entered October 28, 2009), p. 126 (“Regarding the DEP’s concerns about plan adjustments outside the annual review process, we find that an EDC cannot shift program funds within a customer class, or between customer classes without prior Commission approval. Doing so would constitute a modification of the EDC’s approved plan.”); *Petition of West Penn Power Company d/b/a Allegheny Power for Approval of its Energy Efficiency and Conservation Plan, Approval of Recovery of its Costs through a Reconcilable Adjustment Clause and Approval of Matters Relating to the Energy Efficiency and Conservation Plan*, Docket No. M-2009-2093218 (Order Entered October 23, 2009), p. 98 (“Regarding DEP’s concerns about plan adjustments outside the annual review process, an EDC cannot shift program funds within a customer class, or between customer classes without prior

Therefore, while the Commission noted in the *EE&C Order* that mid-course changes to the EE&C Plan require approval, it limited the required approvals to certain categories, as identified in the quoted items above and in the relevant ordering paragraph. Therefore, according to the *EE&C Order*, and as applicable here, PPL Electric needs Commission approval to: (1) shift EE&C Plan program funds within a customer class and (2) shift EE&C Plan program funds between customer classes. Additionally, the Commission contemplated that the discontinuation of a program requires approval. *See EE&C Order*, p. 93. However, PPL Electric has not proposed to discontinue a Commission-approved program; therefore, that category is not applicable in this proceeding. Consistent with the Commission's *EE&C Order*, PPL Electric identified two proposed modifications to its currently effective EE&C Plan that fit within the categories established by the Commission in the *EE&C Order*. These two proposed modifications are the subject of the Company's Petition and were appropriately approved by the ALJs.

The Recommended Decision concludes that PPL Electric's interpretation of the *EE&C Order* is too narrow. R.D., p. 11. This conclusion was based on the premise that, while the Commission listed the types of modifications that require Commission approval, the listed revisions were only examples and that other modifications "could constitute modifications requiring Commission review and approval." R.D., p. 11. The Recommended Decision further stated that the "Commission was clear in Ordering Paragraph No. 17 [of the *EE&C Order*] that mid-course changes to the Plan should be submitted to the Commission for approval, and it did

Commission approval. Doing so would constitute a modification of the EDC's approved plan."); *Petition of PECO Energy Company for Approval of its Act 129 Energy Efficiency and Conservation Plan and Expedited Approval of its Compact Fluorescent Lamp Program*, Docket No. M-2009-2093215 (Order Entered October 28, 2009), p. 42 ("We find that an EDC cannot shift program funds within a customer class, or between customer classes without prior Commission approval. Doing so would constitute a modification of the EDC's approved plan.").

not confer upon PPL [Electric] or any EDC the authority to unilaterally decide that an issue is not significant when challenged by stakeholders.” *Id.* As discussed below, in Section A.1., the Recommended Decision’s overly broad interpretation of reliance on Ordering Paragraph No. 17 of the *EE&C Order* ignores the full meaning and context of that ordering paragraph.

The Recommended Decision erred by not following the Commission’s prior determinations in the *EE&C Order* as to what changes require prior Commission approval. Pursuant to 66 Pa.C.S. § 316 “[w]henver the commission shall make any rule, regulation, finding, determination or order, the same shall be prima facie evidence of the facts found and shall remain conclusive upon all parties affected thereby, unless set aside, annulled or modified on judicial review.” Therefore, the final determinations in the *EE&C Order* are binding in this phase of the docket. *See e.g., Peoples Natural Gas Co. v. Pennsylvania Public Utility Com.*, 116 Pa. Cmwlth. 512, 542 A.2d 606, *affirmed by* 523 Pa. 370, 567 A.2d 642 (1989) (the Commission abused its discretion by failing to apply and be bound by Section 316).

Moreover, the Recommended Decision fails to recognize that the issue of what changes require Commission approval has already been decided and is now the law of the case. The Law of the Case Doctrine has traditionally been used where a court has ruled on a question, that same court will normally not reverse that determination upon consideration of another phase of the case. *Great Valley School District v. Zoning Hearing Board*, 863 A.2d 74, 81 (Pa. Cmwlth. 2004). The doctrine is designed to promote judicial economy, uniformity of decision making, protect the settled expectations of the parties, maintain the consistency of the litigation and end the case. *Peden v. Gambone Brothers Development Co.*, 798 A.2d 305, 310 (Pa. Cmwlth. 2002) (*citing Commonwealth v. Starr*, 541 Pa. 564, 664 A.2d 1326 (1995)).

