COMMONWEALTH OF PENNSYLVANIA

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December 23, 2024

Via Electronic Filing
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Petition of PPL Electric Utilities Corporation for a Waiver of the Distribution System Improvement Charge Cap of 5% of Billed Revenues
Docket No. P-2024-3048732

Dear Secretary Chiavetta:

Attached please find the Office of Consumer Advocate's Reply Exceptions in the captioned proceeding.

Copies will be served as indicated on the enclosed Certificate of Service.

Respectfully submitted,

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Enclosures

cc: The Honorable Arlene Ashton (*Via Email Only*)
Office of Special Assistants (*Via Email*: ra-OSA@pa.gov)
Certificate of Service (As Indicated)

CERTIFICATE OF SERVICE

Petition of PPL Electric Utilities Corporation for a Waiver of the Distribution System Improvement Charge Cap of 5% of Billed Revenues	: : : :	Docket No. P-2024-3048732

I hereby certify that I have this day filed electronically on the Commission's electronic filing system and served a true copy of the following document, the Office of Consumer Advocate's Reply Exceptions, upon parties of record in this proceeding in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant), in the manner and upon the persons listed below.

Dated this 23rd day of December 2024.

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Dated: December 23, 2024

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of PPL Electric Utilities Corporation for a Waiver of the Distribution System Improvement Charge Cap of 5% of Billed Revenues	: : : :	Docket No. P-2024-3048732

REPLY EXCEPTIONS
OF THE
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Dated: December 23, 2024

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I. INTRODUCTION

The Office of Consumer Advocate (OCA) submits this Reply to Exceptions of PPL Electric Utilities Corporation (PPL Electric or Company) to the Recommended Decision issued on November 21, 2024, of Administrative Law Judge (ALJ) Arlene Ashton. In this Reply, the OCA submits that the Commission should deny PPL Electric's Exceptions and adopt the well-reasoned Recommended Decision of ALJ Ashton, which is consistent with applicable law and supported by substantial evidence, and appropriately recommends that the Commission deny PPL Electric's proposed waiver of the distribution system improvement charge (DSIC) rate cap of 5%.

II. LEGAL STANDARDS

A. Burden of Proof

ALJ Ashton correctly summarized the burden of proof in this proceeding, to determine whether the Company's proposed waiver of the statutory 5% DSIC rate cap should be granted, as follows:

> PPL Electric has the burden of producing evidence to support its argument that (1) a waiver of the 5% statutory DSIC cap is necessary "to ensure and maintain adequate, efficient, safe, reliable and reasonable service" and (2) that a DSIC rate up to 9% of billed distribution revenues is "just and reasonable." Furthermore, this burden must be satisfied with substantial evidence that outweighs the substantial evidence produced by the opposing parties.

R.D. at 10-11.

The ALJ correctly determined that the burden of proof always remains on the party seeking affirmative relief from the Commission, here, PPL Electric; and the proponent in the proceeding must persuade the Commission by a preponderance of the substantial evidence that the relief sought is proper and justified. R.D. at 10; *Petition of Pennsylvania Power Company for a Waiver of the Distribution System Improvement Charge Cap of 5% of Billed Distribution Rate Revenue and Approval to Increase the Maximum Allowable Distribution System Improvement Charge Cap* *to 11.81% (Penn Power Waiver Petition)*, Docket No. P-2019-3012628 (Order entered March 12, 2020) (*Penn Power Order*) (adopting Recommended Decision[1] (Penn Power R.D.)) (Penn Power R.D. at 24); 66 Pa. C.S. §§ 315(a), 332(a), 1301; OCA M.B. at 2; OCA R.B. at 1; Bureau of Investigation & Enforcement's Main Brief (I&E M.B.) I&E M.B. at 3. Here, this means that PPL Electric must come forward with the preponderance of substantial evidence in support of its position that a waiver of the statutory 5% DSIC rate cap is necessary "to ensure and maintain adequate, efficient, safe, reliable and reasonable service." R.D. at 8; 66 Pa. C.S. § 1358(a)(1).

B. Just and Reasonable Rates and Due Consideration of Consumer Interests

PPL Electric also bears the burden of proving the justness and reasonableness of its DSIC, its application to the various customer classes, and all inputs to its calculation. R.D. at 7; *Penn Power Order* (Penn Power R.D. at 25); 66 Pa. C.S. §§ 315(a), 332(a), 1301; OCA M.B. at 4; OCA R.B. at 2; I&E M.B. at 4.

