**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PPL Electric Utilities Corporation :

for Approval of its Act 129 Phase II : M-2012-2334388

Energy Efficiency and Conservation Plan :

**FIFTH PREHEARING ORDER**

 This Prehearing Order addresses the January 14, 2013 Petition of Comverge, Inc. (Comverge) for Admission *Nunc Pro Tunc* of the Direct Testimony of Raymond G. Berkebile. That Petition was objected to by PPL Electric Utilities Corporation (PPL) on January 15, 2013.[[1]](#footnote-1)

 Because of the expedited schedule in this case, it is not possible to resolve this issue by continuing the hearing scheduled for today, January 16, 2013, without violating the directive in the Commission’s Implementation Order of August 3, 2012, at *Energy Efficiency and Conservation Program*, Docket No. M-2012-2289411 (Order entered August 3, 2012) (*Implementation Order*). Therefore, oral argument has been held on January 16, 2013, immediately before the start of the evidentiary hearing in this case. For the reasons set forth in this Order, Comverge’s Petition is denied.

**I. HISTORY AND POSITION OF THE PARTIES**

 Comverge timely filed a Petition to Intervene in this proceeding on December 19, 2012. That Petition to Intervene was granted in the Third Prehearing Order in this case, issued December 27, 2012.[[2]](#footnote-2) However, because of the expedited time-frame for this case directed by the *Implementation Order*, a Prehearing Conference had already been held on December 10, 2012. At that hearing, December 28, 2012 was established as the date for filing of “Other Parties Comments/Direct Testimony”[[3]](#footnote-3) in this case.

 On December 12, 2012, I issued the Second Prehearing Order confirming the December 28, 2012 direct testimony filing date, but also noted that the necessity of holding an evidentiary hearing by no later than January 18, 2013 (again in conformity with the *Implementation Order*) had the potential of placing future intervenors at a disadvantage. I stated that flexibility would be afforded to such intervenors and noted PPL’s willingness to work with any such intervenors. However, flexibility has its limits, and at the Prehearing Conference I also made it clear I would not accept “comments” into the record, a ruling that I memorialized in a Fourth Prehearing Order issued in this case on January 9, 2013, after Comverge attempted to introduce the Comments of Raymond G. Berkebile into the record in the case of *Petition of PECO Energy Company for Approval of its Act 129 Phase II Energy Efficiency and Conservation Plan*, Docket No. M-2012-2333992, that same day.[[4]](#footnote-4)

 In its Petition, Comverge argues that the Commission’s regulation at 52 Pa. Code § 1.2(a) permits a Presiding Officer to “disregard an error or defect of procedure which does not affect the substantive rights of the parties.” Similarly, the Commission’s regulation at 52 Pa. Code § 1.2(c) permits a Presiding Officer to “waive a requirement of this subpart when necessary or appropriate, if the waiver does not adversely affect a substantive right of a party.” Petition at 2, ¶¶ 8-9. Comverge notes the expected time schedule of this proceeding, its late (though not untimely) intervention, its timely filing of comments to PPL’s Phase II Plan, and asserts that it was only informed by Order one day before the filing deadline that comments would not be accepted into the record as justification for granting its Petition. Petition at 2-3, ¶ 10. Comverge argues that its direct testimony does not differ in substance from its comments, which were timely filed. Petition at 3, ¶ 11. Comverge states that it is willing to agree to whatever extension of time is reasonable to allow other parties to address Comverge’s testimony. Petition at 3, ¶ 12. Given that statement, Comverge argues that admission of its direct testimony *nunc pro tunc* will not prejudice other parties in this proceeding. Petition at 3, ¶ 13. Comverege points out that the record in this case has not yet closed. Petition at 3, ¶ 15. Comverge argues that admitting Comverge’s testimony is in the public interest and will ensure that the record is complete. Petition at 3, ¶ 16. At oral argument, Comverge essentially repeated these contentions, adding that this is merely a “legal debate.”

