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Lindsay A. Berkstresser  
Principal

lberkstresser@postschell.com  
717-612-6021 Direct  
717-731-1985 Direct Fax  
File #: 201764

February 26, 2024

***VIA ELECTRONIC FILING***


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: Waterco Springs LLC v. PPL Electric Utilities Corporation**  
**Docket No. C-2023-3036860**

Dear Secretary Chiavetta:

Attached for filing is the Reply to Exception on behalf of PPL Electric Utilities Corporation in the above-referenced proceeding. Copies are being provided as indicated on the Certificate of Service.

Respectfully submitted,



Lindsay A. Berkstresser  
Principal

LAB/kl  
Attachment

cc: The Honorable Chad Allensworth (*via email; w/attachment.*)  
Certificate of Service

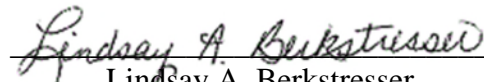
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I hereby certify that a true and correct copy of the foregoing document has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

### VIA E-MAIL AND FIRST-CLASS MAIL

Simi Kaplan Baer, Esquire  
Daniel R. Utain, Esquire  
Kaplin Stewart  
910 Harvest Drive  
Blue Bell, PA 19444  
[skbaer@kaplaw.com](mailto:skbaer@kaplaw.com)  
[dutain@kaplaw.com](mailto:dutain@kaplaw.com)

Date: February 26, 2024

  
Lindsay A. Berkstresser

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Waterco Springs LLC,	:	
	:	
Complainant,	:	
	:	
v.	:	Docket No. C-2022-3036860
	:	
PPL Electric Utilities Corporation,	:	
	:	
Respondent.	:	

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**REPLY OF PPL ELECTRIC UTILITIES CORPORATION TO THE  
EXCEPTION OF WATERCO SPRINGS LLC**

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Kimberly A. Klock (ID # 89716)  
Michael J. Shafer (ID # 205681)  
PPL Services Corporation  
Two North Ninth Street  
Allentown, PA 18101  
Phone: 610-774-2599  
Fax: 610-774-4102  
E-mail: [kklock@pplweb.com](mailto:kklock@pplweb.com)  
[mjshafer@pplweb.com](mailto:mjshafer@pplweb.com)

Devin T. Ryan (ID # 316602)  
Lindsay A. Berkstresser (ID # 318370)  
Post & Schell, P.C.  
17 North Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101-1601  
Phone: 717-731-1970  
Fax: 717-731-1985  
E-mail: [dryan@postschell.com](mailto:dryan@postschell.com)  
[lberkstresser@postschell.com](mailto:lberkstresser@postschell.com)

Date: February 26, 2024

Attorneys for PPL Electric Utilities Corporation

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**I. INTRODUCTION**

PPL Electric Utilities Corporation (“PPL Electric” or the “Company”) hereby file its Reply to the Exception of Waterco Springs LLC (“Complainant”). Complainant filed its Exception to the January 25, 2024, Initial Decision (“ID”) rendered by Administrative Law Judge Chad L. Allensworth (the “ALJ”) on February 14, 2024. The ID held that Complainant failed to sustain its burden of proof that PPL Electric incorrectly billed it for electricity at market rate based on an administrative error following its purchase of a property from a prior electric customer, or otherwise violated the Public Utility Code or a Pennsylvania Public Utility Commission (“Commission”) order or regulation. (ID at 1.)

For the reasons set forth herein, PPL Electric respectfully submits that Complainant’s Exception should be denied, that the ID should be adopted without modification, and that the Complaint should be dismissed in its entirety.