C. DSIC and Waiver of the Statutory 5% Cap

The Company failed to acknowledge: (1) the purpose of the DSIC is to allow utilities to recover a portion of the reasonable and prudent costs incurred to repair, improve, and replace certain eligible property that is part of the utility's distribution system; and (2) a waiver to increase the statutory 5% DSIC rate cap may *only* be granted when a utility shows that the 5% DSIC rate cap is not sufficient to support planned levels of plant replacement and DSIC-eligible spending corresponding to the utility's LTIIP. *Penn Power Order* (Penn Power R.D. at 25); 66 Pa. C.S. §§ 1350, 1351, 1358(a). Again, as set forth in the R.D., the OCA's and I&E's main and reply briefs, the utility must demonstrate by a preponderance of the evidence that: (1) DSIC revenue in excess

[1] Penn Power R.D. *available at* https://www.puc.pa.gov/pcdocs/1654264.pdf (last visited Dec. 19, 2024).

of the statutory 5% cap is *necessary* for the utility to ensure and maintain adequate, efficient, safe, reliable and reasonable service; and (2) the amount requested in excess of the statutory 5% cap is appropriate and just and reasonable. R.D. at 29; *Penn Power Order* (Penn Power R.D. at 25); 66 Pa. C.S. § 1301; OCA M.B. at 6; I&E at 4. Further, as correctly stated in the Recommended Decision, "additionally, PPL must carry this burden of producing substantial evidence in the face of all of the substantial evidence produced by the opposing parties." R.D. at 29-30.

III. REPLIES TO EXCEPTIONS

A. <u>Reply to PPL Electric Exception 1</u>: ALJ Ashton's conclusion that waiver of the statutory 5% DSIC rate cap is <u>not</u> necessary for PPL Electric to provide and maintain adequate, efficient, safe, reliable and reasonable service is supported by substantial evidence and consistent with applicable law. R.D. at 43; OCA M.B. at 10, 20; OCA R.B. at 4, 11.

PPL Electric excepts to the ALJ's conclusion that the Company's proposal is not necessary to ensure and maintain adequate, efficient, safe, reliable, and reasonable service. PPL Electric Exc. at 8-18; R.D. at 38, 42-43. PPL Electric specifically excepts to the following conclusions of the ALJ in the Recommended Decision:

- A waiver of the statutory DSIC rate cap of 5% is not necessary to address the reliability challenges PPL Electric faces.
- Commitment to complying with its Long-Term Infrastructure Improvement Plan (LTIIP) weighs in favor of denying the Company's Petition.
- Filing a base rate case is a more appropriate avenue to afford the Commission and interested parties the opportunity for simultaneous review of all aspects of the Company's revenues, expenses and capital costs for the same timeframe.
- PPL Electric failed to demonstrate with substantial evidence that its rates will remain just and reasonable if a DSIC cap increase is approved.

PPL Electric Exc. at 8-18; R.D. at 38, 42-43.

In PPL Electric's Exception 1, the Company reiterates its position that a waiver of the statutory 5% DSIC cap is needed for timely recovery of investment projects and to "free up funding" for non-LTIIP projects, such as increased vegetation management. PPL Electric Exc. at 10. However, ALJ Ashton correctly determined that a waiver is not necessary to ensure and maintain adequate, efficient, safe, reliable and reasonable service because the Company "failed to present evidence to demonstrate that an increase to the DSIC cap is necessary and in the public interest." R.D. at 43. In connection with the ALJ's correct determination, the ALJ properly highlighted: (1) PPL Electric's strong financial position; (2) the timing of PPL Electric's most recent base rate filing relevant to evaluation PPL Electric's DSIC waiver request; (3) PPL failed to meet its burden of proving that rates will remain just and reasonable if the DSIC cap increase request is approved; and, (4) a waiver of the DSIC cap to less than 9% is also not appropriate. R.D. at 31, 38, 42. The record evidence fully supported these findings in the Recommended Decision.

