BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PPL Electric Utilities Corporation	:	
For an Evidentiary Hearing on the Energy	:	P-2012-2320369
Efficiency Benchmarks Established for the Period	:	
June 1, 2013 through May 31, 2016	:	

CLEAN AIR COUNCIL AND SIERRA CLUB'S REPLY BRIEF IN SUPPORT OF THEIR BRIEF IN OPPOSITION TO PPL ELECTRIC UTILITIES CORPORATION'S PETITION FOR EVIDENTIARY HEARING

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Clean Air Council ("Council") and the Pennsylvania Chapter of the Sierra Club ("Sierra Club") (collectively, "Intervenors"), on behalf of their respective members and the public interest, submit the following Reply Brief in support of their Opposition Brief to PPL Electric Utilities Corporation's ("PPL") Petition for Evidentiary Hearing and PPL's attempts thereby to revise the Phase II Implementation Order issued by the Pennsylvania Public Utility Commission (the "Commission" or the "PUC") under Act 129.

I. INTRODUCTION

In its main brief, PPL makes it abundantly clear that it is not challenging its reduction targets in the Public Utility Commission's ("Commission" or "PUC") Phase II Implementation Order, and indeed is presenting no evidence that those reduction targets must be changed. Instead, PPL is using this evidentiary petition process to repeat claims it has already made and had addressed in a petition for reconsideration of the Implementation Order, the substance of which PPL has admitted is speculative. Accordingly, PPL's petition should be denied.

II. ARGUMENT

PPL's main brief demonstrates that PPL is seeking not a review of the evidence the Commission used to establish PPL's reduction targets under the Implementation Order, but instead a legal determination as to the viability of potential future challenges it might later choose to bring. This is both beyond the narrow scope of the evidentiary petition process established in the Implementation Order, and it is unsupported by the evidence in the record.

A. PPL's Claims Are Beyond the Scope of the Evidentiary Petition Process

PPL is not challenging anything that can be challenged in the evidentiary petition process, and for this reason its petition should be denied.

The Implementation Order establishes that the evidentiary petition process is for the limited purpose of contesting the facts relied upon by the Commission in developing the Implementation Order's reduction targets, not in arguing the law: evidentiary petitions are solely "to contest the facts the Commission relied upon in adopting the consumption reduction requirements" and "[t]he scope of any such proceeding will be narrow and limited to the consumption reduction requirement issue." Implementation Order at 31.

Nonetheless, PPL states in its main brief that it is attempting no such thing here: "Preliminarily, it must be stressed what is actually being challenged by PPL Electric in this proceeding. . . . In this proceeding, PPL Electric is <u>not</u> challenging the 2.1% consumption reduction target or the 25% adjustment factor adopted in the *2012 Implementation Order*." PPL Brief at 9 (emphasis in original). Instead, PPL is seeking an order allowing it to "challenge the application of future changes to the TRM, TRC, and other Commission actions" and to "request, if necessary, modifications to . . . the Phase II consumption reduction target, to account for any future changes to the TRM, TRC, other Commission actions, and other market conditions that

are not, and cannot be, presently known." *Id.* at 10. PPL thus is specifically disclaiming the review and remedies afforded by the evidentiary petition process, and is instead bringing *legal* claims. *Id.*; *see also id.* at 11 (claiming that the Implementation Order "erred as a matter of law"); *id.* at 13 (claiming that the conclusion reached in the Implementation Order "constitutes an error of law"). Challenging purported errors of law as to whether or not the Commission must affirmatively enunciate here and now PPL's ability to challenge issues that may (or may not) arise in the future is not "contest[ing] the facts the Commission relied upon in adopting the consumption reduction requirements," nor a challenge to the "consumption reduction requirement." Implementation Order at 31.[1] PPL's petition must be denied on these grounds alone.

B. Because PPL Has Failed to Carry Its Evidentiary Burden in Showing that the Implementation Order Must Be Changed, Its Petition Must Be Denied

However, even if this were the proper venue—which it is not—for PPL to advance its claims, PPL has presented no evidence that it must now or ever challenge its reduction targets.

A party seeking a rule or order from the Public Utility Commission bears the burden of proof. 66 Pa. C.S. § 332(a); *see also* Implementation Order at 31 ("The EDC contesting the consumption reduction requirement shall have the burden of proof"). As such, 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." *Samuel J. Lansberry, Inc. v. Pa. Public Utility Com'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990) (denying petition where based only on substantial evidence). If a party upon whom the burden

[1] Indeed, as discussed further below and in the Intervenors' Opposition Brief, PPL has testified that it believes it can and will hit its Phase II reduction targets—it has no issue with the consumption reduction requirements. *See* PPL Petition at 5 (stating that the consumption reduction target of 2.1% in the Implementation Order is "reasonably achievable"); Hearing Transcript at 38:7-13 (PPL's Phase II target is "achievable").

of proof is placed fails to carry that burden, denial of the relief requested is necessary. *See, e.g.*, *Warwick Water Works, Inc. v. Pa. Public Utility Com'n*, 699 A.2d 770, 774-75 (Pa. Cmwlth. 1997).

PPL's central claim is that—though it has no intention of challenging its reduction targets now—it needs assurances from the Commission that it will have the option of challenging those targets later, should conditions change such that PPL might want to challenge them. PPL, however, fails to submit any evidence that it will actually need to challenge the reduction targets. Instead, PPL highlights in its brief hypothetical situations that are, ultimately, at best speculative, and at worst counterfactual.