Issues related to what changes to the EE&C Plan require Commission approval were previously addressed in a fully-litigated proceeding. The Commission carefully examined the evidence and adopted the current standard in the *EE&C Order*. The Recommended Decision erred by not applying the Commission's prior determinations, and it should be revised accordingly. To the extent that the Commission were now to reverse its prior order and determine that prior approval is required for any change to the EE&C Plan, such a requirement should only be implemented prospectively.

1. The Recommended Decision Misinterprets Ordering Paragraph No. 17 Of The *EE&C Order*

The Recommended Decision misinterprets Ordering Paragraph No. 17 of the *EE&C Order*, because Ordering Paragraph No. 17 is applicable to only cost recovery and reconciliation changes which are at issue in this proceeding. Ordering Paragraph No. 17 of the *EE&C Order* states:

That we encourage the use of a stakeholder process to consider the need for corrections to make mid-course corrections to PPL Electric Utilities Corporation's cost recovery mechanism; however, we require PPL Electric Utilities Corporation to seek Commission approval of any mid-course changes to the Plan that it intends to make.

Ordering Paragraph No. 17 of the *EE&C Order* is an encapsulation of the determinations discussed on pages 52-57 of the *EE&C Order*. The relevant section of the *EE&C Order* addresses levelized cost recovery and reconciliation. In the *EE&C Order*, the Commission adopted PPL Electric's levelized cost recovery plan, as well as its reconciliation proposal. *EE&C Order*, p. 56. PPL Electric's approved proposal stated that, in addition to the annual reconciliation, it would make "mid-course" corrections in the cost recovery mechanism to reflect major changes to any of its EE&C programs, and that any "mid-course" corrections would be subject to Commission review and approval before PPL Electric actually adjusts customers'

rates. *EE&C Order*, p. 53. The Recommended Decision's reliance on the final clause of Ordering Paragraph No. 17, that PPL Electric be required to "seek Commission approval of any mid-course changes to the Plan that it intends to make," is an excessively broad interpretation of a directive that only applied to cost recovery and reconciliation changes. As discussed above, Ordering Paragraph No. 17 relates to cost recovery and reconciliation changes, and the Recommended Decision erred by relying on it to replace the *EE&C Order's* direct representations that approval is required to: (1) shift EE&C Plan program funds within a customer class, (2) shift EE&C Plan program funds between customer classes, and (3) discontinue a program. The finding that any change to the EE&C Plan requires Commission approval directly contradicts the clear and controlling precedent regarding PPL Electric's EE&C Plan, specifically the limited categories of changes that require Commission approval. *See* Section A., above.

Additionally, the Recommended Decision's reliance on Ordering Paragraph No. 17 and the apparent determination that any mid-course corrections should be subject to Commission review and approval is contradicted by other statements and determinations in the Recommended Decision. For example, Ordering Paragraph No. 9 of the Recommended Decision (discussed in detail below in Section C), states that Commission review and approval is required where modifications may affect the cost allocations among customer classes, even when a program's approved budget is not altered. The fact that Ordering Paragraph No. 9 makes such a determination is inconsistent with the Recommended Decision's reliance on Ordering Paragraph No. 17 of the *EE&C Order*. The inconsistency exists because if, pursuant to reliance on Ordering Paragraph No. 17, any mid-course changes require approval then Ordering Paragraph No. 9 of the Recommended Decision is redundant and unnecessary because the changes

discussed in Ordering Paragraph No. 9 would be included in the mid-course changes discussed in Ordering Paragraph No. 17. Further undercutting the Recommended Decision's reliance on Ordering Paragraph No. 17 is the fact that the Recommended Decision does not discuss or mention the various implementation changes (other than the changes to the Load Curtailment Program) that PPL Electric has implemented which are supported by uncontested testimony. *See* PPL Electric St. 5, pp. 16-31. Since PPL Electric's other implementation changes were not discussed or mentioned in the Recommended Decision, presumably the Recommended Decision concluded that they did not warrant Commission approval; however, this conclusion is inconsistent with the Recommended Decision's determination that any mid-course change requires approval. Therefore, the text of the Recommended Decision undercuts the reliance on Ordering Paragraph No. 17 and, as such, the Recommended Decision should be revised to the extent that it relies on Ordering Paragraph No. 17 of the *EE&C Order*.