1. **PPL Electric failed to prove by a preponderance of the evidence that waiver of the statutory 5% DSIC cap is necessary to ensure and maintain adequate, efficient, safe, reliable and reasonable service under section 1358 of the Public Utility Code. R.D. at 43.**

In its Exception 1, the Company asserts that the ALJ erred in finding that a waiver of the statutory 5% DSIC rate cap is necessary to "address the reliability challenges on its system in an efficient, effective, and timely manner." PPL Electric Exc. at 8. Throughout this proceeding, the Company insisted that its reliability performance deterioration mainly rested upon severe weather events. PPL Electric M.B. at 3; PPL Electric R.B. at 7; PPL Electric Exc. at 9. However, the preponderance of record evidence showed that trees are a top cause of system outages, that outages negatively affect reliability of service to PPL Electric's customers, and that the remedy to such outages is a more rigorous vegetation management plan, not additional infrastructure investment.

OCA M.B. at 13-14; OCA R.B. at 4. Vegetation management expense is not eligible for recovery under the DSIC. 66 Pa. C.S. § 1351.

ALJ Ashton correctly recognized that the Company does not need the waiver to maintain efficient, safe, reliable and reasonable service, noting PPL Electric's expressed intentions to accelerate investments in both LTIIP and non-LTIIP projects should the waiver be granted. R.D. at 12. However, the ALJ correctly relied upon the undisputed facts or record and concluded that PPL Electric "could satisfy its safety and reliability concerns and the Commission's concerns described in the 2024 Audit by filing a base rate case . . . most telling[ly,] the Company stated that it will comply with its Modified Third LTIIP regardless of whether the DSIC cap is waived." R.D. at 32 (citing I&E St. 1 at 8). While PPL Electric discusses all the reasons why it prefers to recover its investments through the DSIC surcharge mechanism, including to fund non-LTIIP projects, the ALJ correctly determined that the PPL Electric failed to meet its burden of proof to demonstrate that a waiver is necessary. PPL Electric continues to inappropriately urge the Commission to set aside the statutorily based purpose of the DSIC – to allow utilities to recover a portion of the reasonable and prudent costs incurred to repair, improve and replace certain eligible property that is part of the utility's distribution system – by seeking to persuade the Commission to grant the waiver to free up funds to be used toward non-LTIIP expenses. OCA M.B. at 13-14; OCA R.B. at 4-5.

Ultimately, PPL Electric failed to persuade the ALJ that its preference or desire to fund non-LTIIP projects is an appropriate use of any waiver of the statutory 5% DSIC rate cap. Thus, the ALJ properly concluded that the Company failed to sustain its burden of proving that a waiver is necessary "to ensure and maintain adequate, efficient, safe, reliable and reasonable service." 66 Pa. C.S. §§ 315(a), 1358(a)(1); R.D. at 44; OCA M.B. at 11-12; OCA R.B. at 5, 12.

2. **PPL Electric's ability to comply with its Long-Term Infrastructure Improvement Plan underscores the Company's financial health and its overall ability to ensure and maintain adequate, efficient, safe, reliable and reasonable electric service. R.D. at 43.**

PPL Electric claimed its strong financial condition "does not support denying PPL Electric's Petition." PPL Electric Exc. at 17. The Company further suggested that "a base level of compliance with the LTIIP should not be a reason to deny the Company's proposal." PPL Electric Exc. at 4.

ALJ Ashton appropriately weighed PPL Electric's statement that it will comply with its modified Third LTIIP regardless of whether the DSIC cap is waived. R.D. at 25; OCA St. No. 1 at Exh. JDM-1 (PPL Electric's Response to OCA-I-9). This is, in part, because PPL Electric's current annual distribution revenue is approximately $1.136 billion, thus, the statutory 5% DSIC cap already allows the Company to collect approximately $56.8 million in DSIC revenue annually. R.D. at 5; I&E St. 1 at 16. Moreover, the Company's Rate of Return of at least 8.12% since its last rate case in 2015 demonstrates the Company has enough capital necessary to address reliability metric concerns. OCA M.B. at 20.

ALJ Ashton correctly considered PPL Electric's financial ability to comply with its LTIIP to support her finding that a waiver of the statutory 5% DSIC cap is not warranted here.