 In objecting to the Petition, PPL argued that it would be prejudiced by allowing the introduction of testimony at this point in the proceeding. PPL argued that what Comverge is asking for would require a substantial expansion of PPL’s Plan, and PPL has had no time to consider Comverge’s position or to conduct discovery to learn the details of that expansion. PPL referred to the history of this proceeding, the underlying Orders and the discussion at the Prehearing Conference of December 10, 2012 relative to the offer of comments into the evidentiary record. PPL pointed out that Comverge did not file its Petition until after the January 11, 2013 filing of rebuttal testimony by PPL. PPL also pointed out the several opportunities that Comverge had to file *nunc pro tunc* which Comverge did not take advantage of.

**II. LEGAL STANDARD**

 Before proceeding to a consideration of the merits of the arguments on this issue, it is necessary to consider the standard that Comverge must meet. *Nunc pro tunc* is "[a] phrase applied to acts allowed to be done after the time when they should be done, with a retroactive effect, i.e., with the same effect as if regularly done." Black's Law Dictionary 1218 (4th ed. 1968).

 In the case of *McClean v. Unemployment Compensation Board of Review*, 908 A.2d 956 (2006), the Commonwealth Court held that “[a] *nunc pro tunc* appeal may be allowed where extraordinary circumstances involving fraud or some breakdown in the administrative process caused the delay in filing or where non-negligent circumstances related to the appellant, his or her counsel or a third party caused the delay." See *J.A. v. Dep't of Pub. Welfare*, 873 A.2d 782, 785 (Pa. Cmwlth. 2005) quoting *Cook v. Unemployment Comp. Bd. of Review*, 543 Pa. 381, 671 A.2d 1130 (1996). However, that case involves an appeal from the final determination of an agency where the established deadline for the filing of an appeal is mandatory.

 In *Re Rule-making Proceeding Concerning Standards and Billing Practices for Residential Telephone Service,* Docket No. I-80090338, 59 Pa. PUC 10 (September 5, 1984) the Commission applied a “public interest” standard in denying the Letter-Petition filed by AT&T Communications of Pennsylvania, Inc. requesting the Commission to allow it to file comments *nunc pro tunc* in that rule-making proceeding.

 In proceedings before Commission administrative law judges (ALJ), Petitioners must set forth a reason to justify the allowance of a *nunc pro tunc* filing. See *Re Dela Cab Company*, Docket No. A- 99875F.1, 50 Pa. PUC 451 (December 9, 1976). For example, I note that in the relatively recent case of *Joan Dumas v. PECO Energy Company*, Docket No. C-2010-2175472 (May 19, 2011), Judge Susan Colwell allowed PECO to file an Answer to a complaint *nunc pro tunc* where PECO argued that its computer tracking system showed the Answer as filed when, in fact, the Answer had not been filed. In *Adamthwaite v. PECO Energy Company*, Docket No. C-2008-2029752 (January 23, 2009), then Chief ALJ Veronica Smith treated an attorney’s statement of a medical illness as a Motion *nunc pro tunc* and granted the late filing of an Answer and New Matter and Preliminary Objection.

 Thus, at least at the trial level, it seems that discretion as to whether to accept a filing as *nunc pro tunc* rests within the broad discretion of the individual ALJ based on the facts of the case and a showing of a reason that warrants accepting such a filing as balanced against prejudice to other parties. 52 Pa. Code §1.2. In addition to the provision at 52 Pa. Code § 5.483 which gives an ALJ authority to regulate the course of a proceeding, I note also the Commission’s procedural regulations with respect to control of the receipt of evidence and the use of written testimony:

**§ 5.403. Control of receipt of evidence.**

 (a)  The presiding officer shall have all necessary authority to control the receipt of evidence, including the following:

    (1)  Ruling on the admissibility of evidence.

    (2)  Confining the evidence to the issues in the proceeding and impose, where appropriate:

      (i)    Limitations on the number of witnesses to be heard.

      (ii)   Limitations of time and scope for direct and cross examinations.

      (iii)   Limitations on the production of further evidence.

      (iv)   Other necessary limitations.

 (b)  The presiding officer will actively employ these powers to direct and focus the proceedings consistent with due process.