2. The Text Of The *EE&C Order* Does Not Support The Recommended Decision's Reliance On Ordering Paragraph No. 17 Of The *EE&C Order*

The Recommended Decision, in support of its determinations that Ordering Paragraph No. 17 of the *EE&C Order* is controlling, incorrectly interprets other provisions of the *EE&C Order*. The Recommended Decision states that:

Even applying the plain language doctrine to the Order, the Commission clearly and unambiguously listed shifting of funds between programs or customer classes as an example, and the Commission also listed the discontinuation of a program as another example of a modification requiring review and approval, and used the abbreviation, "etc.," thus indicating that there were other modifications that could constitute modifications requiring Commission review and approval.

The reference to the "etc." language refers to the part of the *EE&C Order*, quoted above, which states that:

The EDC's petition should explain the specific reasons supporting its requested modifications to its approved plan, i.e., the shifting of funds between programs or customer classes, the discontinuation of a program, etc.

EE&C Order, p. 93. The Recommended Decision's finding that this provision concerns examples of items that require Commission approval is contradicted by the text quoted above. The Commission specifically used the term "i.e." which means "that is." Black's Law Dictionary (9th ed. 2009). The Commission did not use "e.g." which means "for example." *Id.* Therefore, the Commission did list those modifications that require approval, and did not just provide examples of items that need Commission approval. Moreover, the use of the term "etc." by the Commission does not support the theory that the items listed are only examples. The term "etc." means "and other things," and as used in this context, *i.e.* at the end of a list, refers to other modifications mentioned in the *EE&C Order*. For example, the "etc." refers to changes to the cost recovery mechanism as discussed on pages 52-57 of the *EE&C Order*. However, the use of the term "etc." does not render the items listed by the Commission as an open-ended list of examples that could potentially include modifications which may need approval, but which are not discussed in the *EE&C Order*. Therefore, the Recommended Decision's reliance on Ordering Paragraph No. 17 should be rejected because the Recommended Decision's foundation for its reliance on Ordering Paragraph No. 17 was based on an incorrect interpretation of the *EE&C Order*.

3. The Recommended Decision, If Adopted, Would Require The Commission To Micro-Manage PPL Electric's EE&C Plan In Contradiction To The *EE&C Order*

By not following the precedent set forth in the *EE&C Order* (*see* Section A, above), the Recommended Decision is attempting to micro-manage the Company's EE&C Plan. In

approving PPL Electric's proposed modification to the Load Curtailment Program, the Recommended Decision agrees with PPL Electric that the:

EE&C Plan is a new endeavor that is based upon forward-looking estimates and projections which ought to be revised and updated based upon actual experience and data in order for an EDC to meet the mandated goals of Act 129.

R.D., p. 16. Moreover, the Recommended Decision states that “[a]n EDC *must be given some leeway* in monitoring its progress towards meeting the EE&C Plan goals, to detect problems quickly, and *to take corrective action and adjust the EE&C Plan over time.*” R.D., p. 16 (emphasis added). The Recommended Decision also explained that the EE&C Plan is dependent upon the consumer participation and “*some flexibility must be allowed* as projections regarding customer participation are likely to change as time elapses.” *Id.* (emphasis added). Furthermore, the Recommended Decision acknowledges that, pursuant to Section 2806.1(f), EDCs, like PPL Electric, are subject to penalties if the Act 129 consumption reduction mandates are not met. *Id.*

The statements in the Recommended Decision regarding allowing PPL Electric flexibility to administer the EE&C Plan are consistent with the *EE&C Order's* determination that the Commission would not micro-manage the Company's Act 129 compliance efforts because PPL Electric is the entity that bears the risk of penalties in the event of non-compliance. *EE&C Order*, p. 88. However, by misinterpreting and relying on Ordering Paragraph No. 17 of the *EE&C Order* (*i.e.*, concluding that any mid-course change requires Commission approval), and articulating, in Ordering Paragraph No. 9, that modifications which may affect the cost allocations among customer classes, even when a program's approved budget is not altered, require Commission approval, the Recommended Decision has removed the flexibility that PPL Electric needs to manage the EE&C Plan. The Recommended Decision's removal of flexibility to manage the EE&C Plan is in contradiction to the determinations in the *EE&C Order* and

should be revised because it essentially installs the Commission as manager of the Company's EE&C Plan.