3. **PPL Electric alone controls when it next files a base rate case, but the Commission should not allow the Company to circumvent base rate case scrutiny to recover an additional $45 million per year now. R.D. at 43.**

PPL Electric's Exceptions to the Recommended Decision continued its mantra throughout this proceeding: that opposing parties' arguments are "turning the DSIC's purpose on its head." PPL Electric Exc. at 14; PPL Electric M.B. at 21. The Company argued it is within the Commission's authority and discretion to grant PPL Electric a waiver of the statutory 5% rate cap "in order to ensure and maintain adequate, efficient, safe, reliable and reasonable service," citing section 1358 of the Public Utility Code. *Id.*; 66 Pa. C.S. § 1358. PPL Electric also argued it "should not be forced to file a base rate case before receiving a waiver of the DSIC cap." *Id.* While PPL Electric correctly understands that granting a waiver of the DSIC rate cap is within the Commission's authority and discretion, PPL Electric simply failed to meet, with substantial evidence, its burden of proving a waiver of the DSIC rate cap is necessary. R.D. at 43; OCA M.B. at 10, 20; OCA R.B. at 4, 11. Moreover, a waiver of the statutory 5% DSIC rate cap is not automatic, nor is it an entitlement. R.D. at 42.

The Company's dissection of section 1358(a)(1) ignores Commission precedent and record evidence in this proceeding, as more fully laid out in the OCA's briefs. OCA M.B. at 15-19; OCA R.B. at 7-9. After discussing the legislative history relating to the passage of Act 11, the Commission's consistent policy statements and the Commission's 2018 denial of a request by Newtown Artesian Water Company (NAWC) to increase its DSIC cap from 5% to 7.5%, ALJ Ashton accurately concluded,

> Considering the Commission's numerous pronouncements on the timing of rate filings, the consumer protection afforded by the scrutiny of the Company's finances and operations in a base rate case, and the lesser and more limited scrutiny available in this proceeding, I find that it would be more appropriate for the Company to seek addition revenues to fund system enhancements through a base rate filing.

R.D. at 37-38. The Commission specifically distinguished NAWC from the requests by other water utilities, noting that those other utilities "have been filing base rates cases regularly and in a timely manner." *Pa. PUC v. Newtown Artesian Water Co.*, R-2017-2624240, C-2017-2626954 (July 12, 2018), Order on Remand at 20. *See* R.D. at 36; OCA M.B. at 17; OCA R.B. at 8.

The Recommended Decision correctly reasoned that the Company's decisions to file for a waiver of the statutory 5% DSIC rate cap and delay a base rate filing until at least 2026 calls into question whether the DSIC waiver is *necessary*. *See* R.D. at 38. This finding is supported by substantial record evidence, including PPL Electric's failure to file a base rate case to reset the DSIC to zero soon after April 2021, when the Company reached the 5% DSIC cap; and the Company's own admission that a waiver in the instant proceeding would extend the period from its last rate filing until 2026. *Id.*

4. PPL Electric failed to prove, with substantial evidence, that a waiver of the statutory 5% DSIC rate cap would produce an appropriate or just and reasonable rate for any of its customer classes. R.D. at 39-41.

PPL Electric claimed the ALJ erred in her determination that the Company's proposal would be "a significant increase in the burden of monthly and annual utility costs to be borne by the Company's customers." PPL Electric Exc. at 18. The Company's conclusory statement that its proposed DSIC rate increase "would have minimum impact on the average bill for customers in every customer class, and this impact is greatly exceeded by the benefits that would flow from the DSIC cap waiver" blatantly ignores record evidence. PPL Electric Exc. at 19.

ALJ Ashton properly concluded that the Company failed to meet its burden of proving that its rates will remain just and reasonable if the statutory 5% DSIC rate cap increase is approved. R.D. at 42. As, in any proceeding involving any proposed or existing rate of any public utility, the burden of proof to show that the rate requested is just and reasonable shall be upon the public utility. 66 Pa. C.S. §§ 315(a), 1301; R.D. at 43-44; OCA M.B. at 2-5; OCA R.B. at 1-3. The Recommended Decision highlighted that all parties to this proceeding agree that waiver of the statutory 5% DSIC rate cap to 9% of distribution revenues would generate more than **$45 million** annually in additional revenues. R.D. at 42. ALJ Ashton concluded, "[t]hat figure represents a significant increase in the burden of monthly and annual utility costs to be borne by the Company's customers." *Id.*

The record evidence provides that customers would experience a significant financial impact, yet they would not necessarily benefit with improvements to reliability. Residential consumer testimony shed light upon the significant impact residential customers would face. For example, Consumer Gadomski stated,

> And we end up being in the red at the end of every month. And I don't know where all these utilities and companies expect seniors, who are hit the hardest, to actually – to keep getting this money from. We would not like to have to move out of our homes because of constant people raising prices that really are not really attainable for us.