**§ 5.412. Written testimony.**

 (a)  *General*. Use of written testimony in Commission proceedings is encouraged, especially in connection with the testimony of expert witnesses. Written direct testimony is required of expert witnesses testifying in rate cases.

 (b)  *Use*. The presiding officer may direct that expert testimony to be given upon direct examination be submitted as prepared written testimony. A reasonable period of time will be allowed to prepare written testimony.

 (c)  *Rules regarding use*. Written testimony is subject to the same rules of admissibility and cross-examination of the sponsoring witness as if it were presented orally in the usual manner.

 (d)  *Cross-examination*. Cross-examination of the witness presenting written testimony shall proceed at the hearing at which testimony is authenticated if service of the written testimony is made upon each party of record at least 20 days prior to the hearing, unless the presiding officer for good cause otherwise directs. In a rate proceeding, the presiding officer or the Commission will establish the schedule for the filing and authentication of written testimony, and for cross-examination by other parties.

 (e)  *Form*. Written testimony must normally be prepared in question and answer form, include a statement of the qualifications of the witness and be accompanied by exhibits to which it relates. A party offering prepared written testimony shall insert line numbers in the left-hand margin on each page. A party should also use a logical and sequential numbering system to identify the written testimony of individual witnesses.

 (f)  *Service*. Written testimony shall be served upon the presiding officer and parties in the proceeding in accordance with the schedule established by this chapter. At the same time the testimony is served, a certificate of service for the testimony shall be filed with the Secretary.

 (g)  *Copies*. At the hearing at which the testimony is authenticated, counsel for the witness shall provide two copies of the testimony.

**III. DISCUSSION**

 In resolving this controversy, I am not insensible to Comverge’s arguments as set forth in its Petition and as repeated at oral argument with respect to the fact that the record in this case is still open and that the expedited procedural schedule worked somewhat to Comverge’s disadvantage. I also agree that an evidentiary record should be as complete as possible, but that must be done in conformity with the orderly conduct of the proceeding and the dictates of due process and the Commission’s procedural rules.

 I disagree with Comverge’s primary reason for requesting approval of a *nunc pro tunc* filing: that Comverge had only one day’s notice that comments would not be included as part of the evidentiary record. The transcript of the Prehearing Conference of December 10, 2012, was readily available to Comverge, and my concern with respect to the treatment of comments was set forth at pages 22-23. In fact, I made similar comments in the PECO case which had an even earlier Prehearing Conference on November 30, 2012, and where my direction with respect to the treatment of comments was pointedly made. As an intervenor in *both* the PECO and PPL cases, Comverge had to know that it was a “latecomer” to these proceedings (through no fault of Comverge’s), and that diligence would be necessary to come current with each case. This is one reason why Orders granting intervention state that the intervention is granted subject to the intervenor accepting the record and underlying Orders as they stand, and it is incumbent upon an intervenor to acquaint itself with the established record.

 A review of the transcript of either the November 30, 2012 Prehearing Conference in the PECO case, or the December 10, 2012 Prehearing Conference in the PPL case would put any potential intervenor on notice of the status of comments in these cases. Certainly by January 9, 2013, Comverge was well aware that comments would not be accepted into the evidentiary record, yet Comverge delayed until January 14, 2013, to file testimony in this case: testimony that could have unquestionably been filed at any time on or immediately after January 9, 2013, particularly given that the testimony consists of Mr. Berkebile’s comments reformatted.[[5]](#footnote-5) While I sympathize with Comverge to a point (given the disjunction between the intervention deadline and the procedural schedule in this case), that sympathy is tempered by the fact that Comverge waited until January 14, 2013 to submit direct testimony.

 The other weakness in Comverge’s justification is the assertion that admission of its direct testimony *nunc pro tunc* will not prejudice other parties in this proceeding, an assertion that PPL understandably took vigorous exception to.