4. The Recommended Decision Inappropriately Relied On A Proposal Offered By PPL Electric In A Prior Phase Of This Docket Which Was Rejected By The Commission And Was Not Advanced By PPL Electric Or Any Other Party In This Phase Of The Proceeding

In support of its determinations, the Recommended Decision relied on the fact that the Commission did not adopt PPL Electric's proposal in the *EE&C Order* regarding stakeholder and Commission involvement with revisions to the EE&C Plan. R.D., pp. 11-12. The reliance on this proposal is misplaced because the Commission has already specifically rejected this proposal and neither PPL Electric or any other party has relied on or advocated the use of this proposal in this phase of the proceeding.

As summarized in the Recommended Decision, in a prior phase of this docket, PPL Electric suggested it be permitted to notify the Commission of minor changes through quarterly and annual EE&C reports to the Commission. For major changes, PPL Electric proposed to notify stakeholders and the Commission, discuss these changes with stakeholders, and seek appropriate Commission approval. PPL Electric requested that a major change be defined as one that will increase the cost of the program by more than \$5 million or more than 10%, whichever is greater. R.D., pp. 11-12. Importantly, the Commission specifically rejected the Company's proposal. *EE&C Order* p. 89. Therefore, PPL Electric determined the modifications to the EE&C Plan that require Commission approval based on the standard specified in the *EE&C Order* and detailed in Section A, above.

PPL Electric did not utilize or advance its prior proposal in this phase of the proceeding. The Recommended Decision nonetheless states that "[t]he fact that [PPL Electric] chose to discuss with stakeholders its plans to expand and increase the Load Curtailment Program to

achieve an additional 50 MW of peak load reductions, is indicative that [PPL Electric] thought this was a major change.” R.D., p. 12. While not explicitly stated, the Recommended Decision’s rationale appears to be that, since PPL Electric chose to discuss the change to the Load Curtailment Program with the stakeholders and sought stakeholder support for such a change, then the modification was a major change and, therefore, Commission approval is required. However, as discussed above, PPL Electric did not utilize the minor/major classification that it originally proposed, and therefore, the Recommended Decision’s use of the prior proposal is inappropriate. Moreover, the fact that PPL Electric chose to discuss a change to a program with the stakeholders does not support the rationale that choosing to do so indicates that Commission approval is required for the change. PPL Electric discusses and notifies its stakeholders of all modifications to the EE&C Plan, and not just those that require Commission approval or that would be “major” under PPL Electric’s prior proposal. PPL Electric does this so as to elicit stakeholder input on its proposed changes. However, consistent with the *EE&C Order*, stakeholder approval is not required.⁹ As illustrated in the slideshow presented at the October 20, 2010¹⁰ stakeholder meeting (*see* PPLICA Cross Exhibit No. 2, slides 33-39), various modifications were presented for stakeholder review.

B. The Recommended Decision’s Standard That Commission Approval Is Required For Any Mid-Course Change Is Unworkable

Any standard that would require Commission approval for any mid-course changes to the EE&C Plan is unworkable. As the Company has explained throughout this phase of the proceeding, the EE&C Plan contains hundreds, if not thousands, of estimates and projections.

⁹ *EE&C Order* p. 88 (“We are mindful, however, that PPL is the Party that bears the risk of penalties in the event of non-compliance with the mandates of Act 129. We will not micro-manage the Company’s compliance efforts. The Company shall therefore be responsible for determining the topics to be covered in stakeholder meetings and all other aspects of the on-going stakeholder process.”).

PPL Electric M.B., pp. 2, 11-12, PPL Electric R.B., p. 3. Every single one of these estimates will likely turn out to be “wrong” in the sense that actual results will differ from the original estimate. PPL Electric R.B., p. 3. According to the Recommended Decision’s misinterpretation and reliance on Ordering Paragraph No. 17 of the *EE&C Order*, every time actual experience turns out to be different than the original estimate, PPL Electric would have to seek Commission “approval.” Such review and approval would undoubtedly result in substantial administrative and regulatory burdens, and cannot have been intended by the Commission or the General Assembly. R.B., p. 3.