**II. REPLY TO EXCEPTION NO. 1: THE ALJ PROPERLY CREDITED THE TESTIMONY OF PPL ELECTRIC WITNESS MS. DANA BRUNNER IN FINDING THAT WATERCO SPRINGS FAILED TO SUSTAIN ITS BURDEN OF PROOF AND NO ADVERSE INFERENCE IS WARRANTED**

*See ID at 5 (Finding of Fact No. 15), and 16 (Conclusion of Law No. 14)*

Complainant erroneously contends in its Exception that the ALJ should have drawn an adverse inference against the testimony of PPL Electric witness Ms. Dana Brunner, which the ALJ found was “credible and persuasive in establishing that she provided the PPL account number to Mr. Aframian on June 30, 2022.” (ID at 3–4.) Complainant argues that an adverse inference was necessary because the Company did not introduce a recording of a phone call as required by the Best Evidence Rule. (Complainant’s Exception, p. 6.) Complainant contends that because the recording of the initial phone call on June 30, 2022 (“Recording”), was not produced by PPL Electric during its case in chief, the ALJ should have drawn the adverse inference that PPL Electric

did not provide an account number to Complainant in the Recording. (Complainant’s Exception, p. 6.) As explained in detail below, none of Complainant’s arguments have merit, the relief it seeks is unwarranted, and even if granted, an adverse inference would not warrant modification of the Initial Decision. As such, the Exception should be denied and the well-reasoned Initial Decision of the ALJ should be affirmed without modification.

**A. COMPLAINANT WAIVED ITS OPPORTUNITY TO OBJECT TO PPL ELECTRIC’S TESTIMONY BASED ON THE BEST EVIDENCE RULE**

Complainant argues for the first time in its Exception that the ALJ “should have required PPL to produce and introduce the Recording based on the best evidence rule.” (Complainant’s Exception, p. 6.) The procedure to raise and preserve an evidentiary issue in Pennsylvania courts is governed by Pennsylvania Rule of Evidence 103, which states that:

A party may claim error in a ruling to admit . . . evidence only:

(1) if . . . [that] party, on the record:

(A) *makes a timely objection*, motion to strike, or motion *in limine*;  
and

(B) *states the specific ground*, unless it was apparent from the context . . .

Pa.R.E. 103(a) (emphasis added). This evidentiary rule requires a party to make a contemporaneous objection to the objectionable testimony or evidence and secure a clear and definitive ruling on the objection from the presiding officer. *See Blumer v. Ford Motor Co.* 20 A.3d 1222, 1233 (Pa. Super. 2011) (finding that appellants’ hearsay objection was not preserved on appeal because they failed to raise a hearsay objection during the trial and obtain a ruling from the court on the issue). Here, Complainant has failed on both counts.

Crucially, Complainant failed to raise an objection to Ms. Brunner’s testimony on Best Evidence grounds during the hearing. (*See* Tr. 66:12–116:7.) During closing, Complainant’s Counsel asserted that the Recording was the best evidence of what was said during the initial phone

call. (See Tr. 129:15–132:5.) However, a credibility argument made during Complainant’s own closing statement does not constitute a specific, contemporaneous objection to the testimony of Ms. Brunner on Best Evidence grounds under Pa.R.E. 103(a). Specifically, Complainant stated:

What’s interesting is PPL could have offered that audio, that recording. That’s in their possession. That’s the best evidence of what their customer service rep actually said. The fact that they’ve refused and made a calculated decision not to offer it raises grave questions as to what’s really on that recording. (Tr. 129:15–129:21.)

\* \* \*

So, in summary, her failure to present the best evidence to establish that they performed their obligations and didn’t mislead the complaint is damning. (Tr. 131:23–132:1.)

Despite the colorful language, these passages reveal that no objection based on the Best Evidence Rule was ever raised during the hearing. (See Tr. 129:15–132:5.)

Moreover, because no objection based on the Best Evidence Rule was ever raised, Complainant never received a ruling on the Best Evidence Rule issue from the ALJ, which further bars Complainant from raising the objection now. See *Boscia v. Massaro*, 529 A.2d 504, 507 (Pa. Super. 1987) (“It is the generally accepted practice that when a court admits evidence subject to an objection, thereby reserving its ruling on that objection, the objecting party must later request a ruling or the issue will be deemed waived.”) (citing Standard Pa. Practice 2d § 56:7).