 PPL argued persuasively that it would be prejudiced by allowing the introduction of testimony at this point in the proceeding, and I agree. What Comverge is asking for would require a substantial expansion of PPL’s Phase II Plan, and PPL has had no time to consider Comverge’s position, to conduct discovery, to hold discussions or to ascertain how such an expansion would impact Plan funding plans and recovery. PPL’s citation to the history of this case is more accurate than that of Comverge. PPL pointed out the several earlier opportunities that Comverge had to file *nunc pro tunc* which Comverge did not take advantage of. For example, PPL is correct that despite the ability to do so earlier, Comverge did not file its Petition until after the January 11, 2013 filing of rebuttal testimony by PPL.

 In the final analysis, what must be considered in deciding this issue is the reason for the requested filing *nunc pro tunc* against the prejudice to PPL. This is more than a legal debate. Comverge is belatedly asking to introduce testimony with respect to combined heat and power technology (CHP) and to make a critique of PPL’s Smart On-site Program as compared to PECO’s Phase II Plan.[[6]](#footnote-6) Comverge wants to “help” PPL in revising PPL’s Phase II Plan to track with PECO’s in the use of CHP. This would involve a significant revision of PPL’s Phase II Plan well past “the eleventh hour.” PPL has had no time to evaluate this new proposal, and to require PPL to address the proposal without allowing adequate time for discovery and discussion is contrary both to the orderly conduct of this proceeding and to PPL’s due process rights. Comverge has not shown a good reason why a *nunc pro tunc* filing of late filed testimony should be allowed. Finally, the admission at hearing by Comverge that it did not have Mr. Berkebile present for cross-examination by PPL effectively eliminated any discretion that I could bring to bear on this issue. The absence of Mr. Berkebile underscored the prejudice to PPL inherent in granting the Petition. It would be a flagrant violation of PPL’s right to due process to allow the filing of direct testimony by Comverge *nunc pro tunc* while not even affording PPL the opportunity to cross-examine Comverge’s sponsoring witness.

 THEREFORE,

 IT IS ORDERED:

 1. That the Petition of Comverge, Inc. for Admission *Nunc Pro Tunc* of the Direct Testimony of Raymond G. Berkebile is denied.

January 16, 2013 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Dennis J. Buckley

 Administrative Law Judge

**M-2012-2334388 – PETITION OF PPL ELECTRIC UTILITIES CORPORATION FOR APPROVAL OF ITS ACT 129 PHASE II ENERGY EFFICIENCY AND CONSERVATION PLAN.**

***REVISED 12/28/12***

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1. Comverge’s late filing of testimony has been a subject of controversy in this case and at least two other cases in which Comverge has intervened: *Petition of PECO Energy Company for Approval of its Act 129 Phase II Energy Efficiency and Conservation Plan*, Docket No. M-2012-2333992, and in the consolidated FirstEnergy cases at Docket Nos. M-2012-2334392, M-2012-2334387, M-2012-2334395 and M-2012-2334398. [↑](#footnote-ref-1)
2. The grant of intervention was necessarily delayed both because of the Christmas holiday and to provide the parties a meaningful opportunity to review the Petition to Intervene and to formulate and file any objection thereto. No objections were raised. [↑](#footnote-ref-2)
3. The reference to “Other Parties Comments” notwithstanding, and as will be discussed herein, I made my concerns with respect to the inclusion of “comments” in the certified record of this and other Act 129 Phase II proceedings clear at the Prehearing Conference. [↑](#footnote-ref-3)
4. Comverge’s request to admit the comments was denied, and thereafter Comverge filed Mr. Berkebile’s comments in the form of testimony, which testimony was admitted into the record in the PECO case without objection. I note, however, that Mr. Berkebile’s testimony is *supportive* of PECO’s plan, which is not the case with respect to PPL’s Plan. Further, the dates in the PECO proceeding are different from those in this case. In the PECO case, direct testimony from the Other Parties was due before Comverge could reasonably have been expected to file direct testimony which is one reason why I afforded Comverge broad leniency in that case. [↑](#footnote-ref-4)
5. I note that though somewhat differently situated than Comverge in terms of time of appearance, the OCA filed both comments and testimony in this case. [↑](#footnote-ref-5)
6. While I do not reach the issue of whether this is even a proper or viable comparison, I am troubled by the implication that Comverge may attempt to “bootstrap” from the PECO proceeding to this proceeding. [↑](#footnote-ref-6)