Tr. at 119; OCA M.B. at 23. Ms. Gadomski further stated,

> They haven't been maintaining the lines, cut down the trees. They're laying on the lines, which is making it unsafe. Trees that are broken. And I realize they want money to better things, but they haven't been doing it in this area where I'm at for at least I'm going to say 13 years . . . My concern is I just want our power to be – everybody's power to be – to be better. Okay? For everything to get better, okay. I'm not here to hang, you know, PP&L – you know, I would like to see you do a better job. If you want a raise, okay, and you want to raise prices and even if people can't really afford them, at least do a better job.

Tr. at 120, 132-33. Another consumer, Mr. Theisen provided further testimony regarding PPL Electric's profits,

> I am confused by the statement that PPL has not had a base rate case since 2015, because PPL's own website shows that they increased their rates by 94% just two years ago in 2022. This led to a PPL profit of $519,000,000 in 2023. Since we're only looking for another $45,000,000, I think they should take it out of the $519,000,000 profit they made last year instead of from us ratepayers, especially since PPL is also proposing another $96,000,000 for the various riders.

Tr. at 139.

As to another customer class, the Company failed to present a projection in its filing about the impact a waiver of the statutory 5% DSIC rate cap would have on large usage customers. I&E witness Kubas testified on the projected impact on large usage customers of increasing the DSIC rate to 9%: an additional $1,359.92 per year. I&E St. 1 at 21-22; OCA M.B. at 24. As a result of the customer class record evidence, ALJ Ashton stated:

> I find the arguments presented by OCA and I&E on this issue persuasive and conclude that PPL failed to meet its burden of proving that the DSIC waiver to 9% is just and reasonable. Likewise, I find that PPL failed to meet its burden of proving that its rates will remain just and reasonable if a DSIC cap increase is approved.

R.D. at 42.

The evidentiary record supports the conclusion that a waiver of the statutory 5% DSIC rate cap is a significant increase in the burden of monthly and annual utility costs. *See* R.D. at 42; OCA M.B. at 23-24.

B. <u>Reply to PPL Electric Exception 2</u>: ALJ Ashton correctly concluded that PPL Electric failed to present evidence to demonstrate that any increase to the DSIC cap is necessary and in the public interest. R.D. at 42-43.

In its Exception 2, PPL Electric contended "there was ample record evidence to support an increase in the DSIC cap to a level substantially above 5% but less than the requested 9%." PPL Electric Exc. at 20. The Company continued to assert its circumstances are like prior waiver proceedings. *Id.*

ALJ Ashton correctly found that PPL Electric failed to sustain its burden that a waiver is necessary nor would the rates as a result of a waiver be just or reasonable because: (1) the Company's rate of return has not been below 8.12%; (2) the Company's current class cost of service has not been reviewed since 2015; (3) the Company will comply with its modified Third LTIIP regardless of whether the DSIC cap is waived to *any* percent over the statutory 5% DSIC rate cap; (4) the rates produced by a 9% DSIC would not be just and reasonable; and (5) PPL Electric does not intend to file a base rate case until at least 2026. R.D. at 6-7, 43-44.

The Recommended Decision correctly concluded that the Company failed to sustain its burden of proving that (1) waiver of the statutory 5% DSIC rate cap is necessary to "ensure and maintain adequate, efficient, safe, reliable and reasonable service"; or (2) an increase in of the statutory 5% DSIC rate cap to 9% is just and reasonable. 66 Pa. C.S. §§ 315(a), 1358(a)(1); R.D. at 44.

C. <u>Reply to PPL Electric Exception 3</u>: A party to a Commission proceeding is entitled to present a brief, regardless of whether the party proffered independent evidence.

ALJ Ashton correctly held, in her Order Denying PPL's Motion to Strike (Order Denying Motion to Strike, Nov. 14, 2024), that a party to a Commission proceeding is entitled to publish a reply brief so long as the petitioner has filed its initial brief. *Order Denying Motion to Strike*, Nov. 14, 2024, 1-2. The Company inappropriately[2] attempts to challenge ALJ Ashton's Order dated November 14, 2024, by and through its third exception. The Company phrases its argument that it is excepting to the "Recommended Decision," alleging that ALJ Ashton should have "disregarded PPLICA's Reply Brief instead of relying upon it." PPL Electric Exc. at 21. The Company then seemingly alleges that ALJ Ashton relied on PPLICA's Reply Brief on pages 28-30, 41[3] of her Recommended Decision to effectuate its arguments within its third exception. *Id*. In an attempt to anchor its exceptions to the Recommended Decision, the Company also attempts to except to ALJ Ashton's recitation of PPLICA's position in its Reply Brief because it did not submit evidence into the record nor file a main brief. For the reasons discussed below, of which ALJ Ashton has

[2] The OCA respectfully asserts that the proper procedural method for the Company to challenge the Order Denying its Motion to Strike would have been by petition for interlocutory review to the Commission. *See* 52 Pa. Code §§ 5.301-5.303.