By contrast, Complainant’s Counsel raised timely hearsay objections to PPL Electric Exhibit Nos. 1, 2, and 3, at the time that PPL Electric’s Counsel moved them into the record. (See Tr. 116:15–124:10.) The hearsay objections to PPL Electric Exhibit Nos. 1 and 2 were overruled during the hearing and the exhibits were admitted into the record. (Tr. 118:3–5, 120:24–121:3.) The ALJ withheld ruling on the hearsay objection to PPL Electric Exhibit 3 until he issued the ID, in which the ALJ ultimately sustained Complainant’s objection and did not admit PPL Electric Exhibit 3 into the record. (ID at 7–9). Clearly, Complainant’s Counsel had knowledge of the

Pennsylvania Rules of Evidence and could have raised a Best Evidence Rule objection contemporaneously with his objections to PPL Electric's exhibits. (*See* Tr. 116:15–124:10.) Alternatively, Complainant could have raised the Best Evidence Rule objection at any point during Ms. Brunner's testimony, but it did not. (*See* Tr. 66:12–116:7.) Because Complainant failed to timely object and obtain a ruling on a Best Evidence Rule objection, the objection has been waived and cannot be raised now. As such, Complainant's Exception, which primarily relies on a waived Best Evidence Rule objection, should be denied.

**B. EVEN ASSUMING, ARGUENDO, THAT COMPLAINANT DID NOT WAIVE ITS BEST EVIDENCE RULE OBJECTION, THE BEST EVIDENCE RULE DOES NOT BAR THE ADMISSION OF PPL ELECTRIC'S TESTIMONY REGARDING THE RECORDING AT ISSUE**

Even assuming for the purposes of argument that Complainant did not waive its Best Evidence Rule objection, PPL Electric is not barred from proving the contents of the Recording through other evidence. The Best Evidence Rule requires that “[a]n original writing, recording, or photograph is required in order to prove its content *unless these rules*, other rules prescribed by the Supreme Court, or a statute provides otherwise.” Pa.R.E. 1002 (emphasis added). Pennsylvania Rule of Evidence Rule 1004 enumerates the exception to this requirement, including that:

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith.

Pa.R.E. 1004(a).

PPL Electric's reliance on the testimony of Ms. Brunner in lieu of the Recording meets the lost or destroyed exception to the Best Evidence Rule laid out in Pa.R.E. 1004(a). PPL Electric's Call Recordings Retention Policies (“Retention Policy”) provide that customer service calls are

retained in its records for six months and then automatically purged. The call at issue took place on June 30, 2022. (ID at 4, Tr. 19:74–75.) The Company no longer has a recording of the call in its possession because the call was purged automatically pursuant to the Company’s Retention Policy six months after it was recorded on December 30, 2022. The Company did not otherwise alter the Recording and did not purge the Recording prior to December 30, 2022. Because the Company’s purge of the Recording was carried out in accordance with the Retention Policy, the Recording was not destroyed by the Company in bad faith.

PPL Electric introduced PPL Electric Exhibit 2, which contains records of all contacts between PPL Electric and Complainant, in part because the Recording was not available. (Tr. 100:6–22.) In addition, PPL Electric presented the testimony of witness Ms. Brunner in order to establish that PPL Electric provided Complainant with an account number during the initial call. (Tr. 74:16–76:8, 84:20–23.) Ms. Brunner presented credible testimony that she provided the new account number to Waterco during the call, noting that it is her customary practice to provide all new customers with their new account numbers during the initial call establishing service. (Tr. 90:20–23, 95:12–19.) The ALJ appropriately credited Ms. Brunner’s assertion that PPL Electric provided Complainant with its account number based on her testimony. (ID at 13–14.)

As such, even if the Best Evidence Rule objection were properly raised, the testimony of Ms. Brunner is admissible to prove the content of the Recording because the Recording was purged prior to the hearing date of October 18, 2023, in accordance with the Company’s Retention Policy. This automatic purging fits the exception to the Best Evidence Rule allowing for the admission of other evidence if the original is lost or destroyed and not by the proponent acting in bad faith. As explained more fully in Section II.D, below, the ALJ properly credited the testimony of Ms. Brunner that PPL Electric provided Complainant with its account number during the June 30,

2022, call. (ID at 13–14.) Thus, even assuming that Complainant did not waive its Best Evidence Rule objection, which it did, the Best Evidence Rule does not bar the admission of Ms. Brunner’s credible testimony regarding the content of the Recording.