For example, PPL states that if it "carried forward the mix of measures from its Phase I EE&C Plan to the Phase II EE&C Plan . . . it would be difficult for the Company to achieve the 2.1% consumption reduction compliance target." PPL Brief at 17. But PPL testified that it does not actually plan on carrying forward the Phase I mix of measures into Phase II, and that to the contrary, whatever mix of measures PPL does use in Phase II "will be designed to meet those [reduction compliance] targets". Hearing Transcript at 45:24-46:14. The example that PPL raises in its brief thus bears no relation to reality.

Similarly, PPL states in its brief that "there will be less 'low hanging fruit' available in Phase II" to make the argument that costs going forward may be higher because such "low hanging fruit" tends to "usually" be less costly to implement. PPL Brief at 18. Besides not providing any numbers as to cost differentials between the "low-hanging fruit" and "fruit a bit higher in the tree," PPL admitted that it does not "have [the] information" as to the amount of market penetration of those Phase I measures among PPL's customer base; PPL thus cannot even begin to quantify whether or not such lower-cost measures are exhausted (or whether PPL's

added experience in implementing such measures may, to the contrary, further lower the cost of implementation in the future). Hearing Transcript at 46:15-22. Likewise, PPL discusses at length in its brief potential impacts of theoretical TRM changes concerning CFLs, quoting from its testimony: "if the Commission were to subsequently revise the TRM such that CFLs provide no allowable savings . . . it likely would be impossible for an EDC to find other measures to replace the forgone CFL savings to meet its compliance target". PPL Brief at 26. But PPL admitted that the Commission has given no indication that "it will do such a thing," and that moreover PPL's CFL example is in fact "a purely hypothetical situation." Hearing Transcript at 36:17-23.

PPL's main brief relies entirely on such hypothetical situations of what might come to pass, without any indication that such things *will* happen, or that they *will* threaten PPL's ability to achieve its reduction targets in Phase II.[2] But conjecture as to what could happen, or thought experiments about how certain situations might impact PPL's ability to comply with the Implementation Order, are simply not evidence, as PPL admits:

[2] PPL's reliance on subjunctive, potential events in its briefing is widespread. *See, e.g.*, PPL Brief at 16 (future changes "**could** impair" an EDC's ability to hit its targets) (emphasis added); *id.* (PPL is concerned over "**proposed** changes") (emphasis added); *id.* at 17 (changes "**if approved**" would cause PPL to exclude some measures from its plans); *id.* at 17-18 (reduction target may be difficult to achieve "**if** the Commission adopts significant changes to the TRM") (emphasis added); *id.* at 18 (the 25% adder will not be sufficient to address "**potential impacts if** the structure of PPL Electric's Phase II EE&C Plan is similar to Phase I") (emphasis added); *id.* (the acquisition cost "**may** not be adequate to account for all **unknown, future changes** to the TRM") (emphasis added); *id.* ("**future unknown changes could** significantly affect PPL Electric's EE&C Plan") (emphasis added); *id.* at 26 ("[no party] knows what future adjustments **may be made** to the TRM or the impact those changes **may have** on savings reductions, acquisition costs, and PPL Electric's ability to meet its Phase II target") (emphasis added); *id.* at 28 (the "Commission **could still** adopt changes to the TRM, over the objection of an EDC, which **could** significantly jeopardize an EDC's ability to meet its consumption reduction targets . . .") (emphasis added); *id.* (PPL "**could** potentially face very significant penalties") (emphasis added); *id.* at 29 (future changes have the "**potential** to make it more difficult for an EDC to achieve its Phase II consumption reduction target") (emphasis added).

> Neither the Commission, the SWE, the Company, or any other party knows what future changes will *actually be adopted* or how they will impact the Company's EE&C Plan. Any attempt to put into evidence any such future changes would be nothing more than mere speculation.

PPL Brief at 29 (emphasis in original). Speculation is not enough to support the burden that PPL must carry in establishing its claim that the Implementation Order must be revised. *Samuel J. Lansberry*, 578 A.2d at 602; *Warwick Water Works*, 699 A.2d at 774-75.

At best, such hypotheticals suggest that at some point in the future, PPL may have a reason to seek review of the targets in the Implementation Order, even though it believes that it can achieve them. *See* Hearing Transcript at 38:7-13 (PPL's reduction target is "achievable"). But, as PPL admits, the mere fact that it cannot tell if future TRM changes may impact its ability to achieve its reduction targets "does not necessarily mean that [PPL] will need to request to modify its Phase II consumption reduction target" at any point. PPL Brief at 29. PPL's claims are unsupported by evidence, and are exceedingly premature.[3] PPL's petition must therefore be denied.

III. CONCLUSION

For the foregoing reasons, PPL's petition should be denied.

[3] Indeed, PPL argues that "EDCs should be permitted to seek pre-enforcement review through a petition to modify or amend their Phase II consumption reduction targets to account for changes to the TRM and TRC that are *actually adopted,* as well as to account for other Commission actions and market conditions that were not known or knowable at the time the EDCs' Phase II EE&C Plans were adopted." PPL Brief at 28. Whatever the viability of such a potential "pre-enforcement review" at a later date, PPL's seeking it now amounts to pre-pre-enforcement review. PPL's claims are simply not yet ripe.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of Clean Air Council and Sierra Club's Reply Brief in Opposition to PPL Electric Utilities Corporation's Petition For Evidentiary Hearing upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

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