

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Petition of PPL Electric Utilities Corporation :
: P-00062227
for Approval of a Competitive Bridge Plan :

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ORDER GRANTING MOTION TO STRIKE REPLY BRIEF

On January 19, 2007, Eric Joseph Epstein (Mr. Epstein) filed and served a Reply Brief in this proceeding. On January 24, 2007, petitioner PPL Electric Utilities Corporation (PPL Electric) filed a Motion to Strike the Reply Brief. On January 26, 2007, a Reply to the Motion was filed and served. For the reasons stated below, the Motion is granted and the Reply Brief filed by Mr. Epstein is ordered stricken.

The sole issue raised in the Reply Brief is Mr. Epstein's position that he should be included in the series of meetings that PPL Electric agreed to conduct with the Office of Consumer Advocate (OCA) and the Sustainable Energy Fund of Central Eastern Pennsylvania (SEF) to develop details and a timeline for PPL Electric's expenditure of the \$875,000 consumer education budget for its CBP. *This proposal was not contained in testimony or a main brief, thus depriving PPL Electric (or any other party) to respond to it.* Although Mr. Epstein was permitted to intervene in this proceeding, he chose not to submit either direct or responsive testimony, not to attend the hearings and not to file a main brief. Instead, after his attempt at negotiation with the petitioner failed, he included his demand to be included in the consumer education meetings in his Reply Brief.

This "sandbagging" is clearly improper and inappropriate. It violates both 52 Pa. Code §5.243(e) which prohibits the introduction of evidence during rebuttal or surrebuttal which should have been included in the active participant's case-in-chief or which substantially varies from the active participant's case-in-chief, unless the evidence is introduced in support of a proposed settlement and my Prehearing Order #2, dated September 22, 2006, which specifically referenced that provision. In addition, I specifically discussed this issue during the prehearing

conference, which was attended by Mr. Epstein, quoting the entire provision and adding: “You all understand that. No sandbagging.” Tr. 29.

In addition, as noted by PPL in its Motion, the Reply Brief improperly describes the timing and general content of discussions held and electronic communications undertaken between Mr. Epstein and PPL Electric’s Associate General Counsel. He stated in his Reply Brief that “PPL undertook selective . . . negotiations with the parties, failed to respond in a timely manner to telephonic, electronic and written communications [with Mr. Epstein, concerning his demand to be included in the consumer education meetings], . . . [and] flatly failed to follow up on Mr. Epstein’s repeated requests to close out modest settlement issues.” Reply Brief at 5.

Section 5.231(d) of the Commission’s Rules of Procedure, 52 Pa. Code §5.231(d), provides: “Offers of settlement, of adjustment or of procedure to be followed, and proposed stipulations not agreed to by every party . . . will not be admissible in evidence against a counsel or party claiming the privilege.”

PPL Electric correctly states that settlement discussions are confidential, and any details of those discussions, disclosed with intent to try to ascribe “blame” to a party for failing to settle, would not be admitted as evidence and likewise should not be permitted in Mr. Epstein’s Reply Brief.

In his Reply to the Motion, Mr. Epstein does nothing except to repeat his assertion that PPL Electric failed to respond to his offer that he be included in the consumer education effort, saying that it “stonewalled” him “until the period when Reply Briefs were due.” Reply at 4.

Nothing – and certainly not PPL Electric – prevented Mr. Epstein from presenting his proposal in the form of testimony, which the company could have decided to accept, reject or otherwise respond to. In fact, the company accepted the proposals of numerous parties and substantially modified its proposed CBP to incorporate those positions. Mr. Epstein could have done the same.

Although Mr. Epstein is representing himself, he made a point in his Reply Brief of noting other proceedings in which he was an active participant.¹ Therefore, it is even less understandable why he would file a pleading which so clearly violates the Commission's regulations, my Prehearing Order #2 and the due process rights of PPL Electric.


Although Mr. Epstein made a point in his Reply of citing 52 Pa. Code §1.2, Liberal Construction, he seems to not understand the express language in both sections of that provision that make it clear that the Commission or presiding officer may disregard procedural errors **only when they do not affect the substantive rights of a party** (emphasis mine). By waiting to present his proposal until the filing of reply briefs, Mr. Epstein has prevented PPL Electric and every other party from having any opportunity at all to address his proposal. Obviously, his action affects the substantive rights of the parties and therefore cannot be permitted.

THEREFORE,

IT IS ORDERED:

1. That the Motion of PPL Electric Utilities Corporation to Strike the Reply Brief of Eric Joseph Epstein is granted; and
2. That the Reply Brief filed and served by Eric Joseph Epstein is stricken from the record of this proceeding.

Date: January 29, 2007


MARLANE R. CHESTNUT
Administrative Law Judge

¹ In this connection, it should be noted that Mr. Epstein's statement that as of January 19, 2007 he was an active participant at Docket M-FACE0612 was incorrect, since he was not granted party status until an Order Granting Petition to Intervene was issued by ALJ Weismandel on January 23, 2007.