**C. THE APPLICATION OF AN ADVERSE INFERENCE BASED ON A THEORY OF SPOILIATION OF EVIDENCE IS INAPPROPRIATE WHEN THE COMPANY DID NOT ACT IN BAD FAITH AND COMPLAINANT NEVER REQUESTED PRODUCTION OF THE RECORDING**

Alternatively, Complainant argues for the first time in its Exception that the ALJ “should have drawn an adverse inference from PPL’s refusal to offer the Recording into evidence . . . that PPL did not provide an account number in the Phone Call,” citing cases related to the spoliation of evidence. (Complainant’s Exception, p. 6.) Spoliation of evidence is “the failure to preserve, or the significant alteration of, evidence for pending or future litigation,” a charge that, when evidence of spoliation is presented, allows a trial court to impose sanctions against the spoliator, including drawing an adverse inference against the party. *See Monarca v. Annie’s Express Laundry, LLC*, 237 A.3d 1048, \*14 (Pa. Super. 2020) (finding no spoliation occurred when entity destroyed relevant surveillance footage as part of its regular practice of taping over older footage after two weeks had passed). In Pennsylvania, a three-part test governs whether sanctions should be imposed:

- (1) the degree of fault of the party who altered or destroyed the evidence;
- (2) the degree of prejudice suffered by the opposing party; and
- (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct in the future.

*Schroeder v. Commonwealth*, 710 A.2d 23, 27 (Pa. 1998) (“*Schroeder*”).

Initially, PPL Electric denies that there has been a sanctionable spoliation of evidence in this instance because Complainant neither produced evidence of spoliation during the hearing nor requested the Recording at issue from Complainant during discovery. In order to support sanctions

related to spoliation, a party must demonstrate through evidence that spoliation has occurred. *See Mt. Olivet Tabernacle v. Edwin L. Wiegand Division, Emerson Electric Co.*, 2781 A.2d 1263, 1269 (Pa. Super. 2001) (“Since the early 17th century, courts have admitted evidence tending to show that a party destroyed evidence relevant to the dispute being litigated . . . Such evidence permitted an inference, the ‘spoliation inference’, that the destroyed evidence would have been unfavorable to the offending party.”) (internal citations omitted).

Here, Complainant presented no evidence during the hearing related to PPL Electric’s inability to produce the Recording at issue upon request and never raised an argument that a negative inference should be drawn based on that omission. (*See generally* Tr.) The first time Complainant requested a copy of the Recording was when it filed its Petition to Reopen the Record on February 14, 2023, and the first time Complainant requested an adverse inference was in its Exception. (*See* Complainant’s Petition to Reopen the Record, pp. 3–4; Complainant’s Exception, p. 6.) In fact, Complainant never conducted discovery between the time the Complaint was filed on November 17, 2022, and the date the hearing was held on October 18, 2023. The Company maintains that the routine purging of the Recording was not a sanctionable spoliation of evidence, as evidence related to spoliation was never presented during the hearing and Complainant never sought production of the Recording through discovery. *See Wilson v. Pa. R. Co.*, 421 Pa. 419, 425–26 (Pa. 1966) (finding it was inappropriate to draw a negative inference “from a party’s failure to produce evidence where . . . the opposing party has not shown, either by pre-trial discovery procedure or at trial, that such evidence was in defendant’s possession.”)

Moreover, sanctions are not warranted in this instance under the three-part test laid out in *Schroeder*. First, courts consider the degree of fault of the party who altered or destroyed the evidence. *Schroeder*, at 27. PPL Electric’s routine purge of the Recording is similar to the facts

at issue in *Baker v. Workers' Comp. Appeal Board*, 186 A.3d 580 (Pa. Cmwlth. 2018) (“*Baker*”), in which the Commonwealth Court found that the routine destruction of logbooks relevant to a claim did not warrant sanctions. In *Baker*, the court found that the logbooks were destroyed “in accordance with a bona fide company policy and there [was] no evidence to suggest that [the party] destroyed the records in bad faith or with the intent of discarding inculpatory evidence.” *Id.* at \*23. Here, PPL Electric followed its standard Retention Policy in its treatment of the Recording, an automated action not carried out in bad faith or with the intent of destroying problematic evidence.