To require that any change to the Company’s EE&C Plan must receive prior Commission approval,¹¹ on its face, is a requirement that the Commission micro-manage virtually every aspect of PPL Electric’s EE&C Plan. For example, this would mean that changing the start date of a program, even if PPL Electric desired to launch a program a mere few days earlier or later than planned, would require Commission approval, and the Commission’s control of such administrative and managerial aspects of a program is surely micromanagement. Notably, this is not a hypothetical example, the Recommended Decision considered arguments raised in this proceeding regarding whether PPL Electric should be permitted to change the start date of the Load Curtailment Program and such a review constitutes the type of micromanagement that the Commission sought to avoid in the *EE&C Order*.

The Recommended Decision’s determination in this regard should be rejected for several reasons. First, as discussed above (and in PPL Electric’s M.B., pp. 17-14 and R.B., pp.1-2.), the precise issue of what changes to PPL Electric’s EE&C Plan require prior Commission approval

¹⁰ Notably, these changes were also discussed at the April 28, 2010 stakeholder meeting and not just at the October meeting. PPL Electric St. 5, p. 15.

¹¹ If the Recommended Decision’s misinterpretation of Ordering Paragraph No. 17 of the *EE&C Order* is upheld, then any change would require Commission approval.

has already been decided by the Commission. Second, the Recommended Decision's determination is also inconsistent with many years of well-established precedent that the Commission is not authorized to manage the business affairs of public utilities.¹²

Third, the Recommended Decision would have the Commission act as manager of all of the details of PPL Electric's EE&C Plan. This is clearly an unreasonable result. Indeed, pursuant to Act 129, only if the Company fails to achieve its peak load and electricity consumption targets is the Commission permitted to assume control of an EDC's EE&C plan. 66 Pa.C.S. § 2806.1(f). The Recommended Decision's standard of review ignores the reality that PPL Electric is the party that bears the risk of penalties in the event of non-compliance with the mandates of Act 129, and if PPL Electric fails in this regard, the responsibility to achieve the reductions in consumption is transferred to the Commission. *EE&C Order*, p. 88; 66 Pa.C.S. § 2806.1(f). PPL Electric requests that the Commission reject the Recommended Decision's standard that would require it to act as manager of all of the details of PPL Electric's EE&C Plan.

C. The Recommended Decision Erroneously Recommends A New Standard That Should Be Applied When Determining Whether A Modification To The EE&C Plan Requires Commission Approval

Independent of the Recommended Decision's reliance on Ordering Paragraph No. 17 of the *EE&C Order* to define the standard that should be used to determine when EE&C Plan modifications require Commission approval, the Recommended Decision also formulated a new standard to apply to determine whether a modification to the Company's EE&C Plan requires

¹² The Courts have determined that the Commission is not a "super board of directors" and "[s]hould have an inquisitorial and corrective authority to regulate and control the utility in the field specifically brought within the commission's jurisdiction." *Peoples Cab Co. v. Pennsylvania Public Utility Comm'n*, 137 A.2d 873 (Pa. Super. 1958). In fulfilling its statutory responsibilities, the Commission undertakes an after-the-fact review of the determinations of a public utility and its management. As the Commission "[m]ay regulate with a view to enforcing reasonable rates and charges, it is not clothed with the general power of management incident to ownership." *Id.* at 879, citing *Southwestern Bell Tel. Co. v. Pub. Serv. Com.*, 262 U.S. 276, 289 (1923).

Commission approval. Specifically, Ordering Paragraph No. 9 of the Recommended Decision states as follows:

That in future filings of petitions to modify PPL Electric Utilities Corporation's Energy Efficiency and Conservation Plans, PPL Electric Utilities Corporation shall include a request for Commission review and approval regarding proposed modifications which may affect the cost allocations among customer classes even when a program's approved budget is not altered.

The Recommended Decision erred in formulating this new standard that contradicts the standard established in the *EE&C Order*. See Section A, above.

Ordering Paragraph No. 9 appears to be a reference to the Recommended Decision's discussion approving changes to the Load Curtailment Program. See R.D., pp. 15-16. As discussed in PPL Electric's Main and Reply Briefs, the Company reviewed the nature and effect of the changes to the Load Curtailment Program and applied the standard articulated in the *EE&C Order* for changes that require Commission approval. PPL Electric determined that the changes to the Load Curtailment Program did not (1) shift EE&C Plan program funds within a customer class, (2) shift EE&C Plan program funds between customer classes, or (3) discontinue a program. Therefore, Commission approval was not required to implement the changes, See PPL Electric M.B., pp. 25-32; PPL Electric R.B., pp. 11-12.