[3] As to the Company's assertion that Judge Ashton relied upon PPLICA's Reply Brief on page 41 of her Recommended Decision, the undersigned can only find the Judge's footnote (n. 128) that states that on pages 3-4 of PPLICA's Reply Brief, PPLICA agrees with the OCA and I&E as to the assertion that a DSIC waiver cap "serves as a means of preventing cost of service disparity issues from becoming worse over time." R.D. at 41. "A party's statement in its brief is treated as a judicial admission" and is not evidence. *Jules Ciamaichelo & Rob Stevens, Inc. v. Indep. Blue Cross,* 928 A.2d 407, 413 (Pa. Commw. 2007). Thus, PPL Electric's argument that Judge Ashton inappropriately relied on PPLICA's Reply Brief in her Recommended Decision should be dismissed as contrary to applicable law.

already correctly addressed and decided in her November 14, 2024 Order Denying PPL's Motion to Strike, PPL Electric is wrong.

ALJ Ashton did not err in repeating PPLICA's position within her recitation of background in the Recommended Decision. R.D. at 28-30. ALJ Ashton stated that PPLICA, in its Reply Brief, aligns itself with the key arguments presented by I&E, OCA, and OSBA. R.D. at 21. ALJ Ashton also recalled that PPLICA simply disagreed with I&E's alternative argument/relief in this case by citing to PPLICA's statement that it "contends that [the other] parties' well-reasoned arguments against PPL Electric's proposal for a permanent DSIC waiver apply with equal force to the alternative proposal for a temporary DSIC waiver." *Id*. at 29. Worded differently, PPLICA filed a reply brief that simply agrees with other intervenors in this case.

Procedural arguments aside, should ALJ Ashton be found to have considered PPLICA's position in its reply brief, she did not err in her substantive consideration of the same. ALJ Ashton is and was correct in denying the Company's motion to strike, reasoning that "[t]he only prerequisite to the filing of a Reply Brief found in Regulation 5.502 is the filing of an 'initial' brief by the party with the burden of proof." *Order Denying Motion* at 2. ALJ Ashton repeatedly reminded PPL Electric that they have the burden of proof in this matter throughout her November 14, 2024 Order denying the Motion. *Id.* ALJ Ashton specifically and correctly denied the Company's relief pursuant to 52 Pa. Code § 5.502(c).

As a petition to waive the statutory DSIC cap is not a rate case, subsection (c) applies:

> "(c) *Filing of briefs in nonrate proceedings*.
>
> (1) *Initial brief*. An initial brief shall be filed by the party with the burden of proof except as provided by agreement or by direction of the presiding officer.
>
> (2) *Response brief*. A party may file a response brief to the initial brief."

52 Pa. Code § 5.502(c). However, should the Commission determine this is a rate proceeding, Section 5.502(d) provides:

(d) *Filing of briefs in rate proceedings*.

(1) *Main brief*. A main brief may be filed by a party except as provided by agreement or by direction of the presiding officer.

(2) *Reply brief*. A party may file a reply brief to a main brief regardless of whether the party filed a main brief.

ALJ Ashton correctly reasoned that the only prerequisite to the filing of a Reply Brief found in Regulation 5.502 is the filing of an "initial" brief by the party with the burden of proof. *Order* at 2. This is true under either 5.502(c) or (d). Worded differently, PPL Electric is interpreting 52 Pa. Code § 5.502(c) to mean that a party may only file a response brief if the party itself has filed an initial brief. PPL Electric Exc. at 22. ALJ Ashton is interpreting 52 Pa. Code § 5.502(c) to mean that a party can file a response brief to the petitioner's filed initial brief. Order Denying Motion to Strike, Nov. 14, 2024, 1-2. ALJ Ashton is correct.[4]

Application of Shenango Valley Water Co., 1994 Pa. PUC LEXIS 111, at *25 (Recommended Decision dated Jan. 25, 1994) is offered via footnote by the Company to support its case, but it is important to note that this case is distinguishable. In *Application of Shenango Valley Water Co.*, the party offering the reply brief offered a completely new argument therein. *Id*.