In addition, PPL Electric’s actions are distinguishable from those in the case cited by Complainant, *Marshall v. Brown’s IA, LLC*, 213 A.3d 263 (Pa. Super. 2019) (“*Marshall*”).<sup>1</sup> In *Marshall*, the accused party was placed on notice that certain surveillance footage was going to be requested, received a request for that footage, selectively edited the footage before producing it, and then destroyed the remaining footage. *See id.* at 271–73. The court found imposition of an adverse inference instruction to the jury related to the destroyed footage was warranted because of these deliberate actions. *See id.* at 272–73. In contrast, PPL Electric did not act in bad faith or take deliberate action to alter or destroy the Recording. Instead, the Company’s purge of the Recording was an automatic action taken pursuant to its standard Retention Policy.

The second factor looks to “the degree of prejudice suffered by the opposing party.” *Schroeder* at 27. Complainant cannot in good faith argue that it was prejudiced by the Company’s failure to produce evidence that Complainant never sought through the discovery process. Despite

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<sup>1</sup> *Duquesne Light Co. v. Woodland Hills Sch. Dist.*, 700 A.2d 1038 (Pa. Cmwlth. 1997) is also distinguishable from the case at bar. In *Duquesne Light*, a school district intentionally disposed of a water line during its investigation of a landslide, after its hired expert indicated that the water leaking from the line may have caused the landslide. *Id.* at 1050-51. By contrast, PPL Electric did not engage in the intentional destruction of evidence, rather, the Recording at issue was purged under the Company’s Retention Policy.

Complainant's claim in its Exception that the Recording's "contents were at the very heart of the parties' dispute," Complainant failed to avail itself of the discovery process to seek the Recording, Company records or policies related to the Recording, or any information or materials related to the Complaint. (Complainant's Exception, p. 5.) Complainant bears the burden of proof in this proceeding and so should have been motivated to conduct discovery and gather the evidence necessary to support its claim. *See* 66 Pa.C.S. § 332(a). Instead, Complainant erroneously tries to shift its burden to PPL Electric and impose sanctions on the Company in the process. Complainant was not prejudiced by the Company's inability to produce a Recording never sought in discovery, and the second factor weighs against imposing an adverse inference.

The third and final factor asks, "whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct in the future." *Schroeder* at 27. Here, PPL Electric's failure to produce the Recording is not "unfair," let alone "substantially unfair," to Complainant, which never requested the Recording. Further, PPL Electric is not "seriously at fault" in this instance, having simply followed its automated Company Retention Policy in its purge of the Recording. Finally, applying an adverse inference in this case would not act as a deterrent to PPL Electric, which was under no obligation to produce a record that was never requested. Imposing an adverse inference on PPL Electric would be unfair and unwarranted given Complainant's own inaction on this issue.

**D. AN ADVERSE INFERENCE DOES NOT CONSTITUTE EVIDENCE AND CANNOT BE USED TO SUPPORT A FINDING THAT PPL ELECTRIC DID NOT PROVIDE COMPLAINANT WITH AN ACCOUNT NUMBER**

Complainant argues that because PPL Electric did not produce the Recording, "an adverse inference should have been drawn that PPL did not provide an account number in the Phone Call." (Complainant's Exception, p. 6.) An adverse inference cannot be used to support a finding of fact because it is not evidence. *See Kennett Square Specialties v. Workers' Comp. Appeal Bd.*, 31 A.3d

325, 328-29 (Pa. Cmwlth. 2011) (“The reason that an adverse inference cannot serve as substantial evidence to support a finding of fact is because an adverse inference does not constitute evidence, period.”); *see also John Snow v. Equitable Gas Co., LLC*, 2013 Pa. PUC LEXIS 893, Docket No. C-2012-2315572 (Order entered July 16, 2013) (reversing ALJ’s application of an adverse inference that gas company caused explosion because it failed to produce its meter as evidence during the hearing).