The Commission should reverse the Recommended Decision to the extent that Ordering Paragraph No. 9 modifies the *EE&C Order*, in which the Commission identified EE&C Plan revisions that require Commission approval. Specifically, in the *EE&C Order*, the Commission stated that approval is required to: (1) shift EE&C Plan program funds within a customer class, (2) shift EE&C Plan program funds between customer classes, and (3) discontinue a program. Ordering Paragraph No. 9 adds a new element to this standard which is that modifications that may affect the cost allocations among customer classes, even when a program's approved budget is not altered. The Recommended Decision's addition of this new type of change that requires

Commission approval should not be affirmed because it contradicts the *EE&C Order*. Moreover, the Recommended Decision should not revise the standard established in the *EE&C Order* pursuant to 66 Pa.C.S. § 316, and the Law of the Case doctrine both discussed in Section A, above.

Additionally, the standard articulated in Ordering Paragraph No. 9, should not be accepted by the Commission because it is not supported by the record in this proceeding. The Recommended Decision articulates the standard in Ordering Paragraph No. 9 in response to the changes in the Load Curtailment Program and uses those changes to support the implementation of a new standard. However, the changes in the Load Curtailment Program would not even meet the new standard in Ordering Paragraph No. 9. The changes to the Load Curtailment Program do not affect the cost allocations among customer classes. Moreover, nothing that PPL Electric plans to do with regard to the Load Curtailment Program changes any cost incurred by any rate class, including Large C&I. The Commission approved a certain level of costs to be allocated to the Large C&I class. The Large C&I customers, will pay no more than they were required to pay under the original Commission-approved plan. Notably, the Office of Consumer Advocate (“OCA”) also took the position in its Reply Brief that the applicable changes to the Load Curtailment Program will not result in such cost-shifting and OCA explained that PPL Electric has not proposed to increase overall costs assigned to the Large C&I class from the level in its original *EE&C Plan*.

Therefore, since the changes to the Load Curtailment Program do not fit within this new standard, there is no record evidence to support the need or implementation of this new standard, and, as such, the new standard should be rejected.

To the extent that the Commission approves this new standard, PPL Electric requests clarification as to what the new element means. Specifically, guidance would be required as to, how and on what basis should PPL Electric determine when a modification “*may* affect the cost allocations.”

D. The Recommended Decision Erred By Not Addressing All Of The Implementation Changes To The EE&C Plan Presented In PPL Electric’s Uncontested Testimony

PPL Electric does not waive its challenge to the Recommended Decision’s conclusion as to the proper standard that the Commission articulated in the *EE&C Order* for modifications that require approval, as set forth in Section A, above. However, to the extent that the Commission affirms the Recommended Decision finding that any mid-course changes to the EE&C Plan should have been submitted to the Commission for approval pursuant to Ordering Paragraph No. 17 of the *EE&C Order*, PPL Electric requests that the Commission affirm that all of the implementation changes presented in PPL Electric’s testimony and submitted with its Annual Report are approved. With the exception of the Load Control Program, the Company’s testimony on these changes was not contested by any party. PPL Electric presented uncontested testimony supporting all of the other EE&C Plan modifications, and the Recommended Decision did not reject any of the implementation changes. The Recommended Decision (p. 15) does state that:

“[s]ince these implementation changes do not impact the projected costs of the program, do not impact the projected cost of the EE&C Plan, do not impact the projected savings of the program or of the EE&C Plan, and do not impact the cost allocation between customer sectors, the proposed changes are satisfactory.

However, this discussion is in a paragraph regarding revising the start date for the Load Curtailment Program, and the reference to “implementation changes” does not appear to refer to all of the implementation changes presented by PPL Electric in this proceeding. Therefore, to

alleviate any confusion, PPL Electric requests that the Commission clarify that either Commission approval is not required for all of the Company's implementation changes, or that said changes were approved in the Recommended Decision.