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[4] PPL Electric provides a string citation via footnote to support its allegation that ALJ Ashton is ignoring "well-established precedent." PPL Electric Exc. at 21. However, the cases offered are distinguishable and often turn on different errors/facts than the instant controversy related to 52 Pa. Code § 5.502(c). For example, in *Pa. PUC v. City of Lancaster – Sewer Fund*, 2007 Pa. PUC LEXIS 783, at *44 (Order entered Jan. 31, 2007), the Commission's rationale for the decision to preclude an issue was based on the grounds that the propounding party only ever raised the issue of controversy in its rebuttal testimony for the first time. *City of Lancaster 2007* at 38. PPL Electric next cites *Application of Newtown Artesian Water Co. and Indian Rock Water Co.*, 1990 Pa. PUC LEXIS 83, at *6 (Order dated June 20, 1990) ("*NAWC 1990*"). PPL Electric states that this case found that a party does "not have a substantive right to raise entirely new issues in a reply brief where these issues could have or should have been raised in the party's initial brief." *NAWC 1990* at *6. While this citation is not completely inaccurate, the Court in this case reasoned its ruling on the fact that a party was raising issues from interrogatories and not record evidence in supplemental memoranda of law. *Id*. at *5. These are very different facts from the instant case. Further, *Application of Apollo Gas*, 1994 Pa. PUC LEXIS 45, at *7 is not instructive here. In *Apollo Gas*, the Commission agreed with striking a new argument by and through a party's exceptions, as the party did not make the argument during briefing to allow for response. *Apollo Gas* at 7. The Company also offers *Petition of West Penn Power Co. 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*, 2009 Pa. PUC LEXIS 2237 to support its third exception. While the Commission disfavors a party raising arguments in a reply brief, the Commission did not deny the motion to strike in this case on that basis alone. *Petition of West Penn Power Co*. at *112. The Commission upheld its decision to strike because a party mischaracterized another party's case in reply briefs. *Id*. The mischaracterization was the basis for the holding. *Id*.

That is not the issue in the instant matter – PPLICA simply endorsed PPL Electric's opponents in its reply brief and relied on the other parties' main briefs, evidence and arguments to support its position. The Company, then, was not denied of an opportunity to respond to anything substantively in PPLICA's brief, as PPLICA merely restated the arguments that other parties already offered in their main briefs. "Due process principles require an opportunity, among other things, to hear evidence adduced by an opposing party, cross-examine witnesses, introduce evidence on one's own behalf, and present argument." *Commonwealth v. Karn*, 2010 Pa. Commw. Unpub. LEXIS 201, at *9 (Commw. Ct. Mar. 8, 2010). PPL Electric was not denied the opportunity to respond to the evidence nor arguments that PPLICA endorsed in its brief. In this case, PPLICA is merely informing the court that it agrees with I&E, OCA, and OSBA by and through its Reply Brief. PPLICA does not offer novel facts, evidence, or argument in its reply brief nor is it raising new issues by and through exceptions. Thus, the argument that ALJ Ashton should have completely ignored PPLICA in her Recommended Decision is incorrect and should be dismissed as contrary to the applicable law.

Importantly, and further still, a party is entitled to submit a brief that relies upon record evidence, even if adduced by others. *See In re Adoption of M.J.*, 311 A.3d 575 (Pa. Super. 2023). In *In re Adoption of M.J.*, parents did not testify, nor did they present any evidence on their own behalf while the record was open before the trial court. *Id*. However, parents were not precluded from appealing the decision and writing briefs, using evidence that was offered by the opposing party. *Id*. In this case, the Superior Court upheld the legal severance of parental rights to children by and through briefs written by parties who did not offer record evidence at trial. *Id*. Thus, if such a grave ability and right to appeal is available as in *In re Adoption of M.J.*, surely this Honorable

Commission can hear the position of an intervenor like PPLICA that merely states that they agree with others in the case.

IV. CONCLUSION

For the reasons state above, the OCA requests that the Commission deny PPL Electric's Exceptions, adopt the ALJ's Recommended Decision, and reject the Company's proposal to waive the statutory 5% distribution system improvement charge rate cap.

Respectfully submitted,

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