Complainant seeks to remedy its failure to satisfy its burden of proof through a negative inference that would establish that PPL Electric did not provide Waterco with an account number during the initial phone call. (Complainant’s Exception, p. 6.) The issue of whether PPL Electric provided Waterco with an account number is a material fact in this proceeding that must be supported by substantial evidence. *See* 2 Pa.C.S. § 704. Because an adverse inference does not constitute evidence, Waterco cannot now establish that PPL Electric did not provide Waterco with an account number through the adverse inference it seeks.

Therefore, the determination of whether PPL Electric provided Complainant with an account number depends on the credibility determination already made by the ALJ in the well-reasoned ID. Here, the ALJ properly found that Complainant failed to sustain its burden of proof that the Company “incorrectly billed it for electricity at market rate based on an administrative error following its purchase of a property from a prior electric customer” or that the Company violated the Public Utility Code or the Commission’s regulations or orders. (ID at 1.) In this case, Complainant claims that PPL Electric failed to provide it with a new account number necessary to place a service contract with electric generation supplier Constellation NewEnergy, Inc. (“Constellation”) in its name. (ID at 4.) In support of its claims, Complainant presented testimony of its CFO Mr. Aframian, who testified “that he needed his PPL account number to complete a

new enrollment with Constellation, that he was not provided his PPL account number when he first spoke with a PPL representative on June 30, 2022 and that [he] did not receive the PPL account number until receipt of the first bill from PPL.” (ID at 10.) PPL Electric presented testimony in rebuttal from Ms. Brunner, a customer service representative, who testified that the Company “provided Mr. Aframian with his PPL account number during the initial June 30, 2022 call when he set up the account.” (ID at 12.)

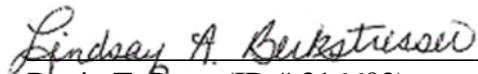
The ALJ properly found “the testimony of Ms. Brunner to be more credible and persuasive than that of Mr. Aframian” on the issue of whether PPL Electric provided Complainant with its account number on the initial call. (ID at 13.) The ALJ based this finding on “the manner of her testimony, the clearness on the issue and the confidence with which [Ms. Brunner] presented her testimony on this issue,” in conjunction with her “additional testimony that she always provides the account number to all new customers.” (ID at 13.) Ms. Brunner also presented credible testimony rebutting Mr. Aframian’s assertion that he was informed he had to wait for the first bill to issue to learn his account number by denying that “PPL has a policy requiring new customers to wait for their first bill to receive their PPL account number and clarif[ying] that only new customers seeking to set up an online account have to wait to receive their first bill.” (ID at 14.) Based on this reasoning, the ALJ correctly concluded that PPL Electric provided Complainant with its account number on June 30, 2022, and that “Waterco Springs failed to establish a violation for PPL not providing timely information to allow it to enroll with Constellation.” (ID at 14.)

For these reasons, the ALJ properly held that Complainant failed to sustain its of proof that PPL Electric did not provide it with its account number. Accordingly, the Commission should deny Complainant’s Exception No. 1 and affirm the well-reasoned Initial Decision of the ALJ without modification.

**III. CONCLUSION**

WHEREFORE, for the foregoing reasons, and those set forth in the Initial Decision, the Exception of Waterco Springs LLC should be denied.

Respectfully submitted,



Kimberly A. Klock (ID # 89716)  
Michael J. Shafer (ID # 205681)  
PPL Services Corporation  
Two North Ninth Street  
Allentown, PA 18101  
Phone: 610-774-2599  
Fax: 610-774-4102  
E-mail: [kklock@pplweb.com](mailto:kklock@pplweb.com)  
[mjshafer@pplweb.com](mailto:mjshafer@pplweb.com)

Devin T. Ryan (ID # 316602)  
Lindsay A. Berkstresser (ID # 318370)  
Post & Schell, P.C.  
17 North Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101-1601  
Phone: 717-731-1970  
Fax: 717-731-1985  
E-mail: [dryan@postschell.com](mailto:dryan@postschell.com)  
[lberkstresser@postschell.com](mailto:lberkstresser@postschell.com)

Date: February 26, 2024

Attorneys for PPL Electric Utilities Corporation