As discussed above, the Recommended Decision discusses the two modifications presented in PPL Electric's September 15 Petition and the changes to the Load Curtailment Program; however, none of the other implementation changes are discussed. While PPL Electric believes that these revisions to the EE&C Plan do not require Commission approval, it presented evidence so that a broad review could be undertaken. Each implementation change is fully described in PPL Electric St. 5, pp. 16-31, and each was briefly summarized in Section IV.C.1. of PPL Electric's Main Brief. Moreover, a summary of the implementation changes was part of the Company's PY1 Annual Report.

As explained in PPL Electric's Main Brief (at p. 25), the implementation changes fall into five broad categories. *See* PPL Electric St. 5, p. 16. The first category includes the fine-tuning of program rebate levels, energy efficiency measure descriptions and eligibility requirements. *Id.* As illustrated in Exhibit PDC-1, there are 21 revisions that fall in to the first category. The second category includes measures added to the Efficient Equipment Program. *Id.* The third category includes measures deleted from the Efficient Equipment Program. The fourth category includes measures moved from the Efficient Equipment Program to the Custom Incentive Program. *Id.* The fifth category includes changes to program schedule milestones or changes to projected peak load reduction for the load curtailment measure. *Id.* A summary of these changes and further explanations were part of the Company's PY1 Annual Report. *See* Exhibit PDC-1. To the extent that the Commission affirms the Recommended Decision's finding that any mid-

course change requires approval, it is appropriate for the Commission to affirm that the changes presented in Exhibit PDC-1 and PPL Electric St. 5 (pp. 16-31) are approved.

E. PPL Electric Followed The Commission-Approved CSP Contract Procedures For The Load Curtailment Program CSP Contract(s)

The Recommended Decision correctly rejects Constellation NewEnergy, Inc.'s ("Constellation") requests that the Commission open a proceeding to review whether PPL Electric's contracting process with CSP(s) for its Load Curtailment Program met the requirements of Act 129 and that the Commission should require the issuance of a new request for proposals to all CSPs. The Recommended Decision, however, contains a mischaracterization of PPL Electric's contracting process, and PPL Electric requests that the Recommended Decision be revised to correct this mischaracterization.

The Recommended Decision states that:

On the surface, it appears the Company followed a competitive bidding arrangement in procuring bids, even though it narrowed its pool of bids from 80 to approximately 8-10 bidders to seriously consider for the procurement of 150 MW.

PPL Electric requests that the Commission clarify this statement. As shown in the record in this proceeding, PPL Electric solicited load curtailment bids from over 80 curtailment service providers. Tr. 56. As explained in PPL Electric's Reply Brief, "[f]rom the list of bidders that responded a short list of less than 10 entities was selected for further negotiations." PPL Electric R.B., p. 30; see Tr. 56. To be clear, the Company did not narrow "its pool of bids from 80 to approximately 8-10 bidders," as stated by the Recommended Decision. PPL Electric solicited load curtailment bids from over 80 curtailment service providers, but did not receive bids from 80 providers. The short list of less than 10 entities that were selected for further negotiations was not compiled from the 80 providers that PPL Electric solicited, but was compiled from the

limited number of providers that responded to PPL Electric's solicitation.¹³ Therefore, PPL Electric requests that the Commission clarify that PPL Electric did not narrow the pool of bids received from 80 to less than 10.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, PPL Electric Utilities Corporation respectfully requests that the Recommended Decision of Administrative Law Judges Elizabeth H. Barnes and Dennis J. Buckley issued on December 17, 2010 be modified, as discussed above, and that the Commission:

- 1) Approve PPL Electric's Petition filed on September 15, 2010.
- 2) Adopt PPL Electric's interpretation of the *EE&C Order* regarding the EE&C Plan revisions that require Commission approval and confirm that Commission approval is only required where a modification (1) shifts EE&C Plan program funds within a customer class, (2) shifts EE&C Plan program funds between customer classes, or (3) discontinues a program.
- 3) Reject Ordering Paragraph No. 9 of the Recommended Decision, which erroneously creates a new standard for determining when a modification to the Company's EE&C Plan requires Commission approval.
- 4) To the extent necessary, approve all of the implementation changes to the EE&C Plan presented in PPL Electric's uncontested testimony.
- 5) Revise and correct the Recommended Decision's mischaracterization of PPL Electric's contracting process.

¹³ See Tr. 56 (discussing the bid solicitation process). The exact number for responsive bidders and those on the shortlist has not been publicly disclosed.

- 6) Revise the Recommended Decision as more fully discussed herein.

Respectfully submitted,



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